



ICTR-98-41-T
06-06-2006
(27988-27985)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

27988
IVAN

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 6 June 2006

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR 98-41-T

JUDICIAL RECORDS/ARCHIVES
ICTR
1 2006 JUN - 6 P 5:25:11

DECISION ON NSENGIYUMVA MOTION FOR LEAVE
TO AMEND ITS WITNESS LIST

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

1/2

27987

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 Nsengiyumva “Confidential and Extremely Urgent Motion for Leave to Amend the List of Defence Witnesses”, filed on 16 May 2005;

CONSIDERING the Prosecution Response thereto, filed 18 May 2006; the Nsengiyumva Reply, filed 23 May 2006; and the Corrigendum to the motion, filed on 25 May 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. Nsengiyumva requests leave to add twelve new witnesses to its witness list, and to remove twelve others. The new witnesses are said to have been contacted only recently, allegedly because of the difficult conditions in the places where they reside and lack of information concerning their whereabouts. The testimony of the new witnesses concerns matters on which the Chamber has not yet heard testimony, which will replace that of the witnesses being removed. The identities and content of the testimony of each of the twelve new witnesses is provided with the motion, and the total expected time for their testimony is said not to exceed five days.¹

2. The Prosecution opposes the addition of the new witnesses

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.

This standard has previously been addressed in this case:²

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” and be in the “interests of justice”.³ Similar principles have been applied in assessing Defence motions to vary a witness list.⁴ The determination of whether to

¹ Defence Motion, paras. 14-16.

² *Bagosora et al.*, Decision on Defence Motions to Amend the Defence Witness List (TC), 17 February 2006, para. 4.

³ *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.

⁴ *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) for Leave to Call Additional Defence Witnesses (TC), 9 October 2002.

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.⁵

Whether the addition of witnesses will result in "unfair surprise or prejudice" to the opposing party must be considered in light of the disclosure obligations of the moving party.⁶

(ii) *Removal of Witnesses*

4. The request to remove witnesses is not opposed by the Prosecution, will economize judicial resources and is obviously consistent with the effective presentation of Defence evidence. The request is, therefore, granted.⁷

(iii) *Addition of Witnesses*

5. The Prosecution challenges the addition of witnesses on a number of fronts, including: (i) having "stood on its right" to request variation of the list at an earlier stage, the Defence cannot now request a variation; (ii) the Defence has not discharged its burden to show why the proposed witnesses were not contacted earlier; (iii) only one of the new witnesses is intended to replace removed witnesses; (iv) the timing of the motion amounts to unfair surprise which deprives the Prosecution of the opportunity to investigate and prepare effective cross-examinations; (v) the anticipated testimony of the new witnesses has not been demonstrated as material to the Defence case; and (vi) the witness list is already "bloated".

6. Rule 73 *ter* (B)(iii)(b) gives the Chamber discretion to "order that the Defence ... file ... [a] list of witness the Defence intends to call with ... [a] summary of the facts on which each witness will testify". This discretion was exercised on 14 October and 21 December 2004, with further explanation given on 16 May 2005, to the effect that the Defence was required to "provid[e] a factual summary and not merely the subject matter on which each witness will testify".⁸ In respect of a previous amendment of the Defence witness list, the Chamber required the Defence to provide this information no later than "thirty-five days before the appearance of the witness".⁹

7. The Defence has provided a detailed summary of each witness's testimony and its relevance to the case. The matters on which they will testify are confined to well-defined material facts which are at the core of the Prosecution case. Although additional investigation into the background of the witnesses will be required, a reasonable delay in these witness's ~~appearance will provide sufficient time for adequate preparations, particularly in light of the~~

⁵ *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.

⁶ *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. 10.

⁷ The witnesses removed are: LG-2, LB-1, NR-4, BD-2, ZM-1, GRE-1, MG-1, MG-2, ZEU-2, BE-1, XEN-2 and Setako.

⁸ T. 16 May 2005 p. 31. T. 14 October 2004 p. 15; T. 21 December 2004 pp. 25-26.

⁹ *Bagosora et al.*, Decision on Defence Motions to Amend the Defence Witness List (TC), 17 February 2006, p. _____

27985

Prosecution's familiarity with the material facts on which they will testify, the circumscribed focus of the testimony, and the specificity of the identifying information provided. The Chamber cannot say that the failure to discover these witnesses earlier is unreasonable, or that the late-stage of the proceedings will make it more difficult for the Prosecution to conduct any necessary investigations. The addition of these witness will not extend the proceedings, in light of the Defence's undertaking to present these witnesses, whose testimony will take no more than five days, during the present session ending on 14 July. For these reasons, the Chamber considers that the interests of justice are served by permitting the addition of these twelve witnesses to the Defence witness list, with an adequate period of disclosure to permit Prosecution investigations.

(iv) *Timing of Disclosure*

8. No witness shall be permitted to appear less than thirty-five days after substantial disclosure of witness identifying information and a summary of their proposed testimony, unless the Prosecution waives the right to insist on this delay. In the absence of more particularized objections from the Prosecution, the Chamber is of the view that substantial disclosure was effected on 17 May 2006 in the annex to the motion.¹⁰

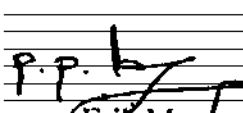
FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in its entirety;

AUTHORIZES the addition of Witnesses NATO-1, WFP, WHO-1, LIQ-1, TRA-2, LSK-1, HOP-1, HCR-1, DEF-1, ABC-1, LUXX, and OAU-1 to the witness list;

ORDERS that none of the witnesses shall appear less than thirty-five days after substantial disclosure of their identifying information and summaries of their testimony, unless this period is waived by the Prosecution.

Arusha, 6 June 2006


Erik Mose

Presiding Judge


Jai Ram Reddy

Judge


Sergei Alekseevich Egorov

Judge

[Seal of the Tribunal]



¹⁰ Disclosure of the identities and summaries of testimony of some of the new witnesses may have been provided before 17 May 2006, according to the Defence. Motion, fn. 5.