



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

2962/H

*Handwritten initials*

ICTR-98-41-A  
07<sup>th</sup> February 2011  
{2962/H – 2957/H}

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding  
Judge Mehmet Güney  
Judge Fausto Pocar  
Judge Liu Daqun  
Judge Theodor Meron

Registrar: Mr. Adama Dieng

Decision of: 7 February 2011

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME  
COPIE CERTIFIÉE CONFORMÉ À L'ORIGINAL PAR MOI  
NAME / NOM: *KOEFU KUMELIO A. AICANDE*  
SIGNATURE: *[Signature]* DATE: *07 Feb 2011*

ICTR Appeals Chamber  
Date: *7<sup>th</sup> February 2011*  
Action: *R. Dieng*  
Copied To: *Concerned Judges, SLOs, LOs*

**Théoneste BAGOSORA**  
**Aloys NTABAKUZE**  
**Anatole NSENGIYUMVA**

v.

**THE PROSECUTOR**

Case No. ICTR-98-41-A

*ALOs, CMS, Parties, LSS. June 2*

**DECISION ON THÉONESTE BAGOSORA'S MOTION FOR  
ADMISSION OF ADDITIONAL EVIDENCE**

Counsel for Théoneste Bagosora

Raphaël Constant  
Richard Perras

Counsel for Aloys Ntabakuze

Peter Erlinder  
André Tremblay

Counsel for Anatole Nsengiyumva

Kennedy Ogetto  
Gershom Otachi Bw'Omanwa

Office of the Prosecutor

Hassan Bubacar Jallow  
James J. Arguin  
George W. Mugwanya  
Inneke Onsea  
Renifa Madenga  
Abubacarr Tambadou  
Evelyn Kamau  
William Mubiru  
Aisha Kagabo  
Ndeye Marie Ka

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 seised of a motion to call a witness on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) filed by Théoneste Bagosora (“Bagosora”) on 25 August 2010.<sup>1</sup>

#### A. Background

2. On 18 December 2008, Trial Chamber I of the Tribunal (“Trial Chamber”) rendered its Judgement in the *Bagosora et al.* case.<sup>2</sup> The Trial Chamber held Bagosora guilty of genocide, crimes against humanity (murder, extermination, rape, persecution, and other inhumane acts), and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life, outrages upon personal dignity) pursuant to Articles 6(1) and 6(3) of the Statute of the Tribunal.<sup>3</sup> Bagosora’s convictions as a superior were based on the Trial Chamber’s findings that in the period of 6 to 9 April 1994, as *directeur de cabinet* in the Rwandan Ministry of Defence, Bagosora assumed the power of the highest authority in the Ministry of Defence, acting in fact as the Minister of Defence, and that his conduct reflected “that he exercised control over the Rwandan Armed Forces, the most powerful entity at the time in the Rwandan government”.<sup>4</sup> He was sentenced to life imprisonment.<sup>5</sup>

3. Bagosora filed a notice of appeal on 8 January 2010, and his appeal brief on 24 March 2010, challenging his convictions and sentence.<sup>6</sup> The Prosecution responded to Bagosora’s appeal on 3 May 2010,<sup>7</sup> to which Bagosora replied on 27 July 2010.<sup>8</sup> As part of his appeal, Bagosora submits that the Trial Chamber erred in failing to compel Marcel Gatsinzi (“Gatsinzi”), who was appointed acting army Chief of Staff on 7 April 1994, to comply with a subpoena to testify in his defence.<sup>9</sup>

<sup>1</sup> Appellant Théoneste Bagosora’s Motion Seeking Leave to Present Additional Evidence, filed in French on 25 August 2010, English translation filed on 14 September 2010 (“Motion for Additional Evidence”).

<sup>2</sup> *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Judgement and Sentence, signed on 18 December 2008, filed on 9 February 2009 (“Trial Judgement”).

<sup>3</sup> Trial Judgement, paras. 2158, 2186, 2194, 2203, 2213, 2224, 2245, 2254, 2258.

<sup>4</sup> Trial Judgement, paras. 2031, 2265. *See also ibid.*, para. 723.

<sup>5</sup> Trial Judgement, para. 2277.

<sup>6</sup> Notice of Appeal Appellant: Théoneste Bagosora, filed in French on 8 January 2010, English translation filed on 2 March 2010 (“Notice of Appeal”); Théoneste Bagosora’s Appellant’s Brief, filed in French on 24 March 2010, English translation filed on 23 June 2010 (“Appeal Brief”).

<sup>7</sup> Prosecutor’s Brief in Response to Théoneste Bagosora’s Appeal, 3 May 2010.

<sup>8</sup> Théoneste Bagosora’s Reply to Prosecutor’s Brief in Response, filed in French on 27 July 2010, English translation filed on 8 November 2010 (“Reply Brief”).

<sup>9</sup> Notice of Appeal, Ground 1(I), p. 7; Appeal Brief, paras. 101-114; Reply Brief, paras. 38-43. A subpoena for Gatsinzi’s appearance and testimony was issued pursuant to an order by the Trial Chamber filed on 11 September 2006.

4. On 25 August 2010, Bagosora filed the present Motion for Additional Evidence, in which he requests the Appeals Chamber to order and compel Gatsinzi to testify *viva voce* in this case at the seat of the Tribunal in Arusha.<sup>10</sup> On 24 September 2010, the Prosecution responded that the Motion for Additional Evidence should be dismissed.<sup>11</sup> Bagosora filed his reply on 8 October 2010.<sup>12</sup>

### B. Submissions

5. Bagosora requests the Appeals Chamber to order and compel Gatsinzi to testify *viva voce* in the present case pursuant to Rule 115 of the Rules.<sup>13</sup> Bagosora submits that he has consistently requested that Gatsinzi appear as a witness, even securing an order from the Trial Chamber to subpoena Gatsinzi.<sup>14</sup> However, he contends, he was erroneously denied the right to present this evidence by the Trial Chamber's passivity about Gatsinzi's recalcitrance to testify.<sup>15</sup> He posits that Gatsinzi's testimony not only was, but remains relevant, and that it could have an impact on the Trial Chamber's verdict against him.<sup>16</sup> In particular, Bagosora argues that, as the former interim army Chief of Staff appointed on 7 April 1994, Gatsinzi is well placed to testify on the functioning of the army and on the chain of command from 6 to 9 April 1994, as well as a number of matters relevant to the Trial Chamber's finding that Bagosora exercised *de facto* authority.<sup>17</sup> He submits that he would be acquitted if Gatsinzi acknowledges his previous statements, which are part of the trial record.<sup>18</sup>

6. The Prosecution responds that the Motion for Additional Evidence should be summarily dismissed for failing to comply with the Practice Direction on Formal Requirements for Appeals from Judgement of 4 July 2005 ("Practice Direction"), arguing that Bagosora has failed to attach an appendix with copies of the evidence sought to be admitted, indicate the content of the anticipated testimony, identify the ground or grounds of appeal to which it relates, or explain how it could or

---

*See The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request for a Subpoena, 11 September 2006 ("Subpoena Decision"), p. 5. At the time when the subpoena was issued, Gatsinzi was the Minister of Defence of the Government of Rwanda. *See ibid.*, paras. 1, 7. Currently, Gatsinzi is the Minister of Disaster Management and Refugee Affairs of the Government of Rwanda. *See* www.gov.rw.

<sup>10</sup> Motion for Additional Evidence, para. 2, p. 6.

<sup>11</sup> Prosecutor's Response to "*Requête de l'Appelant Bagosora demandant la permission de présenter des moyens de preuve supplémentaires Art. 115 du Règlement de procédure et de preuve*", 24 September 2010 ("Response"), paras. 2, 5, 22, 23.

<sup>12</sup> *Réplique à la Réponse du Procureur à la Requête de l'Appelant Bagosora demandant la permission de présenter des moyens de preuve supplémentaires*, 8 October 2010 ("Reply").

<sup>13</sup> Motion for Additional Evidence, para. 2, p. 6.

<sup>14</sup> Motion for Additional Evidence, paras. 3(a), 4-6, 8, 12, 36; Reply, paras. 17-25.

<sup>15</sup> Motion for Additional Evidence, paras. 3(a), 7-14, 37, 38; Reply, paras. 8-11, 26-29.

<sup>16</sup> Motion for Additional Evidence, paras. 3(b) and (d), 15-35; Reply, paras. 4-6, 14-16.

<sup>17</sup> Motion for Additional Evidence, paras. 23, 24. Bagosora lists the topics on which Gatsinzi could testify, and points to several paragraphs in the Trial Judgement to which Gatsinzi's testimony would relate. *See ibid.*, paras. 24-26.

<sup>18</sup> Motion for Additional Evidence, paras. 32, 33, referring to Exhibits DB274 (Audio-recording of Jean Kambanda's speech and portion of Gatsinzi's interview with a journalist of Radio Rwanda of 10 April 1994), DB284 (Book written by Jacques Roger Booh-Booh titled "*Le Patron de Dallaire parle*").

would have been a decisive factor at trial.<sup>19</sup> In the alternative, the Prosecution contends that the Motion for Additional Evidence should be denied on its merits because (i) the proposed evidence was already before the Trial Chamber as Exhibits DB274 and DB284; (ii) Bagosora did not exhaust all available mechanisms to call Gatsinzi to testify at trial; (iii) the relevance and credibility of Gatsinzi's potential testimony cannot be determined; and (iv) the proposed evidence neither could, nor would impact the verdict.<sup>20</sup>

7. Bagosora replies that, as Gatsinzi has yet to testify, he cannot provide an appendix with copies of evidence which does not yet exist.<sup>21</sup> He submits that Gatsinzi's testimony would establish that, contrary to the Trial Chamber's verdict, Bagosora did not exercise control over the Rwandan army, and that efforts were made to prevent and punish crimes.<sup>22</sup> He further contends that documentary evidence is no substitute for *viva voce* testimony.<sup>23</sup>

### C. Discussion

8. The Appeals Chamber recalls that "it has the authority to summon a witness, in appropriate circumstances, to testify before the Chamber so as to facilitate the effective conduct of appeal proceedings, and especially Rule 115's power to admit additional evidence".<sup>24</sup> However, the purpose of Rule 115 is to deal "with the situation 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."<sup>25</sup> The Appeals Chamber considers that Rule 115 of the Rules does not permit a party to

<sup>19</sup> Response, paras. 2-4, 14, 22.

<sup>20</sup> Response, paras. 2, 6-22.

<sup>21</sup> Reply, para. 3.

<sup>22</sup> Reply, paras. 4, 16.

<sup>23</sup> Reply, para. 13.

<sup>24</sup> *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 ("*Kupreškić et al.* Decision of 8 May 2001"), para. 5. See also *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 ("*Nahimana et al.* Decision of 5 May 2006"), para. 20.

<sup>25</sup> *Kupreškić et al.* Decision of 8 May 2001, para. 5 (emphasis added). See also *Nahimana et al.* Decision of 5 May 2006, para. 20; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Hassan Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage, confidential, 23 February 2006 ("*Nahimana et al.* Decision of 23 February 2006"), para. 6; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator, 4 October 2005, p. 4; *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 ("*Nahimana et al.* Decision of 14 February 2005"), fn. 5. See also, e.g., *Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, Decision on Tharcisse Renzaho's Motions for Admission of Additional Evidence and Investigation on Appeal, 27 September 2010, para. 3; *Emmanuel Rukundo v. The Prosecutor*, Case No. ICTR-01-70-A, Decision on Rukundo's Motion for the Admission of Additional Evidence on Appeal, 4 June 2010, para. 5; *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Decision on Zigiranyirazo's Motion for Admission of Additional Evidence on Appeal, 16 September 2009, para. 5; *Kupreškić et al.* Decision of 8 May 2001, para. 10; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Decision on Motions to Admit Material Relating to Witness AT into Evidence Pursuant to Rule 115 and to Call Additional Witnesses, confidential, 29 May 2001 ("*Kupreškić et al.* Decision of 29 May 2001"), para. 19.

merely request a particular person to be summoned as a witness to give evidence at the appellate stage.<sup>26</sup> As repeatedly held, a party seeking the admission of additional evidence on appeal must provide the Appeals Chamber with the evidence sought to be admitted.<sup>27</sup> Where a party seeks to call a witness at the appellate stage, it needs to provide a statement or other documentation of the potential witness's proposed evidence,<sup>28</sup> which the Appeals Chamber may admit as additional evidence pursuant to Rule 115 and on the basis of which it may determine whether calling the witness to testify on appeal is necessary.<sup>29</sup>

9. In the present case, Bagosora has not provided the Appeals Chamber with any statement from Gatsinzi or any documentation that may be admissible as additional evidence and the contents of which would prompt the Appeals Chamber to call the witness to testify in person. Bagosora explains that he could not procure a statement from Gatsinzi because Gatsinzi was unwilling to cooperate with his Defence.<sup>30</sup> In addition, although Bagosora provides no alternative documentation on appeal, the Appeals Chamber notes that Bagosora introduced aspects of Gatsinzi's potential testimony into evidence at trial in the form of Exhibits DB256 (Gatsinzi *Pro Justitia* Statement dated 16 June 1995), DB274 (Audio-recording of Jean Kambanda's Speech and portion of

<sup>26</sup> *Nahimana et al.* Decision of 5 May 2006, para. 20; *Nahimana et al.* Decision of 14 February 2005, fn. 5; *Kupreškić et al.* Decision of 8 May 2001, para. 5.

<sup>27</sup> See, e.g., *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Dragomir Milošević's Further Motion to Present Additional Evidence, 9 April 2009, para. 18; *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Decision on Mile Mrkšić's Second Rule 115 Motion, 13 February 2009, para. 13; *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on Request to Admit Additional Evidence, 2 October 2008, para. 7; *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-A, Decision on a Request to Admit Additional Evidence, 27 April 2007, para. 8; *Nahimana et al.* Decision of 5 May 2006, para. 18; *Nahimana et al.* Decision of 14 February 2005, p. 3. See also Practice Direction, para. 7(e), which provides that a motion under Rule 115 should contain an appendix with copies of the evidence the party is applying to present.

<sup>28</sup> Cf. *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on the First and Third Rule 115 Defence Motions to Present Additional Evidence Before the Appeals Chamber, 30 June 2005, para. 87; *Kupreškić et al.* Decision of 29 May 2001, para. 19.

<sup>29</sup> See *Nahimana et al.* Decision of 23 February 2006; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Decision to Summon a Witness *Proprio Motu*, 20 September 2005; *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Decision on Appellant's Motion for Admission of Additional Evidence on Appeal, confidential, 12 April 2005; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Appellants' Motions to Admit Additional Evidence Pursuant to Rule 115, 16 February 2004; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, Chapter XVI "Annex A – Procedural Background", para. 41; *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Decision on the Consolidated Defence Motion for an Order Varying the Grounds of Appeal, for the Rehearing of Oral Arguments in the Appeal and for the Admission of Additional Evidence, and Scheduling Order, signed on 19 February 2003, filed on 14 May 2003; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on the Defence Supplemental Motion to Present Additional Evidence, 20 November 2003; *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision on Defence Motion for Leave to Present Additional Evidence and to Supplement Record on Appeal, 12 December 2003; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 505. Cf. also *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on the Admissibility of Material Presented by the Prosecution in Rebuttal to Rule 115 Evidence Admitted on Appeal, 19 November 2003. The Appeals Chamber observes that the Appeals Chamber of the International Tribunal for the Former Yugoslavia departed from this settled jurisprudence in the particular circumstances of the *Momčilo Krajišnik* case. See *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Appellant Momčilo Krajišnik's Motion to Call Radovan Karadžić Pursuant to Rule 115, 16 October 2008, paras. 15, 20, Disposition.

Gatsinzi's Interview with a journalist of Radio Rwanda of 10 April 1994), and DB284 (Book written by Jacques Roger Booh-Booh titled "*Le Patron de Dallaire parle*"). In the absence of any material from Gatsinzi that Bagosora can legitimately seek to admit as "additional evidence", the Appeals Chamber considers that Bagosora's request for an order to call Gatsinzi as a witness pursuant to Rule 115 of the Rules cannot be granted.

10. Gatsinzi's testimony could, however, assist the Appeals Chamber's adjudication of Bagosora's submissions under his first ground of appeal in relation to the Trial Chamber's alleged violation of his fair trial rights by failing to enforce a subpoena for Gatsinzi's live testimony,<sup>31</sup> in particular with regard to Bagosora's superior responsibility between 6 and 9 April 1994. Given that the Trial Chamber indeed issued a subpoena for Gatsinzi's appearance and that Gatsinzi never testified, the Appeals Chamber considers the circumstances in this case to be appropriate to summon Gatsinzi pursuant to Rules 98 and 107 of the Rules in order to determine whether or to what extent such failure to testify violated Bagosora's right to a fair trial or caused him the prejudice he purports.

#### **D. Disposition**

11. For the foregoing reasons, the Appeals Chamber

**DISMISSES** Bagosora's Motion for Additional Evidence pursuant to Rule 115 of the Rules; and


**ORDERS *proprio motu*** that, pursuant to Rules 98 and 107 of the Rules, Marcel Gatsinzi will be heard by the Appeals Chamber in relation to the aforementioned topics on a date specified by an order to be issued in due course.

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

Done this 7<sup>th</sup> day of February 2011,  
At The Hague,  
The Netherlands.



[Seal of the Tribunal]

  
\_\_\_\_\_  
Judge Patrick Robinson  
Presiding Judge

<sup>30</sup> Reply, para. 8. *See also* Subpoena Decision, para. 7, in which the Trial Chamber ordered the issuance of a subpoena for Gatsinzi's appearance because, *inter alia*, Bagosora had made reasonable efforts to secure Gatsinzi's voluntary cooperation, without success.

<sup>31</sup> Notice of Appeal, Ground 1(I), p. 7; Appeal Brief, paras. 101-114; Reply Brief, paras. 38-43.