

ICTR-01-76-T
27-08-2004
(2827-2823)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Sergei Alekseevich Egorov
Judge Dennis C. M. Byron

Registrar: Adama Dieng

Date: 27 August 2004

THE PROSECUTOR

v.

Aloys SIMBA

Case No. ICTR-01-76-I

JUDICIAL RECORDS/ARCHIVES
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ICTR

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DECISION ON THE PROSECUTION'S MOTION TO VARY THE WITNESS LIST

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”);

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

BEING SEIZED OF the “Prosecutor’s Extremely Urgent Motion for Leave to Vary the List of Prosecution Witnesses Pursuant to Rules 54, 73, and 73 *bis* E of the Rules of Procedure and Evidence”, filed on 16 August 2004;

CONSIDERING the Defence’s Response, filed on 24 August 2004, and the Defence’s Addendum, filed on 26 August 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Indictment against Aloys Simba was confirmed on 8 January 2002. The first amended Indictment was filed on 27 January 2004, and the second amended Indictment was filed on 10 May 2004. The trial was scheduled to commence on 16 August 2004. On 18 August 2004, the Chamber postponed the commencement of trial to 30 August 2004.
2. On 26 August 2004, the Prosecution filed a rejoinder to the Defence submissions. The Chamber did not consider this pleading.

SUBMISSIONS

3. The Prosecution seeks leave to remove twelve witnesses from its witness list: YA, KSD, DDG, ANQ, KCJ, XXG, XXI, KSH, YI, ALT, AMP, and KSB. In their place, the following witnesses are to be added: YD, KTB, KSK, and KSM. It is asserted that this proposed variation will promote judicial economy by producing the best evidence in the fewest number of witnesses. It is also noted that Witnesses YA and KSD have expressed reluctance to testify. According to the Prosecution, the Defence will not be prejudiced by the addition of four new witnesses given that their redacted statements were disclosed on 10 May 2002 as part of the supporting materials to the Indictment. The request to remove the twelve witnesses is strictly conditioned on the Chamber’s agreement to add the four proposed witnesses.
4. The Defence argues that the Prosecution’s motion is premature because, according to Rule 73*bis* (E), a motion to vary the witness list may be brought only after commencement of trial, which is not scheduled to begin until 30 August 2004. The Defence also notes that if any of the four new proposed witnesses are Rwandan prisoners, then obtaining their judicial records would delay the proceedings and consequently prejudice the Accused. Furthermore, it is argued that the manner in which the Prosecution gave notice of these additional witnesses and disclosed their unredacted statements does not conform with Rules 66 and 67 (A)(i) and the Chamber’s decision on protection measures for prosecution witnesses. The Defence also asserts that it is prejudiced

because in its trial preparation it has relied on the Prosecution's "Summary of Witness Testimony", dated 10 May 2004.

DELIBERATIONS

5. Rule 73bis (E) 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.

6. Though the trial has not yet commenced, the Chamber finds it appropriate in the present circumstances to consider the Prosecution's motion. The Prosecution filed its motion on 16 August 2004, the date when the trial was originally scheduled to commence, and the Chamber envisions no relevant intervening circumstances before trial commences on 30 August 2004 that warrant postponing the consideration of the Prosecution's motion. The interests of justice favour a prompt disposition of the motion so that the Chamber and all parties will have additional time to prepare and make arrangements for trial. In the Chamber's view, the time constraints placed on the Prosecution by Rule 73bis (E), do not narrow the Chamber's authority, both inherent and pursuant to Rule 54, to issue all relevant orders ensuring the proper conduct of the trial proceedings.

7. In previous case law, considerations of the interests of justice and the existence of good cause guided the Chamber in determining whether or not to grant leave to vary the witness list in the context of an ongoing trial.¹ Those principles are equally applicable in this context as well. Relevant considerations include the materiality of the testimony, the complexity of the case, and prejudice to the Defence, including elements of surprise, on-going investigations, replacements and corroboration of evidence.² The Chamber should also consider factors such as the justification for adding witnesses, date on which the Prosecution declared its intention to call the proposed witnesses, the stage of the trial proceedings, whether the late discovery of the witnesses arose from fresh investigations, and whether the Defence will have adequate time to make an effective cross-examination.³ The Chamber may grant a postponement of the testimony of new witnesses in order to allow the Defence sufficient time to prepare its cross-examination.⁴

8. After making a close analysis of the written statements of the proposed witnesses, the Chamber finds that these criteria have been met. The four proposed witnesses will, according to

¹ *Bagosora et al*, Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis (E), 21 May 2004, paras. 8-10; *Bagosora et al*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis (E) (TC), 26 June 2003, paras. 14-22; *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.

² *Bagosora et al*, Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis (E), 21 May 2004, para. 8; *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 Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis (E), 21 May 2004, paras. 9-10; *Bagosora et al*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis (E) (TC), 26 June 2003, paras. 14-22.

⁴ *Bagosora et al*, Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis (E), 21 May 2004, para. 10.

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their statements, provide in many respects firsthand material evidence in support of the Indictment, and not new allegations. Witness YD to some extent replaces the testimonies of Witnesses YA and KSD, who have expressed reluctance to testify. In addition, Witness KSM replaces the testimony of Witnesses DDG, ANQ, ALT, and YI. The statements of Witnesses KTD and KSK, as well as the others, indicate that they will corroborate other prosecution witnesses.

9. The fact that the request was made at the outset of trial favours allowing the variation, particularly given that the witnesses will not testify on new allegations outside the scope of the Indictment. The proposed variation will promote judicial economy by substantially reducing the number of witnesses scheduled for trial. Moreover, it does not impact the witnesses that the Prosecution has proposed to call at the outset of trial.

10. There is minimal prejudice to the Defence given that the redacted witness statements of the four proposed witnesses were disclosed to the Defence on 10 May 2002 as part of the supporting material to the Indictment. This disclosure was well before the deadline envisioned in Rule 66 (A)(ii). In addition, the Chamber has compared the redacted statements with the unredacted statements and notes that very little relevant information, if any, was removed apart from identifying information. Moreover, the Chamber does not find that the Prosecution's notice to the Defence of its intent to call additional witnesses violates Rule 67 (A)(i) as it was done prior to the commencement of the trial.

11. In its witness protection decision, the Chamber ordered the Prosecution to disclose all identifying information of its witness to the Defence no later than 30 days before the commencement of trial.⁵ The Prosecution disclosed the unredacted statement of Witness KSK on 30 July 2004, which meets this deadline. However, it did not disclose the unredacted statements of YD, KTB, and YSM until 16 August 2004. In order to remedy this late disclosure and any possible prejudice flowing from it or this variation of witnesses, the Chamber will consider reasonable requests for the postponement of the testimony of these witnesses to provide additional time for the Defence to prepare for cross-examination.

12. The Chamber is also aware that one of the proposed witnesses appears to be currently detained in Rwanda. If the Prosecution is in possession of this witness's judicial records, then they should be immediately disclosed.

⁵ *Simba*, Decision on Prosecution Request for Protection of Witnesses (TC), 4 March 2004, para. 10.

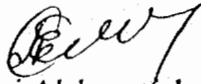
FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution leave to vary its witness list removing YA, KSD, DDG, ANQ, KCJ, XXG, XXI, KSH, YI, ALT, AMP, and KSB and adding YD, KTB, KSK, and KSM.

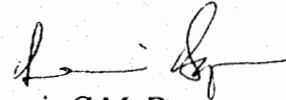
Arusha, 27 August 2004



Erik Møse
Presiding Judge



Sergei Alekseevich Egorov
Judge



Dennis C.M. Byron
Judge

(Seal of the Tribunal)

