ICTR-98-41-T
21-05-2004
(20160 – 20152)

20160
S. Mussa

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

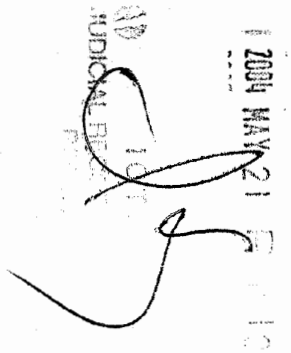
OR: ENG

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 21 May 2004



THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. ICTR-98-41-T

DECISION ON PROSECUTOR'S MOTION FOR LEAVE TO VARY THE WITNESS LIST PURSUANT TO RULE 73*BIS*(E)

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20159

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 "Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule *73bis*(E) of the Rules of Procedure and Evidence", filed on 24 March 2004;

CONSIDERING the "Ntabakuze Defence Response to the Prosecutor's Motion", filed by Counsel for Ntabakuze on 5 April 2004; "Memoire en réponse à la requête du parquet intitulée "Prosecutor's Motion", filed by Counsel for Kabiligi on 5 April 2004; "Defence Response to the Prosecutor's Motion", filed by Counsel for Nsengiyumva on 6 April 2004; and "Réponse de la défense de Bagosora", filed by Counsel for Bagosora on 8 April 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. Pursuant to the "Order for Reduction of Prosecutor's Witness List", issued by Trial Chamber III on 8 April 2003, ordering the reduction of the Prosecution witness list to one hundred witnesses, the Prosecution filed a witness list of 121 witnesses on 30 April 2003. On 1 March 2004, Trial Chamber I issued the "Decision on Reconsideration of Order to Reduce Witness List and on Motion for Contempt for Violation of that Order", ordering the Prosecution to file its list of one hundred witnesses by 12 March 2004. The Prosecution duly filed its revised witness list on 12 March 2004. Prior to the rendering of the instant decision, the Prosecution sought to call Witness AL, one of the witnesses mentioned in the present motion. On 29 April 2004, the Chamber ruled that Witness AL could be called, as he replaced Witness CA who had recently died.[1] In the present decision, the Chamber will consider the other eight witnesses covered by the motion.

SUBMISSIONS

2. The Prosecution seeks to vary the witness list by adding eight witnesses: AAA, ABQ, AFJ, AJP, AMI, ANC, ANE, and Commander Maxwell Nkole. These witnesses do not appear on the 30 April 2003 list, but do appear on the 12 March 2004 list, marked as "added" or "substitute". The Prosecution submits that good cause and the interests of justice are relevant to a determination in this respect, and contends that the expected testimonies of the eight witnesses have probative value. Further, since disclosure has already been made and the witnesses are to appear only in the last session of the Prosecution case (scheduled for 31 May to 14 July 2004), there is no issue of unfair surprise and prejudice to the Defence. If, however, prejudice is found, the Prosecution proposes the remedy of adjournment or recall of previous witnesses, instead of excluding these eight witnesses. The details as to disclosure and the substance of the expected testimonies are examined below.

[1] T. 29 April 2004, pp. 48-49.

20158

3. The Ntabakuze Defence argues that an important consideration is the timing of the request to vary the witness list: the later in the Prosecution's case that the request is made, the more reluctant should the Chamber be to grant it. The Defence states that it concentrates on witnesses who will be coming to testify, and cannot devote time and resources to prepare for hypothetical witnesses that may or may not come to testify. Another consideration when variation of the list is sought at a late stage in proceedings is whether the expected testimonies have a potentially determinative effect, that is, whether they would significantly alter the likelihood of conviction or acquittal. The Prosecution must be able to show that the testimonies will have such an effect. The Defence objects to the filing of the motion at an advanced stage of the Prosecution case, and submits that the proposed testimonies will not be determinative of the counts charged.

4. The Kabiligi Defence objects to the motion but reserves its arguments while awaiting the French translation of the motion.

5. The Nsengiyumva Defence objects to the motion given the advanced stage of proceedings, as it prejudices the Accused's right to a fair trial and constitutes unfair surpise. The Defence submits that it would have been a waste of Tribunal resources to embark on investigations before the witnesses were listed to testify, and that it would face logistical difficulties in conducting investigations at this stage. The Defence points out that the Prosecution has had seven years from the arrest of the Accused to conduct investigations to prepare for its case, and the purpose of calling these additional witnesses now is to counter effective cross-examination by the Defence. In addition, the Prosecution has not demonstrated the materiality of the proposed testimonies.

6. The Bagosora Defence submits that the list of one hundred witnesses filed by the Prosecution on 12 March 2004 was accompanied by another list of seven additional names the Prosecution wished to call pursuant to Rule 92*bis*. The Defence objects to witnesses having been dropped from the list without notice, stating that its cross-examination of witnesses who did appear may have been different if they had known that certain witnesses would not be testifying after all, and that some witnesses were to appear as authors of documents conditionally entered into evidence. The Prosecution should explain why these potential witnesses have been dropped from the list, as it constitutes a variation under Rule 73*bis*(E) as well. Regarding the witnesses to be added, the Defence notes that the request is being made late in the trial process. The Prosecution has not explained why it did not seek to add these witnesses earlier, nor justified its request. The Prosecution has not indicated to which paragraphs in the Indictments the witnesses' testimonies will relate.

DELIBERATIONS

7. Rule 73*bis*(E) of the Rules of Procedure and Evidence provides that:

> After commencement of Trial, the Prosecutor, if he considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called.

20157

8. In *Nahimana et al.*, the Chamber held that in determining whether or not to grant leave to vary the witness list, it was necessary to assess the "interests of justice" and the existence of "good cause" in the particular case.

> In assessing the "interests of justice" and "good cause" Chambers have taken into account such considerations as the materiality of the testimony, the complexity of the case, prejudice to the Defence, including elements of surprise, on-going investigations, replacements and corroboration of evidence. The Prosecution's duty under the Statute to present the best available evidence to prove its case has to be balanced against the right of the Accused to have adequate time and facilities to prepare his Defence and his right to be tried without undue delay.[2]

9. The Chamber expanded on this decision in *Bagosora et al.*:

> These considerations [under Rule 73*bis*(E)] require a close analysis of each witness, including the sufficiency and time of disclosure of witness information to the Defence; the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictments; the ability of the Defence to make an effective cross-examination of the proposed testimony, given its novelty or other factors; and the justification offered by the Prosecution for the addition of the witness.[3]

10. In that decision, the Chamber considered factors such as the date on which the Prosecution had declared its intention to call those witnesses and therefore given notice to the Defence of the same, so that there was no unfair surprise or prejudice to the Defence. Other considerations were the early stage of the trial proceedings, the probative value of the content of the expected testimonies, and whether the late discovery of the witnesses arose from fresh investigations. In the case of one witness, the Chamber considered that his testimony should be postponed to allow the Defence time to prepare its cross-examination.[4]

11. In *Milosevic*, the Chamber denied similar applications in two decisions and held that one of the factors to be considered was the late stage of proceedings. In both decisions, it was noted that the applications were made close to the end of the Prosecution's case.[5] However, timeliness was not the determining factor. In its decision of 17 December 2003, the Chamber held that even if it were inclined to accept the evidence so late in the Prosecution case, the conditions the Prosecution wished to impose upon the witness's expected testimony in that case were too restrictive to be admissible. In a decision dated 18 February 2004, the Chamber took into account that the witnesses did not previously appear in the Prosecution's final witness list, in an omnibus motion for the addition of witnesses, or in a confidential "Witness Schedule to End of Prosecution Case".

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[2] *Nahimana et al.*, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses (TC), 26 June 2001, paras. 19-20.

[3] *Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73*bis*(E) (TC), 26 June 2003, para. 14.

[4] *Ibid.*, paras. 15-22.

[5] *Prosecutor v. Slobodan Milosevic*, Decision on Prosecution's Motion to Add Witness C-1249 to the Witness List and for Trial Related Protective Measures (TC), 17 December 2003; Decision on Prosecution's Request to Call Witness C-063 (TC), 18 February 2004.

20156

12. The Chamber in *Delalic et al.* allowed seven witnesses to be added, after having considered that the Prosecution informed the Defence as soon as it formed the intention to call the witnesses, that the witnesses were material to the Prosecution and that disclosure obligations had been complied with.[6]

13. The Chamber considers that the interests of justice would be served by a fair and expeditious trial, and therefore would be reticent, at this stage when the Prosecution is nearing the end of the presentation of its case, to allow new witnesses to be introduced, save in certain circumstances, including where ongoing investigations have revealed new evidence that is material to the Prosecution's case. Although the lateness of such an application is an important factor, it must be weighed against other factors such as the materiality of the evidence and the date of disclosure of the same. The Chamber considers that there is some merit in the Defence's argument that Counsel cannot afford to expend time and resources to prepare for witnesses who have not been confirmed as witnesses. The various factors cannot be applied generally to all eight witnesses, but must be weighed separately with respect to each witness, together with an analysis of the proposed evidence of each witness.

Witness AAA

14. Witness AAA is expected to provide evidence relating to the Accused Kabiligi and Ntabakuze. The witness will testify that Kabiligi made potentially incriminatory statements about the Tutsi at a meeting towards the end of April 1994. The witness has information regarding killings and rapes by soldiers and *Interahamwe,* and will also testify to statements made by Ntabakuze regarding the RPF and *Inkotanyi.*

15. The Prosecution submits that the evidence of oral statements by the Accused is material to its case, and since disclosure of redacted statements took place on 29 July 2003, at which time it was indicated that this was a prospective witness, there is no issue of unfair surprise to the Defence. The Defence for Ntabakuze argues that the witness's proposed testimony is not determinative of the elements of the charges, and the Prosecution should have sought to add him to the list in July 2003 when the statements were disclosed.

16. The Chamber notes that the evidence appears to have probative value with respect to the charges against Ntabakuze and Kabiligi. The alleged statements go to the intent of the Accused and are material to the Prosecution's case. The Chamber has weighed the lateness of the application against the materiality of the evidence and the disclosure of the statements to the Defence in July 2003. Taking these factors into account, the Chamber considers that it would be in the interests of justice to add Witness AAA to the list of Prosecution witnesses.

Witness ABQ

17. Witness ABQ claims to have heard the Accused Nsengiyumva at a meeting on 7 April 1994 talk about eliminating the Tutsi and read out names from lists of Tutsi to be killed, which was followed by attacks. The witness will also testify about a meeting in the Hotel Meridien in

[6] *Delalic et al.*, Decision on Confidential Motion to Seek Leave to Call Additional Witnesses (TC), 4 September 1997.

64

20155

May/June 1994 attended by the Accused Bagosora and Nsengiyumva, in which Bagosora told the people not to let the Tutsi cross the border, and ordered Nsengiyumva to search for a woman who was subsequently killed. Additionally, the witness has information about the distribution of weapons by Bagosora and Nsengiyumva to the *Interahamwe* who later killed Tutsi refugees in the Bisesero hills.

18. The Prosecution submits that the oral statements and the corroborative elements of this evidence are material to its case. Disclosure of the witness's redacted statements, as being those of a prospective witness, took place in July 2003 and therefore there is no unfair surprise or prejudice to the Defence. The Ntabakuze Defence argues that the Prosecution should have sought to add Witness ABQ to the list in July 2003, when the statements were disclosed, and further, the Prosecution has not justified the need for this witness. The Nsengiyumva Defence submits that the witness is being called to counter effective cross-examination by the Defence of Witness OQ. Additionally, the reliability of Witness ABQ is in doubt as he was questioned by investigators at the same time that Witness OQ was giving evidence in Arusha, and Witness ABQ is one of the Defence's potential witnesses. The Defence also argues that it has now lost the opportunity to cross-examine Witness OQ on matters that may be raised by Witness ABQ on the same events. The Bagosora Defence submits that it is the first time mention is made of the Accused Bagosora having made a statement at the meeting at the Hotel Meridien, and having issued an order to Nsengiyumva to search for a woman.

19. The Chamber considers that the proposed testimony has probative value and is material to the Prosecution's case against the Accused Bagosora and Nsengiyumva. The lateness of the application has been weighed against the materiality of the testimony, and the fact that the Defence had notice of the witness's evidence in July 2003. Having considered all the relevant factors, the Chamber finds that it would be in the interests of justice to add Witness ABQ.

Witness AFJ

20. Witness AFJ will testify that the Accused Ntabakuze ordered soldiers and the *Interahamwe* to take Tutsi to Nyanza where they were subsequently killed. The witness claims to have personally heard these orders.

21. The Prosecution contends that the witness's evidence is material as it includes a direct order by the Accused Ntabakuze, which resulted in killings of Tutsi. The witness's unredacted statement was disclosed in August 2003, when it was also indicated that he was a prospective witness, and therefore there is no unfair surprise or prejudice to the Defence. The Defence for Ntabakuze argues that the Prosecution has not justified the addition of this witness now when an application to vary the list could have been made in August 2003, when the statements were disclosed. Further, his proposed testimony is repetitive and unnecessary. The evidence regarding orders and killings at Nyanza is entirely hearsay and not determinative of the counts charged. Counsel for Bagosora points to a mischaracterization of Witness AR's testimony: Witness AR only saw Bagosora in his vehicle on the road to Nyanza, and made certain deductions from that.

22. The Chamber notes that the unredacted statement was disclosed in August 2003. The Prosecution considers the evidence to be material to its case as it involves a direct order from the

20154

Accused Ntabakuze, which led to killings of Tutsi. The Chamber considers that where the evidence has been adduced through other witnesses, it would be a factor against admitting the evidence. Although the evidence has been testified to by other witnesses, Witness AFJ claims to have heard the orders himself. Considering all the circumstances, the Chamber finds that it would be in the interests of justice to add Witness AFJ to the witness list.

Witness AJP

23. Witness AJP's evidence will confirm the presence of a previous Prosecution witness, Witness XBH, at his employer's house in Butare in February 1994.

24. The Prosecution submits that the corroborative elements of this evidence are material to its case. Disclosure of the witness's redacted statement, as being that of a prospective witness, took place in September 2003 and therefore there is no unfair surprise or prejudice to the Defence. Counsel for Ntabakuze submits that the application to add Witness AJP should have been made in September 2003 at the time of disclosure. In addition, Witness AJP does not corroborate Witness XBH's testimony, as he does not place Witness XBH at a particular time in a particular place. The Defence for Nsengiyumva submits that the witness is being called to counter effective cross-examination by the Defence. The Defence for Bagosora echoes the objections of Counsel for Ntabakuze and Nsengiyumva, and submits that he is being called to rehabilitate Witness XBH's credibility.

25. Witness AJP's evidence is not directly material to the Prosecution's case as he merely corroborates that Witness XBH stayed in the house at Butare sometime from 1993 to April 1994, but does not corroborate the substance of Witness XBH's testimony. The Chamber therefore does not find that the interests of justice would be served by adding Witness AJP to the list.

Witness AMI

26. Witness AMI will testify to the Accused Kabiligi's involvement in distribution of weapons to soldiers and *Interahamwe* at the roadblock close to Zigiranyirazo's house around 12 April 1994.

27. The Prosecution contends that the witness's evidence is material as it corroborates that of other witnesses and provides more detail of Kabiligi's involvement. The witness's redacted statement was disclosed in January 2004, within the usual timeframe for disclosure, at which time it was also indicated that he was a prospective witness, and therefore there is no unfair surprise or prejudice to the Defence. Counsel for Ntabakuze argues that Witness AMI does not add anything new that would be dispositive of the counts charged. The Defence for Nsengiyumva submits that the witness is being called to counter effective cross-examination by the Defence and his evidence was prepared after Witness DAS's testimony.

28. Although the evidence is material to the Prosecution's case, it is repetitive as it relates to evidence previously given by other witnesses. Furthermore, the witness's statement was only disclosed in January 2004, which does not constitute reasonable notice to the Defence, given the advanced stage of the proceedings. Taking into account all these factors, the Chamber does not find that it would be in the interests of justice to call Witness AMI.

Witness ANC 20153

29. Witness ANC will testify to attacks by para-commandos on civilians from the night of 6 April 1994 onwards, and rapes at CHK and the "Chinese house" in Kiyovu.

30. The Prosecution submits that the testimony is material to its case as it constitutes first-hand evidence of rapes at the CHK and "Chinese house", and is also corroborative testimony. Disclosure of the witness's redacted statement, as being that of a prospective witness, took place in March 2004, within the usual timeframe for disclosure, and therefore there is no unfair surprise or prejudice to the Defence. Counsel for Ntabakuze argues that Witness AMI's evidence does not go directly to the counts charged, and is corroborative and repetitive. The Defence for Nsengiyumva submits that the witness is being called to counter effective cross-examination by the Defence and his evidence was prepared after Witness DAS's testimony.

31. The testimony of Witness ANC is deemed to be material by the Prosecution. However, the evidence relating to attacks by para-commandos has already been adduced through other witnesses, and there has been much evidence on the activities of the para-commandos. The late disclosure of the witness's statement, in March 2004, is a significant factor that militates against adding the witness. For these reasons, and taking into account the late stage of proceedings, the Chamber does not find that it would be in the interests of justice to admit Witness ANC's evidence.

Witness ANE

32. Witness ANE has information about a meeting at Gako military camp three days after the shooting down of the plane, which was attended by Bagosora, Kabiligi, Ntabakuze and the camp commander, after which Bagosora said he did not want to see any RPF accomplices left in Bugesera.

33. The Prosecution contends that the witness's evidence is material as it constitutes first-hand information on the acts and conduct of three of the Accused and includes an oral statement by Bagosora. The evidence also speaks to massacres of Tutsi civilians, and is important in light of Witness DP's evidence relating to Nyamata as containing a concentration of the "enemy". The witness's unredacted statement was disclosed in March 2004, which the Prosecution submits is consistent with the usual period for disclosure. The Prosecution states that there is no unfair surprise or prejudice to the Defence. The Defence for Ntabakuze argues that the Prosecution should have sought to add Witness ABQ to the list in August 2003, when he first spoke to investigators. To admit the witness now is to introduce new allegations, which would render the trial unfair. Counsel for Bagosora submits that some of the witness's proposed testimony is new and not found in the Indictment or Pre-Trial Brief, notably the meeting at Gako camp and the alleged statement by Bagosora. The Defence for Bagosora also points out that the witness met investigators in August 2003 and there is no explanation for the late application to add him to the list.

34. The Chamber considers the evidence of the witness to be material to the Prosecution's case but notes that disclosure of the statement only took place in March 2004. The late disclosure of

the statement is a factor against adding the witness at this stage of trial. Consequently, the motion to add Witness ANE is denied.

Witness Commander Maxwell Nkole

35. Witness Commander Maxwell Nkole, an Investigator with the Prosecution who replaces Witness Hock, will be called to establish a chain of custody for certain documents. It is intended that a collection of documents will be tendered, and adding this witness, instead of calling many other witnesses for the purpose of producing documents, would save time. The Prosecution submits that there would be no unfair surprise or prejudice to the Defence as he is of no consequence to the Defence case.

36. The Defence for Ntabakuze argues that the documents should have been introduced through the witness for whom they are relevant, and calling an investigator to establish a chain of custody does not justify a wholesale tendering of a collection of documents. Counsel for Bagosora has no objections to an investigator being called to testify to the provenance of the documents, but objects to Nkole testifying to Hock's report, as Hock would have more knowledge of the facts and the methodology involved.

37. The Chamber notes that the witness is not providing evidence as such, but testifying to a chain of custody in relation to documents. As this witness does not affect the substantive case, and would not require an investigation by the Defence, the Chamber grants the motion to add him.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion with respect to Witnesses AAA, ABQ, AFJ and Commander Maxwell Nkole and **DENIES** the motion in all other respects.

Arusha, 21 May 2004

Erik Møse	Jai Ram Reddy	Sergei Alekseevich Egorov
Presiding Judge	Judge	Judge

[Seal of the Tribunal]