



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

386/H

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IN THE APPEALS CHAMBER

ICTR-01-74-A
29 October 2008
(386/H – 380/H)

Before:

Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron

Registrar:

Mr. Adama Dieng

Decision of:

29 October 2008

ICTR Appeals Chamber

Date: 29 October 2008

Action: P.T.

Copied To: concerned Judges,
Parties, Staff, Legal Affairs,
Archives

(Signature)

FRANÇOIS KARERA

v.

THE PROSECUTOR

Case No. ICTR-01-74-A

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda OFFICE OF THE CLERK OF THE APPEALS CHAMBER COPIES FOR THE CONCERNED PARTIES NAME / NOM: <i>Ms. Carmelle Marchessault</i> SIGNATURE: <i>(Signature)</i> DATE: 29 Oct 2008
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**DECISION ON THE APPELLANT'S REQUEST TO ADMIT ADDITIONAL
EVIDENCE PURSUANT TO RULE 115 OF THE RULES OF PROCEDURE
AND EVIDENCE**

Counsel for the Appellant

Ms. Carmelle Marchessault
Mr. Alexandre Bergevin
Mr. Christian Deslauriers

Office of the Prosecutor

Mr. Hassan Bubacar Jallow
Mr. Alex Obote-Odera
Ms. Dior Sow Fall
Mr. Abdoulaye Seye
Mr. François-Xavier Nsanzuwera
Mr. Alfred Orono Orono
Ms. Florida Kabasinga
Ms. Béatrice Chapaux

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 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of a motion to admit additional evidence, filed confidentially by François Karera ("Appellant") on 28 August 2008.¹ The Prosecution filed its response opposing the Motion on 16 September 2008,² and the Appellant filed his confidential reply on 6 October 2008.³

2. As a preliminary matter, the Appeals Chamber notes that the Reply was untimely filed⁴ and that no good cause has been shown for such delay. Accordingly, the Appeals Chamber will not consider the Reply.

BACKGROUND

3. On 7 December 2007, Trial Chamber I convicted the Appellant of three counts of genocide, extermination as a crime against humanity, and murder as a crime against humanity, and imposed a single sentence of imprisonment for the remainder of his life.⁵ The Appellant has appealed his convictions and his sentence.⁶ On 28 August 2008, the parties presented their oral arguments on the appeal at a hearing held in Arusha, Tanzania. At the outset of the hearing, the Presiding Judge informed the parties that the Appeals Chamber would render its decision on the Motion in due course, after the completion of the briefing.⁷

4. The present Motion concerns, in particular, the Appellant's convictions based on his role in the attack at Ntarama Church on 15 April 1994.⁸ The Trial Chamber found that at a meeting at the Ntarama sector office on 14 April 1994, the Appellant promised to provide security by bringing

¹ *Requête extrêmement urgente de la Défense aux fins de présenter des éléments de preuve supplémentaires*, 28 August 2008 ("Motion").

² Prosecutor's Response to Appellant Karera's "*Requête Extrêmement Urgente de la Défense aux fins de Présenter des Éléments de Preuve Supplémentaires*", 16 September 2008 ("Response").

³ *Réplique à la Réponse du Procureur à la Requête extrêmement urgente de la Défense aux fins de présenter des Éléments de Preuve Supplémentaires*, 6 October 2008 ("Reply").

⁴ Pursuant to paragraph 14 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, the moving party may file a reply to a response within fourteen days of the response. The Prosecution filed its Response on 16 September 2008. Accordingly, the Appellant's Reply was due on 30 September 2008.

⁵ *The Prosecutor v. François Karera*, Case No. ICTR-01-74-T, Judgement and Sentence, 7 December 2007 ("Trial Judgement").

⁶ *Avis d'appel de la Défense*, 14 January 2008, para. 255; *Mémoire d'appel*, 7 April 2008, p. 76.

⁷ AT, 28 August 2008 p. 4.

soldiers to protect the refugees.⁹ It further found that on 15 April 1994, the Appellant encouraged a group of *Interahamwe* and soldiers to attack the refugees at the Ntarama Church instead of providing the security he had promised¹⁰ and concluded that several hundred Tutsis were killed during the attack.¹¹ Based on these findings, the Trial Chamber found that the Appellant committed and instigated genocide and extermination as a crime against humanity¹² and instigated murder as a crime against humanity.¹³

SUBMISSIONS OF THE PARTIES

5. The Appellant requests the Appeals Chamber to admit the evidence of two potential witnesses, identified under the pseudonyms PN1 and PN2, who he asserts would prove that he is innocent of the crimes for which he was convicted, in particular with respect to the events that took place in Ntarama in April 1994.¹⁴ The Appellant submits that the testimonies of these witnesses would also affect the credibility of the other witnesses and evidence relating to crimes committed in Nyamirambo and Rushashi for which he was convicted by the Trial Chamber.¹⁵ The Appellant argues that the proposed evidence "totally contradicts the evidence adduced by the Prosecutor" and consolidates the entire defence evidence, including the alibi.¹⁶ He submits that the evidence is "trustworthy, credible and reliable enough to prove that the Accused's conviction is not justified"¹⁷ and that its exclusion would lead to a miscarriage of justice.¹⁸

6. The Appellant further requests the admission into evidence of a roadmap of Rwanda comprising an enlarged and more detailed version of a map of Kigali prefecture which had already been tendered into evidence as Exhibit D 77, as well as a roadmap already tendered as Exhibit P 13.¹⁹

7. The Prosecution responds that the Motion should be dismissed.²⁰ It submits that the Appellant fails to satisfy the threshold test of admissibility under Rule 115 of the Rules of

⁹ Motion, paras. 1, 2, 10, 11.

¹⁰ Trial Judgement, paras. 246-254.

¹¹ Trial Judgement, paras. 292-315.

¹² Trial Judgement, para. 315.

¹³ Trial Judgement, paras. 541-544; 554, 557.

¹⁴ Trial Judgement, para. 560.

¹⁵ Motion, paras. 1, 10.

¹⁶ Motion, para. 3.

¹⁷ Motion, paras. 11, 12.

¹⁸ Motion, para. 19.

¹⁹ Motion, para. 20.

²⁰ Motion, para. 13.

²¹ Response, paras. 3, 28.

Procedure and Evidence of the Tribunal ("Rules").²¹ In particular, it contends that the proffered evidence was available at trial and was presented by the Appellant through other witnesses.²² The Prosecution submits that an analysis of the witness statements shows that the proffered evidence is inconsistent with some aspects of the evidence given by other witnesses the Appellant called at trial.²³ It concludes that even if the proffered evidence had been adduced at trial, it neither could nor would have been a decisive factor in the decision at trial.²⁴

DISCUSSION

8. Rule 115 of the Rules provides a mechanism for the 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.²⁵ According to Rule 115(A) of the Rules, the motion must be filed not later than thirty days from the date for filing of the brief in reply, unless good cause or, after the appeal hearing, cogent reasons are shown for a delay. 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 considers 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."²⁶ 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 the proposed additional evidence could have been a decisive factor in reaching the decision at trial.²⁷

9. In the present case, the Appellant filed his reply brief on 2 June 2008, making 2 July 2008 the deadline for the filing of any motion for additional evidence. The Appellant submits that despite

²¹ Response, paras. 12-25.

²² Response, paras. 16, 17.

²³ Response, para. 18.

²⁴ Response, paras. 19-25.

²⁵ *The Prosecutor v. Idéphonse Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on Request to Admit Additional Evidence, 3 October 2008, para. 5; *Mikaëli Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Decision on the Appellant's Request to Admit Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 12 January 2007, para. 5; *The Prosecutor v. Idéphonse Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on Request to Admit Additional Evidence, 3 October 2008, para. 5.

²⁶ *The Prosecutor v. Idéphonse Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on Request to Admit Additional Evidence, 3 October 2008, para. 5; *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. 3, 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 citations omitted).

numerous investigations and searches, he was unable to contact the proffered witnesses earlier.²⁸ He contends that when an investigator in a different case, John Martin Ndahiriwe, informed the Defence of the possibility to contact persons whose testimonies would be relevant to the Appellant's case,²⁹ his counsel took the required steps to have an exceptional work programme approved to obtain the testimonies of these persons.³⁰ The Appellant argues that, given the witnesses' reluctance to testify and fear for their safety, it was only in August that the proffered witnesses agreed to meet with the Appellant's counsel, give their statements and testify before the Tribunal.³¹ The Appellant attaches to the Motion the redacted statements of Witnesses PN1 and PN2, handwritten by Lead Counsel on 26 August 2008.³² The Prosecution responds that the Appellant fails to show good cause for the delay and that the Motion should be dismissed on this basis alone.³³

10. The good cause requirement obliges the moving party to show that it was not able to comply with the time limit set out in Rule 115(A) of the Rules and that it filed the motion as soon as possible after it became aware of the existence of the evidence sought to be admitted.³⁴ The Appellant does not explain when and under which circumstances he learned from John Martin Ndahiriwe about the proposed witnesses and why it was not possible to obtain the information about their ability to testify on the events at Ntarama earlier, either from John Martin Ndahiriwe or through the Appellant's own investigator. The Appellant further fails to explain why it was only two days before the hearing of the appeal that the Appellant's counsel was able to meet with the proposed witnesses. Absent this information, the Appeals Chamber cannot find that the Appellant has shown good cause for the late filing of the Motion.

11. In any event, even if the Appellant had shown good cause for this delay and assuming that the other admissibility criteria under Rule 115 of the Rules had been met, the proposed additional evidence could not have been a decisive factor in reaching the decision at trial. According to the proffered statements, both proposed witnesses state that they did not see any authority, nor did they

²⁷ *The Prosecutor v. Ildéphonse Hategeekimana*, Case No. ICTR-00-55B-R11bis, Decision on Request to Admit Additional Evidence, 3 October 2008, para. 5.

²⁸ Motion, paras. 4, 18.

²⁹ Motion, para. 5.

³⁰ Motion, paras. 6, 7.

³¹ Motion, para. 8. The Appellant also requests the Appeals Chamber to grant the protective measures for the proffered witnesses. Motion, p. 4.

³² Motion, para. 9; Motion, Annexes I and II.

³³ Response, paras. 3-6, 28.

³⁴ *Emmanuel Ndinabahizi v. The Prosecutor*, Case No. ICTR-01-71-A, Decision on the Admission of Additional Evidence, 4 April 2006, p. 3.

hear anyone mention that the Appellant was present during the attack at the Ntarama Church.³⁵ One of the proposed witnesses states that he had no knowledge of and did not hear anyone talking about a meeting in which the Appellant participated with the villagers or the *conseiller de secteur* in Ntarama or in the surrounding area between the time the President was murdered on 6 April 1994 and the beginning of the attacks in Ntarama.³⁶ The Appeals Chamber notes that the Trial Chamber based the Appellant's conviction for the events at Ntarama on the evidence of four Prosecution witnesses whom it found credible and corroborative of each other to a certain extent.³⁷ At trial, the Defence "presented five witnesses who testified that he was neither present nor involved in the attack at Ntarama Church",³⁸ The Trial Chamber found that these testimonies carried limited weight.³⁹ The proposed evidence does not add anything to the evidence of the Defence witnesses presented at trial. The Appeals Chamber further notes that the Appellant does not present any argument in support of his submission that the testimonies of the proffered witnesses would also affect the credibility of the other witnesses and evidence relating to crimes committed in Nyamirambo and Rushashi for which he was convicted by the Trial Chamber. The Appellant has therefore failed to show how the proposed evidence could have impacted the decision of the Trial Chamber.

12. Finally, the Appeals Chamber notes that it need not consider the Appellant's request to have a roadmap of Rwanda admitted into evidence. The same request was already considered and granted during the hearing of his appeal.⁴⁰ The present request is therefore moot.

PROSECUTION'S REQUEST FOR SANCTIONS

13. The Prosecution submits that the Motion is frivolous and amounts to an abuse of process and requests the Appeals Chamber to impose sanctions, pursuant to Rules 46, 73(F), and 107 of the Rules.⁴¹ The Prosecution argues that the Appellant makes "extremely cursory, not to say non-existent arguments" and "leaves it to the Respondent, and the Appeals Chamber, to imagine the relevance, credibility, and reliability of the evidence, as well as the potential impact on the verdict

³⁵ Motion, Annexes I, II.

³⁶ Motion, Annex I.

³⁷ Trial Judgement, paras. 313, 314.

³⁸ Trial Judgement, para. 309.

³⁹ Trial Judgement, paras. 313. With respect to Witnesses NKZ and ZIH, the Trial Chamber further found that "the attack involved a high number of attackers and refugees moving about" and that it was "therefore quite possible that someone may have been present even if he or she was not observed by these two witnesses." Trial Judgement, para. 309.

⁴⁰ AT. 28 August 2008 p. 19. A roadmap of Rwanda was admitted into evidence as Exhibit No. D 79.

⁴¹ Response, paras. 27, 28. See also Response, para. 11.

under appeal,"⁴² it argues that, in addition to the fact that potentially relevant information, including the names of the proffered witnesses, is redacted, and does not allow the Prosecution to conduct any investigation it might deem necessary,⁴³ the annexes to the Motion are "difficult to read, and sometime [sic] illegible".⁴⁴

14. Rule 73(F) of the Rules provides that in addition to the sanctions envisaged by Rule 46, a Chamber may impose sanctions, which may include non-payment in whole or in part of the fees associated with a motion, against Counsel if Counsel brings a motion that is frivolous or an abuse of process.⁴⁵ The Appeals Chamber has consistently held that the power to impose sanctions should be exercised cautiously.⁴⁶ While the Appeals Chamber agrees with the Prosecution that the Motion is in poor condition, it finds no basis to conclude that the Motion is frivolous or abusive. The Appeals Chamber therefore does not consider that any sanctions against Counsel for the Appellant are warranted.

DISPOSITION

For the foregoing reasons, the Appeals Chamber

DISMISSES the Appellant's Motion in its entirety; and

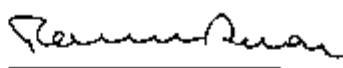
DENIES the Prosecution's request for non-payment of the fees associated with the Motion to Counsel for the Appellant.

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

Done this 29th day of October 2008,
At The Hague,
The Netherlands.



[Seal of the Tribunal]


Judge Fausto Pocar
Presiding

⁴² Response, para. 10.

⁴³ Response, para. 8.

⁴⁴ Response, para. 7.

⁴⁵ *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on Request to Admit Additional Evidence of 1 August 2008, 1 September 2008, para. 12, citing *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Hassan Ngeze's Motion Requesting Immediate Action in Respect of Alleged Falsification of the Prosecutor's Request for a Further Extension of the Restrictive Measures of 12 December 2005, 27 February 2006 (confidential), para. 12; *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. 10.

⁴⁶ *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on Request to Admit Additional Evidence of 1 August 2008, 1 September 2008, para. 12.