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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
27-09-2005  
(1034 - 1031)

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S. Mussa

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TRIAL CHAMBER I

**Before:** Judge Jai Ram Reddy, Presiding  
Judge Sergei Alekseevich Egorov  
Judge Flavia Lattanzi

**Registrar:** Adama Dieng

**Date:** 27 September 2005

THE PROSECUTOR

v.

Jean MPAMBARA

*Case No. : ICTR-2001-65-T*

2005 SEP 27 A 10:09  
S. Mussa

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**DECISION ON THE PROSECUTION'S REQUEST TO ADD WITNESS AHY**

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**The Prosecution**

Richard Karegyesa  
Andra Mobberley  
Didace Nyirinkwaya  
Ousman Jammeh

**The Defence**

Arthur Vercken  
Vincent Courcelle-Labrousse

165.

## INTRODUCTION

1. On 22 September 2005, the Prosecution made an oral request to vary its witness list by adding Witness AHY. This motion is related to the Prosecution's written request of 20 September 2005 to vary its witness list by removing Witnesses AOL, LEN, LEL, LEP and LEB and by adding Witness AHY. In that motion, the Prosecution expressly conditioned the removal of the five witnesses on the addition of Witness AHY. The Chamber denied that motion in an oral decision on 22 September.<sup>1</sup> After that decision, the Prosecution renewed its request in two separate oral motions. The Chamber granted the unopposed motion to remove the five witnesses and indicated that it would issue a decision shortly on the request to add Witness AHY.

2. In an oral decision on 23 September 2005, the Chamber granted the Prosecution's request to add Witness AHY. The Chamber indicated that the written reasons below would follow. In reaching this decision, the Chamber considered the substantive arguments on this issue set forth in the Prosecution's written submissions of 20 September, the Defence's response of 22 September and the parties' oral arguments on 22 September.

## DELIBERATIONS

3. Rule 73bis (E) provides:

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.

4. In the Tribunal's jurisprudence, considerations of the interests of justice and the existence of good cause guide the Chamber in determining whether or not to grant leave to vary the witness list in the context of an ongoing trial.<sup>2</sup> 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. The Chamber should also consider factors such as the justification for adding witnesses, date on

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<sup>1</sup> See Oral Decision, T. 22 September 2005 p. 30 ("On 20 September 2005, the Prosecution filed a motion to vary its witness list. The Prosecution requested to remove Witnesses AOL, LEN, LEL, LEP, and LEB. In exchange, it asked to add Witness AHY. Witness AHY only came to the attention of the Prosecution on 17 September 2005. The Prosecution has expressly conditioned the removal of the five witnesses on the addition of Witness AHY. The Defence in its response, filed on 22 September, does not object to the removal of the five witnesses, but does object to the addition of Witness AHY. In the Chamber's view, the Prosecution has not adequately demonstrated that the testimony of Witness AHY addresses the same issues as Witness BCG or Witnesses AOL, LEN, LEL, LEP, and LEB to justify expressly conditioning the two requests on each other. Consequently, the Chamber will only view the two requests separately. The Chamber will deny the Prosecution motion accordingly. However, the Prosecution may apply for each of these requests separately in subsequent written or oral motions.")

<sup>2</sup> See generally *Simba*, Decision on the Prosecution's Motion to Vary the Witness List (TC), 27 August 2004, para. 7; *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; ); *Ntagerura et al.*, Decision on Defence of Ntagerura's Motion to Vary its Witness List Pursuant to Rule 73 ter (E) (TC), 11 June 2002, paras. 8, 10; *Kamuhanda*, Decision on the Prosecutor's Motion to Add Witness DAL (TC), 15 February 2002, para. 8; *Kamuhanda*, Decision on the Prosecutor's Motion to Add Witnesses GKI, GKJ, and GKL (TC), 6 February 2002, para. 4; *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.

1032

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. 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.

5. After a careful analysis of the written statement of Witness AHY in the context of this case, the Chamber finds that the Prosecution has satisfied the criteria for adding Witness AHY to its witness list. The statement of Witness AHY indicates that he will attest to Mpambara distributing grenades on 9 April 1994 to assailants who subsequently participated in attacks at Rukara Parish. The proposed evidence of the witness appears relevant to the allegation in paragraph 18 (viii) of the Indictment, which alleges that Mpambara distributed weapons in the context of the attacks which unfolded at Rukara Parish between 8 and 13 April. The evidence also appears relevant to the testimony of Witness AOI and the anticipated testimony of Witness LEK relative to the use of grenades during the attack. The Defence has asserted the proposed testimony of Witness AHY constitutes a new allegation which is not pleaded in the Indictment. However, at this stage, the Chamber is not in a position to fully appreciate the nature and scope of the witness's testimony in order to make such a determination.<sup>3</sup>

6. In granting the Prosecution's motion, the Chamber has also considered the timing of the disclosure of the witness's statement. Rule 66 (A)(ii) provides that the Prosecution should disclose copies of all statements of testifying witnesses sixty days before the date set for trial. However, also pursuant to Rule 66(A)(ii), the Chamber may allow statements to be disclosed in any other time frame where good cause is shown. The present witness protection regime in this case requires that the identifying information of each Prosecution witness be communicated to the Defence not later than thirty days before the actual testimony of that witness.<sup>4</sup>

7. In the Chamber's view, good cause exists for altering the time frame for disclosure envisioned in Rule 66 (A)(ii) as well as the current witness protection regime. As set forth in a sworn affidavit by one of the Tribunal's investigators, Witness AHY came to the attention of the Prosecution only on 17 September 2005 after the witness's testimony about Mpambara during a local gacaca proceeding. The written statement of Witness AHY was then forwarded to the Defence on 19 September 2005. The Prosecution filed a motion to add Witness AHY the following day.

8. The Chamber has also considered any possible prejudice arising from the late addition of this witness. The Defence argues that the Prosecution's motion should be denied given its timing during the course of ongoing proceedings as well as the element of surprise. In light of the sworn declaration supporting the request, the Chamber cannot infer any bad faith on the part of the Prosecution. Moreover, the Chamber observes that the request was made at the

<sup>3</sup> See *Simba*, Decision on the Admissibility of the Evidence of Witness KDD (TC), 1 November 2004, para. 18.

<sup>4</sup> By motion dated 27 March 2002, the Prosecution requested protective measures for its witnesses, including an order that the identifying witness information be disclosed to the Defence not later than twenty-one (21) days prior to that witness' testimony. The Chamber granted this request in a written decision of 29 May 2002. At a status conference on 29 April 2005, however, the Chamber ordered that the identifying information of each Prosecution witness be communicated to the Defence not later than thirty (30) days before that witness' testimony, as is standard practice at the Tribunal where witness protection measures are in place. See *Mpambara*, Decision on Protection of Defence Witnesses (TC), 4 May 2005, para. 2, footnote 3 (noting that the Prosecution witness protection measures had been modified).

1031

outset of the Prosecution case and that, even with the addition of Witness AHY, the Prosecution is set to close its case on or before 7 October 2005. The timing for the Defence case has not yet been set. In addition, the Chamber will accord the Defence an adequate opportunity to fully investigate this witness with the possibility of recall. Furthermore, Witness AHY appears to be testifying only about a single event occurring on a specific date. These factors favor hearing the witness during the present trial session.

9. In order to mitigate any possible prejudice, the Chamber will postpone the Defence's cross-examination until the end of the present trial session. In light of the witness's proposed testimony and based on other trial considerations, including the remaining number of witnesses, the Chamber finds this to be an adequate period in which to prepare a cross-examination. In addition, the Chamber will allow the Defence to recall the witness during the next trial session should additional investigations warrant further cross-examination.<sup>5</sup> The next trial session will be set in full consultation with the parties bearing this possibility in mind.

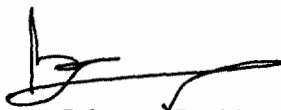
**FOR THE ABOVE REASONS, THE CHAMBER**

**GRANTS** the Prosecution's request to add Witness AHY to its witness list;

**ORDERS** that he be accorded existing witness protection measures; and

**FURTHER ORDERS** that he be brought immediately to Arusha to testify during the present trial session.

Arusha, 27 September 2005



Jai Ram Reddy  
Presiding Judge



Sergei Alekseevich Egorov  
Judge



Flavia Lattanzi  
Judge

[Seal of the Tribunal]



<sup>5</sup> See, e.g., *Bagosora et al.*, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, para. 8.