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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

TRIAL CHAMBER I

Original: English

Before: Judge Navanethem Pillay
Judge Erik Møse
Judge Asoka de Z. Gunawardana

Registrar: Ms Marianne Ben Salimo

Decision date: 26 June 2001

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Aminatta L.R. N'GUM
26/06/2001

THE PROSECUTOR

v.

FERDINAND NAHIMANA
HASSAN NGEZE
JEAN BOSCO BARAYAGWIZA
(Case No. ICTR-99-52-T)

DECISION ON THE PROSECUTOR'S ORAL MOTION FOR LEAVE TO AMEND
THE LIST OF SELECTED WITNESSES

Office of the Prosecutor:

Mr Stephen Rapp
Mr William T. Egbe
Mr Alphonse Van
Ms Charity Kagwi
Ms Simone Monasebian
Mr Elvis Bazawule

Counsel for the Accused:

Ms Diana Ellis
Mr John Floyd III
Mr Alfred Pognon

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda	
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME COPIE CERTIFIÉE CONFORME A L'ORIGINAL PAR NOUS	
NAME / NOM: AMINATTA L.R. N'GUM	
SIGNATURE: <i>Aminatta L.R. N'GUM</i>	DATE: 26/06/2001.

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal");

SITTING as Trial Chamber I, composed of Judge Navanethem Pillay, presiding, Judge Erik Møse and Judge Asoka de Zoysa Gunawardana;

BEING SEIZED of the Prosecution's oral motion, dated 4 June 2001, for leave to amend the list of selected witnesses for the balance of the trial pursuant to Rule 73bis(E) and considering the Prosecution's summary of anticipated testimony of additional prosecution witnesses, dated 7 June 2001;

HAVING HEARD the Parties in closed session on 11, 12 and 13 June 2001; and having received a written summary from Counsel for the Accused Ferdinand Nahimana, dated 11 June 2001.

INTRODUCTION

1. On 27 June 2000 the Prosecutor filed a list ("the initial list") of 97 selected witnesses. It was amended on 4 August 2000. A list of more than 300 witness statements from 221 witnesses disclosed to the Defence was filed on 16 August 2000.
2. On 16 October 2000 the presiding Judge issued a Scheduling Order according to which the Prosecution was obliged to provide a list of exhibits and related witnesses four days in advance of each week's hearing. The trial commenced on 23 October 2000.
3. On 22 February 2001 the Trial Chamber made an oral order to the Prosecution to present a schedule of witnesses to be called to testify. Counsel for the Prosecution responded on 26 February 2001 that there would be 40 additional Prosecution witnesses to be called to testify. He made the commitment that they would as far as possible be from the list of 97 witnesses.
4. On 25 April 2001 the Chamber requested the Prosecution to indicate when a final list of witnesses would be provided. Counsel for the Prosecution answered that such a list would be presented on 27 April 2001. On 2 May 2001 he stated that, at that stage of the trial, it was impossible to provide a final list of witnesses, but he undertook to schedule witnesses to be called during the trial until the judicial recess in July 2001.
5. The Prosecution submitted a revised list of witnesses on 4 June 2001 and indicated its intention to present an oral motion under Rule 73bis of the Rules of Procedure and Evidence ("the Rules"). During the Status Conference on 11 June 2001 the Chamber decided, following representations from Counsel for Ferdinand Nahimana, to hear the oral motion in court, but in a closed session.

SUBMISSIONS BY THE PARTIES

The Prosecution

6. Counsel for the Prosecution argued that the Prosecution has the burden to prove its case beyond reasonable doubt and must therefore be able to present the best and most effective witnesses. Consequently, pursuant to Rule 73bis (E), the Prosecution

requested leave to vary the initial list of 97 witnesses ("the initial list") in the following way:

- a) Retaining eight more witnesses from the initial list;
 - b) Not calling the remaining 55 in the initial list;
 - c) Adding 25 new witnesses, two of whom are investigators;
 - d) Adding two new expert witnesses.
7. Among the 55 witnesses that the Prosecution does not intend to call are two deceased witnesses and seven who are reluctant to testify due to fear for their security. The testimonies of the additional witnesses contain probative evidence in relation to the indictments. Counsel for Prosecution explained that some of the additional witnesses stem from on-going investigations; some of them are expected to counter the alibi notice from Ferdinand Nahimana; some will replace witnesses that the Prosecution does not intend to call; and some will corroborate evidence led so far during the trial.
8. Counsel for the Prosecution submitted that the new list represents its final determination of witnesses as requested by the Defence. This implies that the actual number of witnesses will be reduced from 97 to 71 and that the whole trial will be shortened. In addition, he argued that it is not the intention of the Prosecution to call the witnesses until the Defence has had proper disclosure and sufficient time to prepare.
9. The Prosecution's request also included two more expert witnesses, namely Jean-Pierre Chrétien and Marcel Kabanda. The Chamber was informed that these persons had not been willing to testify initially, but that they are now available. Their testimonies will cover electronic and print media.

The Defence

10. Counsel for Hassan Ngeze submitted that his client would suffer substantial prejudice if the motion submitted by the Prosecution were granted. It would also be a violation of due process and fundamental fairness. On several occasions earlier, the Prosecution had assured the Defence that what the Prosecution had presented so far was all the material relevant to the case.
11. Counsel also argued that the additional witnesses will present new facts, which he had not been able to contradict during his previous cross-examinations. This would cause substantial prejudice to the strategy of the Defence.
12. Counsel for Ferdinand Nahimana questioned the relevance of Rule 73*bis* to this case. The decisive criterion is not "the interests of justice" but whether the Prosecution has shown "good cause" under Rule 66(A)(ii) for the late disclosure of the witness statements. Difficulties in the Prosecution's office or unsubstantiated allegations pertaining to the security of witnesses are not "good cause". Disclosure has been improper, incomplete and late. Witness statements of some of the witnesses have not been received at all.

13. Counsel argued that the varying of the initial list of witnesses would cause delays in the proceedings. The Prosecution had stated that only 47 witnesses would be called. The additional witnesses would also cause prejudice to the Accused. The Defence would not have adequate time to prepare as required under Article 20 of the Statute. Moreover, the Defence is entitled to have all the evidence before the trial so as to have a comprehensive view of the entire case.
14. Counsel for Nahimana also submitted that the Prosecution has had sufficient time to make the necessary inquiries as it had received notice of alibi well in advance of the trial in conformity with Rule 67. Counsel noted that by presenting witness AEN, the Prosecutor failed to challenge the alibi. It is contrary to a fair trial if the Prosecution is allowed to replace two weak witnesses by another stronger one.
15. Counsel for Jean Bosco Barayagwiza associated himself with the submissions made by the Defence for the two other Accused. He argued, *inter alia*, that some aspects to be testified to by the new witnesses are clearly not covered by the indictment, especially in respect of the presence of his client at roadblocks.

DELIBERATIONS

Applicable Provisions

16. The Prosecution's motion is based on Rule 73bis (E) of the Rules, which states:

"After commencement of Trial, the Prosecutor, if he 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 his decision as to which witnesses are to be called."¹

17. It follows from case law that the final decision as to whether it is in the interests of justice to allow the Prosecution to vary its list of witnesses rests with the Chamber. In the case of *The Prosecutor v. Alfred Musema*, former Trial Chamber I found that it was in the "interests of justice" to allow the Prosecutor to vary her initial witness list by calling four new witnesses. However, leave was denied in relation to one witness who was not an eye-witness to the events.² In the *Goran Jelusic case*, the ICTY held "it to be in the interests of justice that any evidence necessary to ascertain the truth be presented to it and be subject to examination by the parties". However, such interests must not prejudice the principle that the accused has the right to trial without undue delay. The Chamber therefore allowed the additional witnesses but ruled that the Prosecution could only call one of two witnesses as both were to testify to the same facts as a witness already on the initial list. The Prosecutor was ordered to choose between the two latter.³
18. In the present case, the parties had different views on the relationship between Rule 73bis (E) and Rule 66. The latter provides that the Prosecution shall disclose to the Defence no later than 60 days before trial copies of all witnesses the Prosecution "intends to call to testify at trial". However, upon "good cause" shown, a Trial

¹ As amended on 31 May 2001.

² Decision of 20 April 1999 (ICTR-96-13-T).

³ Decision of 27 April 1999 (Case No. IT-95-10-T).

Chamber may order that copies of statements of additional prosecution witnesses be made available to the Defence within a prescribed time". Therefore, whereas Rule 73bis (E) relates to variation and addition of witnesses during the trial, Rule 66 - according to its wording - deals with disclosure at the pre-trial stage. In *The Prosecutor v. Ignace Bagilishema*, this Trial Chamber stated that the purpose of Rule 66 is to give the Defence sufficient notice and adequate time and, at the same time, to ensure that relevant Prosecution evidence is not excluded merely on procedural grounds.⁴ The principle of "good cause" was, therefore, also applied at the trial stage. The Chamber notes that the need for the Defence to have a clear and cohesive view of the Prosecution's strategy and to be able to make appropriate preparations was also stressed in *The Prosecutor v. Tihomir Blaskic*. However, that case only dealt with pre-trial disclosure of a list of witnesses.⁵

19. The Rules do not define the term "interests of justice", but the Chamber is of the opinion that it refers to a discretionary standard applicable in determining a matter given the particularity of the case. When a Trial Chamber has granted leave to call new prosecution witnesses under Rule 73bis, statements of such witnesses will form part of the case against the Accused. It follows that the Chamber in its determination will bear in mind also the question of "good cause".
20. In assessing the "interests of justice" and "good cause" Chambers have taken into account such considerations as the materiality of the testimony, the complexity of the case, prejudice to the Defence, including elements of surprise, on-going investigations, replacements and corroboration of evidence. The Prosecution's duty under the Statute to present the best available evidence to prove its case has to be balanced against the right of the Accused to have adequate time and facilities to prepare his Defence and his right to be tried without undue delay.

Factual Witnesses

21. On 21 May 2001 the Prosecution tendered a list of 13 witnesses to be called from May through August 2001. The Defence raised no objection to these 13 witnesses, of whom two have now testified. The Chamber notes that there is no dispute between the parties concerning this group of witnesses, who were all on the initial list.
22. Eight witnesses - GF, SA, AAN, ABH, AAO, AFK, AFM and AFP - were on the initial list of 97 witnesses, but the Prosecution had not informed Defence that they would be called before the present motion was introduced. Defence Counsel conceded that they had read the statements of these witnesses, but that the statements had not been used during cross-examination in the way the Defence would have done had it been certain that these witnesses would be called.⁶ The Chamber does not find this convincing. It is clear that until the present motion was filed the Prosecution had not submitted a final list of witnesses. In February 2001 the Prosecution indicated that 47 witnesses would be called. By May 2001 it identified a limited number of further witnesses out of 47. Under these circumstances, Defence was under notice that further

⁴ Decision of 2 December 1999 (Case No. ICTR-96-1-T).

⁵ Decision of 27 January 1997 (Case No. IT-95-14 PT).

⁶ See, in particular, transcripts of 11 June p. 117 (Floyd) and of 12 June 2001 pp. 127-128 (Ellis).

witnesses from the list of 97 would be called. Consequently, the Chamber allows the Prosecutor to call these eight witnesses to testify at trial.

23. In addition to these witnesses, the Prosecution's amended list of witnesses of 4 June 2001 contains 25 new factual witnesses. Two of these witnesses (Nos. 24 and 25) are ICTR investigators: Aaron Musonda and Kaiser Rizwi. The Defence did not address these investigators during the hearing, with the exception of Counsel for Ngeze, who explicitly stated that the calling of these two witnesses had been anticipated.⁷ Consequently, the Chamber allows that these two investigators be called.
24. The Prosecutor has submitted that some witnesses are no longer available. Two witnesses - AAH and FK - are deceased. Seven are reluctant to testify due to fear of security. These are witnesses AC, AEO, AGS, AN, AX, FD and FT. The Chamber has no reason to doubt the information provided by the Prosecution and takes the view that it is in the interests of justice to allow their replacement. The Prosecutor has submitted that those witnesses will be replaced by ABC, ABM, ADO, AHD, AHH, AM/AFO, DCD, DCH, GHK and QAX. Thus, the Chamber holds that it is in the "interests of justice" to allow their testimony and that there is "good cause" for the disclosure of their statements.
25. Witness AHE, AHJ and AZZ are called to counter the notice of alibi from the Accused Nahimana. The Chamber allows these testimonies. Notice of alibi was filed in conformity with Rule 67, but shortly before commencement of trial. It is understandable that the Prosecution needed time to investigate. Therefore, the inclusion of these witnesses in the list would be justified both on good cause and in the interests of justice.
26. Witness AFT is called to replace witness AX and to counter the alibi. Another witness, AHD, is also called to replace AX. There appears to be a duplication of testimony. Furthermore, the main part of AFT's testimony appears to fall outside the temporal jurisdiction of the Tribunal. Therefore, the Chamber disallows witness AFT.
27. Nine witnesses - ABC, ABM, ABU, ADO, AEI, AFF, AFI, LAG and QAX - were not on the initial list. However, their statements were among the 300 statements disclosed on 16 August 2000, well in advance of the 60-day deadline in Rule 66(A)(ii). The Chamber has already granted leave to call Witnesses ABC, ABM, ADO and QAX in order to replace other witnesses, see para. 25 above. In relation to the remaining five witnesses, the Chamber will balance the need for the Defence to have sufficient notice of the case against the Accused, and the interests of justice under Rule 73bis.
28. The Prosecutor must have had a view on how it would prove its case at the stage of confirmation of the indictment. Before the trial, it selected 97 witnesses out of the 300 statements and informed the Defence, who was relying on this information to prepare their defense. The Chamber has carefully considered the summaries of the proposed testimony of the five witnesses, in particular whether disallowing them will prejudice the Prosecution. The Chamber has decided to allow three witnesses: ABU is expected to testify in respect of the involvement of all three Accused in the CDR. Witness AEI

⁷ Transcripts of 12 June 2001 p. 82.

apparently heard Barayagwiza stating at a meeting that Tutsi should be massacred. Witness LAG is expected to testify that Ngeze and Barayagwiza played a leading role during a meeting where people were beaten. On the other hand, the Chamber does not grant leave to call witness AFF, who is a journalist collaborating on the same publication as one of the new expert witnesses. Similarly, AFI is a journalist who worked in Rwanda in 1994. Her statement mainly contains indirect evidence and would seem to be of limited value for the Chamber.

29. Some of the witness statements were disclosed in May 2001. The Chamber recalls that Rule 66 (C) envisages that the Prosecution may undertake further or on-going investigations. It would run counter to this provision if the Chamber were to exclude all testimonies which were the product of on-going investigations. In the present case, the Prosecution could hardly have disclosed these statements earlier. The Chamber will consider each case on its merits bearing in mind the materiality of the testimony to the case and the potential prejudice of the late disclosure to the Defence. Witnesses AHB and AHC are called to corroborate AAJ's testimony about Jean Bosco Barayagwiza's alleged involvement in the distribution of weapons. The Chamber is of the view that paragraphs 5.17 and 5.23 of the indictment give sufficient notice in this regard. However, in order to avoid duplication the Chamber will allow the Prosecution to call one of these witnesses.
30. Witness AHF, whose statement was also disclosed for the first time in May 2001, is called as a replacement for ADT in relation to meetings attended by Nahimana in 1992 and 1993. The Chamber sees limited need for further evidence in relation to this period and disallows this witness.
31. AHI's statements were disclosed on 9 April 2001. The Chamber notes that the Prosecutor has disclosed six statements based on on-going investigations and that the witness is anticipated to testify on Ngeze's superior responsibility. This is material to the case and has not been covered by witnesses so far.
32. The Defence has generally argued that they are taken by surprise by late disclosure and have lost opportunities to cross-examine earlier witnesses on matters arising from the new testimonies. The Chamber notes that considerable time will pass before any of these witnesses will be called. This will allow Defence adequate time for preparation. In relation to previous cross-examination, the Defence may apply for leave to recall witnesses for further cross-examination.
33. The present decision implies that the Prosecution will be allowed to call more witnesses than 47, indicated by the Prosecution in February 2001, but less than 97, which was the original number on the initial list. This will require more time for the trial. Defence stressed that this is unreasonable, particularly in view of the Prosecution's previous statement that it anticipated conclusion of its case by 23 July 2001. However, the Chamber observes that the length of the trial and delays are attributable not only to the number of OTP witnesses but also to the extensive cross-examination by Defence Counsel. The Chamber intends to exercise greater control over the examination-in-chief and cross-examination as a way of achieving a more expeditious trial (see also Rule 90(F)(ii) of the Rules.)

Expert witnesses

34. According to Rule 94bis the Prosecutor shall disclose to the opposing party the full statement of an expert witness to be called as early as possible. It shall be filed with the Trial Chamber not less than twenty-one days prior to the date on which the expert is expected to testify.
35. The Chamber observes that on the initial list it was indicated that the Prosecution would call Alison Des Forges, historical expert, and Mathias Ruzindana, socio-linguistic expert. The present motion introduces two additional experts, Marcel Kabanda and Jean-Pierre Chrétien. They are experts concerning print media and electronic media, respectively. The Prosecution has explained that these two witnesses were not previously available.
36. The Chamber notes that considerable parts of the indictments refer to the Accused persons' alleged involvement in the 1994 media apparatus in Rwanda. Such testimonies of the expert witnesses are relevant for the determination of the case. Even if their testimony may take some time, it is important that the core issues of the case are thoroughly dealt with. Moreover, in conformity with its previous practice, the Chamber will seek to limit the time for questioning of all expert witnesses and focus on issues arising from their written reports.
37. The Chamber is not convinced that the Defence is taken by surprise. It is true that the Defence cannot instruct their potential experts without knowing the parameters to be given by the Prosecution expert witnesses. The Chamber notes, however, that the Prosecution experts will not be testifying in the near future, and that further time will elapse before the experts for the Defence will give evidence. This being said, the Chamber is anxious to ensure that the reports of the experts be made available to the Defence as soon as possible. It follows from Rule 94 that the intention is that as soon as the Prosecution comes into possession of the expert reports it should disclose them as early as possible and not wait until 21 days before their respective testimony.

FOR ALL THE ABOVE REASONS, THE TRIBUNAL,

GRANTS leave to the Prosecution to call the eight witnesses "GF", "SA", "AAN", "ABH", "AAO", "AFK", "AFM" and "AFP", who were on its initial list of witnesses;

GRANTS leave to the Prosecution to call two investigators, Aaron Musanda and Kaiser Rizwi.

GRANTS leave to the Prosecution to vary its initial list of witnesses by adding the replacement witnesses "ABC", "ABM", "ADO", "AHD", "AHH", "AM/AFO", "DCD", "DCH", "GHK" and "QAX";

GRANTS leave to the Prosecution to vary its initial list of witnesses by adding counter alibi witnesses "AHE", "AHJ" and "AZZ";

GRANTS leave to the Prosecution to vary its initial list by adding witnesses "ABU", "AEI" and "LAG", whose statements were previously disclosed;

DENIES leave to the Prosecution to vary its initial list by calling witnesses "AFF" and "AFI", whose statements were previously disclosed;

GRANTS the Prosecution leave to vary its initial list by calling witness "AHI" and either witness "AHB" or "AHC";

DENIES leave to the Prosecution to vary its initial list by adding witness "AHF", whose statement was recently disclosed;

DENIES leave to the Prosecution to vary its initial list by adding witnesses "AFT";

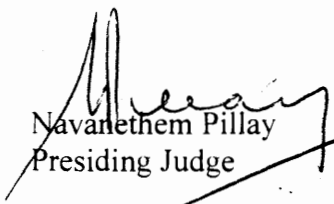
ORDERS the Prosecution, in cases where it has not done so, to disclose the witness statements in both working languages to the Defence within 15 days from the date of this decision;


GRANTS leave to the Prosecution to vary her initial list of witnesses by adding the expert witnesses Jean-Paul Chrétien and Marcel Kabanda;

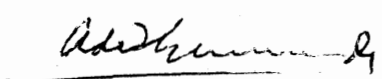
ORDERS the Prosecutor to disclose as early as possible and not later than the date to be fixed at the Status Conference to be held on 26 June 2001 the full reports of the four expert witnesses, Alison Des Forges, Mathias Ruzindana, Jean-Paul Chrétien and Marcel Kabanda.

DECIDES that should the Prosecution fail to comply with the deadlines imposed in this order it will be barred from calling the witnesses concerned.

Done in Arusha, this 26th day of June 2001.


Navanethem Pillay
Presiding Judge


Erik Møse
Judge


Asoka de Z. Gunawardana
Judge

