



ICTR-98-41-7
14-07-2004
(21354-21351)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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S. MUSA

OR: ENG

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 14 July 2004

THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. ICTR-98-41-T

2004 JUL 14 P 12:28
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**DECISION ON PROSECUTOR'S SECOND 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)"**

Office of the Prosecutor:

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Segun Jegede
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Counsel for the Defence

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Peter Erlinder
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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 2 July 2004;

CONSIDERING the Ntabakuze Defence Response, filed on 5 July 2004; the Nsengiyumva Defence Response, filed on 6 July 2004; the Bagosora Defence Response, filed on 7 July 2004; and the Kabiligi Defence Response, filed on 7 July 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 filed a motion on 28 May 2004 for the suspension of the time-limit for certification of the Decision, which was denied on 16 June 2004. On 1 June 2004, the Prosecution filed a motion for reconsideration of the 21 May decision, which was denied on 15 June 2004. The Prosecution sought certification to appeal the decision of 16 June 2004 by way of a motion filed on 23 June 2004. The Prosecution has now additionally filed a second reconsideration motion in respect of the same witnesses as the first reconsideration motion which was denied.

SUBMISSIONS

2. The Prosecution wishes the Chamber to reconsider its 21 May Decision with respect to Witnesses AMI, ANC and ANE on the ground that new circumstances have arisen. As the Prosecution case will not end on 14 July 2004, as previously anticipated, but will continue for another trial session, the Prosecution argues that this alleviates the concerns of late disclosure at an advanced stage of the proceedings and will give the Defence time to prepare for these material witnesses.

3. The Ntabakuze Defence asserts that there are no new circumstances as it was always obvious that the Prosecution case would not close on 14 July 2004. Further, there are four months from the filing of the motion to the anticipated close of the case, which was the case with the original motion to vary the witness list - therefore there are no new circumstances. The Defence should know the Prosecution’s case before the commencement of trial and most of the Prosecution case

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has now been heard. Finally, Witness ANC should not be added as he provides the same evidence as Witness DAZ who has since returned to complete his testimony.

4. The Nsengiyumva Defence echoes the objections of the Ntabakuze Defence and adds that addition of the witnesses would compel the Defence to seek to recall previous Prosecution witnesses who testified to similar issues in order to question them.

5. The Bagosora Defence joins in the Ntabakuze Defence response and contends that there are no new circumstances, adding that the trial is presently at an even later stage than at the time of the 21 May Decision.

6. The Kabiligi Defence seeks the rejection of the motion, making similar arguments as the other Defence teams, and submits that under the Rules, the Prosecution files its list of witnesses prior to the trial, after which the list may be varied only if in the interests of justice.

DELIBERATIONS

7. The Chamber has previously held that reconsideration is an exceptional measure that is available only in particular circumstances, including where new circumstances have arisen since the filing of the impugned Decision that affect the premise of the impugned Decision.¹ The Chamber notes that the Prosecution did not mention in its motion that it is presently seeking a *second* reconsideration of the impugned decision after an unfavourable ruling.

8. The Prosecution argues that the delay in the close of the Prosecution's case, to sometime after the previously anticipated date of 14 July 2004, qualifies as a new circumstance warranting reconsideration. As it permits the Defence more time since disclosure of these witnesses to prepare for their cross-examination, it resolves the problem of unfair surprise to the Defence. The Prosecution has failed to comprehend the Chamber's rulings on this matter. The re-scheduling of the close of its case does not constitute a new circumstance, or a change in circumstance, that affects the premise of the impugned decision. The delayed close of the Prosecution case does not change the fact that the new witnesses would be added at a very advanced stage of the Prosecution case, meaning that most the Prosecution case has now already been heard.

9. The Chamber reiterates that Rule 66 provides the framework in which disclosure by the Prosecution is to take place; Rule 73bis(E) is an exceptional measure where the interests of justice mandate a departure from Rule 66. The Chamber considers that it would be unfair to the Defence to be faced with entirely new witnesses when their reasonable expectation would be that the Prosecution is closing its case and the Defence is already aware of all the evidence to be called. If the witnesses were to be added, the Defence would have been deprived of the opportunity to use the evidence of these new witnesses to cross-examine previous Prosecution witnesses who testified to similar issues, in order to test the totality of the evidence and the credibility of all the witnesses testifying to similar issues. The Chamber therefore finds that there are no grounds for reconsideration and will not proceed to examine the merits of the motion.

¹ *Bagosora*, 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 73bis(E)" (TC), 15 June 2004, paras. 7-9.

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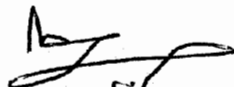
10. This motion represents the fifth filing of the Prosecution on the issue of varying the witness list. While either party is clearly entitled to challenge a decision by reconsideration, appeal or certification to appeal, the Prosecution has continued to file motions challenging the Chamber's rulings after these avenues have been exhausted. A court ruling cannot be subjected to an infinite process of reconsiderations and certifications; the Chamber urges Counsel to exercise judgment in these matters, and to make informed and reasoned choices in the conduct of their cases.


FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 14 July 2004


Erik Møse
Presiding Judge


Jai Ram Reddy
Judge


Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

