



107/H

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-00-55B-R11bis

3 October 2008

(107/H - 103/H)

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IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Gilney
Judge Liu Daqun
Judge Andréia Vaz

Registrar: Mr. Adama Dieng

Decision of: 2 October 2008

THE PROSECUTOR

v.

Idephonse HATEGEKIMANA

Case No. ICTR-00-55B-R11bis

ICTR Appeals Chamber

Date: 3 October 2008

Action: P.T.

Copied To: concerned Judges,
Parties, SCSL, ALOS,
LRS, Archives

DECISION ON REQUEST TO ADMIT ADDITIONAL EVIDENCE

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Mr. Alex Obote-Odora
Mr. Richard Karegyesa
Ms. Dior Sow Fall

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: Patricia Tchidi mbao
SIGNATURE: [Signature] DATE: 03/10/08

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of a motion filed on 3 September 2008 by Ildéphonse Hategekimana ("Hategekimana") to admit additional evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules").¹ The Prosecution responded on 12 September 2008.² Hategekimana did not file a reply.

BACKGROUND

2. On 19 June 2008, a Trial Chamber designated under Rule 11*bis* of the Rules issued a decision denying the Prosecution's request to refer Hategekimana's case to Rwanda pursuant to Rule 11*bis* of the Rules.³ The Prosecution appealed this decision, filing its Notice of Appeal on 30 June 2008⁴ and its Appeal Brief on 14 July 2008.⁵ Hategekimana filed his response on 1 September 2008.⁶ The Prosecution did not file a reply. Hategekimana filed a Notice of Cross-Appeal on 15 August 2008,⁷ and a Cross-Appeal on 15 September 2008.⁸ However, the Cross-Appeal was rejected as it was filed out of time.⁹

3. In his Motion, Hategekimana requests permission to file additional evidence relating to government interference with the ability of the Defence to exercise its function, the availability and protection of witnesses, and the independence and impartiality of the judiciary.¹⁰ He submits that

¹ Requête de la Défense en dépôt de moyens de preuve supplémentaires (Article 115 du Règlement de procédure et de preuve), 3 September 2008 ("Motion").

² Réponse du Procureur à la "Requête de la Défense en dépôt de moyens de preuve supplémentaires (Article 115 du Règlement de procédure et de preuve), 12 September 2008 ("Response").

³ Decision on Prosecutor's Request for the Referral of the Case of Ildéphonse Hategekimana to Rwanda ("11*bis* Decision").

⁴ Prosecutor's Notice of Appeal (Rule 11 *bis* (H)), 30 June 2008.

⁵ Prosecutor's Appellant's Brief (Rule 11 *bis* (H)), 14 July 2008.

⁶ Réponse de la Défense en réaction au Mémoire D'Appel du Procureur (Article 11 *bis* H du Règlement), 1 September 2008 ("Response to Prosecution Appellant's Brief").

⁷ Defence Request for Cross-Appeal, 1 September 2008 ("Notice of Cross-Appeal").

⁸ Mémoire d'appel incident de la Défense, 15 September 2008 ("Cross-Appeal").

⁹ Hategekimana filed a motion for extension of time in which to file his Cross-Appeal Brief. See Defence Motion for Extension of Time to File the Brief in Support of its Notice of Cross-Appeal, 1 September 2008. However, the Appeals Chamber dismissed this motion and rejected the Cross-Appeal. See Decision on a Request for an Extension of Time to File a Cross-Appeal, 16 September 2008.

¹⁰ Motion, para. 7.

the proposed additional evidence will assist the Appeals Chamber in its evaluation of the 11bis Decision with respect to these issues.¹¹

4. The Prosecution responds that the Accused has not provided the Appeals Chamber with the proffered evidence, nor has it described the evidence in a manner that would allow the Appeals Chamber to determine its relevance.¹² It also submits that Hakegekimana has not advanced any arguments to demonstrate how the additional evidence satisfies the requirements of Rule 115, and in particular, has not indicated why the proposed evidence was not available during the referral proceeding.¹³ The Prosecution also submits that Rule 115 of the Rules is not designed to allow a party that succeeded in the first instance to present additional evidence to support a point that was decided in his favour.¹⁴

DISCUSSION

5. Rule 115 of the Rules provides a mechanism for admission of additional evidence on appeal where a party is in possession of material that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial.¹⁵ According to Rule 115(A) of the Rules, a motion for additional evidence shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed. In addition, Rule 115(B) of the Rules provides that the additional evidence must not have been available at trial and must be relevant and credible. When determining the availability at trial, the Appeals Chamber will consider whether the party tendering the evidence has shown that it sought to make "appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence [...] before the Trial Chamber."¹⁶ Once it has been determined that the additional evidence meets these conditions, the Appeals Chamber will determine in accordance with Rule 115(B) of the Rules whether it could have been a decisive factor in reaching the decision at trial.

¹¹ Motion, paras. 6, 9.

¹² Response, paras. 2, 6.

¹³ Response, paras. 2, 6, 7.

¹⁴ Response, paras. 2, 9.

¹⁵ *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-A, Decision on a Request to Admit Additional Evidence, 27 April 2007, para. 6 ("*Muvunyi Decision*"); *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 4 ("*Nahimana et al. Rule 115 Decision*").

¹⁶ See *Muvunyi Decision*, para. 6 and *Nahimana et al. Rule 115 Decision*, para. 5, quoting *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 9 (internal references omitted).

6. Furthermore, in accordance with established jurisprudence, where the proffered evidence is relevant and credible, but was available at trial, or could have been discovered through the exercise of due diligence, the Appeals Chamber may still allow it to be admitted on appeal provided the moving party can establish that its exclusion *would* amount to a miscarriage of justice.¹⁷ That is, it must be demonstrated that had the additional evidence been adduced at trial, it *would* have had an impact on the verdict.¹⁸

7. The Appeals Chamber recalls that a party seeking the admission of additional evidence on appeal must provide to the Appeals Chamber the evidence sought to be admitted to allow it to determine whether the evidence meets the requirements of relevance and credibility.¹⁹ Hategekimana has not attached the proposed additional evidence to the Motion, nor has he described the content of the proposed evidence in sufficient detail which would allow the Appeals Chamber to assess whether they are relevant to the findings made by the Trial Chamber.²⁰

8. This reason alone suffices to dismiss the Motion. However, the Appeals Chamber also notes that Hategekimana has not demonstrated that the potential additional evidence was not available in the first instance proceeding, that it could not have been discovered through the exercise of due diligence, or that it would have had an impact on the verdict.

9. In light of the above, the Appeals Chamber is not satisfied that Hategekimana has established that the purported additional evidence meets the requirements of Rule 115 of the Rules.

¹⁷ Muvunyi Decision, para. 7; Nahimana et al. Rule 115 Decision, para. 6 (with further references).

¹⁸ Muvunyi Decision, para. 7; Nahimana et al. Rule 115 Decision, para. 6.

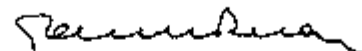
¹⁹ See Practice Direction on Formal Requirements for Appeals from Judgment, 15 June 1997, para. 7. See also Muvunyi Decision, para. 8; Ferdinand Nahimana et al. v. The Prosecutor, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006, para. 18; Ferdinand Nahimana et al. v. The Prosecutor, Case No. ICTR-99-52-A, Decision on Appellant Hassan Ngeze's Motion for Leave to Present Additional Evidence, 14 February 2005, p. 3. See also Prosecutor v. Zoran Kupreškić et al., Case No. IT-95-16-A, "Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to Be Taken Pursuant to Rule 94(B)", 8 May 2001, para. 5.

²⁰ See The Prosecutor v. Gaspard Kanyankiga, Case No. ICTR-2002-78-R11bis, Decision on Request to Admit Additional Evidence of 18 July 2008, 1 September 2008, para. 9. The Appeals Chamber notes that Hategekimana indicates that the proposed additional evidence is relevant both to support its Cross-Appeal and to its Response to the Prosecution's Appellant's Brief. See Motion, paras. 2-5. Given that the Cross-Appeal was rejected by the Appeals

DISPOSITION

For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion.

Done in English and French, the English text being authoritative.



Judge Fausto Pocar
Presiding

Dated this 2nd of October 2008,
at The Hague, The Netherlands.



Chamber, to the extent that the proposed additional evidence supports the Cross-Appeal, it would not be relevant in any event.