ICTR-98-41-T
09-05-2007
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

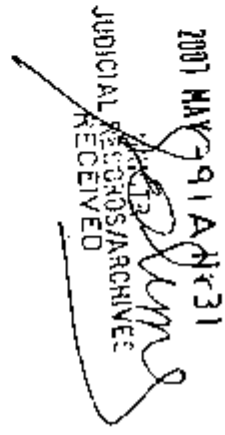
(38187-38183)

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 9 May 2007



THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. ICTR-98-41-T

DECISION ON BAGOSORA REQUEST FOR CERTIFICATION OR RECONSIDERATION CONCERNING ADMISSION OF SCHOOL DOCUMENTS

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

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 or Reconsideration" etc. of the Trial Chamber's decision of 21 March 2007, filed on 28 March 2007; and its addendum, filed on 30 March 2007;

HEREBY DECIDES the request.

INTRODUCTION

1. During the cross-examination of Prosecution Witness ABQ in September 2004, the Defence challenged his testimony that he attended a particular school in Rwanda under his current name.[1] In November 2006, the Defence requested and obtained from the Rwandan authorities documents listing students who attended that school. According to the Defence, Witness ABQ's name did not appear on the lists. On 12 December 2006, the Defence moved to admit the documents into evidence, arguing that they established that the witness was lying about either his name or his attendance at the school.[2]

2. On 21 March 2007, the Chamber denied the motion. It held that material used for impeaching the credibility of a witness can only be tendered in connection with that witness' testimony. Recall of Witness ABQ was precluded since the Defence filed the motion after its case closed. The Chamber found no justification for the delay in seeking the lists from the Rwandan authorities, given that his attendance at the school was a credibility issue since 2004.[3] The Defence seeks certification to appeal or reconsideration of the decision.

DELIBERATIONS

Certification

3. 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 a 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]

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[1] T. 7 September 2004 pp. 2, 5-6, 11; T. 8 September 2004 pp. 17, 20, 46; T. 9 September 2004 pp. 32-34.

[2] *Bagosora et al.*, Requête de la Défense de Bagosora visant le dépôt de documents en preuve, filed on 12 December 2006.

[3] *Bagosora et al.*, Decision on Bagosora Defence Request for Admission of Documents (TC), 21 March 2007, paras. 9-10.

[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).

4. The Defence argues that there are no provisions in the Rules of Procedure and Evidence requiring that documents used for impeaching the credibility of a witness be tendered during his or her testimony.[5] This standard was only created by the Chamber in a decision dated 26 February 2007, concerning the Accused Nsengiyumva ("Nsengiyumva Decision").[6] It should not have been applied to a Defence motion which preceded that decision, without hearing Defence submissions on the matter.[7] Furthermore, the requirement is applicable only to witnesses' written statements.[8] The Defence submits that material which meets the conditions of Rule 89 (C) must be admitted, unless such admission would adversely impact the Accused.[9] Given that the Chamber found the documents relevant and probative, it should have admitted them under Rule 89 (C).

5. The Chamber observes that recalling a witness when a party seeks to admit new evidence intended to impeach his or her credibility, is established practice. The Nsengiyumva Decision merely reiterated this practice, which provides the witness with an opportunity to explain why the new evidence does not discredit him or her. Although the decision related to written statements, the standard was clearly found to be of general application to any material intended to impeach witnesses.[10] In the challenged decision, the Chamber stressed the general applicability of the standard.[11]

6. Rule 89 (C) permits, but does not require, the Chamber to admit relevant and probative evidence.[12] The Appeals Chamber has upheld a decision of this Trial Chamber not to admit evidence which met the requirements of Rule 89 (C).[13] It affirmed that the Trial Chamber "has a broad discretion to direct the course of the proceedings in accordance with its fundamental duty to ensure a fair and expeditious trial pursuant to Article 19(1) of the Statute. In pursuit of these goals, the Trial Chamber may choose to exclude otherwise relevant and probative evidence where its prejudicial effect will adversely affect the fairness or expeditiousness of the proceedings."[14]

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[5] Request, para. 36.

[6] *Bagosora et al*., Decision on Nsengiyumva Motion to Admit Documents as Exhibits (TC), 26 February 2007 (referred to by the Defence in its Request, para. 20).

[7] Addendum, para. 41A.

[8] The Defence adds that recalling a witness in order to admit documentary evidence involves unnecessary expenses and delays (Request, para. 24). Instead, the evidence should be admitted, and assessed by the Chamber in light of the fact that it was not presented to the witness (Request, paras. 39).

[9] Request, paras. 22-23.

[10] Nsengiyumva Decision, in particular paras. 6, 8.

[11] *Bagosora et al.*, Decision on Bagosora Defence Request for Admission of Documents (TC), 21 March 2007, para. 10 (referring to the analysis in the Nsengiyumva Decision, the Chamber reiterated the standard identified there, and held: "Here, the Defence does not seek to impeach Witness ABQ's testimony through witness statements but rather through school records. The same analysis still applies.")

[12] *Bagosora et al.*, Decision on Admissibility of Proposed Testimony of Witness DBY (TC), 18 September 2003, para. 4.

[13] *Bagosora et al.*, Decision on Prosecutor's Interlocutory Appeals regarding Exclusion of Evidence (AC), 19 December 2003, para. 13 ("Even where pattern evidence is relevant and deemed probative, the Trial Chamber may still decide to exclude the evidence in the interests of justice when its admission could lead to unfairness in the trial proceedings, such as when the probative value of the proposed evidence is outweighed by its prejudicial effect, pursuant to the Chamber's duty to ensure a fair and expeditious trial as required by Article 19 (1) of the Statute of the International Tribunal.") The fact that the evidence addressed by the decision qualified as "similar pattern evidence" under Rule 93, has no bearing on the analysis that evidence which meets the requirements of Rule 89 (C) may still be deemed inadmissible "in the interests of justice when its admission could lead to unfairness in the trial proceedings".

[14] *Bagosora et al.*, Decision on Prosecutor's Interlocutory Appeals regarding Exclusion of Evidence (AC), 19 December 2003, para. 16. (This affirmation was correctly recognized by the Defence in its Request, para. 21).

7. While considerations of fairness often benefit the Accused, they also require that witnesses be confronted with evidence intended to discredit their credibility. This was recognised in the *Kamuhanda* judgement, where the Chamber disregarded Defence evidence intended to impeach a Prosecution witness, on the basis that it was not presented to the witness during her testimony.[15]

8. The Defence complains that the Chamber erred in finding that its delay in seeking the documents from Rwanda was unjustified. It argues that the Chamber based the finding on a mistaken assumption that the material could have been obtained beforehand. The Defence explains that an earlier request for the documents would have been futile, as were its past requests from the Rwandan authorities.[16] However, the Chamber's decision was based on a finding that the documents were not requested prior to November 2006, and the Defence did not establish otherwise.

9. The Defence also challenges the Chamber's finding that its case had already been closed when it filed the request.[17] The Chamber recalls that the Bagosora Defence was expected to close its case by 13 October 2006. The Chamber has subsequently allowed the admission of some evidence.[18] From 15 to 18 January 2007, only witnesses for the Accused Nsengiyumva and Kabiligi testified. The Prosecution filed its Closing Brief on 1 March 2007. The Defence submissions about pending matters are not convincing. More generally, they overlook the need for finality.

10. As demonstrated above, the arguments that the challenged decision erred in the legal standard it applied, and in its factual findings, are unsubstantiated. Accordingly, the requirements of Rule 73 (B) are not met. Moreover, the Appeals Chamber held that certification should not be ordinarily granted on questions of admissibility of evidence, but is rather "the absolute exception".[19] The Chamber finds no such exception in the present circumstances.

Reconsideration

11. The Chamber recalls that reconsideration is an exceptional measure, available when new circumstances have arisen since the filing of the challenged decision which affect the premise of the decision. It can also be permissible where the challenged decision was erroneous in law or an abuse of discretion.[20] There has been no new circumstance since the

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[15] *Kamuhanda* Judgement (TC), 22 January 2004, para. 268 ("During Witness GEK second appearance before the Chamber, the Defence failed to confront her with the new evidence regarding the birth of her child. Basic fairness requires that the Defence confront the Witness with evidence that it intends to use to discredit her credibility.")

[16] Request, paras. 1-6; Addendum, para. 13.

[17] Request, paras. 31-35.

[18] For instance, the Chamber set the deadline for all Defence teams to tender documentary evidence to 13 December 2006. *See Bagosora et al.*, Decision on Bagosora Motion to Present Additional Witnesses and Vary its Witness List, 17 November 2006, para. 16. After the January 2007 hearings, documentary evidence has only been admitted in exceptional circumstances. *See e.g. Bagosora et al.*, Decision on Bagosora Motion to Tender Statement of Witness G-10, 3 April 2007.

[19] *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.

[20] *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

Chamber's decision of 31 March 2007, which may affect this decision. Furthermore, as demonstrated above, the decision was not erroneous in law or an abuse of discretion. Reconsideration is therefore not justified.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the request.

Arusha, 9 May 2007

Erik Møse	Jai Ram Reddy	Sergei Alekseevich Egorov
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

"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.