ICTR-98-41-T
15-06-2004
(20630 - 20623)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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S. Thussa

OR: ENG

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 15 June 2004

THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. ICTR-98-41-T

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

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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 "Prosecutor's Motion for Reconsideration of the Trial Chamber's 'Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule *73bis*(E)'", etc., filed on 1 June 2004;

CONSIDERING the Joint Defence Response, filed on 7 June 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 21 May 2004, the Chamber issued its Decision regarding an application by the Prosecution to vary its witness list. The Prosecution was allowed to add Witnesses AAA, ABQ, AFJ and Commander Maxwell Nkole (another witness, Witness AL, had already been added during the trial, before the Decision was rendered). The Chamber denied the motion in respect of Witnesses AJP, AMI, ANC and ANE, citing, *inter alia*, the lateness of the disclosure of the statements of these witnesses to the Defence and the advanced stage of proceedings. The Prosecution case is tentatively scheduled to close on 14 July 2004.

SUBMISSIONS

The Prosecution

2. The Prosecution wishes the Chamber to reconsider its Decision with respect to Witnesses AMI, ANC and ANE on the ground that the Decision was erroneous and causes prejudice to the Prosecution. The submissions pertaining to each witness will be detailed below.

3. According to the Prosecution, the removal of these witnesses has prejudiced its ability to present the best available evidence to prove its case against the Accused Kabiligi on Conspiracy to Commit Genocide and other counts where he is charged with Article 6(1) responsibility, and its case against all Accused on counts of Rape and Outrages Upon Personal Dignity. The quality of the three witnesses' evidence cannot be replaced by other witnesses, and more witnesses would have to be called. The addition of the three witnesses will shorten the Prosecution's case.

The Defence

4. In its Joint Response, the Defence argues that the Chamber has discretion to reconsider its decisions, as an exceptional measure, where particular circumstances exist. Responding to the "erroneous and has caused prejudice" ground for the Prosecution's motion, the Defence submits that it is principally applicable at the appeal stage, as the Appeals Chamber is the court of last resort in the hierarchy of the Tribunal. Moreover, that ground is a condition precedent for all

reconsideration motions, rather than an independent basis for reconsideration, and reconsiderations are not available only where there has been a change in circumstances. Therefore, the ground of "erroneous and has caused prejudice", by itself, is insufficient to trigger reconsideration. The Defence contends that in the absence of "unfair procedure", in order to show that the Decision was erroneous, the Prosecution should allege new circumstances although that may not be required as such. The Defence's position is that there are no circumstances of which the Prosecution could not have informed the Chamber in its original motion. The *Barayagwiza* case was "wholly exceptional" and involved a "possible miscarriage of justice", and constituted a review, not reconsideration. According to the Defence, even a "wrong" decision should not be altered unless it has caused an injustice, which, it is submitted, has not occurred in this case. The Defence additionally submits that the proper remedy the Prosecution should have sought is certification for appeal, rather than reconsideration.

5. Regarding the merits of the motion, the Defence submits that there are no exceptional circumstances which would warrant the addition of new witnesses at an advanced stage of trial. The Prosecution has not explained why these witnesses could not been located earlier with "all reasonable diligence". The Defence argues that the evidence would most likely be inadmissible on appeal as well, since the Prosecution could have found the evidence earlier. Stressing that late disclosure is an exception, not the rule, the Defence notes that the Prosecution did not address the issue of lateness of disclosure, which was the reason for rejecting the witnesses.

6. Finally, the Defence points out that the Prosecution's arguments relating to the scheduled close of its case on 14 July 2004 are not valid. The individual submissions relating to each witness will be examined below.

DELIBERATIONS

Grounds for Reconsideration

7. Before addressing the merits of the motion, the Chamber must first examine whether or not there are grounds for the reconsideration of the decision. The Chamber notes at the outset that the Rules do not provide for the reconsideration of decisions. The Tribunal has an interest in the certainty and finality of its decisions, in order that parties may rely on its decisions, without fear that they will be easily altered. The fact that the Rules are silent as to reconsideration, however, is not, in itself, determinative of the issue whether or not reconsideration is available in "particular circumstances", and a judicial body has inherent jurisdiction to reconsider its decision in "particular circumstances".[1] Therefore, although the Rules do not explicitly provide for it, the Chamber has an inherent power to reconsider its own decisions. However, it is clear that reconsideration is an exceptional measure that is available only in particular circumstances.

[1] *Barayagwiza*, Decision (Prosecutor's Request for Review or Reconsideration) (AC), 31 March 2000, Separate Opinion of Judge Shahabuddeen, para. 3. See also *Mucic et al.*, Judgment on Sentence Appeal (AC), 8 April 2003, para. 53: "The absence of any reference to this power in the Rules is therefore no bar to the existence of the inherent power to reconsider. There is nothing in the Rules which is inconsistent with the existence of such an inherent power." It is noted that these were Appeals Chamber cases but the same principles would apply to the Trial Chambers.

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8. There is no exhaustive list of such "particular circumstances", but they include "a case in which the decision, though apparently *res judicata*, is void, and therefore non-existent in law, for the reason that a procedural irregularity has caused a failure of natural justice", or where a party has been subjected to "an unfair procedure".[2] In *Mucic et al.*, the Appeals Chamber, in examining its own powers to reconsider, held as follows:

> The Appeals Chamber has an inherent power to reconsider any decision, including a judgment where it is necessary to do so in order to prevent an injustice. The Appeals Chamber has previously held that a Chamber may reconsider a decision, and not only when there has been a change of circumstances, where the Chamber has been persuaded that its previous decision was erroneous and has caused prejudice. Whether or not a Chamber does reconsider its decision is itself a discretionary decision. Those decisions were concerned only with interlocutory decisions, but the Appeals Chamber is satisfied that it has such a power also in relation to a judgment which it has given – where it is persuaded:
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> (a) (i) that a clear error of reasoning in the previous judgment has been demonstrated by, for example, a subsequent decision of the Appeals Chamber itself, the International Court of Justice, the European Court of Human Rights or a senior appellate court within a domestic jurisdiction, or
> (ii) that the previous judgment was given *per incuriam*; and
>
> (b) that the judgment of the Appeals Chamber sought to be reconsidered has led to an injustice.[3]

9. The Chamber notes that the language utilized by the Appeals Chamber in the above case seems to suggest that the Appeals Judges were primarily concerned with reconsideration at the appellate level. However, the Chamber considers that the holding is equally applicable to reconsideration of Trial Chamber decisions. This Trial Chamber has previously held that reconsideration is permissible where the impugned decision was erroneous in law or an abuse of discretion when decided,[4] or where there have been new circumstances since the filing of the impugned Decision that affect the premise of the impugned Decision.[5] It is noted that the Prosecution is basing its motion solely on the argument that the impugned decision was erroneous and has caused prejudice.

10. Consequently, the Chamber will now examine, in relation to each witness, if there were any errors in the impugned decision or an abuse of discretion, and whether an injustice has been occasioned by the decision.

Witness AMI

11. The Prosecution submits that the Decision erroneously characterized Witness AMI's proposed testimony as "repetitive": His evidence relates to the Accused Kabiligi's involvement

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[2] *Barayagwiza*, Decision (Prosecutor's Request for Review or Reconsideration) (AC), 31 March 2000, Separate Opinion of Judge Shahabuddeen, paras. 4-5.
[3] *Mucic et al.*, Judgment on Sentence Appeal (AC), 8 April 2003, para. 49.
[4] *Bagosora et al.*, Decision on Reconsideration of Order to Reduce Witness List and on Motion for Contempt for Violation of that Order (TC), 1 March 2004, para. 11.
[5] *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.

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in the distribution of weapons to soldiers and *Interahamwe* at the roadblock close to Zigiranyirazo's house, whereas previous testimonies spoke only of the existence of the roadblock and killings at that place, without placing the Accused Kabiligi at the scene. The evidence goes to Kabiligi's liability for Conspiracy to Commit Genocide and under Article 6(1) for all counts, and is material to proving Kabiligi's presence in Rwanda during the first week of the genocide, which is a disputed fact.

12. The Defence observes that the Indictment does not charge the Accused Kabiligi with distributing weapons to *Interahamwe*.

13. In the impugned decision, the Chamber held:

> 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.

14. The Chamber examined the statement of Witness AMI and found that much of the evidence, relating to the existence of roadblocks manned by soldiers and *Interahamwe* and the distribution of weapons, was repetitive. In the summary of the proposed testimony of the witness, the Chamber highlighted the two main reasons for which the Prosecution is seeking to call Witness AMI: the Accused Kabiligi's involvement in the distribution of weapons at the roadblock close to Zigiranyirazo's house, on a date around 12 April 1994. The statement mentions that on 12 April 1994, the Accused Kabiligi was part of a convoy of vehicles that offloaded weapons at Zigiranyirazo's house, the guards of which house were possibly the soldiers at the roadblock. The Chamber acknowledged the materiality of this evidence but weighed it against the late disclosure to the Defence of a new witness not previously on the Prosecution witness list, who would testify to a new allegation, and the fact that this new witness was being added close to the end of the Prosecution's case. The Chamber was concerned not merely with the late disclosure of the statement but the late disclosure of the existence of the witness himself, given that Prosecution witnesses should usually be identified and communicated to the Defence prior to the commencement of trial. In the exercise of its discretion to vary a witness list, and weighing all these relevant considerations, the Chamber found that it would not have been in the interests of justice to allow Witness AMI to be called. There is therefore no error in law, nor an abuse of discretion, in the Chamber's decision.

15. This is sufficient to reject the motion for reconsideration in respect of Witness AMI, but the Chamber goes on to consider whether the impugned decision led to an injustice. The effect of admitting this evidence would be to surprise the Defence for Kabiligi, close to the end of the Prosecution case, with a new witness, and with a completely new allegation not contained in the Indictment against the Accused Kabiligi. If, as argued by the Prosecution, the evidence were vital to the case against Kabiligi and fills lacunae in the Prosecution case, the Prosecution should have exercised more diligence at an earlier stage in its investigations to secure this evidence. The question of whether or not there was an injustice caused involves a consideration of the respective positions of both the Prosecution and the Defence, and the Chamber is convinced that

despite the materiality of the evidence, to have accepted it in the circumstances would have amounted to gross prejudice to the Accused Kabiligi. In light of the above, the Chamber is not persuaded that the impugned decision led to an injustice, and consequently declines to exercise its discretion to reconsider.

Witness ANC

16. With respect to Witness ANC, the Prosecution contends that the Chamber mistakenly directed its Decision only to the attacks by para-commandos, which is repetitive, whereas the Prosecution is seeking to adduce direct evidence of rapes at CHK and the "Chinese House" by soldiers and *Interahamwe*, which is new evidence. In support of this application, the Prosecution states that Witness DAZ, who testified to rape by soldiers and *Interahamwe*, has refused to appear for cross-examination, which leaves Witness ANC as one of the few possible witnesses to these acts.

17. The Defence contends that the allegations of rape lack specificity. If Witness DAZ refuses to appear for cross-examination, the Prosecution should seek a subpoena instead.

18. The Chamber held, in the impugned decision in respect of Witness ANC, that:

> 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.

19. The Prosecution submits that the Chamber erroneously stated that the evidence sought related to the activities of para-commandos. This is not the case. In its summary of the proposed testimony of Witness ANC, the Chamber stated that the witness would also testify to "rapes at CHK and the 'Chinese house' in Kiyovu". The Chamber clearly indicated that it was the evidence of attacks by para-commandos that was repetitive. Its decision was guided predominantly by the late disclosure of the witness statement in March 2004, and the addition of a new witness at an advanced stage of the proceedings, that is, close to the end of the Prosecution's case. In weighing the competing interests of the Prosecution and the Defence, that is, the materiality of the evidence against the late disclosure to the Defence of a new witness, the Chamber found that it would not be in the interests of justice to call Witness ANC. There is therefore no error in law, nor an abuse of discretion, in the impugned decision. The issue of specificity, raised by the Defence, does not fall to be considered at this stage. The lateness of disclosure to the Defence of this evidence, and the late application to add this witness, would prejudice the Defence if the evidence were admitted. Therefore, as more fully set out in paragraphs 14 and 15, there has been no injustice caused by the decision as the facts stood then.

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20. The Chamber notes that the refusal of Witness DAZ, invoked by the Prosecution, to appear for cross-examination constitutes new circumstances.[6] However, during the proceedings on 10 June 2004, the Prosecution stated that Witness DAZ would be appearing for cross-examination after all.[7] Therefore, there are no new circumstances that would change the Chamber's decision.

Witness ANE

21. Turning to Witness ANE, the Prosecution submits that the witness provides unique evidence relating to the joint appearance of three of the four alleged co-conspirators at Gaki Military Camp around 10 April 1994, the issuance of instructions by the Accused Bagosora in the presence of the other two, and the ensuing massacre of Tutsi civilians by soldiers and *Interahamwe* in the neighbouring areas. The evidence therefore goes to Prosecution's case that the events in 1994 in Rwanda occurred by design, not by chance; the Accused's Kabiligi's liability for Conspiracy to Commit Genocide, and the first sighting of Kabiligi in Rwanda during the first week of the genocide. As to disclosure, the Prosecution argues that Witness ANE's statement, taken on 4 March 2004, was disclosed to the Defence as soon as it was possible and practicable, on 9 March 2004, and that there was reasonable notice to the Defence. The Prosecution argues that as the Tribunal is a truth-seeking body, it is not reasonable to exclude material evidence at the trial stage when such evidence would have been admissible as additional evidence on appeal. The Prosecution cites two cases, *Kordic and Cerkez* and *Barayagwiza*, where additional evidence was admitted at late stages, after the close of the Defence case, and after final judgment and release of the Accused, respectively. The removal of material available evidence causes injustice to the interests of the international community and victims of the crimes.

22. The Defence argues that the evidence does not point to a conspiracy. Furthermore, Bagosora's instructions, which it is unclear if the Accused Kabiligi and Natbakuze heard, regarding RPF accomplices, was a legitimate order in a war situation. In addition, the massacres in Nyamata and Ntamara are not alleged in the Indictments.

23. As with the previous two witnesses, the impugned decision relating to Witness ANE was dictated largely by the late disclosure of the existence of such a witness and the concomitant prejudicial effect it would have on the Defence, as spelt out in the relevant portion of the decision:

> 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.

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[6] The Chamber is not confined to addressing the arguments raised by the parties, but may adopt its own arguments and reasoning. See *Barayagwiza*, Decision (Prosecutor's Request for Review or Reconsideration) (AC), 31 March 2000, Separate Opinion of Judge Shahabuddeen, paras. 7-8.

[7] T. 11 June 2004, pp. 48-49.

24. Therefore, contrary to the Prosecution's arguments, the Chamber appreciated the materiality of the witness's evidence, but exercised its discretion not to add the witness to the list, considering the lateness of disclosure and the advanced stage of proceedings.

25. The Prosecution makes further arguments relating specifically to disclosure, which apply to all three witnesses. The Prosecution cites *Kordic and Cerkez* in support of its arguments.[8] However, that decision related to the disclosure of documents, not the calling of witnesses, and does not have any relevance to disclosure as part of an assessment of "good cause" and "the interests of justice", pursuant to Rule 73*bis*(E). Moreover, the documents had been sought by the Prosecution throughout the course of the trial, not merely at the end of the case.[9] The Prosecution also cites *Barayagwiza* where late disclosure of new evidence was accepted.[10] This was a decision for review only, after the Appeals Chamber considered both avenues of review and reconsideration and specifically rejected the motion to reconsider. Furthermore, the Prosecution has confused the issue of a new fact that warrants reconsideration and is subsequently admitted, with disclosure obligations. In any event, the Appeals Chamber acknowledged that its decision in that case was "wholly exceptional" and involved a "possible miscarriage of justice". The Chamber is not persuaded by the relevance of these authorities to any of the three witnesses concerned in the present motion. There was no error in law, or an abuse of discretion, in the impugned decision, nor did it cause an injustice.

Merits of the motion

26. As the Chamber has found no grounds to reconsider the impugned decision, it will not examine the merits of the motion. The Chamber considers that the present motion should not have been filed, and the Prosecution, since it was generally making the same arguments as in the previous motion, should have sought certification for appeal instead, which would have been the more appropriate remedy.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 15 June 2004

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

[Seal of the Tribunal]

[8] *Kordic and Cerkez*, Decision on Prosecutor's Submissions Concerning "Zagreb Exhibits" and Presidential Transcripts (TC), 1 December 2000.
[9] *Ibid.*, para. 1.
[10] *Barayagwiza*, Decision (Prosecutor's Request for Review or Reconsideration) (AC), 31 March 2000.