



UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

ICTR-98-41-T  
11-09-2006  
(29329-29326)

29329

S. MUSA

TRIAL CHAMBER I

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

**Registrar:** Adama Dieng

**Date:** 11 September 2006

2006 SEP 11 A 9:16  
JUDICIAL RECORDS/ARCHIVES  
UNICTR

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON BAGOSORA MOTION TO MODIFY 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

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA**

**29328**

**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 visant la modification de sa liste de témoins”, filed on 31 August 2006;

**CONSIDERING** the Prosecution Response, filed on 1 September 2006;

**HEREBY DECIDES** the motion.

**INTRODUCTION**

1. The Bagosora Defence requests leave to add two new witnesses to its witness list, and to remove fifteen others. The Defence claims that it learned of the existence of these two witnesses only recently. Their testimony is said to rebut specific Prosecution evidence and the time required for examination of both witnesses is estimated to be only three-and-a-half hours.<sup>1</sup>

2. The Prosecution does not oppose the motion, stating that it “takes no position” on whether the motion should be granted. It does argue, however, that the Defence is not required to request leave to remove witnesses from its witness list and that, indeed, they have already been removed by virtue of a letter from Lead Counsel to the Chamber dated 12 April 2006.

**DELIBERATIONS**

*(i) Applicable Standard*

3. Rule 73 *ter* (E) of the Rules of Procedure and Evidence 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:

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”. Similar principles have been applied in assessing Defence motions to vary a witness list. 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

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<sup>1</sup> Motion, paras. 27, 36.

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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>2</sup>

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.<sup>3</sup>

(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.<sup>4</sup>

(iii) *Addition of Witnesses*

5. In light of all of the factors enumerated above, the Chamber considers that it is in the interests of justice to allow the Defence to add Witnesses X-06 and X-07 to its witness list. The testimony of these two witnesses appears to be narrowly defined and focused to rebut to specific Prosecution evidence.

6. The present request is only the second filed by the Bagosora Defence, which demonstrates that they have acted diligently to minimize changes to its roster of witnesses and the consequent disruption to trial preparations. The testimony of these witnesses appears to have been discovered only in late July, which suggests that the Defence has brought the present motion as soon as practicable. Furthermore, the limited time required to hear these witnesses suggests that the orderly appearance of witnesses within the time scheduled before the end of the Prosecution case will not be disturbed, particularly in light of the withdrawal of a number of other witnesses. No basis arises from the present motion to alter the present trial schedule, which requires the Bagosora Defence to call all of its factual witnesses by the end of the present session on 13 October 2006.

7. The original disclosure obligation incumbent on the Defence was to file its witness list, along with summaries of the testimony of prospective witnesses by 3 January 2005.<sup>5</sup> In respect of subsequent amendments to Defence witness lists, the Chamber has required disclosure of this information “thirty-five days before the appearance of the

<sup>2</sup> *Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E) (TC), 26 June 2003, para. 14 (references omitted).

<sup>3</sup> *Bagosora et al.*, Decision on Nsengiyumva Motion for Leave to Amend Its Witness List (TC), 6 June 2006, para. 3.

<sup>4</sup> The witnesses removed are: B-04, E-01, F-05, G-09, H-01, H-06, L-01, M-09, N-05, N-08, O-05, Q-01, T-07, X-02 and Z-08.

<sup>5</sup> T. 21 December 2004 p. 27. 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”.

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witness”.<sup>6</sup> Disclosure of the details of these two witnesses was given to the Prosecution on 24 and 28 August 2006. In light of the limited number of witnesses involved, the Chamber considers the latter of the two dates of disclosure to be the effective date of notice for both witnesses. Accordingly, subject to any waiver by the Prosecution, Witnesses X-06 and X-07 may testify no earlier than 2 October 2006.

**FOR THE ABOVE REASONS, THE CHAMBER**

**GRANTS** the request of the Bagosora Defence to add witness X-06 and X-07 to the witness list;

**ORDERS**, to the extent that it has not yet been provided, that any identifying information and summaries of their testimony be disclosed to the Prosecution;

**DECLARES**, subject to any waiver by the Prosecution, that the witnesses may not testify before 2 October 2006.

Arusha, 11 September 2006



Erik Møse  
Presiding Judge



Jai Ram Reddy  
Judge



Sergei Alekseevich Egorov  
Judge

[Seal of the Tribunal]



<sup>6</sup> For example *Bagosora et al.*, Decision on Defence Motions to Amend the Defence Witness List (TC), 17 February 2006, p. 6.