

ICTR-98-41-T
29-03-2004
(19363 - 19360)



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

19363

S. Musea

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 29 March 2004

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

2004 MAR 29 A 10:52
S. Musea

DECISION ON DEFENCE MOTION TO PRECLUDE PORTIONS OF THE
ANTICIPATED TESTIMONY OF PROSECUTION WITNESS DCH, FOR THE
POSTPONEMENT OF WITNESS DCH'S TESTIMONY, AND FOR THE
APPOINTMENT OF DEFENCE COUNSEL FOR DCH

The Office of the Prosecutor

Barbara Mulvaney
Drew White
Segun Jegede
Alex Obote-Odora
Christine Graham
Rashid Rashid

Counsel for the Defence

Raphaël Constant
Paul Skolnik
Jean Yaovi Degli
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”),

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the “Ntabakuze Defence Motion to Postpone the Testimony of Witness DCH Until a Reasonable Time After the Receipt Of Certain Documents Necessary for the Cross-Examination”, filed on 10 February 2004; the “Ntabakuze Defence Motion for the Exclusion of Portions of the Anticipated Testimony of Prosecution Witness DCH, for the Postponement of DCH’s Testimony Until Certain Documents Have Been Received, for the Appointment of Defence Counsel for DCH Before He Can Testify”, filed on 16 February 2004; and the “Bagosora Defence Motion for the Exclusion of Portions of the Anticipated Testimony of Prosecution Witness DCH and the Postponement of his Testimony Until Certain Documents Have Been Received”, file on 16 February 2004;

NOTING that the Prosecutor has not filed a response to these motions;

HEREBY DECIDES the Motions:

INTRODUCTION

1. The major issues before this Chamber concern postponing and precluding certain aspects of the anticipated testimony of Prosecution Witness DCH due to the late disclosure of witness statements, the Defence’s needs for documents and translations relevant to his testimony, and the Defence for Ntabakuze’s assertions that the witness’s anticipated evidence lacks probative value.

SUBMISSIONS

2. In their motions filed on 16 February 2004, the Defences for Ntabakuze and Bagosora request the Chamber to preclude the Prosecution from presenting evidence on all matters arising from witness statements DCH-6 and DCH-7 because these statements were disclosed late and in violation of this Chamber’s order to disclose all witness statements by 28 July 2003. Witness statement DCH-6 was made on 23 April 2003, signed by the witness on 23 July 2003, but not disclosed to the Defence until December 2003. Witness statement DCH-7 was made on 4 and 5 February 2003, signed on 26 May 2003, but not disclosed to the Defence until 11 February 2004. In addition, the Defence also complains that these statements have not been received in English, effectively preventing the unilingual English speaking Counsel from properly preparing.

3. The Defences for Ntabakuze and Bagosora also request the Chamber to postpone the testimony of Prosecution DCH until certain documents related to the witness have been translated and disclosed.

4. The Defence for Ntabakuze requests the Chamber to preclude the anticipated evidence of Prosecution Witness DCH concerning the Ruhanga church massacre. In support of this request, the Defence points to the *Semanza* Judgement, in which Trial Chamber III found that Witness DCH was not credible or reliable because his evidence about the Ruhanga church massacre conflicted with other prosecution evidence about the massacre and because his confession failed to mention the participation of the accused in that case Laurent Semanza.¹ The Defence invites the Chamber to take judicial notice of Trial Chamber III’s findings

¹ *Semanza*, Judgement (TC), 15 May 2003, para. 137.

concerning Witness DCH's lack of credibility and reliability. Bearing this credibility finding in mind, the Chamber should then determine that Witness DCH's anticipated testimony concerning Ruhanga consequently has no probative value and should be precluded under Article 89.

5. Relying on Rule 42 and a witness's right to protection against self-incrimination, the Defence for Ntabakuze also requests the Trial Chamber to appoint counsel for Witness DCH because, according to the Defence, the witness proposes to testify that he participated in crimes for which he has never been charged nor tried.

DELIBERATIONS

6. In seeking to preclude any evidence arising out of witness statements DCH-6 and DCH-7, the Defences for Ntabakuze and Bagosora are challenging the admission of evidence arising from them because the Prosecutor had the statements in its possession on the date of final disclosure previously ordered by the Chamber, but nonetheless did not disclose them at that time. The Chamber agrees with the Defence that the Prosecution's late disclosure is in clear and direct contravention of an unequivocal order.² However, in absence of a showing that the Prosecution acted in bad faith, the Chamber does not feel that the appropriate remedy in this case is to exclude testimony arising out of the statements.³

7. The Chamber is of the view that it is preferable to hear relevant testimony, but will only permit admission of such evidence when there is a reasonable opportunity to evaluate its probative value in conformity with the rights of the Accused.⁴ Given that Witness DCH is not scheduled to testify in the upcoming trial session from 29 March to 7 May 2004, the Chamber does not find that the Accused are prejudiced by the late disclosure of these statements and will allow testimony arising from them. In addition, the Defence's complaint that DCH-6 and DCH-7 were not disclosed in English is moot, given the Prosecutor's recent disclosure of the English versions of these statements, which were filed with the Registry on 24 March 2004.

8. The Chamber agrees that the Defence should be provided with all relevant documents related to the testimony of Witness DCH, duly translated, prior to his testimony. However, the Chamber finds the Defence request to delay the testimony of Witness DCH to be premature. Based on representations made by the Prosecution to the Chamber as well as to the Defence, Witness DCH is not scheduled to testify during the upcoming trial session.

9. Rule 94 allows a Chamber to take judicial notice of adjudicated facts from other proceedings. The Chamber does not find it appropriate to take judicial notice of another Trial Chamber's assessment of the credibility and reliability of a particular witness and then to use that assessment to preclude the witness's testimony for lacking probative value. At the outset, the Chamber is unwilling to pre-judge the credibility and reliability of witness's anticipated testimony. In addition, facts involving interpretations or legal characterisations of facts should not be admitted under Rule 94.⁵ The Chamber also notes that the *Semanza* Judgement is currently pending on appeal.

² *Prosecutor v. Bagosora et al*, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003 ("The Chamber . . . orders, in accordance with this decision, the Prosecution to make such disclosure no later than 28 July 2003").

³ *Prosecutor v. Bagosora et al*, Decision on the Admissibility of Evidence of Witness DBQ (TC), 18 November 2003, para. 29.

⁴ *Ibid.*, para. 24.

⁵ *Prosecutor v. Nyiramasuhuko et. al.*, Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence (TC), 15 May 2002, para. 39; *Prosecutor v. Ntakirutimana*, Decision on the Prosecutor's Motion

10. In the Chamber's view, the Defence for Ntabakuze lacks standing to request that counsel be appointed for Witness DCH. Reference is also made to Rule 90(E) concerning self-incrimination.

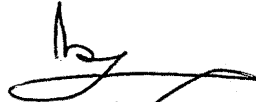
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motions.

Arusha, 29 March 2004



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

