

ICTR-98-41-AR93 and ICTR-98-41-AR93.2
19 DECEMBER 2003
(975/H - 968/H)

975/H



International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

IN THE APPEALS CHAMBER

Before:

Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Fausto Pocar
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

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2003 DEC 22 A 041

Registrar:

Mr. Adama Dieng

Decision of:

19 December 2003

ICTR Appeals Chamber
Date: 19 Dec 03
Action: PG
Copied To: *[Handwritten]*

THE PROSECUTOR

v.

THÉONESTE BAGOSORA
GRATIEN KABILIGI
ALOYS NTABAKUZE
ANATOLE NSENGIYUMVA

[Handwritten notes]
ALW, / L0s;
LSS;
Parties;
Judicial Authority
Rby Bunde

ICTR-98-41-AR93 & ICTR-98-41-AR93.2

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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DATE: 19 Dec 03

**DECISION ON PROSECUTOR'S INTERLOCUTORY APPEALS
REGARDING EXCLUSION OF EVIDENCE**

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Mr. Kennedy Ogetto
Mr. Gershom Otachi Bw'omanwa

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 "International Tribunal," respectively) is seised of the "Prosecutor's Appeal against the Trial Chamber's 'Decision on Admissibility of Proposed Testimony of Witness DBY' Rendered on 18 September 2003, and Oral Ruling of 22 September 2003", filed 9 October 2003 ("First Appeal") and the "Prosecutor's Appeal against the Trial Chamber's Oral Ruling of 2 October 2003 Excluding the Proposed Evidence of Witness DP Regarding the Attempted Assassination of Prime Minister Dismas Nsengiyaremye in October 1992", filed 10 November 2003 ("Second Appeal"). Because both interlocutory appeals concern the exclusion of evidence relating to alleged acts of the Accused pre-dating the temporal jurisdiction of the International Tribunal, the Appeals Chamber will consider these appeals together. The Appeals Chamber hereby decides these two interlocutory appeals without oral argument on the basis of the written briefs.

Procedural History

(A) The First Appeal

2. In its "Decision on Admissibility of Proposed Testimony of Witness DBY" of 18 September 2003 ("Decision of 18 September 2003"), Trial Chamber I ruled inadmissible certain aspects of Witness DBY's testimony concerning events prior to the temporal jurisdiction of the International Tribunal. The Trial Chamber, indeed, accepted that evidence of events prior to 1 January 1994 may be relevant to, and probative of, crimes committed in 1994, and may therefore be admitted pursuant to Rule 89(C). The Trial Chamber focused on three possible areas of relevance. First, the Trial Chamber stated that evidence of acts occurring prior to the mandate may be relevant to an offence which continues into 1994. Second, the Trial Chamber also considered that evidence of pre-1994 events, which are concerned with background or context and which do not form part of the crimes charged, may be admissible. Finally, the Trial Chamber considered that evidence of pre-1994 events could be admitted as "similar fact evidence". The Trial Chamber, however, concluded that even relevant and probative evidence may nevertheless be excluded where its admission would be unduly prejudicial.

3. In an oral statement on 22 September 2003, the Presiding Judge stated that while evidence of background information could be led, the Chamber was not interested in the specific pre-1994

orders and actions of any of the Accused.¹ The Chamber reconsidered its previous ruling and determined that in a borderline case it was difficult to draw the line between background elements and the specific prior actions of an Accused, and that, in the circumstances, the Chamber did not wish to hear more evidence about a particular incident.

4. On 2 October 2003, the Trial Chamber granted certification to appeal both the written Decision of 18 September 2003 and the oral decision of 22 September 2003.²

5. In its appeal brief, the Prosecutor submits that the Appeals Chamber should overturn the Trial Chamber's decisions and should order the Trial Chamber to admit the excluded evidence of Witness DBY.³ The Prosecution alleges a number of errors of law and argues that the Trial Chamber erred in the exercise of its discretion by underestimating the probative value of the evidence while overestimating its prejudicial effect.

6. In a joint response, the Defence submits, *inter alia*, that the Prosecutor has failed to identify an error of law or principle that could warrant the intervention of the Appeals Chamber.⁴ The Defence considers that Rule 89(C) permits the Trial Chamber to admit evidence, but does not require it to do so. According to the Defence, the impugned evidence relates to events which not only fall outside the temporal jurisdiction of the International Tribunal, but are also not charged in the Indictment. The Defence emphasises that, in order to be admissible, evidence must concern elements of crimes for which the accused has been indicted or else the trial would be unfair.

(B) The Second Appeal

7. In its oral decision of 2 October 2003, the Trial Chamber, by a majority, ruled inadmissible certain aspects of the testimony of Prosecution Witness DP ("Oral Ruling of 2 October 2003").⁵ In a decision of 3 November 2003, the Chamber certified the Second Appeal in relation to the exclusion of evidence relating to the role allegedly played by the Accused Ntabakuze in an attempt to kill the Prime Minister of Rwanda in October 1992, which it found to be arguably distinct from the matters considered in the Decision of 18 September 2003.⁶

¹ T. 22 September 2003 p. 16.

² Decision on Prosecution Request for Certification of Appeal on Admissibility of Testimony of Witness DBY, 2 October 2003.

³ Prosecutor's Appeal against the Trial Chamber's "Decision on Admissibility of Proposed Testimony of Witness DBY" Rendered on 18 September 2003, and Oral Ruling of 22 September 2003, 9 October 2003.

⁴ (Shortened Version of) Defence Response to the "Prosecutor's Appeal against the Trial Chamber's 'Decision on Admissibility of Proposed Testimony of Witness DBY' rendered on 18 September 2003 and Oral Ruling of 22 September 2003", 5 November 2003.

⁵ T. 2 October 2003 p. 36.

⁶ Certification of Appeal on Admission of Testimony of Witness DP Concerning Pre-1994 Events, 3 November 2003. The Trial Chamber denied certification of an appeal against the exclusion of testimony concerning the alleged acts of ICTR-98-41-AR93 & ICTR-98-41-AR93.2

8. In its brief concerning the Second Appeal, filed on 10 November 2003, the Prosecutor submits, *inter alia*, that the Trial Chamber erred in failing to admit the evidence pursuant to Rule 89(C) and in failing to give reasons for the decision.⁷ In addition to reiterating many of the same arguments raised in the First Appeal, the Prosecutor emphasizes that the Accused Bagosora, Kabiligi, and Ntabakuze are charged with the murders of numerous high ranking political figures and that the attempted assassination of Prime Minister Nsengiyaremye is mentioned in the Bagosora and Kabiligi/Ntabakuze Indictments and is specifically referred to in relation to the crimes charged therein. The Prosecutor submits, therefore, that the evidence should be admitted either as background or as evidence of a continuing offence.

9. In its joint response, the Defence argues that the Trial Chamber, though not obliged to do so, effectively gave reasons for its decision by referring to the previous, related Decision of 18 September 2003.⁸ In relation to the standard to be applied on appeal, the Defence argues that the Appeals Chamber should not reverse a discretionary decision unless no reasonable panel of judges could have come to the same decision. The Defence asserts that the Trial Chamber fully appreciated the probative value of the proposed evidence and correctly assessed its prejudicial impact.

10. In Reply, the Prosecutor explains that the Trial Chamber needed to provide more reasons for its decision than merely referring to the Decision of 18 September 2003.⁹ The Prosecutor reiterates its arguments supporting the claim that the Trial Chamber erred in exercising its discretion.

II. Discussion

11. The decision to admit or exclude evidence pursuant to Rule 89(C) is one within the discretion of the Trial Chamber and, therefore, appellate intervention is warranted only in limited circumstances. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") has summarized the applicable standard of review as follows: "It is for the party challenging the exercise of a discretion to identify for the Appeals Chamber a 'discernible' error made by the Trial Chamber. It must be demonstrated that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the

Accused Ntabakuze in October 1990, because the evidence was "substantially identical" to evidence excluded by the Decision of 18 September 2003, which was already under consideration in the First Appeal.

⁷ Prosecutor's Appeal against the Trial Chamber's Oral Ruling of 2 October 2003 Excluding the Proposed Evidence of Witness DP Regarding the Attempted Assassination of Prime Minister Dismas Nsengiyaremye in October 1992, 10 November 2003.

⁸ Defence Response to the "Prosecutor's Appeal against the Trial Chamber's Oral Ruling of 2 October 2003 Excluding the Proposed Evidence of Witness DP Regarding the Attempted Assassination of Prime Minister Dismas Nsengiyaremye in October 1992", 20 November 2003.

⁹ Prosecutor's Reply to "Defence Response to the 'Prosecutor's Appeal against the Trial Chamber's Oral Ruling of 2 October 2003 Excluding the Proposed Evidence of Witness DP Regarding the Attempted Assassination of Prime Minister Dismas Nsengiyaremye in October 1992', filed on 20 November 2003", 24 November 2003.

discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion.”¹⁰ If the Trial Chamber has properly exercised its discretion, the Appeals Chamber may not intervene solely because it may have exercised the discretion differently.¹¹

A. The First Appeal

(i) Alleged errors of law

12. In relation to the First Appeal, the Prosecutor argues that the Trial Chamber erred in its interpretation of Rule 93. The Prosecutor submits that Rule 93 is a refinement of the general provision of Rule 89(C), creating an “exception for admitting evidence that may show a pattern of conduct” because such evidence is highly relevant, probative, and necessary to proving complex crimes. The Prosecutor states that in rejecting the view that Rule 93 “broadly authorizes the admission of evidence of prior criminal acts” the Trial Chamber erred by relying on irrelevant Trial Chamber precedents concerning patterns of conduct as *mens rea* evidence, and in failing to consider ICTY Appeals Chamber jurisprudence.

13. Rule 93 provides that “Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice.” Rule 93 does not create an exception to Rule 89(C), but rather is illustrative of a specific type of evidence which may be admitted by a Trial Chamber. Rule 93 must be read in conjunction with Rule 89(C), which permits a Trial Chamber to admit any relevant evidence which it deems to have probative value. Even where pattern evidence is relevant and deemed probative, the Trial Chamber may still decide to exclude the evidence in the interests of justice when its admission could lead to unfairness in the trial proceedings, such as when the probative value of the proposed evidence is outweighed by its prejudicial effect, pursuant to the Chamber’s duty to ensure a fair and expeditious trial as required by Article 19(1) of the Statute of the International Tribunal.

14. The Trial Chamber correctly stated that evidence of prior criminal acts of the Accused is inadmissible for the purpose of demonstrating “a general propensity or disposition” to commit the crimes charged. The Trial Chamber emphasised that “this does not preclude the introduction of such evidence for other valid purposes.” The Trial Chamber found that the Prosecutor failed to show that the proposed testimony had any relevance beyond showing that the Accused committed crimes on

¹⁰ *Prosecutor v. Milosević*, Nos. IT-99-37-AR73, IT-01-50-AR73 & IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 5 (footnotes omitted).

¹¹ *Ibid.*, para. 4.

previous occasions, which was not directly relevant to the crimes charged in the Indictments. Thus, the Trial Chamber correctly excluded the evidence because it had a low probative value but a substantial prejudicial effect. The Prosecutor has failed to show that the Trial Chamber erred in this determination.

(ii) Alleged errors relating to the timing and method of assessing relevance

15. The Prosecutor also alleges that the Trial Chamber erred in law by determining the probative value of the evidence at the time of its proposed admission, rather than waiting to consider it within the context of the trial record as a whole. The Prosecutor argues that the practice of both this International Tribunal and the ICTY favours the admission of all relevant evidence, with the determination of the weight to be accorded to that evidence to be left to a later stage of the proceedings.

16. The Appeals Chamber affirms that the Trial Chamber has a broad discretion to direct the course of the proceedings in accordance with its fundamental duty to ensure a fair and expeditious trial pursuant to Article 19(1) of the Statute. In pursuit of these goals, the Trial Chamber may choose to exclude otherwise relevant and probative evidence where its prejudicial effect will adversely affect the fairness or expeditiousness of the proceedings. The Prosecutor has not shown that the Trial Chamber erred in law in doing so in this case.

17. In a similar vein, the Prosecutor alleges that the Trial Chamber erred by compartmentalizing its analysis of probative value. The Appeals Chamber affirms that the correct approach is to assess the aggregate probative value of the particular evidence against its aggregate prejudicial effect. Although the Trial Chamber has broken this question into pieces as part of the process of analysis, the Appeals Chamber is not convinced that the Trial Chamber failed to assess these matters in their totality. Accordingly, the Prosecutor has failed to demonstrate any error.

(iii) Alleged errors in exercising discretion

(a) Alleged failure to consider the relevance of the evidence to anticipated defences

18. The Prosecutor alleges that the Trial Chamber erred in the exercise of its discretion by failing to consider the probative value of the evidence in relation to anticipated defences. The Defence "does not necessarily disagree" that pre-1994 evidence may be relevant to anticipated defences, but explains that the proposed background evidence, being only "bad character evidence", is no more relevant to the anticipated defences than to allegations of conspiracy.

19. The Appeals Chamber finds that the Trial Chamber did consider the relevance of each of the three categories of the proposed evidence in relation to background and context. Although the Trial Chamber did not specifically advert to this argument in the Decision of 18 September 2003, the Prosecutor has failed to show in any detail how the excluded evidence serves to rebut an anticipated defence and has therefore failed to show any error.

(b) Alleged error as to the capacity of the professional judges of the International Tribunal to assess prejudicial effect

20. The Prosecutor submits that the Trial Chamber erred by failing to accord the necessary weight to the fact that the International Tribunal is composed of professional judges and not lay jurors in assessing the prejudicial impact of the proposed evidence. The Appeals Chamber is not persuaded by these submissions. In reaching its Decision, the Trial Chamber specifically adverted to this distinction between national and Tribunal practice. The Trial Chamber was aware of its own composition and the obvious difference between professional and lay triers of fact when it assessed the prejudicial effect of the proposed evidence. The Appeals Chamber is not persuaded that the Trial Chamber erred in the exercise of its discretion.

B. The Second Appeal

(a) Alleged error in failing to provide reasons

21. The Prosecutor submits that the Trial Chamber erred in the Oral Ruling of 2 October 2003 by failing to give reasons. The Appeals Chamber affirms that it is not necessary for a Trial Chamber to give formal oral or written reasons in response to each and every objection raised by the parties. To require reasons for all objections would place an unreasonable burden on the resources of the Trial Chamber. In this case, having already provided a detailed written decision on a closely related objection on 18 September 2003, the Trial Chamber was competent to determine that it was unnecessary to provide further reasons. The Appeals Chamber sees no reason to interfere with this determination.

(b) Alleged error in assessing probative value

22. In addition to raising the same issues as in the First Appeal, the Prosecutor contends that the Trial Chamber failed to appreciate the probative value of the proposed evidence because the alleged attempted assassination of the Prime Minister is specifically pleaded in the indictments against the Accused Bagosora and Ntabakuze. The Appeals Chamber is not persuaded by this argument. The Appeals Chamber notes that the pleaded event differs in important aspects from the proposed

evidence. Assuming, without deciding, that the alleged attempted assassination of Prime Minister Nsengiyaremye in October 1992 is pleaded in the indictments, the Appeals Chamber finds that it is still within the discretion of the Trial Chamber to determine that evidence relating to a pleaded event is not relevant to the crimes charged, or that such evidence should be excluded for other reasons. The Prosecutor has not shown that the Trial Chamber erred in exercising its discretion to do so.

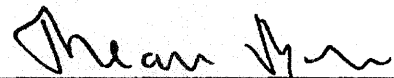
23. The Prosecutor also argues that the evidence of Witness DP should have been admitted because it is "hard to replicate." The Appeals Chamber is not persuaded that the Trial Chamber erred in failing to take this factor into account explicitly.

III. Disposition

24. Accordingly, the Appeals Chamber finds that the Prosecutor has failed to establish that the Trial Chamber erred in exercising its discretion to exclude certain aspects of the evidence of Witnesses DP and DBY.

25. The Appeals are therefore DISMISSED.

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



Theodor Meron

Presiding Judge of the Appeals Chamber

Done this 19th day of December 2003,
At The Hague,
The Netherlands.

[Seal of the International Criminal Tribunal for Rwanda]

