



ICTR-98-41-T  
17-02-2006  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

(26504-26499)

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**TRIAL CHAMBER I**

**Before:** Judge Erik Møse  
Judge Jai Ram Reddy  
Judge Sergei Alekseevich Egorov

**Registrar:** Adama Dieng

**Date:** 17 February 2006

**THE PROSECUTOR**

**v.**

**Théoneste BAGOSORA**

**Gratien KABILIGI**

**Aloys NTABAKUZE**

**Anatole NSENGIYUMVA**

*Case No. : ICTR-98-41-T*

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*[Signature]*

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**DECISION ON DEFENCE MOTIONS TO AMEND THE  
DEFENCE WITNESS LIST**

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**The Prosecution**

Barbara Mulvaney  
Drew White  
Christine Graham  
Rashid Rashid

**The Defence**

Raphaël Constant  
Allison Turner  
Paul Skolnik  
Frédéric Hivon  
Peter Erlinder  
André Tremblay  
Kennedy Ogetto  
Gershom Otachi Bw'Omanwa

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## THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

**SITTING** as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

**BEING SEIZED OF** the “Requête de la Défense de Bagosora en Modification de sa Liste de Témoins”, filed on 7 December 2005; the Ntabakuze Defence “Motion for Leave to Vary the Witness List Pursuant to Rule 73 *ter* (E)”, filed on 7 December 2005; and the Nsengiyumva Defence “Urgent Motion for Leave to Amend the List of Defence Witnesses”, filed on 15 December 2005;

**CONSIDERING** the parties’ subsequent written pleadings;

**HEREBY DECIDES** the motions.

### INTRODUCTION

1. The Bagosora, Ntabakuze, and Nsengiyumva Defence teams request leave to amend their witness lists so as to eliminate a total of fifty-one of their prospective witnesses and to add thirty-one others. The Prosecution does not oppose the deletion of names from the witness lists, but argues that the addition of any new witnesses must be conditional upon complete disclosure of the witnesses’ intended testimony and identifying information. A detailed mechanism to ensure such disclosure is proposed, by which the Prosecution would determine whether the disclosure conditions have been met as a prerequisite to their addition to the witness lists. If the Chamber declines to authorize such a mechanism, the Prosecution opposes the motion.

2. The Chamber notes that some of the parties’ submissions were filed outside of the time-limits prescribed by the Rules of Procedure and Evidence (“the Rules”). The Trial Chamber has discretion to consider late-filed submissions and, in the present instance, chooses to do so.<sup>1</sup>

### DELIBERATIONS

#### *(i) Applicable Standard*

3. Rule 73 *ter* (E) of the Rules provides that:

After commencement of the Defence case, the Defence, if it 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 its decision as to which witnesses are to be called.

4. In interpreting a similarly worded provision applicable to Prosecution witnesses, this Trial Chamber has held that amendments of a witness list must be supported by “good cause”

<sup>1</sup> *Bagosora et al.*, Decision on Kabiligi Request for Particulars of the Amended Indictment (TC), 27 September 2005, para. 3; *Mpambara*, Decision on the Defence Preliminary Motion Challenging the Amended Indictment (TC), 30 May 2005, para. 1, n.1.

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and be in the "interests of justice".<sup>2</sup> Similar principles have been applied in assessing Defence motions to vary a witness list.<sup>3</sup> The determination of whether to grant a request to vary the witness list requires a close analysis of each witness, including the sufficiency and time of disclosure of the witness' information; the materiality and probative value of the proposed testimony in relation to existing witnesses and allegations in the indictment; the ability of the other party to make an effective cross-examination of the witness; and the justification offered by the party for the addition of the witness.<sup>4</sup>

(ii) Removal of Witnesses

5. The Bagosora, Ntabakuze and Nsengiyumva Defence teams seek leave to drop nine, thirty-two and ten witnesses respectively.<sup>5</sup> The requests are not opposed by the Prosecution, will economize judicial resources, and are obviously consistent with the effective presentation of Defence evidence. The requests are, therefore, granted.

(iii) Proposed Consent Mechanism

6. The Prosecution does not oppose the requests to add Defence witnesses, provided that the addition of any witness is conditional upon (i) disclosure of the witness' intended testimony, identifying information and statements; (ii) written confirmation by the Prosecution that adequate disclosure has taken place; and (iii) the witness not testifying sooner than sixty days after the Prosecution's confirmation that full disclosure has taken place.

7. The Prosecution has rightly pointed out its need to be informed of the identifying information of any new witnesses and to be provided with a summary of the intended testimony. However, the suggested procedure would interfere with the Chamber's responsibility to grant or deny permission under Rule 73 *ter* (E). Discretion for variance of the witness list is solely vested with the Chamber, and any Defence team wishing to add new witnesses must make application to the Chamber. Moreover, granting the Defence requests subject to a series of subsequent conditions imposed by the Prosecution could cause confusion and give rise to further disputes. Based on the parties' submissions, the Chamber is in a position not only to assess the merits of the Defence requests to add witnesses, but also to

<sup>2</sup> *Nahimana et al.*, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses (TC), 26 June 2001, paras. 17-20; *Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, paras. 13-14; *Bagosora et al.*, Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) (TC), 21 May 2004, para. 8.

<sup>3</sup> *Ntagerura et al.*, Decision on Defence for Ntagerura's Motion to Amend its Witness List Pursuant to Rule 73 *ter* (E) (TC), 4 June 2002, paras. 8, 10; *Nahimana et al.*, Decision on the Defence Application Under Rule 73 *ter* (E) Leave to Call Additional Defence Witnesses (TC), 9 October 2002.

<sup>4</sup> *Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, para. 14; *Bagosora et al.*, Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) (TC), 21 May 2004, paras. 8-10.

<sup>5</sup> The Bagosora Defence wishes to remove Witnesses I-08, J-01, J-06, J-10, K-04, K-05, K-06, K-10 and expert witness Hounkpatin. The witnesses to be removed by the Ntabakuze Defence are: Witnesses Anyidoho, Apedo, Matthew Morcher, Kwesi, Michel Chossudovsky, Gilbert Ngijol, Romeo Dallaire, Plante, Lancaster, Luc Marchal, Todd Howland, DK-17, DM-27, DM-45, DN-15, DN-30, DN-35, DH-50, DM-40, DH-65, DK-12, DH-23, DH-26, L-21, DH-11, DH-21, DH-52, DI-21, DK-51, DK-52, DK-71 and DM-198. The witnesses to be removed by the Nsengiyumva Defence are: GW-1, BZ-2, CF-3, SR-1, BR-5, LN-2, BD-1, LK-7, BK-2 and LND-1.

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prescribe the timing of the Defence's disclosure obligations so as to ensure that the Prosecution has adequate information and time to prepare for cross-examination.<sup>6</sup>

*(iv) Addition of Witnesses*

a. General Issues

8. The Chamber will first address issues common to the three motions and will then turn to each Defence team's specific request. The timing of the motions has not been challenged by the Prosecution. It does not claim unfair surprise or an inability to prepare an effective cross-examination of the proposed witnesses, provided that it is given sufficient time for preparation.

9. The Defence requests provide a general indication of the scope of each witness' proposed testimony and, where applicable, identify the Prosecution evidence to be rebutted by the new witness. The Bagosora and Ntabakuze Defence teams also refer to the paragraphs of the Indictment which are relevant to each proposed witness' testimony. The Ntabakuze and Nsengiyumva Defence teams specify the anticipated duration of the witness' examination-in-chief. The information which the Defence has thus far provided may be viewed as a substantial step toward compliance with the Defence's disclosure obligations. Moreover, the Defence requests establish that the proposed testimony is relevant to the charges against the Accused, responds to evidence offered by the Prosecution as part of its case against the Accused, and is relatively brief in length.

10. The Prosecution places particular emphasis on the overall number of Defence witnesses and on the trial schedule. The Defence challenges the Prosecution arguments and asserts that each team's request must be assessed separately in accordance with Rule 82 (A). The Chamber need not resolve this dispute in deciding the present motions. Each witness is considered individually, applying the criteria mentioned above.

11. Notwithstanding the fact that each witness' proposed testimony must be individually assessed by the Chamber, the Chamber notes that the overall number of witnesses to be called by the Defence teams is reduced, thereby expediting the proceedings. This does not exclude, however, the possibility that certain testimony may be duplicative and may not be allowed by the Chamber at a later stage.

b. Bagosora Request

12. The Bagosora Defence requests leave to amend its list of witnesses by adding one witness. The proposed witness, Witness X-04, will testify about his observations at the SGP gas station on the night of 6 April 1994 and the morning of 7 April 1994. His evidence directly responds to the testimony of Prosecution Witness CW and addresses paragraph 6.32 of the Indictment. The Defence claims to have learned of the witness' existence on 24 October 2005 and to have immediately taken measures to contact him.

<sup>6</sup> This Chamber has previously addressed the issue of remedies for late disclosures of witness information. Where new information pertaining to Prosecution Witness DBQ was disclosed shortly before the witness' appearance, the Chamber postponed cross-examination of the witness in order to afford the Defence sufficient time to investigate and prepare for the new evidence. *Bagosora et al.*, Decision on Admissibility of Evidence of Witness DBQ (TC), 18 November 2003, paras. 24-29.

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13. The Chamber finds that the Bagosora Defence has satisfied the criteria for adding Witness X-04. His proposed testimony is probative of a specific allegation against the Accused and appears to have been recently discovered through ongoing investigations. Moreover, the testimony will directly respond to Prosecution evidence.

c. Ntabakuze Request

14. The Ntabakuze Defence seeks leave to amend its list of witnesses by adding eight witnesses.<sup>7</sup> In the Chamber's view, the criteria for adding these witnesses have been satisfied. The Defence has stated that each of the proposed witnesses was discovered as a result of new or ongoing investigations. The probative value of each witness has also been sufficiently established, with reference to specific Prosecution evidence and paragraphs of the Indictment. Moreover, several of the witnesses replace or condense testimony of other Defence witnesses, which economizes judicial resources and streamlines the presentation of evidence for Ntabakuze. The Chamber grants the request.

d. Nsengiyumva Request

15. The Nsengiyumva Defence requests leave to amend its list of witnesses by adding twenty-two witnesses.<sup>8</sup> It has provided a summary of the proposed testimony for each witness and has estimated the length of the examination-in-chief. In most instances, the Defence has also expressly described the Prosecution evidence to which the proposed testimony responds. The Defence has explained that the availability of most of these witnesses has only recently been confirmed.

16. Even though the explanation for the late availability could have been more detailed, the Chamber finds that the criteria have been met with regard to each of the proposed testimonies. The witnesses respond directly to Prosecution evidence proffered in this case and many are claimed to be the sole witness on a particular issue. The estimated examination-in-chief for each of the proposed witnesses is also relatively brief.

(v) *Timing of Disclosures*

17. The Chamber orders that disclosure of all information pertaining to the new witnesses must be made at least thirty-five days before the trial session in which the witness is to appear. This requirement is consistent with prior witness protection decision in this case.<sup>9</sup>

<sup>7</sup> The witnesses to be added by the Ntabakuze Defence are: Witnesses DM-04, DH-133, DI-41, DK-14, DI-40, DI-37, L-22 and DH-7.

<sup>8</sup> The witnesses to be added by the Nsengiyumva Defence are: Witnesses ZEU-1, ZDR-1, XEN-1, KYZ-1, ZDR-2, XEN-2, OME-1, BRA-1, WIN-1, ANG-1, SUM-1, KB-1, MNC-1, BE-1, WY, ZEU-2, MAR-1, Joseph Nzirodera, Ephrem Setako, Edouard Karemera, Simon Bikindi and Joseph Serugendo.

<sup>9</sup> *Bagosora et al.*, Decision on Motion to Harmonize and Amend Witness Protection Orders and to Permit Investigations (TC), 1 June 2005; *Bagosora et al.*, Decision on Ntabakuze Motion for Protection of Witnesses (TC), 15 March 2004; *Bagosora et al.*, Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003; *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003.

(vi) *Witness Protection Measures*

18. Pursuant to Rule 75, the Chamber has ordered measures to safeguard the privacy and security of witnesses in this case.<sup>10</sup> Existing witness protection measures shall apply to all new witnesses.

**FOR THE ABOVE REASONS, THE CHAMBER**

**GRANTS**, in their entirety, the requests of the Bagosora, Ntabakuze, and Nsengiyumva Defence teams;

**ORDERS** that witness protection measures in this case be extended to each new witness;

**ORDERS** that all identifying information and unredacted statements of the witness be disclosed to the Prosecution at least thirty-five days before the appearance of the witness.

Arusha, 17 February 2006

  
Erik Møse  
Presiding Judge

  
Jai Ram Reddy  
Judge

  
Sergei Alekseevich Egorov  
Judge

[Seal of the Tribunal]



<sup>10</sup> *Bagosora et al.*, Decision on Motion to Harmonize and Amend Witness Protection Orders and to Permit Investigations (TC), 1 June 2005; *Bagosora et al.*, Decision on Ntabakuze Motion for Protection of Witnesses (TC), 15 March 2004; *Bagosora et al.*, Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003; *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003.