



ICTR-98-41-T
17-10-2006
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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ORIGINAL: ENGLISH

TRIAL CHAMBER I

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Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 17 October 2006

THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

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DECISION ON REQUESTS FOR DISCLOSURE AND INVESTIGATIONS
CONCERNING THE ASSASSINATION OF PRESIDENT HABYARIMANA

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid
Gregory Townsend

The Defence

Raphaël Constant
Allison Turner
Paul Skolnik
Frédéric Hivon
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion for Investigation and Production of (Additional) Evidence", filed by the Bagosora Defence on 13 December 2005;

CONSIDERING the Prosecution Response, filed on 19 December 2005; the Ntabakuze Reply, filed on 9 January 2006; and the Bagosora Reply, filed on 10 February 2006;

HEREBY DECIDES the application.

INTRODUCTION

1. The Bagosora Defence seeks an order requiring the Prosecution to (i) disclose any and all evidence gathered during any investigation into the assassination of President Habyarimana on 6 April 1994; (ii) disclose any exculpatory information obtained as a result of such investigations; and (iii) undertake additional investigations into the assassination. The motion also requests that the United Nations be obliged to disclose any evidence in its possession concerning the assassination, including the flight recorder of the Presidential aircraft.¹ The Defence argues that although Colonel Bagosora is not charged with any involvement in the President's assassination, suggestions to that effect during the Prosecution cross-examination of the Accused has transformed the event into "a material fact to which the Accused must now answer".² Various grounds for these orders are invoked, including Rules 66 (B), 68, and 98 of the Rules of Procedure and Evidence.

DELIBERATIONS

2. The relevance to this trial of evidence concerning the assassination of President Habyarimana, which the Defence attributes to agents of the Rwandan Patriotic Front, has been the object of several decisions of this Chamber.³ The fullest discussion arose in connection with a Ntabakuze request for a subpoena to a former investigator of the Office of the Prosecutor:

The Indictment does not attribute responsibility for the attack on the Presidential airplane to any of the Accused or their alleged co-conspirators. Paragraph 6.2 of the Indictment states neutrally that: "On 6 April 1994 at about 8:30 p.m., the plane carrying, among other passengers, the President of the Republic, Juvénal Habyarimana, was shot down on its approach to Kigali Airport, Rwanda." This event is characterized as the trigger for the massacres which ensued; but, unlike other paragraphs of the Indictment, no involvement of the Accused is alleged. Nor did the Prosecution present evidence during its case-in-chief to prove any responsibility by the Accused in the assassination. The only such suggestion was made during the

¹ Motion, p. 15; Reply paras. 24-26.

² Motion, para. 8; Reply, para. 11.

³ *Bagosora et al.*, Decision on Request for Subpoenas of United Nations Officials (TC), 6 October 2006, paras. 12-18; *Bagosora et al.*, Decision on Ntabakuze Motion for Disclosure of Prosecution Files (TC), 6 October 2006, para. 5; *Bagosora et al.*, Decision on Request for Cooperation of the Government of France (TC), 6 October 2006, paras. 3-6; *Bagosora et al.*, Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A) (TC), 8 March 2006, paras. 6-7.

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cross-examination of the Accused Bagosora, when the Prosecution put to Colonel Bagosora that he had been involved in the attack on the Presidential airplane. The Prosecution has made clear, in responding to separate motion by the Bagosora Defence, that this question was posed only for the purpose of challenging the witness's credibility, as he had himself discussed responsibility to the attack during his examination-in-chief. The Prosecution did not suggest, and indeed specifically renounced, that it was seeking to hold the Accused criminally responsible for the President's assassination.

...
The conspiracy in which the Accused is alleged to have participated does not include the attack on the Presidential airplane on 6 April 1994. The Chamber summarized the nature of the conspiracy charge against the Accused in its decision on the Defence motions for dismissal following the close of the Prosecution case:

The Prosecution asserts that the inter-relationship of the Accused as senior officers within the military sets the stage for what appears to be a series of co-ordinated or even common actions: the promulgation of the definition of the enemy, which may arguably have targeted Tutsi civilians; the dissemination of that definition amongst soldiers in the army by the Accused; the uncanny repetition of that definition by the four Accused on various occasions; support for the *Interahamwe* using the resources of the military; and, finally, the direct evidence of some of the Accused being together on various occasions during one or more acts – speeches, preparing lists, ordering killings – which arguably encouraged the commission of genocide.

Evidence that persons other than the Accused or his alleged co-conspirators were involved in shooting down the Presidential plane does not make any of these allegations any less likely.

Nor does responsibility for the assassination of President Habyarimana have any bearing on the offences alleged to have been committed by the Accused and his subordinates after 6 April 1994. Culpability for those crimes would not be reduced because someone other than the Accused created the conditions that led to the commission of those crimes. As this Chamber has previously held in relation to a similar issue:

Descriptions of crimes committed by RPF forces against civilians in geographic areas physically distant from combat between the opposing armed forces in 1994 would not suggest the innocence or mitigate the guilt of the accused. The impact of such events on the criminal conduct with which the accused are charged is too remote and indirect. The Defence submissions have not demonstrated that such information would assist in disproving any element of the offences with which the Accused are charged, or how it could sustain a valid excuse or justification for their alleged conduct.

This said, the Defence is perfectly entitled, of course, to lead evidence concerning the armed conflict with the RPF, the relative strength of forces, and the impact of this context on the crimes for which the Accused is alleged to be responsible.

The identity of the killers of President Habyarimana is undoubtedly a matter of contextual significance for the events described in the Indictment against the Accused. On this basis, the Chamber has admitted some evidence concerning this

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event. On the other hand, the Chamber must exercise its discretion under Rule 89 (C) to ensure that the focus of the present trial is maintained. The admission of detailed evidence on what is, essentially, a matter of collateral and indirect relevance would not assist the Chamber in determining the core issues of this trial.⁴

3. Lead Counsel for Bagosora himself challenged the relevance of questions concerning the attack on the Presidential airplane.⁵ The Chamber did allow a few brief questions to Colonel Bagosora on this topic on the basis that they were intended to contradict the witness's own statements during the examination-in-chief. No incriminating admissions were elicited. No allegation implicating the Accused in the assassination of the President is to be found in the Indictment, the Pre-Trial Brief or any other Prosecution communication. Indeed, no factual evidence in support of that allegation was heard during the Prosecution case. In these circumstances, the questions posed to Colonel Bagosora during cross-examination did not transform responsibility for the assassination of President Habyarimana into a material fact in the present trial. The Chamber need not further consider whether the specific requirements for the orders requested are met.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 17 October 2006



Erik Mose
Presiding Judge



Jai Ram Reddy
A.P. Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]



⁴ *Bagosora et al.*, Decision on Request for Subpoenas of United Nations Officials (TC), 6 October 2006, paras. 12-18 (citations omitted).

⁵ T. 16 November 2005 pp. 47-48 ("Mr. Constant: My client has answered, and let me point out that I did not object. But I have a question regarding the relevance of this line of questioning. Let me remind the Court that my client is not on trial for the assassination of President Habyarimana. In fact, that is one of the peculiarities of this case. Even though it is the Prosecution theory, he is prosecuted for the murder of the Prime Minister, but not of the President. So I do not really understand the line of questioning vis-à-vis the logic of the Indictment").