

ICTR-98-41-T

13-09-2006

(29500-29495)



**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

29500

S. Musa

IN TRIAL CHAMBER I

Before: Judge Erik MØSE, President
Judge Jai Ram REDDY
Judge Sergei Alekseevich EGOROV

Registrar: Adama Dieng

Date: 13 September 2006

THE PROSECUTOR

v.

**Théoneste BAGOSORA
Gratien KABILIGI
Anatole NSENGIYUMVA
Aloys NTABAKUZE**

Case No: ICTR-98-41-T

JUDICIAL RECORDS/ARCHIVES
2006 SEP 13 P. 5:112

**NTABAKUZE MOTION
TO PRECLUDE BAGOSORA WITNESS MARCEL GATSINZI
FROM TESTIFYING AFTER THE ACCUSED**

Counsel for the Prosecution

Barbara MULVANEY
Drew WHITE
Christine GRAHAM
Rashid RASHID
Gregory TOWNSEND

Counsel for Ntabakuze

Peter ERLINDER
André TREMBLAY

Other Defence Counsel

Raphaël CONSTANT
Allison TURNER
Paul SKOLNIK
Frédéric HIVON
Kennedy OGETTO
Gershom Otachi BW'OMANWA

1. On the morning of 11 September 2006, during discussions in Trial Chamber I of witness scheduling for the current, and last, trial session allocated to the Defence of Ntabakuze, which session this Trial Chamber has ordered to terminate by or before 13 October 2006, the Ntabakuze Defence indicated that the Accused Ntabakuze would take the stand to testify in his own defence on Monday 18 September 2006. At the time that that scheduling indication was given to the Chamber, the Ntabakuze Defence had not yet been informed that the Trial Chamber had filed, that very morning, a Decision¹ ordering a subpoena to be issued to Bagosora witness, General Marcel Gatsinzi, the current Minister of Defence of the Rwandan Government, compelling the appearance of this witness before this Trial Chamber to give evidence in the present trial.

2. The Defence for Ntabakuze has consistently opposed the appearance, ostensibly on behalf of the Defence, of General Gatsinzi before this Chamber, inasmuch as this witness, clearly, on the basis of both his present position in the current Rwandan Government, and his public pronouncements on the matter, in reality, will be coming to give evidence of assistance only to the Prosecution. That the witness Gatsinzi would be giving Prosecution oriented evidence, even when testifying allegedly for the Defence, is supported by the contents of the subpoena Request and Order², themselves, indicating, as they do, that he will be testifying regarding paragraphs in the Indictment for which the Prosecution presented no evidence. His testimony will thus fill holes in the Prosecution case. Furthermore, this is a witness who has refused to meet with any of the Defence teams, including that of the Bagosora Defence, and for whom there is no summary of testimony in the Bagosora pre-Defence Brief because the Bagosora Defence has no way of knowing what he will say.

3. Now that a subpoena has been ordered to compel the appearance of witness Gatsinzi, in the context of this late stage in the trial in which a clear, fixed and close deadline has been issued for the completion of the Ntabakuze Defence evidence, and in the context that, in order to meet that imposed deadline, the Defence for Ntabakuze has

¹ *Bagosora et al.*, Decision on Request for a Subpoena, 11 September 2006.

² *Ibid.* at paragraph 6.

scheduled the testimony of the Accused for a date prior to the completion of the balance of the Defence evidence, an issue arises regarding the equity of a trial in which the Accused may be forced by circumstances to testify *before* potentially prejudicial evidence would be heard from a witness whose attendance has been compelled by the Trial Chamber. In essence, this confluence of circumstances and orders of the Trial Chamber seriously risks rendering the trial unfair, and requires a remedy to restore equity to the process.

4. The right to silence, as guaranteed by the Statute of the Tribunal³, from which the Accused benefits, confers upon him the right to decide *whether* or not to testify, and, as a natural consequence of that option, *when* to testify, should he choose to do so, up until any deadline as may be imposed for the completion of his defence evidence. Furthermore, the order of presentation of the evidence, as specified in the Rules of Procedure and Evidence⁴, requires the Prosecution to have *completed* the presentation of its case, except for possible rebuttal, *prior to* the commencement of the presentation of the Defence evidence. A fundamental principle involved in these Rules is the right of the Accused to fully know the case against him before being called upon to answer the allegations with which he has been confronted.

5. Because of this Trial Chamber's liberal policy regarding *curing* the defective Indictment, that is, this Trial Chamber's willingness to admit vast quantities of evidence regarding allegations not mentioned in the Indictment, the Accused, to this day, is unable to know with any certainty what the precise boundaries of the case against him will ultimately be. He risks, at all times having that case against him expanded or enlarged on the basis of evidence emerging during the questioning of Defence witnesses. It is therefore logical, and in keeping with conventional trial practice at this Tribunal, that the Accused should withhold his own testimony to as late as possible in the trial, so that he may effectively answer *all* the allegations against him that may emerge during the testimony, even of Defence witnesses.

³ Article 20. (4).

⁴ Rule 85 (A)(i)

6. Being confronted, however, with a fixed deadline to complete his evidence, coupled with difficulties beyond his power and control regarding the orderly arrival or presentation of his own, and other, Defence witnesses, the Accused Ntabakuze finds himself in a situation in which judicial economy militates strongly for him to take the stand as soon as practicable, and not at the end of the Defence case, as he would have preferred. This practical situation regarding the timing of the Accused's testimony, and the subpoena issued to compel the appearance of witness Gatsinzi, puts the Accused Ntabakuze in a position that might best be described by the expression *between a rock and a hard place*.

7. This Trial Chamber also issued another Decision on the same day as the one that forms the subject matter of this pleading that might, at first blush, appear to protect the Accused from prejudicial evidence raised during the testimony of witnesses for other Accused. However, the scope of that Decision appears to be strictly limited to new elements raised during Prosecution cross examination. The Decision provides no apparent protection against evidence volunteered or raised spontaneously by the witness during his direct examination, whether that evidence was solicited or not by the examining party; nor does it offer any protection against apparently confirmatory or corroborative testimony regarding evidence that was hitherto fatally weak and unconfirmed. It should be noted that this corroboration would be coming from a witness with a powerful motive to fabricate evidence intended to lead to the conviction of the Accused.

8. Given the witness Gatsinzi's position in the current Rwandan Government which is headed by the unindicted person that the Defence evidence in this trial has shown conclusively to have been the individual responsible for the downing of the Presidential aircraft which event triggered the Rwandan horror, and given that Government's consistent and public attempts to blame that unleashing event on the various accused before this Tribunal, and given that Government's current combative position *vis-à-vis* this Tribunal because of the release of the illegally arrested ICTR Defence attorney

Callixte Gakwaya, and given that, on information and belief, we understand that General Gatsinzi himself is under suspicion for genocide, it would be shocking indeed if he were to give evidence contrary to the interests of the Government which he serves. It is thus, uncontestable that he will tailor his testimony to please the Government that has publicly even accused the Counsel in this trial as being *genocidaires*.

9. Asking the Accused Ntabakuze to testify *before* such a potentially damaging and prejudicial, albeit non-credible witness, is tantamount to a reversal of the burden of proof, putting the Defence to its proof before the actual completion of the shifting case against the Accused, and must be avoided to prevent the concomitant injustice. On the other hand, the scheduling of the closing of the Defence case for Ntabakuze, makes it highly risky to delay his testimony, lest he should find that time has run out, preventing him from ever putting his vital evidence before this Tribunal to meet the case against him. It is submitted that the solution to this dilemma would be to preclude the witness Gatsinzi from testifying *after* the Accused. Thus, should the Defence for Bagosora persist in their request to present this witness, it is submitted that he must be brought immediately, to permit his evidence before that of the Accused Ntabakuze, or be precluded from testifying at all.

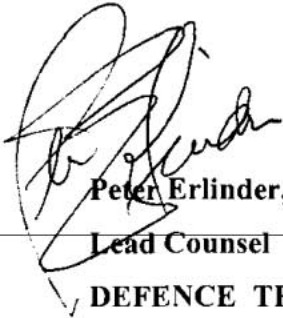
10. It might be suggested that an appropriate remedy would be to permit the Accused Ntabakuze to take the stand for a second time after Gatsinzi has testified to respond to any new allegations arising from his testimony. The Prosecution, on 13 September 2006, clearly indicated its opposition to such an unconventional splitting of the Accused's testimony. It is further submitted that permitting General Gatsinzi the opportunity to testify after the Accused puts him in a privileged position of being able to testify in full knowledge of what the Accused has said. It should be noted that just as a bell can never be unringed, the damage that will be done by the fabricated incriminating testimony of a Minister in the current Government of Rwanda, which is so clearly and publicly hostile to the Accused in this trial, is damage that can not easily be undone under such circumstances. To pretend otherwise is to ignore reality.

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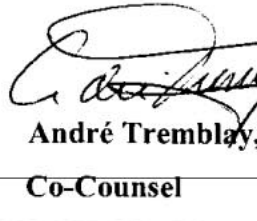
FOR ALL OF THESE REASONS we respectfully pray this Chamber to

PRECLUDE Witness Marcel Gatsinzi from testifying *after* the testimony of the Accused Ntabakuze.

Submitted at Arusha, Tanzania, this 13th day of September 2006.



**Peter Erlinder,
Lead Counsel**



**André Tremblay,
Co-Counsel**

**Marc Nerenberg,
Legal Assistant**

**Wibke Timmermann,
Legal Assistant**

DEFENCE TEAM OF MAJOR ALOYS NTABAKUZE



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	<input checked="" type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input type="checkbox"/> Trial Chamber III C. K. Hometownu	<input type="checkbox"/> Appeals Chamber / Arusha F. A. Talon
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From:	<input type="checkbox"/> Chamber (names)	<input checked="" type="checkbox"/> Defence EPANDER TRAMPLE NERENBERG (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
Case Name:	The Prosecutor vs. Bagosora et al (NTABAKUZE) Case Number: ICTR-98-41-T			
Dates:	Transmitted: 13 Sept 2006		Document's date: 13 Sept 2006	
No. of Pages:	6	Original Language: <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda		
Title of Document:	NTABAKUZE MOTION TO PRECLUDE BAGOSORA WITNESS MARCEL GATSINZI FROM TESTIFYING AFTER THE ACCUSED			
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<input type="checkbox"/> Confidential		<input type="checkbox"/> Disclosure	<input type="checkbox"/> Order	<input type="checkbox"/> Appeal Book
<input checked="" type="checkbox"/> Public		<input type="checkbox"/> Judgement	<input type="checkbox"/> Motion	<input type="checkbox"/> Book of Authorities
<input type="checkbox"/> Submission from non-parties		<input type="checkbox"/> Submission from parties		
<input type="checkbox"/> Accused particulars				

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<input type="checkbox"/> Reference material is provided in annex to facilitate translation.			
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<input type="checkbox"/> Filing Party hereby submits BOTH the original and the translated version for filing, as follows:			
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Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French
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<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: