ICTR-98-41-T
30-10-2006
(31250-31244)

UNITED NATIONS
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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

Arusha International Conference Centre
P.O.Box 6016, Arusha, Tanzania - B.P. 6016, Arusha, Tanzanie
Tel: 255 57 4207-11 4367-72 or 1 212 963 2850 Fax: 255 57 4000/4373 or 1 212 963 2848/49

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S. Musoni

TRIAL CHAMBER I

Before: Judge Erik MØSE, *Presiding*
Judge Jai Ram REDDY
Judge Sergei Alekseevich EGOROV

Registrar: Mr. Adama Dieng

Date filed: 30 October 2006

2006 OCT 30 P 4:18
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THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. ICTR-98-41-T

PROSECUTOR'S RESPONSE TO

"Bagosora Defence Motion to present Its Witnesses Prior to Resting Its Case and Request for Leave to Vary Witness List "

Prosecution Counsel

Christine GRAHAM
Rashid RASHID
Barbara MULVANEY
Drew WHITE
Gregory TOWNSEND
Kartik MURUKUTLA

Defence Counsel

Raphaël CONSTANT
Allison TURNER
Paul SKOLNIK
Frederic HIVON
Peter ERLINDER
André TREMBLAY
Kennedy OGETTO
Gershom Otachi BW'OMANWA

OVERVIEW

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1. The Accused Bagosora brings an application fronting a dual request: first, to postpone the date of closure of the Bagosora defence case, and second, to grant relief regarding the Bagosora Defence Witness List, effectively so as to permit the calling of eleven more Bagosora witnesses.

2. The Prosecutor opposes the requested relief, primarily on the ground that the Trial Chamber has already exercised its discretion with respect to the matters at hand, and exercised the discretion appropriately, and secondarily on the ground that the relief requested is not warranted.

3. The Prosecutor notes that in the 18 May 2006 Prosecutor's Response to Nsengiyumva's Motion to add witnesses, the Prosecutor opposed the addition primarily on the basis of the timing of the request. The Prosecutor herewith reiterates and incorporates the reasoning of the prior 18 May Response.

SUBMISSIONS

Eleven More Bagosora Witnesses

4. The final trial segment contains a possible 28 trial-days, running from 6 November to 13 December. Assuming 6 hours of trial time a day, there is a maximum available of 168 trial-hours which might be expended on witness testimony. The Kabiligi Defence team has indicated 30 witnesses for the final segment. Taking the time estimates for those witnesses provided by the Kabiligi team[1] and assuming an equal amount of time allotted to the Prosecution for cross-examination, the total number of hours estimated is 171, not including the accused himself, not including the Kabiligi expert Duvivier, not including witness Kambanda and not including witness Saint Quentin. When taking reasonable

[1] Being 64.5 hours for the 21 witnesses for whom estimates were provided, at an average of 3 hours per witness, with the addition of 21 hours for the 7 witnesses for whom no estimate was provided, for a total of 85.5 hours in examination-in-chief.

estimates for those other four, the estimated hourly total increases by approximately 57 hours to a cumulative total witness-hours of 225.

5. Thus, even with existing scheduled witnesses, there is a projected shortfall of approximately 9.5 trial-days, or in other words, two full weeks.

6. The Bagosora witness 'proposal' would add another two full weeks on top of the projected shortfall of time. The proposal is patently unreasonable.

Postpone the Closing Date

7. The calculations above illustrate the point that in order to ensure a reasonable completion of the trial proper, it was necessary for the Trial Chamber to impose reasonable limits and deadlines. Without the directions of the Trial Chamber imposed upon the various defence teams, no reasonable completion would take place.

8. A second illustration serves the point. In the trial segment originally scheduled for 15 May 2006 to 14 July 2006, the Bagosora defence team was on notice by February 2006 that the May-July segment of 9 scheduled weeks would be the final opportunity to present their remaining witnesses. That proscription also applied to the Ntabakuze and Nsengiyumva teams. However, at the conclusion of that trial segment none of the three teams was prepared to voluntarily close their case, claiming that each team had more witnesses yet to produce. The Trial Chamber granted a reprieve to call an unspecified but small number of witnesses in the subsequent trial segment. That reprieve was granted despite the obvious loss of considerable trial time during the May-July segment when the defence failed to produce witnesses. The numbers on that loss of time are instructive as to the reasonableness of the Trial Chamber and the need to impose limits. In the 9 week May-July segment, there were 45 available trial-days. Of those 45 available days, only 8 were "full days" in court, even allowing for ending the daily proceedings as early as 3:45 pm[2] because the defence had no more witnesses to produce. Of the 37 remaining trial-days, only 14 could be classified as "partial days", where the evidence ranged from 1 to 3 hours before the witnesses 'ran out'. Consequently, in a trial segment of 45 available court-days, there were

[2] Although the usual assumption is that there are 6 available hours of testimony in a trial day.

23 days on which no testimony was heard.[3] Of the 270 court-hours[4] available in the May-July 2006 trial segment, approximately 195 went unused for testimony[5].

9. In the subsequent 'reprieve' trial segment in September-October 2006, numerous additional trial-days were lost due to the Defence not producing witnesses.[6] The Bagosora defence itself produced only 3 witnesses[7] out of the 27 who appeared during the entire session. In the past 6 months the Bagosora Defence has produced only 6 witnesses.[8]

10. 104 weeks elapsed between the close of the Prosecution case and the close of the case for Bagosora. Of those 104 weeks, some 42 weeks were used in the course of the 6 defence trial segments that took place, leaving 62 unused, clear, out-of-court weeks for the Bagosora Defence to prepare and make arrangements to present their witnesses and defence.

11. The trial record is painfully clear, the Defence had ample and repeated opportunity to present their witnesses during the time that was allotted to them to do so. There need be no concern that imposing the deadline of 13 October was in any way unreasonable or outside of the discretion of the Trial Chamber. The Bagosora defence claim of the proceedings being "unfair"[9] is wholly specious. The companion claim of "abuse of judicial discretion"[10] is so groundless as to be insulting.

Recent Variation of Bagosora Witness List

12. Judicial discretion was exercised in favour of the Bagosora defence on 11 September 2006 when the Trial Chamber granted a request to vary the Bagosora witness list and add witnesses. Both of the witnesses who were requested to be added were added, and both of those witnesses were accommodated by the Chamber within a matter of weeks, before the end of the trial segment that was then in session.

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[3] May 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, June 1, 2, 8, 9, 14, 15, 23, 28, 29, 30, July 3, 5 & 14.
[4] 45 available days times 6 available court-hours per day.
[5] Calculations as taken from the official Minutes of Proceedings.
[6] Days on which there was no testimony: September 4, 5, 12, 14, 19 & 29
30 available court-days = 180 available court-hours, of which approximately 60 went unused for testimony.
[7] Apedo, X06 & X07
[8] Shimamungu, Z06, Kambanda, Apedo, X06 & X07
[9] Motion filed 26 October 2006, page 5, paragraph 27; Registry Page #31157.
[10] Ibid

13. Having granted a discretionary remedy at such a late stage of the proceedings, the Trial Chamber ought to be very hesitant to duplicate the extraordinary concession again, less than 2 months later, when there is no reason to suppose that the Defence should not have made diligent efforts and requests well before the present.

Specific Witness Issues

14. Witness Mpungwe: Judicial discretion was again exercised in favour of the Bagosora defence on 19 October 2006 when the Trial Chamber granted a request to hear Ambassador Mpungwe during the November-December 2006 final trial segment. Consequently, there is no need for the Chamber to deal with witness Mpungwe again in the present Motion.

15. Regarding Bernard Lugan: The Bagosora Defence suggests in paragraph 58 that the Prosecutor's deadline to file a Rule 94*bis* Notice regarding Lugan has "come and gone". Respectfully, the proposed Lugan Report was filed on 27 September and received by the Prosecutor on 28 September 2006, so it was apparent that Lugan could not testify before the 18th of October 2006, according to the 21 day rule. As 18 October fell beyond the Bagosora closing date of 13 October, it was equally apparent that no Rule 94*bis* Notice was necessary, because the deadline for producing the proposed report before the end of the case had "come and gone".

16. Further on the issue of the attendance of proposed expert witnesses, the Defence may have taken some instruction from the Prosecutor's correspondence dated and filed 26 April 2006, provided to all parties, which cautioned that if expert report material was not received sufficiently in advance of the end of the scheduled completion (at that time set for 15 July 2006), "...then we will take the position that you have simply run out of time, failed to produce the witnesses within the time available and that no report can be tendered and no evidence from that expert can be adduced. For the purpose of your scheduling, you may take it that pursuant to Rule 94bis(B), the Prosecutor will require the attendance of the expert witnesses for cross-examination."

17. Regarding Peter Caddick-Adams: The Trial Chamber clearly cautioned the Bagosora defence concerning the requirement to produce both Lugan and Caddick-Adams as

potential expert witnesses during the September-October trial segment.[11] That caution and requirement was issued to the Defence team in person, in the Chamber, on the record, on 5 July 2006. The subsequent period of time between the issuing of that caution and the end of the Defence case some 3 months later was both a reasonable and a practical period of time for the Defence to abide by the direction, and take due caution. Having failed to do so, the Defence has no reason for complaint now, after the close of the case.

18. Regarding the remaining proposed witnesses, General Gatsinzi, J07, B06, N02, G08, 003, ZZ and AZ, their claimed appearances are neither necessary nor warranted, and none of them are worthy exceptions to the planned and orderly completion of the case in a reasonable and fair manner, as described by the Trial Chamber to the Defence on 5 July 2006, at page 17, lines 15-19, where it was cautioned:

> We have now tried to find a solution which balance the various interests of the parties, but in order to carry this to finality in an organised way, there is one additional remark to be made. **To the extent the three teams are not able to present their witnesses by the end of the first segment, those witnesses will fall. That's the end.** You will be in the same position as the Prosecution; you will "live and die with it." That was the expression during the Prosecution case.

Conclusion

19. In summary,

a) none of the relief sought is warranted;

b) the Trial Chamber has repeatedly exercised its discretion in favour of the Defence, fairly and without abuse;

c) the Defence has been the master of its own fate in the matter of witness investigation, scheduling, production and use of available Court time;

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[11] Transcript, 5 July 2006, page 20 lines 26-31
MS. TURNER:
I know I mentioned this earlier, but with respect to the two experts that the Bagosora Defence would like to call at the end of the Kabiligi evidence case, I was wondering whether the Chamber could clarify for the record that these two experts would not have to testify at the end of the next session but at the end of the last session, at the end of all the proof.
MR. PRESIDENT:
They have to testify just like the other ones, by the end of the first session.

d) if the Defence has failed to choose wisely with respect to witness investigation, scheduling, production and use of available Court time, the Trial Chamber has no obligation to relieve the Defence of the burden of the choices they have made;

e) The Trial Chamber has provided the Defence the opportunity of substantial resources for the presentation of the Defence case, but those resources are not without limits, have never been said to be without limits and have, reasonably and fairly, reached their limits.

20. The Motion deserves to be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Arusha, 30 October 2006.

Barbara MULVANEY
(Prosecution Counsel)

Rashid RASHID
(Prosecution Counsel)

Christine GRAHAM
(Prosecution Counsel)

Gregory TOWNSEND
(Prosecution Counsel)

Kartik MURUKUTLA
(Prosecution Counsel)

Drew WHITE
(Prosecution Counsel)

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Case Name:	The Prosecutor vs. **Bagosora et al**		**Case Number:** ICTR-98-41-T	
Dates:	Transmitted: **30 October 2006**		Document's date: **30 October 2006**	
No. of Pages:	7	**Original Language:**	☒ English ☐ French ☐ Kinyarwanda	
Title of Document:	**Prosecutor's response to "Bagosora Defence motion to present its witnesses prior to resting its case and request for leave to vary witness list"**			

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