



**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

ORIGINAL: ENGLISH

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 17 November 2006

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No.: ICTR-98-41-T

**DECISION ON BAGOSORA MOTION TO PRESENT ADDITIONAL WITNESSES
AND VARY ITS WITNESS LIST**

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid
Gregory Townsend

The Defence

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

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 “Motion to Present Its Witnesses Prior to Resting Its Case and Request for Leave to Vary Witness List”, filed by the Bagosora Defence on 26 October 2006;

CONSIDERING the Prosecution Response, filed on 30 October 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Bagosora Defence requests authorization to: (i) add five witnesses to its witness list, two of whom are proposed as replacements for existing witnesses; (ii) call these five plus six other witnesses whose names already appear on the witness list, notwithstanding that the deadline for hearing the Bagosora Defence case, as prescribed by the trial schedule, has passed; and (iii) file additional documentary evidence.

DELIBERATIONS

(i) *Variation of the Witness List*

2. Rule 73 *ter* (E) of the Rules of Procedure and Evidence (“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.

Amendments to a witness list, whether of the Prosecution or the Defence, must be supported by “good cause” and be in the “interests of justice”. A variety of factors are weighed as part of this evaluation:

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.¹

A request to add new witnesses late in a party’s case will be scrutinized closely, particularly where it may have the effect of prolonging proceedings.² As this Chamber recently held in granting a Bagosora request to amend its witness list:

¹ *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.

² *Muvunyi*, Decision on Accused’s Motion to Expand and Vary the Witness List (TC), 28 March 2006, para. 17 (“in light of the very advanced stage of these proceedings, and considering the fact that the Defence has already called the final witness on its original list, the Chamber is of the view that it would not be in the interests of justice to allow the Defence Motion”); *Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, para. 15 (“these witnesses are being presented very early in the Prosecution case”).

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 [Defence] 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 2006.³

A request by the Nsengiyumva Defence to amend its witness list just before its last trial session for presenting evidence was granted subject to the proviso that “[t]he opportunity to call these witnesses depends on the Defence’s own ability to fit them within the existing judicial calendar”.⁴

3. The present motion was filed on 24 October 2006, more than ten days after the expiration of the deadline for hearing evidence from the Bagosora, Nsengiyumva and Ntakabuze Defence teams. As discussed below in more detail, this deadline was fixed well in advance, and based on a thorough and ongoing consideration of the progress of the Defence case, and the overriding need to ensure that the Defence had adequate time to present its evidence. The Chamber considers that the deadline reflects a reasonable exercise of its discretion to establish a trial schedule, informed by an anxious consideration of the challenges faced by the Defence in locating and calling witnesses, balanced against the right of the Accused to be tried without undue delay, as well as the interests of judicial economy. The addition of new witnesses at this late stage would extend that carefully chosen deadline, and undermine the orderly progress of the trial. The timing of the present request weighs against the Defence request to add witnesses.

4. The significance and probative value of the testimony of prospective witnesses AZ, G-08 and O-03 does not outweigh the lateness of their proposed addition to the witness list. Their expected testimony is described in general terms and none of them has yet been interviewed.⁵ The Defence cannot confirm when, or even if, they are available to testify. Adding these individuals to the witness list, and keeping the Bagosora defence case open on the basis of these speculative conditions, is not in the interests of justice.

5. The request to add Ambassador Ami R. Mpungwe, however, is justified. His expected testimony, concerning his eye-witness observations at the Arusha Accord negotiations in 1992 and 1993, is described in detail and appears to the Chamber to be of potential significance. The Prosecution has been on notice of his potential appearance for some time, considering that Ambassador Mpungwe has been the object of two decisions by the Chamber requiring his cooperation and appearance as a witness.⁶ Finally, the record shows unequivocally that the Defence has acted with diligence to secure the witness’s appearance before the end of its case, and that the witness is now prepared to appear during the present session, in compliance with the Chamber’s order. For all of these reasons, the interests of justice are served by allowing his name to be added to the witness list.

³ *Bagosora et al.*, Decision on Bagosora Motion to Amend Its Witness List (TC), 11 September 2006, para. 6.

⁴ *Bagosora et al.*, Decision on the Nsengiyumva Motion to Add Six Witnesses to Its Witness List (TC), 11 September 2006, para. 5.

⁵ Motion, paras. 68 (G-08), 72 (O-03), 94 (AZ).

⁶ *Bagosora et al.*, Decision on the Bagosora Defence Request for Subpoena of Ambassador Mpungwe and Cooperation of the United Republic of Tanzania (TC), 29 August 2006; *Bagosora et al.*, Decision on Request for Subpoena of Ami R. Mpungwe (TC), 19 October 2006.

6. The Defence also wishes to add Witness ZZ on the basis that he may have information concerning the negotiation of the Arusha Accords. Unlike Ambassador Mpungwe, however, this person has apparently not yet been met by the Defence, has not previously been the object of any judicial order, and no notice of his potential appearance or disclosure of his identity has previously been given to the Prosecution. For these reasons, the Chamber considers that it is not in the interests of justice for this witness to be added to the witness list.

(ii) *Extension of Time to Present Evidence*

(a) General Considerations

7. The paramount concern in determining the schedule of a trial is to ensure that an accused has adequate time to prepare and present his or her case.⁷ Determining what is adequate in any particular trial involves an exercise of discretion, based on a myriad of factors.⁸ Such discretionary decisions, as the Appeals Chamber has explained, are guided by “the Trial Chamber’s organic familiarity with the day-to-day conduct of the parties and practical demands of the case, and requires a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly variable set of trial proceedings”.⁹ The Chamber has throughout the trial adopted a flexible and incremental approach to scheduling, in order to guarantee that the Defence has an adequate opportunity to present its case.

8. The deadline of 13 October 2006 for the close of the presentation of evidence by the Bagosora Defence follows a long arc of pre-trial and trial events. The four Accused were arrested between 9 March 1996 and 18 July 1997, meaning that they have now been in custody for more than nine years.¹⁰ Separate trials of the Accused were scheduled to commence in 1998, but were postponed as a result of an unsuccessful attempt to jointly indict them with twenty-five other defendants, and then the decision to hold a joint trial of these four Accused.¹¹ Opening statements were heard before Trial Chamber III on 2 April 2002, but the hearing of evidence did not start until 2 September 2002. After the non-re-election of one judge and the retirement of another, the parties agreed to continue the case before Trial Chamber I, as presently composed, on the basis of the existing trial record, which consisted of thirty-one days of testimony.¹² The remainder of the Prosecution case was heard between

⁷ Article 20 (4)(d): “the accused shall be entitled to ... adequate time and facilities for the presentation of his or her defence ...”.

⁸ *Milosevic*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal By the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case (AC), 20 January 2004 para. 7 (“As the decisions of the Tribunal hold, and as the *amici* acknowledge, the Trial Chamber’s order may be overturned only if the Chamber has erred in the exercise of its discretion in setting the time limits”); *Bagosora et al.*, Decision (AC), 28 October 2003, p. 4 (“it is within the discretion of the Trial Chamber to determine the progress and schedule of the Trial proceedings”).

⁹ *Milosevic*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel (AC), 1 November 2004, para. 9.

¹⁰ The length of time an accused has spent in detention can be used as a factor in determining a trial schedule, even when this factor weighs against a specific request of the Defence: *Milosevic*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeals by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case (AC), 20 January 2004, para. 8; *Martic*, IT-95-11-PT, Decision on Defence’s Motion for Postponement of Commencement of Trial (TC), 6 December 2005 (“considering that the requested postponement of nine months is not appropriate, in particular in view of the length of the pre-trial detention of the Accused”).

¹¹ *Bagosora et al.*, Decision on the Prosecutor’s Motion for Joinder (TC), 29 June 2000.

¹² *Bagosora et al.*, Decision on Continuation or Commencement *De Novo* of Trial (TC), 11 June 2003. The transfer of the case followed the non-re-election of one judge and the retirement of another.

14 June 2003 and 14 October 2004; over those sixteen months, in seven separate trial sessions, the Prosecution called eighty witnesses over 170 trial days.¹³ On 26 October 2004, the Registrar removed Lead Counsel for the Kabiligi Defence from the legal aid program on the basis of evidence that he had committed fraud. In light of the impact of this decision on the Kabiligi Defence, the Chamber postponed the start of the Defence case until 30 March 2005.¹⁴ On 1 March 2005, the Chamber further postponed the start of the Defence to 11 April 2005, with the start of the Kabiligi Defence to be determined at a later date.¹⁵ The Defence began presenting its evidence on that date, almost six months after the close of the Prosecution case. Over the next eighteen months, in six separate trial sessions, the three Defence teams called 131 witnesses over 173 trial days, before reaching the 13 October 2006 deadline.

9. The Kabiligi Defence filed its Pre-Defence Brief on 7 July 2006 and commenced the presentation of its evidence concurrent with the three other Defence teams during the sixth trial session. The seventh Defence trial session, currently underway, is scheduled to be devoted exclusively to presentation of the Kabiligi Defence evidence subject, however, to the Chamber's oral decision to hear the remainder of Bagosora witness Jean Kambanda's testimony, which had begun during the last session; and to hear one Ntabakuze witness who was the object of a pre-existing subpoena.¹⁶

10. The Chamber repeatedly reviewed the progress of the case as the Defence phase of the trial proceeded, calibrating targets and guidelines to suit the legitimate needs of the case, rather than imposing mechanistic deadlines based on a statistical comparison with the duration of the Prosecution case. In light of the pace of testimony and submissions from the Defence concerning the number of remaining witnesses, the bench observed at the end of the third trial session that the entire Defence case should end around October 2006.¹⁷ At the end of the fourth trial session, the Chamber expressly indicated that it was considering 14 July 2006 as the deadline for the presentation of evidence by the three Defence teams, with the remaining time given to the Kabiligi Defence. The three Defence teams raised various specific issues of concern, but did not register any fundamental disagreement with that deadline. To accommodate the specific concerns, the Chamber decided that the following session should be longer than usual, commencing on 15 May 2006, in order to provide sufficient time to finish by 14 July 2006.¹⁸

11. On 3 May 2006, the Presiding Judge issued a memorandum indicating that the Defence had "informed the Chamber that they are not in a position to provide a sufficient number of witnesses from Monday 5 May 20 to Friday 26 May 2006", and postponed the start of the fifth defence trial session to 29 May 2006. The memorandum then reiterated that "the three Defence teams are still expected to present all their witnesses by 14 July 2006".¹⁹ During the fifth trial session, which commenced on 29 May 2006, the Defence failed to call any evidence on thirteen trial days, despite repeated admonitions from the Chamber to use trial time efficiently. A review of the Minutes of Proceedings shows that only 79 hours and

¹³ *Bagosora et al.*, Decision on Motions for Judgement of Acquittal (TC), 2 February 2005, para. 1.

¹⁴ T. 21 December 2004 pp. 27, 41.

¹⁵ T. 1 March 2005 pp. 9, 17.

¹⁶ *Bagosora et al.*, Decision on Commencement of Kabiligi Defence and Filing of Pre-Defence Brief (TC), 21 June 2006; T. 5 July 2006 p. 13; T. 13 October 2006 p. 6 (Status Conference).

¹⁷ T. 30 November 2005 pp. 9-10 ("this case should close around October 2006 at the latest. That's what we should do, and it should be possible. And I think it could be done if everyone really now made an effort.")

¹⁸ T. 7 April 2006 p. 15.

¹⁹ Interoffice Memorandum, 3 May 2006, ICTR/JUD-11-6-1-06/010.

twelve minutes of court time was utilized during that trial session, out of a minimum of 270 hours available. During that trial session, the Bagosora Defence called only four witnesses.

12. During a Status Conference near the end of the fifth trial session, the bench observed that “there are very few witnesses left from the three teams as we have seen the development during the present session”.²⁰ Despite the three Defence teams’ inability to use trial time effectively during that trial session, the Chamber authorized them to present additional evidence in the sixth trial session, concurrent with the Kabiligi Defence, from 4 September through 13 October 2006.²¹ The Chamber unequivocally emphasized that this would be the last opportunity for the Bagosora, Nsengiyumva and Ntabakuze Defence teams to present their evidence.²² Nevertheless, during that sixth trial session, proceedings were again frequently adjourned due to lack of witnesses.²³ The Chamber reiterated throughout the proceedings that the 13 October 2006 deadline remained firm, although the Chamber also emphasized that it would consider any applications to present individual witnesses beyond that date.

(b) Specific Requests

13. The requests to hear Witnesses J-07, B-06 and N-02 after the 13 October 2006 deadline are denied. The Chamber recently denied a Bagosora motion requesting the assistance of a State for the appearance of Witness J-07, on the ground that his testimony had not been shown to be necessary and appropriate for the conduct of the defence.²⁴ The interests of justice do not favour altering the trial schedule to accommodate a witness whose appearance is both unnecessary and unlikely. The timing of the appearance of Witness B-06 is also uncertain. The reason for his unavailability during the entire course of the Defence case prior to 13 October 2006 is unclear, and the Chamber is not persuaded that his testimony is of sufficient importance to justify his appearance at this stage. Witness N-02’s expected testimony has not been described with particularity, nor has any convincing reason been given why steps could not have been taken for his appearance before 13 October 2006. The possibility that Witness N-02’s testimony could have been replaced by documents, yet to be received from the Government of Rwanda, provides no justification for not having called him according to the trial schedule.

14. The Chamber will allow the Bagosora Defence to call Ambassador Mpungwe and General Gatsinzi during the last Defence trial session. Judicial orders for the cooperation and appearance of these witnesses have been outstanding since before the expiry of the 13 October 2006 deadline. The Chamber considers that the interest of justice favours hearing their evidence provided that they can appear prior to the end of the present trial session, which concludes on 13 December 2006.

²⁰ T. 5 July 2006 p. 6.

²¹ T. 5 July 2006 p. 13. Failure to provide a steady flow of witnesses has been taken as an indication that the Defence has had an adequate opportunity to present its case. *See Krajisnik*, Case No. IT-00-39-T, Decision on Defence’s Rule 74 *bis* Motion; Amended Trial Schedule (TC), 27 February 2006, paras. 9, 15, 17.

²² T. 5 July 2006 p. 17 (“To the extent that the three teams are not able to present their witnesses by the end of the first segment [ending on 13 October 2006], those witnesses will fall. That’s the end.”).

²³ *E.g.* 8, 11, 13, 15, 19, 20 September 2006.

²⁴ *Bagosora et al.*, Decision on Bagosora Request for the Government of France to Authorize the Appearance of a Witness (TC), 20 October 2006; *Bagosora et al.*, Decision on Bagosora Request for Certification to Appeal Decision on Request for Assistance Under Article 28 (TC), 6 November 2006.

15. The Chamber also authorizes the appearance of expert witnesses Bernard Lukan and Peter Caddick-Adams.²⁵ The Bagosora Defence's long-held and often-repeated position was that these witnesses should be permitted to testify near the end of the case so as to be able to comment on the totality of factual evidence presented by all the defendants. The Kabiligi Defence did not object to that request until recently. Under these particular circumstances, the Chamber grants leave to the Bagosora Defence to call these witnesses during the trial session which concludes on 13 December 2006. The appearance of these witnesses must be co-ordinated with the Kabiligi Defence, which must have first priority in the presentation of witnesses during the present trial session.

(iii) Documents

16. The deadlines prescribed by the Chamber for the hearing of evidence concerned testimonial evidence. The Chamber hereby declares that any Defence team may tender documentary evidence for admission through the end of the trial on 13 December 2006.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the request for the addition of Ami R. Mpungwe to the Bagosora Defence witness list;

DENIES the request for the addition of witnesses O-03, ZZ, and AZ to the Bagosora witness list;

GRANTS the request to present the testimony of witnesses Mpungwe, Gatsinzi, Lukan, and Caddick-Adams during the trial session ending 13 December 2006;

DENIES the request to present the testimony of witnesses J-07, B-06 and N-02;

DECLARES that any Defence team may tender documentary evidence for admission through the end of the present trial session on 13 December 2006.

Arusha, 17 November 2006

Erik Møse
Presiding Judge

Jai Ram Reddy
Judge

Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

²⁵ The Chamber has already announced orally that it would grant the request to hear the testimony of Dr. Lukan during the present session. T. 10 November 2006 p. 29.