



(38175-38172)

TRIAL CHAMBER I

**Before:** Judge Erik Mose, 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*

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DECISION ON BAGOSORA REQUEST FOR CERTIFICATION OR  
RECONSIDERATION CONCERNING ADMISSION OF  
WITNESS B-06'S STATEMENT

**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 of Decision of 3 April 2006”, filed 11 April 2007; and the Defence addendum thereto, filed on 13 April 2007;

**CONSIDERING** the Prosecution response, filed on 17 April 2007; and the Defence reply, filed on 23 April 2007;

**HEREBY DECIDES** the request.

**INTRODUCTION**

1. On 6 March 2007, the Defence filed a request under Rule 92 *bis* to admit into evidence a statement by Witness B-06.<sup>1</sup> The request was filed almost seven weeks after the last day of the hearings. On 3 April 2007, the Chamber denied the request. It found no exceptional circumstances justifying admission of evidence at that late stage of the proceeding.<sup>2</sup> The Defence asks for certification to appeal or reconsideration of this decision.

**DELIBERATIONS**

*Certification*

2. Pursuant to Rule 73 (B), certification 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”.

3. The Defence essentially argues that the challenged decision prevents it from relying on information of great value to its case. Witness B-06 is a Tutsi who intended to testify that he was saved by the Accused. The decision therefore involves an issue that affects the fairness of the proceedings and most likely the outcome of the trial, and certification should be granted.

4. The Chamber disagrees with the Defence about the information’s potential contribution to its case. The challenged decision reiterated the Chamber’s finding in two prior decisions, that Witness B-06’s testimony was not of sufficient importance.<sup>3</sup> Those decisions denied Defence requests to add the witness to its list.<sup>4</sup>

<sup>1</sup> *Bagosora et al.*, Bagosora Defence Strictly Confidential Motion to Tender Witness Statement Pursuant to Rule 92 *bis*, filed on 6 March 2007.

<sup>2</sup> *Bagosora et al.*, Decision on Bagosora Motion to Tender Statement of Witness B-06 (TC), 3 April 2007.

<sup>3</sup> *Id.*, para 4.

<sup>4</sup> *Bagosora et al.*, Decision on Bagosora Motion to Present Additional Witnesses and Vary its Witness List (TC), 17 November 2006, para. 13 (denying the Defence request to add Witness B-06 to its list on the basis that the Chamber was not persuaded that the “testimony is of sufficient importance to justify his appearance at this stage”); *Bagosora et al.*, Decision on Bagosora Motion to Vary its Witness List and Tender a Witness Statement under Rule 92 *bis* (TC), 12 December 2006, para. 2 (the Chamber reconsidered its previous decision and reiterated its position there).

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5. It is within the Trial Chamber's discretion to determine whether to admit evidence during the trial. According to the Appeals Chamber, certification on questions of admissibility of evidence should not ordinarily be granted, but is rather the "absolute exception".<sup>5</sup> The Chamber finds no such exception in the present circumstances. The Defence has made no argument that an incorrect legal standard was applied, or that the Chamber made an error of fact in applying that legal standard. The Defence simply disagrees with the manner in which the Chamber has exercised its discretion. The Appeals Chamber has ruled that this kind of factual determination is not appropriate for certification.<sup>6</sup>

6. The Defence argument that the decision is unfair and an abuse of discretion overlooks the need for finality. The Bagosora Defence was expected to close its case by 13 October 2006. The Chamber has subsequently allowed the admission of some evidence. In January 2007, only the Defence teams for Accused Nsengiyumva and Kabiligi were permitted to present evidence. The Prosecution filed its Closing Brief on 1 March 2007.

7. Moreover, certification at this advanced stage in the case would not materially advance the proceedings. Consequently, the requirements of Rule 73 (B) are not met.

#### *Reconsideration*

8. Reconsideration is justified 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.<sup>7</sup>

9. The Defence argues that in deeming the Defence filing as unjustifiably late, and in underestimating the importance of Witness B-06's evidence, the challenged decision was an abuse of discretion and a miscarriage of justice. It maintains that the late filing of its Rule 92 *bis* motion was justified, and explains the events leading to the motion.

10. The Chamber observes that no such explanations were made in the motion of 6 March 2007. In any case, the Chamber has reconsidered this issue and finds no justification for the Defence's failure to file a Rule 92 *bis* motion before 6 March 2007, especially given its own claim that the witness was ready to provide information in spring 2006.<sup>8</sup> The Chamber further finds that no new circumstance has arisen since its decision of 3 April 2007, which justifies reconsideration of the matter. Moreover, the Defence suggests that the statement refutes Prosecution allegations concerning the conduct of the Accused.<sup>9</sup> In this light, the Chamber does not see how a request under 92 *bis* could be granted.

<sup>5</sup> *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004 ("*Nyiramasuhuko* decision of 4 October 2004"), para. 5; *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 10.

<sup>6</sup> *Nyiramasuhuko* decision of 4 October 2004, para. 5.

<sup>7</sup> *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.

<sup>8</sup> Request, para. 2. The Defence does not explain why, in October 2006, when it asked to add Witness B-06 to its list, it did not alternatively seek to admit his statement under Rule 92 *bis*, as it did with regard to Witness G-10.

<sup>9</sup> Request, para. 31.

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**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIES** the request.

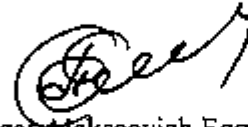
Arusha, 8 May 2007



Erik Mese  
Presiding Judge



Jai Ram Reddy  
Judge



Serger Alekseevich Egorov  
Judge

[Seal of the Tribunal]

