



ICTR-98-41-T
08-05-2007
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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(38179 - 38176)

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 8 May 2007

THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. ICTR-98-41-T

JUDICIAL RECORDS ARCHIVES
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DECISION ON REQUEST FOR CERTIFICATION OR RECONSIDERATION
CONCERNING THE "BAGOSORA AGENDA"

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid
Kartik Murukutla

The Defence

Raphaël Constant
Allison Turner
Paul Skolnik
Frédéric Hivon
Peter Erlinder
Marc Nerenberg
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 "Bagosora Defence Request for Certification to Appeal and Alternatively for Reconsideration", filed on 19 April 2007;

CONSIDERING the Prosecution Response, filed on 25 April 2007; the Defence Reply, filed on 30 April 2007; and the Prosecution Response to the Reply, filed on 3 May 2007;

HEREBY DECIDES the request.

INTRODUCTION

1. The Defence seeks certification to appeal or reconsideration of two decisions rendered by the Chamber on 11 April 2007. Both decisions concern a document known as the "Bagosora agenda", twenty-six pages of which were admitted into evidence on 21 June 2004.¹ The first decision denied a Defence request for disclosure of the complete agenda ("Disclosure Decision").² The second did not grant a Defence request to exclude the twenty-six admitted pages ("Exclusion Decision").³

DELIBERATIONS

Certification

2. Pursuant to Rule 73 (B), certification to appeal may be granted if the challenged decision involves "an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings". The latter includes consideration of "whether a showing has been made that the appeal could succeed. That threshold would be met, for example, by showing some basis to believe that the Chamber committed an error as to the applicable law; that it made a patently incorrect conclusion of fact; or that it was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion."⁴

3. The Disclosure Decision is challenged on the basis that the Chamber erred in its findings of fact and in its application of the "exceptional circumstances" test for considering the Defence motion.⁵ The decision notes that "inspection of additional evidence at this late stage of the proceedings is highly unusual and can only be allowed in exceptional circumstances".⁶ The Chamber observes, however, that its denial of the disclosure request was not founded on the absence of such "exceptional circumstances". Rather, it was based on

¹ T. 21 June 2004. The twenty-six pages were admitted as an annex to a Prosecution expert report.

² *Bagosora et al.*, Decision on Bagosora Motion for Disclosure of Agenda (TC), 11 April 2007.

³ *Bagosora et al.*, Decision on Bagosora Motion to Exclude Photocopies of Agenda (TC), 11 April 2007.

⁴ *Bagosora et al.*, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 February 2006, para. 4 (relying on *Milosevic*, Decision on Interlocutory Appeals of the Trial Chamber's Decision on the Assignment of Defence Counsel (TC), 1 November 2004, para. 10).

⁵ Request, para. 29.

⁶ Disclosure Decision, 11 April 2007, para. 5.

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its finding that the Prosecution did not possess the sought material. While the Defence may disagree with the Chamber's conclusion, this is a factual determination which is not appropriate for certification.⁷ The Appeals Chamber has held that "certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence".⁸ The Chamber finds no such absolute exception in this case.

4. Certification of the Exclusion Decision is sought on the basis that the Chamber failed to consider the issue of evidence tampering, one of the grounds for the Defence exclusion request. The Defence argues that the Chamber's failure to consider this ground resulted in "a patently incorrect conclusion of fact", justifying appellate intervention. The Chamber recalls that the Exclusion Decision stipulated that "the Accused has testified that the excerpts in fact are in his handwriting. He ... indicated the possibility of manipulation". It also stated that this evidence "goes to the weight of the exhibit and will be considered in connection with the Chamber's evaluation of the totality of the evidence".⁹ Reference was also made to the Accused's denial that he wrote certain annotations appearing on one of the agenda pages.¹⁰ The Chamber found that the tampering allegations did not justify exclusion of the contested material. This was a factual determination concerning admissibility of evidence. Such determinations are the responsibility of the Trial Chamber, and certification is the "absolute exception". The Chamber finds no such exception in this case.¹¹

Reconsideration

5. The Defence claims that the "decisions demonstrate an abuse of discretion such that they are based on inaccurate factual findings".¹² The Chamber recalls that reconsideration is available when there have been new circumstances since the filing of the challenged decision that affect the premise of the decision. It can also be permissible where the challenged decision was erroneous in law or an abuse of discretion.¹³ There is no new circumstance which has arisen since the Chamber's decisions of 11 April 2007, and which may affect these decisions. Furthermore, the challenged decisions were not erroneous in law or an abuse of discretion. Reconsideration is therefore not justified.

⁷ *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5.

⁸ *Id.*; *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 10.

⁹ Exclusion Decision, para. 5.

¹⁰ Exclusion Decision, para. 6, footnote 9.

¹¹ It is recalled that the Appeals Chamber had indicated: "... a decision by the Trial Chamber to admit evidence does not in any way constitute a binding determination as to the authenticity or trustworthiness of the documents sought to be admitted. These are matters to be assessed by the Trial Chamber at a later stage in the course of determining the weight to be attached to the evidence in question." See *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 7; *Rutaganda*, Judgement (AC), 26 May 2003, para. 33.

¹² Request, para. 11.

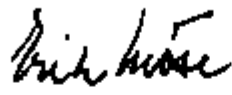
¹³ *Bagosora et al.*, Decision on Prosecutor's second motion for reconsideration of the Trial Chamber's "Decision on Prosecutor's motion for leave to vary the witness list pursuant to Rule 73 bis (E)" (TC), 14 July 2004, para. 7; *Bagosora et al.*, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E)", 15 June 2004, para. 9; *Bagosora et al.*, Decision on Reconsideration of Order to Reduce Witness List and on Motion for Contempt for Violation of that Order (TC), 1 March 2004, para. 11.

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FOR THE ABOVE REASONS, THE CHAMBER

DENIES the request.

Arusha, 8 May 2007


Erik Mase
Presiding Judge


Jai Ram Reddy
Judge


Sergei Atekseevich Egorov
Judge

[Seal of the Tribunal]

