



ICTR-01-69-I
01-09-2009

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
(3457 - 3453)

ORIGINAL: ENGLISH

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Sergei Alekseevich Egorov
Judge Florence Rita Arrey

Registrar: Adama Dieng

Date: 31 August 2009

THE PROSECUTOR

v.

Hormisdas NSENGIMANA

Case No. ICTR-2001-69-I

2009 SEP 01 P 53
JUDICIAL REFERENCES/ARCHIVES
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DECISION ON DEFENCE REQUESTS CONCERNING NEW EVIDENCE

The Prosecution
Wallace Kapaya
Patrick Gabaake
Moussa Séfon
Iskandar Ismail

The Defence
Emmanuel Altit
David Hooper

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov and Judge Florence Rita Arrey;

BEING SEIZED OF the Defence motion of 16 April 2009 asking the Chamber to order the Prosecution to take a position concerning newly discovered evidence ("16 April Motion") and its motion of 22 May 2009 seeking the reopening of the case to introduce new evidence ("22 May Motion");

CONSIDERING the Prosecution Responses, filed on 22 April 2009 and 27 May 2009, respectively; and the Defence Reply to the Prosecution Response to the 22 May Motion, filed on 1 June 2009;

HEREBY DECIDES the Motions.

INTRODUCTION

1. On 12 and 13 February 2009, the Chamber heard closing arguments and adjourned the proceedings. The case is now under deliberation. In the Motions, the Defence requests that the Chamber order the Prosecution to take a position in light of newly discovered evidence, and that the proceedings be reopened to allow for the appearance of an additional witness to present such evidence. According to the Defence, it would rebut Prosecution Witness CAR's testimony that there was a small window on a gate, through which he could see Nsengimana with *Interahamwe* in late April 1994. The new evidence would also affect Witness CAR's general credibility. The Prosecution objects to both Motions, which the Chamber considers together because of overlapping factual and legal issues.¹

DELIBERATIONS

(i) 16 April Motion

2. Having failed to reach an agreement with the Prosecution that the gate had no window, the Defence requests that the Chamber order the Prosecution to take a position with respect to this issue. Reference is made to Rules 85 (A) (v) and 98 of the Rules of Procedure and Evidence and the Chamber's inherent power to order the production of evidence.²

3. The Prosecution responds that Rules 85 and 98 are applicable only prior to the presentation of closing arguments. Subsequently, new evidence can only be introduced if the case is reopened or on appeal. It also argues that the Defence did not exercise due diligence during the trial, that the alleged new fact is of "insubstantial nature", and that it does not materially contradict Witness CAR's testimony.³

4. The Chamber finds no basis upon which to order the Prosecution to take a position on

¹ *Requête d'ordonner au Procureur de se prononcer sur un fait nouveau* etc., filed on 16 April 2009 ("16 April Motion"); *Requête aux fins de reouverture de preuve et d'ordonner la comparution d'un témoin* etc., filed on 22 May 2009 ("22 May Motion"). The Defence first raised the issue of new evidence during closing arguments. T. 12 February 2009 pp. 54-57. The window is referred to as a "judas".

² 16 April Motion, paras. 3-8, 10, 13-19. See also 22 May Motion, paras. 3-11, 26-27 and Annexes 1, 4-5.

³ Prosecution Response to 16 April Motion, paras. 7-15.

whether the gate had a window. It simply notes the Prosecution's submissions that this issue is not substantial and that there is no contradiction compared to Witness CAR's testimony.⁴ The disagreement between the parties about the significance of a window in the gate will be considered in the judgement.

(ii) 22 May Motion

5. In view of the Prosecution's position, the Defence requests that its case be reopened and that the Chamber order the appearance of a witness who will testify that no window existed in the gate. The Defence refers to the rights of the Accused, as set forth in Article 20 of the Statute, and argues that Rules 54 and 98 of the Rules give the Chamber the power to reopen the case even after its closure. It points out that the 22 May Motion has a different purpose than the 16 April Motion.⁵

6. The Prosecution submits that the 22 May Motion should be dismissed because it seeks to re-litigate factual and legal issues raised in the 16 April Motion. Alternatively, it argues that the alleged new fact does not contradict Witness CAR's testimony and that the Defence failed to diligently investigate the issue during the trial.⁶

7. The Chamber recalls that there is no provision in the Statute or the Rules governing the reopening of a case.⁷ Rule 98 of the Rules does not give the parties any right to request additional evidence. It is for the Chamber to exercise its discretion.⁸ Rule 89 (C) has been interpreted to mean that a Chamber may permit a party to reopen its case in order to present "fresh evidence". The main consideration is whether, with reasonable diligence, the evidence could have been identified and presented during the case of the party making the application. If it is shown that the evidence could not have been found with the exercise of diligence before the close of a party's case, the Chamber has discretion to admit the evidence after taking into account the probative value of that evidence and the need to ensure a fair trial.⁹

8. The Prosecution disclosed Witness CAR's statement to Tribunal investigators in November 2006. The statement indicates that he had observed Nsengimana through "a small window" at a specific residence.¹⁰ At a minimum, this provided the Defence with a location

⁴ Prosecution Response to 16 April Motion, paras. 10, 15; Prosecution Response to 22 May Motion, para. 9.

⁵ 22 May Motion, paras. 16, 19-25, 30; Defence Reply to Prosecution Response to 22 May Motion, paras. 6-19, 27-30.

⁶ Prosecution Response to 22 May Motion, paras. 4-10, 18-19.

⁷ *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Prosecution Joint Motion for Re-Opening Its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Michel Bagaragaza via Video-Link (TC), 16 November 2006, para. 12 ("*Zigiranyirazo* Trial Decision"). Cf. *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement (AC), 17 December 2004, para. 216 ("*Kordić* Appeal Judgement").

⁸ *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Decision on the Defence Motion for Orders Calling Prosecution Witness VZ Listed in Prosecution Witness List of November 2000; Prosecution Witness VL, VH And VK Listed in Supporting Material to the Third Amended Indictment to Testify; In the Alternative Admit The Statements of the Said Witnesses in Unredacted Form in Evidence in the Interest of Justice Pursuant to Rules 54, 68 and 98 of the Rules of Procedure and Evidence, 6 September 2001, para. 6.

⁹ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Ntabakuze Defence Motion for the Admission of Additional Evidence (TC), 22 October 2008, para. 6 citing *Kordić* Appeal Judgement para. 222 and *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement (AC), 20 February 2001, para. 283 ("*Čelebići* Appeal Judgement").

¹⁰ Disclosure of Material to Support the Prosecutor's Proposed Amended Indictment, p. K0226390 ("... I was about five metres from the group, watching through a small window, from my hiding place, with my family, inside the house..."), filed on 28 November 2006.

where the Defence could have begun investigations before the trial commenced.¹¹ Furthermore, during Witness CAR's testimony on 16 January 2008, he identified individuals who would be able to confirm his evidence.¹²

9. The Defence has not demonstrated that it exercised sufficient diligence during the proceedings. Rather, it merely states, without documenting prior attempts, that it was unable to make contact with this particular witness prior to 31 October 2008. It then argues that the witness was imprisoned and unable to sign a declaration prior to 21 February 2009.¹³ During closing arguments, the Defence only suggested that it discovered the evidence after the case was closed.¹⁴ The Chamber is not convinced that this, or comparable evidence, could not have been obtained earlier. This weighs heavily against the reopening of the case, given its advanced stage.¹⁵

10. Turning to the probative value of the new evidence and the need to ensure a fair trial, the Chamber recalls that Witness CAR's account is relevant to Nsengimana's alleged involvement in planning meetings, his control of roadblocks and *Interahamwe*, and his training and arming of the militia. The segment of evidence cited by the Defence seems material to the Prosecution's case regarding Nsengimana's control over *Interahamwe* at roadblocks.¹⁶

11. The relevant portion of Witness CAR's testimony concerning the day in late April 1994 does not directly relate to a criminal event charged in the Indictment. The significance of the newly discovered evidence is therefore limited. Furthermore, the Defence only cites a portion of Witness CAR's account concerning his observations on that day. Having considered the totality of his evidence, the Chamber is of the view that the Defence has not met its burden in order to allow it to reopen its case and present an additional witness. The Chamber also declines to exercise its inherent powers under Rule 98 to order such evidence.

¹¹ The Defence submissions during Witness CAR's testimony that they were unable to investigate the house "because of disclosure principles" is not convincing. T. 16 January 2008 p. 40.

¹² T. 16 January 2008 pp. 4-5.

¹³ 16 April Motion, paras. 1, 4, 6, 11; 22 May Motion, paras. 1, 18.

¹⁴ T. 12 February 2008 p. 55.

¹⁵ Cf. *Čelebići* Appeal Judgement para. 280 (noting the Trial Chamber's standard that "the 'advanced stage of the trial'; i.e., the later in the trial that the application is made, the less likely the evidence will be admitted").

¹⁶ Prosecution Closing Brief Chapter 5 pp. 27-28, 118, 122, see more generally Chapter 5 pp. 117-123, Chapter 6 paras. 56, 60, 66.

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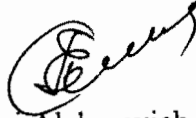
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motions

Arusha, 31 August 2009



Erik Møse
Presiding Judge



Sergei Alekseevich Egorov
Judge



Florence Rita Arrey
Judge
p.p.

[Seal of the Tribunal]

