24085

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

UNITED NATIONS
NATIONS UNIES

TRIAL CHAMBER I

OR: ENG

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

Registry: Mr. Adama Dieng

Decision of: 14 September 2001

THE PROSECUTOR
v.
FERDINAND NAHIMANA
HASSAN NGEZE
JEAN BOSCO BARAYAGWIZA
(Case No. ICTR-99-52-I)

DECISION ON THE PROSECUTOR'S APPLICATION TO ADD WITNESS X TO ITS LIST OF WITNESSES AND FOR PROTECTIVE MEASURES

The Office of the Prosecutor:

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

Counsel for the Accused:

Mr. Jean-Marie Biju-Duval
Ms. Diana Ellis
Mr. John Floyd III
Mr. René Martel
Mr. Giacomo Barletta Caldarera
Mr. Alfred Pognon

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 Z. Gunawardana;

BEING SEIZED OF an *ex parte* application, dated 11 June 2001, and filed with the Trial Chamber pursuant to Rule 66 (C) of the Rules of Procedure and Evidence ("the Rules") for the addition of a new Witness X, to the Prosecution's witness list, and for special protective measures for him;

CONSIDERING additional written submissions from the Prosecution and written submissions from the Defence teams;

CONSIDERING the *inter partes* hearings of the motion on 5 and 6 September 2001;

HEREBY DECIDES the said Prosecution motion.

INTRODUCTION

1. On 26 June 2001, the Trial Chamber decided the Prosecutor's oral motion of 4 June 2001 pursuant to Rule 73 bis (E) for the variation of the Prosecution witness list. In its decision, the Chamber granted the Prosecution leave to add several witnesses to its list of witnesses. The motion was heard by the Chamber in closed sessions on 11-13 June 2001. During the hearing, it became known to the Defence that the Prosecution had filed the present motion concerning Witness X.[1] Following the judicial recess the Trial Chamber decided that the motion should be served on the Defence and that it should be heard in *inter partes* hearings.

SUBMISSIONS OF THE PARTIES

The Prosecution

2. The Prosecution submitted, *inter alia*, that Witness X had been assisting the Prosecutor in its investigation and tracking of suspects for sometime. He has protective status in a host country and recently reconsidered his previous unwillingness to testify, provided that appropriate security precautions are employed for him. Although the Prosecutor was aware of X, she formed the intention to use him as a witness in this case, in June-August 2001.

3. According to the Prosecution, Witness X's testimony is highly material as illustrated by the documents submitted to the Chamber and also disclosed to the Defence. For instance, the Prosecutor submits that Witness X's testimony, relating to the 22 non exhaustive areas presented in a memorandum of 28 August 2001 will rebut points raised in the Defence's pre-trial brief such as Nahimana's involvement with the CDR, the relationship between Radio Rwanda and RTLM, the accused's involvement in false "communiqué", his being head of RTLM, his participation with the Interhamwe and his attitude towards Tutsis and the CDR relations with MRND.[2] The case at hand is complex in that most of the things happened behind closed doors. For the Prosecution to prove its case, it will be necessary to adduce

[1] See transcripts of 11 June 2001 pp. 23-24.
[2] See paras. 4.1, 4.4, 5.1-5.3, 5.9, 5.11, 5.14, 5.17, 5.22 and 5.25.

evidence from an insider. Counsel for the Prosecution stated that they had recently contacted Witness X and the Prosecution is now convinced of the inescapable necessity of this witness to the Prosecution's case.

4. Witness X is a key witness whose testimony will be the equivalent of six witnesses and thereby result in the Prosecution dispensing with six witnesses.

5. It is in the interests of justice to call Witness X based on criteria set out in the Trial Chamber's decision of 26 June 2001 for the assessment of "interests of justice" and "good cause", namely, materiality of the testimony, complexity of the case, minimization of prejudice to the Defence, ongoing investigations, replacements and corroborative evidence.

6. With regard to the disclosure of material to the Defence in terms of Rule 66 (A) (ii), nine transcripts of the interviews with Witness X in a redacted form, have now been served upon the Defence. Furthermore, the Defence have had notice of Witness X's testimony by the identification of the 22 non exhaustive paragraphs in the Indictment against Ferdinand Nahimana and also by the fact that Witness X is anticipated to cover the testimony of six witnesses whose statements had been disclosed to the Defence some time ago. The Defence, therefore cannot claim to be caught by surprise or to be prejudiced in the preparation of the case it has to meet.

The Defence

7. Defence Counsel submitted that the Prosecution's attempt to bring in a new witness at this stage of the trial, and after a final list of witnesses had been determined by the Chamber in its decision of 26 June 2001, is a willful violation of the Accused's rights to a fair and expeditious trial and their right to a timely disclosure as prescribed by Rule 66 (A) (ii). The conditions for new evidence under Rule 73 *bis* are not met.

8. The Prosecutor was aware of the existence of this witness long before this trial date was fixed, and was also in possession of exculpatory material obtained from the witness. Her failure to give notice of the witness and comply with her disclosure obligations was without good cause and by reason therefore, she is not entitled to the relief claimed.

9. The Prosecution should not be allowed to call Witness X, whose existence has been disclosed to the Defence nine months after the commencement of the trial.

10. The element of surprise resulting from the late disclosure will cause serious prejudice to the Defence in the preparation of their case. The Prosecution should not be allowed to call a new witness in spite of previous statements that its list was final.

DELIBERATIONS OF THE CHAMBER

Whether Witness X shall be added to the Prosecution's witness list

11. The Chamber is guided by its reasoning set out in its decision of 26 June 2001, where it stated:

> "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. ...
>
> 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 73*bis*, 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."

12. Regarding the materiality of the evidence, the Chamber notes that Witness X has been identified as an important or key witness for the Prosecution. It is also argued that he is uniquely placed as an insider in the higher echelons of authority to give direct evidence pertaining to the activities of the Accused, as alleged in the Indictment. His past assistance to the investigation work of the Prosecution has rendered him particularly vulnerable to threats and fears of assassination attempts. According to the Prosecution, he has recently overcome his reluctance to testify for reasons of security, by agreeing to do so under special protective measures.

13. The Chamber has been informed by the Parties that the witness is capable of giving both direct and indirect testimony of events in question. It sees no purpose in assessing whether the anticipated indirect testimony outweighs the direct testimony or vice-versa and adopts the view that as long as a witness of the stature of X is available and capable of giving relevant direct testimony on crucial allegations, the Chamber should not exclude such direct testimony. Furthermore, the Chamber has no basis for concluding that the Prosecution has violated its obligations under Rule 68 to provide the Defence with exculpatory evidence.

14. The Chamber observes that the media case is a particularly complex case. It is further noted that Witness X will replace some of the Prosecution witnesses who are now unavailable. It is recalled that all testimonies before the Tribunal are voluntary.

15. The Chamber notes that the Defence has had notice of the nature of the testimony that will be led from Witness X, by reference to the 22 specific areas indicated by the Prosecutor and has also had the benefit of the statements of other witnesses already disclosed to the Defence.

16. The Defence in fact acknowledges an absence of the element of surprise: Counsel for Nahimana stated that "Witness X is not a witness who we can argue, is talking about matters that take us by surprise".[3]

17. The purpose of the disclosure requirements set out in Rule 66 A (ii) is to enable the Defence to have sufficient notice of the case for which it has to prepare. This aim is not

[3] Transcript of 5 September 2001 pp. 112-113.

frustrated by late disclosure, in this instance, for the reason that the Defence is not caught by surprise as to the nature of the evidence to be given by Witness X and is not unduly prejudiced. Under these circumstances, the fact that the witness is added several months into the trial is not decisive. The lapse of time from June, when the Prosecution lodged the present motion, and now, cannot be held against the Prosecution.

18. The Chamber notes, moreover that if Witness X were to testify, he would be replacing six listed Prosecution witnesses, who would then be abandoned by the Prosecutor. The implication of this fact is that the calling of Witness X will not cause undue delay in the trial proceedings.

19. The Trial Chamber considers that these considerations, namely, the materiality of the anticipated testimony, the lack of the element of surprise to the Defence, and no resultant delays to the trial proceedings, contribute to a finding of "good cause" in terms of Rule 66 A (ii).

20. In assessing the imperatives of "interests of justice" and "good cause" the Chamber has applied the criteria set out in its order of 26 June 2001 cited above as well as contextual considerations such as the seriousness of the charges, non-compellability of witness testimony and the need for protection of witnesses which it has balanced with the dictates of due process and fundamental fairness.

21. As stated above, the final decision as to whether it is in the interests of justice to allow the Prosecution to vary its witness list rests with the Chamber. Furthermore, the Trial Chamber is additionally empowered *proprio motu* to order either party to produce additional evidence or itself summon witnesses and order their attendance, pursuant to Rule 98. The disclosure provisions of Rule 66 A (ii) provides for subsequent disclosure.

22. Consequently, the Trial Chamber grants the Prosecution leave to add Witness X to the list of its witnesses.

Measures of Protection Requested by the Prosecutor

23. In its application of 11 June 2001, the Prosecution requested a wide range of protective measures for Witness X. Subsequently, in connection with the hearing on 5 September 2001, the Prosecution submitted a revised outline of the prayers for relief (listed as *litrae* a to k). Some of the requests contained in the application of 11 June 2001 were not included in the revised list, for instance that Witness X shall testify through image- or voice-altering devices, or that all sessions dealing with Witness X be closed.

24. The Chamber notes that some of the requested measures for protection in relation to Witness X are in conformity with the usual practice of witness protection within the Tribunal. It is requested that the witness shall testify under a pseudonym as a protected witness and that his image not be recorded on video (*litra* b); that portions of the testimony that are intrinsically related to his identity and that of those related to him shall be heard in closed session (*litra* c); and that there be no disclosure of his whereabouts or those of his family (*litra* g). The Chamber grants these requests and also orders other measures usually adopted in relation to all Prosecution and Defence witnesses under Rule 75 of the Rules.

25. The Prosecution has also requested that it shall be given the opportunity to propose redactions to the transcripts of Witness X's statements in closed session, before they are released to the public (*litra* e). The Chamber recalls that transcripts from closed sessions are not public, but grants the request in case the question should arise to make them available to persons other than the parties. Furthermore, the Prosecution has requested that portions of Witness X's testimony that are intrinsically related to the integrity of ongoing investigations be conducted in closed session (*litra* d). The Chamber considers this in conformity with the interest of justice, see Rule 73 (A) (iii).

26. The Prosecution has requested that the name, age, former employment, place of birth of Witness X shall be disclosed to the Defence only 30 days before the appearance of the witness (*litra* f). The Chamber notes that the Defence has received the nine redacted transcripts of previous interviews of the witness that the Prosecution intends to rely on and therefore is in a position to commence their preparations now even if the Prosecution has not provided the Defence teams with the identity of the witness. In view of the security considerations that apply in the present case, it is not unreasonable that the identity of the witness is disclosed 30 days before he gives his testimony. For the same reasons, the Chamber also accepts that the said nine transcripts be disclosed in unredacted form to the Defence 30 days before the appearance of Witness X (*litra* i).

27. The Chamber has noted statements from one Defence Counsel to the effect that all Defence teams already know Witness X's identity. If this is correct, the two 30 day periods will only have a limited effect on the preparations of Defence. However, the Chamber does not have sufficient information to verify whether Counsel's assertion is correct.

28. The Chamber does not accept the Prosecution's request that only certain members of the Defence may have access to the information concerning the identity of Witness X and the nine transcripts from the interviews with him unless special permission is given by the Prosecution or the Chamber (*litrae* f and i, see also j). It is understood that the Defence operates as a team. The Chamber considers that Defence Counsel, as officers of the Court, are responsible for ensuring that documents are not made available to persons who do not form part of the Defence teams and that their clients do not disclose documents or information to other detainees or any other person. In view of revelations made by Ngeze to the Chamber, the Chamber makes an explicit order to this effect.

29. In addition to the said nine transcripts on which the Prosecution relies in the present case, there are 17 transcripts which pertain to other accused and which are being used for ongoing investigations in other cases. The Prosecution has requested that there be no disclosure of these transcripts, but that if the Defence so requests the Judges be given the opportunity to review those 17 transcripts out of the presence of the Defence (*litra* h).

30. According to Rule 66 (A) (ii) the Prosecution is under an obligation to disclose previous statements of witnesses that will be called at trial. Rule 66 (C) provides, however, that when disclosure may prejudice on-going investigations or for any other reasons be contrary to the public interest the Prosecution may apply to the Trial Chamber to be relieved from the obligation to disclose such information. When making such an application the Prosecutor shall provide the Trial Chamber, and only the Trial Chamber, with the information or materials that are sought to be kept confidential. This Chamber has not yet received such documentation and requests the Prosecutor to submit forthwith the 17 transcripts to the

Chamber. Consequently, the Chamber reserves this issue for decision at a later date when it has had the opportunity to review the material.

31. The Prosecution has also requested that Witness X be permitted to testify at a location other than Arusha (*litra a*). The Prosecution argued that Witness X has escaped death and has been under direct threats of execution. The security risk is extremely high because of his role as an informant and his unique insider position in 1994. He has been moved from the African continent and is now under stringent security measures in a Western country. It is submitted that it is not possible to provide for the necessary security measures in Arusha, but that Witness X should testify in The Hague.

32. Counsel for Ngeze and Barayagwiza did not oppose the change of venue. However, all Counsel insisted on the Accused's right to participate in the proceedings. Moreover, Counsel for Nahimana argued that the Prosecution had not demonstrated the crucial need for it. It would be wrong to create the impression that Arusha is good enough for "ordinary", but not for "important" witnesses. It would also be impracticable to split the Defence team and not to provide for ready access to voluminous documents available only in Arusha.

33. On the basis of the available material the Chamber accepts that Witness X is in a particularly vulnerable position and that special security measures are required in connection with his testimony. It is undisputed by the parties that the Tribunal's Rules allow for the change of venue. Reference is made to Resolution 955 (1994) para. 6, according to which the Tribunal may meet away from its seat when it considers it necessary for the efficient exercise of its functions. Rule 4 provides that a Chamber or a Judge may exercise their functions away from the Seat of the Tribunal, if so authorized by the President in the interests of justice. Moreover, Rule 71 (D) provides that a deposition may be given by means of a video conference. It also follows from case law from the ICTY that a witness may be heard by way of a video link, provided that certain conditions are met. Reference is made in particular to *The Prosecutor v. Tadic*, the *Kodic and Cerkez* case and the *Zejnil Delali et al.* case.

34. The Chamber does not see any reason to decide a change of venue in the sense that the entire Chamber, Counsel for the Prosecution and the Defence, the Accused as well as the legal and administrative staff shall sit away from the seat of the Tribunal. The choice is between adopting stringent security measures in Arusha and have X testify here, or arranging for the testimony of Witness X to be given by way of a two way closed circuit video link-up between Arusha and the selected venue. During the hearing of this motion, the Prosecution focused on The Hague as an appropriate place.

35. It follows from case law, with which the Chamber agrees, that certain conditions must be fulfilled for the video solution to be utilised in the present case. The Chamber is of the opinion that the testimony is sufficiently important, that it will be in the interests of justice to grant the application for a video link solution, and that the Accused will not be prejudiced in the exercise of his right to confront the witness. The crucial question is whether the witness is unable or unwilling to come to the Tribunal.

36. The Chamber's preference is that witnesses should be heard at the Tribunal's seat in Arusha. This has been the practice in relation to all witnesses who have so far given testimony at the ICTR. No incidents relating to their safety have been reported. As already mentioned, the Chamber acknowledges that the present witness is in a very special situation which requires particularly stringent security measures. The documentation provided by the

Prosecution concerning the risk in case the witness gives testimony in Arusha relates to the security measures which are adopted in relation to all witnesses. The Chamber considers that it may be possible to adopt sufficient measures to ensure that Witness X can testify here in Arusha.

37. Even if this were so, the information provided to the Chamber suggests that Witness X may be unwilling to testify in Africa out of concern for his security. However, it does not follow clearly from the documentation that his position will be maintained if he is given thorough explanations about the extraordinary measures that will be taken during his stay here (such as moving around from place to place, special locations etc). The Chamber is anxious to avoid testimonies outside Arusha unless such a solution is absolutely necessary.

38. Consequently, the Chamber directs the Witness and Victims Support Section to provide Witness X with the necessary information regarding security measures in order to ascertain whether he is willing to testify in Arusha, and to report back to the Chamber forthwith. In the event that he maintains his position the Chamber authorises the alternative procedure of a video link solution in The Hague. The Registry is directed to make the necessary arrangements for this alternative.

FOR THE ABOVE REASONS THE CHAMBER, BY A MAJORITY

1. **GRANTS** leave to the Prosecution to call a new witness, who shall be referred to by the pseudonym of Witness X;

2. **DECIDES** that Witness X shall be subject to all the measures of protection granted to other Defence and Prosecution Witnesses in the present case;

3. **DECIDES** that the Prosecution shall be given the opportunity to propose redactions to the transcripts of Witness X's statements in a closed session before they are released to the public;

4. **DECIDES** that portions of Witness X's testimony that are intrinsically related to ongoing investigations be conducted in a closed session;

5. **DECIDES** that the name, age, former employment and place of birth of Witness X shall be disclosed to the Defence 30 days before the witness testifies;

6. **DECIDES** that nine transcripts from interviews with Witness X shall be disclosed in unredacted form to the Defence 30 days before the witness testifies;

7. **ORDERS** the Prosecution to submit forthwith to the Chamber the seventeen transcripts from interviews with Witness X and reserves its decision on disclosure until the Chamber has had an opportunity to review the said transcripts;

8. **ORDERS** Defence Counsel to take the necessary measures to prevent the disclosure by the Accused of documents relating to Witness X and information therefrom to other detainees or any other persons;

9. **DIRECTS** the Registry to clarify whether Witness X is willing to testify in Arusha under stringent security measures, and to report to the Chamber forthwith;

10. In the event of an affirmative response, **DIRECTS** the Registry to make necessary arrangements to ensure the protection of Witness X during his stay in Arusha;

11. In the event of a negative response, **DIRECTS** the Registry to make the necessary arrangements for Witness X to give his testimony by means of video-link conference in The Hague.

Arusha, 14 September 2001

Navanethem Pillay
Presiding Judge

Erik Møse
Judge

Judge Asoka de Z. Gunawardana attaches a dissenting opinion.

24073

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: 14 September 2001

THE PROSECUTOR
v.
FERDINAND NAHIMANA
HASSAN NGEZE
JEAN BOSCO BARAYAGWIZA

(Case No. ICTR-99-52-I)

SEPARATE AND DISSENTING OPINION OF JUDGE ASOKA DE Z GUNAWARDANA ON THE PROSECUTOR'S APPLICATION TO ADD WITNESS X TO ITS LIST OF WITNESSES AND FOR PROTECTIVE MEASURES

Office of the Prosecutor:

Mr Stephen Rapp
Ms Simone Monasebian

Counsel for the Accused:

Ms Diana Ellis QC
Mr John Floyd III
Mr Giacomo Caldarera

SEPARATE AND DISSENTING OPINION OF JUDGE ASOKA DE Z GUNAWARDANA ON THE PROSECUTOR'S APPLICATION TO ADD WITNESS X TO ITS LIST OF WITNESSES AND FOR PROTECTIVE MEASURES

1. I regret that I can not agree with the decision of the majority, to grant the Prosecution leave to amend its list of witnesses by adding Witness X.

The legal basis of the motion

2. The Prosecution has made this application under Rule 73 *bis* (E) where it is stated that, "the Prosecutor may, 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."

The legal significance of Rule 66 and its consequential application

3. The provision in Rule 66 (A) requires that, "no later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial" should be made available to the defence. This is a specific requirement envisaged by the Rules of the Tribunal, to be observed by the Prosecutor. This specific requirement can only be mitigated upon good cause being shown; for Rule 66 states that, "upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the defence within a prescribed time." Thus it is clear that only in the *specific circumstance* of where good cause is shown by the Prosecution, may the addition of witnesses be permitted.

4. At this point, it may be trite to quote the Trial Chamber in *Prosecutor v Blastic*, "the Rules support the idea that all the names of Prosecution witnesses must be disclosed at the same time in a comprehensive document which thus permits the Defense to have a clear and cohesive view of the Prosecution's strategy and to make the appropriate preparations."[1]

[1] Decision on the Production of Discovery Materials, 27 January 1997.

5. This is not the first instance that the Prosecution has moved to vary the list of Prosecution witnesses in this case. It has done so on several occasions prior to this; the chronology of the relevant applications for variation of the list of witnesses and the disclosures is as follows:-

i. End of March - Prosecution disclosed over 300 statements from 221 witnesses.
ii. 28 June 2000 - Prosecution forwarded final list of 97 witnesses to Defence.
iii. 7 August 2000 - Prosecution forwarded amended final list to Defence.
iv. 11, 12, and 13 June 2001 - Prosecution applied to add additional witnesses to its list; but Witness X was not included in this motion. At the hearing of this motion, the Prosecution submitted that the new list represents its final list of witnesses. However, Witness X was not on that list. The Trial Chamber allowed the addition of new witnesses by its decision of 26 June 2001.
v. 11 June 2001- Prosecution filed its present motion to add Witness X to the witness list.
vi. 10 July 2001 – Prosecution applied to call witness AFI. The Chamber refused this motion.

6. It may be noted that the Prosecution had not listed Witness X on the initial list of 97 witnesses to be called, and had not disclosed any statement of Witness X to the defence, despite having disclosed over 300 statements from 221 other witnesses. Therefore, the main issue to be decided is whether the Prosecution has shown good cause, to enable the Chamber to grant leave to call Witness X now.

The requirement of good cause

7. Mr Rapp, Senior Trial Attorney for the Prosecution, submitted that, pursuant to Rule 66, the Prosecution is only required to furnish copies of statements of witnesses who the Prosecution *intends* to call, to testify at trial. And that in the instant case the Prosecution had no such intention with regard to Witness X, since Witness X was not willing to be a witness prior to June 2001. Mr Rapp stated "when we saw his statements, when we saw what information we had, we sought to try to convince this [...] individual to appear as a witness, something, frankly, opposed by the chief of investigations because of his value for ongoing investigations and arrests. And we were able to obtain the consent of that witness. [...] So, up

to now, up until these last several months [...] this witness was not available to us."[2] Thus the alleged unwillingness of Witness X to give evidence in this trial was proffered as an excuse for the Prosecution not listing Witness X before, and as constituting good cause in moving to call that witness now.

8. However, it appears that this position is not borne out when one considers the following facts:-

i. According to the affirmation of the Prosecution's Operations Commander, dated 16 August 2001, he and the Chief of Investigations were initially against making the application to include Witness X in this trial, but, upon reviewing the present state of the Prosecution's case, are *now* convinced of the necessity of Witness X to the Prosecution's case.

ii. It is to be observed that, in the statement/declaration recorded from Witness X, it is not reflected that he was previously unwilling to be a witness.

iii. It appears from the supplemental affirmation of the Prosecution Operations Commander, dated 6 August [sic] 2001, that Witness X had in fact been listed as a witness in a prior trial but was not used because of security reasons.

iv. It is also pertinent to note that Ms Ellis, Counsel for Nahimana, pointed out that Witness X had been treated as a witness by the Prosecution right from the beginning, and his interviews have been recorded as far back as March 1997.

9. It is clear from the above that Witness X had been available to be listed as a witness for the Prosecution for some time, even prior to June 2001. Nowhere in the three affirmations by Prosecution's Operations Commander does it state that, despite the Prosecution's request, the witness was unwilling to testify in this case, prior to June 2001. Rather, it appears that the decision by the Prosecution to include Witness X as a witness in this trial, was taken only recently, not because of any reluctance on the part of the witness, but because of the present state of the Prosecution's case.[3]

10. The second ground proffered by the Prosecution is that Witness X will provide more direct testimony than the other witnesses who are currently listed. In this regard the Prosecution submitted a document, dated 10 September 2001, indicating which aspects of Witness X's evidence were expected to be more direct than the evidence of the seven witnesses who Witness X would replace. According to this document, Witness X will be able to provide more direct evidence than the witnesses currently listed. However, it is to be observed that some of the witnesses who have given evidence already have testified to

[2] Transcripts 5 September 2001, at page 32 and 33 (closed session)
[3] See, Affirmation of the Prosecution Operations Commander, dated 16 August 2001, at paragraph 4.

matters on which Witness X is also expected to testify. In any event, the Prosecution's argument is mitigated by its own submission (in the very same document where it argued that Witness X will provide more direct testimony) that, "a consideration of whether relevant probative evidence is direct or indirect, is best left to the time of evaluation of the evidence after in-court testimony."[4]

11. In the application of Rule 66 in the Bagilishema case, the fact that some witnesses were discovered as a result of on-going investigations, was held to be good cause.[5] In that case the Court granted leave to rely on *only* one of four categories of statements, namely, those statements that had been obtained after the trial had commenced, as a result of further investigations that had been carried out, following an amendment to the indictment.[6] It was noted that the indictment was amended on 17 September 1999 and the said statements were taken on 17, 18, 22 and 23 September 1999. Thus it can be seen that the addition of witnesses had been allowed on the basis that those witnesses had been revealed by ongoing investigations on the charges in the indictment of that case. But the position in the instant case is very different. The transcripts of the interviews of Witness X had been available from 1997. Thus, Witness X was not discovered due to any on-going investigations. This position is confirmed by the averment by the Prosecution that, "the circumstances surrounding Witness X are exceptional as he falls under the special category of witness. [...] It will prejudice further and ongoing investigation of *other persons* if any information regarding the identity and address of this witness is revealed."[7] (Emphasis added) The fact that there may be ongoing investigations involving Witness X, in relation to other accused persons, will not constitute good cause, in the instant case.

Violation of Rule 68

12. The Defence Counsel for Nahimana submitted that the interview transcripts of Witness X contain exculpatory material and, therefore, the Prosecutor has breached her disclosure

[4] Prosecutor's document, dated 10 September 2001, footnote 3

[5] Similarly in Blastic, the Court was of the view that the addition of statements "should be limited to new developments in the investigations." With regard specifically to the addition of new witnesses who's statement had not been disclosed to the defence in conformation with the disclosure timelines, the Chamber noted that the addition of statements or witnesses "must never result in the rights of the defence being circumvented." Decision of 27 January 1997.

[6] Prosecutor vs Ignace Bagilishema, Decision of 2 December 1999.

[7] Prosecutor's *Ex Parte* Application to the Trial Chamber Sitting in Camera for Relief from Obligation to Disclose the Existence, Identity and Statements of New Witness X, dated 11 June 2001, at paragraph 1.

obligations under Rule 68. On 11 September 2001, the Defence submitted a document that provided examples of exculpatory material contained in the nine interview transcripts of Witness X (attached as "Annex A").

13. I am of the view that, the said breach of Rule 68 by the Prosecutor, provides a further reason why the present motion should be denied.

Conclusion

14. For these reasons, I would deny the "Prosecutor's Ex Parte Application to the Trial Chamber Sitting in Camera for Relief from Obligation to Disclose the Existence, Identity and Statements of New Witness X," dated 11 June 2001.

15. Accordingly, the issue of adopting witness protection measures for Witness X, would not arise.

Done in Arusha, on this fourteenth day of September 2001,

Asoka de Z. Gunawardana
Judge

International Criminal Tribunal for Rwanda

ICTR-99-52-T
(24054-24050)
11/9/2001

ANNEX A

24067

24054

IN THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

TRIAL CHAMBER 1

THE PROSECUTOR

V

FERDINAND NAHIMANA and others

2001 SEP 11 A 8:59

11/09/2001

EXAMPLES OF EXCULPATORY MATERIAL CONTAINED IN THE 9 TRANSCRIPTS OF INTERVIEWS WITH WITNESS 'X'

Cassette no	Page	Content
8 Side A	5	FN* held no official position in the MRND
Side B	13	FN left ORINFOR because a Ministry of Information was formed and controlled by MDR party After leaving ORINFOR, FN gave up a post offered by the President
	17	At the RTLM meeting at Hotel Amahoro, FN was not introduced as holding an official position within RTLM. The RTLM objective was financial
9 Side A	1	Phocas Habimana agreed to be the

		coordinator of RTLM radio station permanently
	2	Kabuga did not give FN a title when he introduced him at the RTLM meeting RTLM was not a station for any particular party. FN outlined the objectives – a limited company aiming to make a profit, educate and inform. All political parties could advertise on RTLM
	4	Phocas Habimana was the Director of RTLM
	7	Limited broadcasting range outside Kigali
	7-8	RTLM broadcast for the parties, political speeches and debates with the opposition which included MRND MDR and RPF
10 Side A	3	RPF killed 30-50 Hutus in Kirambo, Byumba
	6	Meaning of Inkotanyi and Inyenzi
Side B	9-10	Belgians arrived with the idea that the Hutu were against the Tutsi Belgians were anti MRND and attacked MRND people

		Belgians supported the opposition and Uwilingiyimana and Twagiamungu; the majority of the population was MRND
	11	Incident at Cyivugiza
	12	RPF stationed on the mountain near Kigali
11 Side A	4	RTLM communiques were prepared by the Editor-in-Chief
	5	Phocas Habimana was always at the Radio Station in April
Side B	9	During that period of the war FN never spoke on RTLM.
	10	FN had not shown up at RTLM in April. He was at the French Embassy
	13	RTLM left for Cyangugu. FN went to Goma
12 Side A	5	Announcers at Radio Rwanda were sacked because they had worked for FN who was MRND
Side B	9	There was a parallel Interahamwe not answerable to the National Committee
	11	There was parallel training of these Interahamwe
17 Side A	2	Kigali under curfew; state of paralysis in Kigali in March

	3	Paul Kagame said that if the people did not accept the Arusha Accords, they would be forced to accept at gunpoint
	4	People took sides – RPF or Government
Side B	7	People said the RPF had lists of those to be killed
	8	A Tutsi told him that if the President did not put the Government (Transitional) in place they would try and kill him The security of the President increased from January 1994
19 Side A	9	The Government was saying put a stop to the massacres. RPF was patrolling areas of Kigali on 9.4.94, and were in Remera
	10	Many Tutsis had sought refuge in the Hotel Diplomat Government asked him to ensure that massacres stopped
	12	The RPF had infiltrated areas
20 Side A	1	All the roadblocks were manned by Interahamwe intermingled with PSD and MDR
	3	Many merchants and high profile people were at the Hotel Diplomat

	5	The RPF burned Hutus alive in Kivugiza Nyamirambo
Side B	10	Soldiers at roadblocks outside Kigali, didn't want people to leave Kigali

Diana Ellis QC

JEAN-MARIE BIJU-DUVAL

DIANA ELLIS QC

7.9.01

* = FERDINAND NAHIMANA

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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: 14 September 2001

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THE PROSECUTOR
v.
FERDINAND NAHIMANA
HASSAN NGEZE
JEAN BOSCO BARAYAGWIZA

(Case No. ICTR-99-52-I)

SEPARATE AND DISSENTING OPINION OF JUDGE ASOKA DE Z GUNAWARDANA ON THE PROSECUTOR'S APPLICATION TO ADD WITNESS X TO ITS LIST OF WITNESSES AND FOR PROTECTIVE MEASURES

Office of the Prosecutor:

Mr Stephen Rapp
Ms Simone Monasebian

Counsel for the Accused:

Ms Diana Ellis QC
Mr John Floyd III
Mr Giacomo Caldarera

SEPARATE AND DISSENTING OPINION OF JUDGE ASOKA DE Z GUNAWARDANA ON THE PROSECUTOR'S APPLICATION TO ADD WITNESS X TO ITS LIST OF WITNESSES AND FOR PROTECTIVE MEASURES

1. I regret that I can not agree with the decision of the majority, to grant the Prosecution leave to amend its list of witnesses by adding Witness X.

The legal basis of the motion

2. The Prosecution has made this application under Rule 73 *bis* (E) where it is stated that, "the Prosecutor may, 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."

The legal significance of Rule 66 and its consequential application

3. The provision in Rule 66 (A) requires that, "no later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial" should be made available to the defence. This is a specific requirement envisaged by the Rules of the Tribunal, to be observed by the Prosecutor. This specific requirement can only be mitigated upon good cause being shown; for Rule 66 states that, "upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the defence within a prescribed time." Thus it is clear that only in the *specific circumstance* of where good cause is shown by the Prosecution, may the addition of witnesses be permitted.

4. At this point, it may be trite to quote the Trial Chamber in *Prosecutor v Blastic*, "the Rules support the idea that all the names of Prosecution witnesses must be disclosed at the same time in a comprehensive document which thus permits the Defense to have a clear and cohesive view of the Prosecution's strategy and to make the appropriate preparations."[1]

[1] Decision on the Production of Discovery Materials, 27 January 1997.

5. This is not the first instance that the Prosecution has moved to vary the list of Prosecution witnesses in this case. It has done so on several occasions prior to this; the chronology of the relevant applications for variation of the list of witnesses and the disclosures is as follows:-

i. End of March - Prosecution disclosed over 300 statements from 221 witnesses.
ii. 28 June 2000 - Prosecution forwarded final list of 97 witnesses to Defence.
iii. 7 August 2000 - Prosecution forwarded amended final list to Defence.
iv. 11, 12, and 13 June 2001 - Prosecution applied to add additional witnesses to its list; but Witness X was not included in this motion. At the hearing of this motion, the Prosecution submitted that the new list represents its final list of witnesses. However, Witness X was not on that list. The Trial Chamber allowed the addition of new witnesses by its decision of 26 June 2001.
v. 11 June 2001- Prosecution filed its present motion to add Witness X to the witness list.
vi. 10 July 2001 – Prosecution applied to call witness AFI. The Chamber refused this motion.

6. It may be noted that the Prosecution had not listed Witness X on the initial list of 97 witnesses to be called, and had not disclosed any statement of Witness X to the defence, despite having disclosed over 300 statements from 221 other witnesses. Therefore, the main issue to be decided is whether the Prosecution has shown good cause, to enable the Chamber to grant leave to call Witness X now.

The requirement of good cause

7. Mr Rapp, Senior Trial Attorney for the Prosecution, submitted that, pursuant to Rule 66, the Prosecution is only required to furnish copies of statements of witnesses who the Prosecution *intends* to call, to testify at trial. And that in the instant case the Prosecution had no such intention with regard to Witness X, since Witness X was not willing to be a witness prior to June 2001. Mr Rapp stated "when we saw his statements, when we saw what information we had, we sought to try to convince this [...] individual to appear as a witness, something, frankly, opposed by the chief of investigations because of his value for ongoing investigations and arrests. And we were able to obtain the consent of that witness. [...] So, up

to now, up until these last several months [...] this witness was not available to us."[2] Thus the alleged unwillingness of Witness X to give evidence in this trial was proffered as an excuse for the Prosecution not listing Witness X before, and as constituting good cause in moving to call that witness now.

8. However, it appears that this position is not borne out when one considers the following facts:-

i. According to the affirmation of the Prosecution's Operations Commander, dated 16 August 2001, he and the Chief of Investigations were initially against making the application to include Witness X in this trial, but, upon reviewing the present state of the Prosecution's case, are *now* convinced of the necessity of Witness X to the Prosecution's case.

ii. It is to be observed that, in the statement/declaration recorded from Witness X, it is not reflected that he was previously unwilling to be a witness.

iii. It appears from the supplemental affirmation of the Prosecution Operations Commander, dated 6 August [sic] 2001, that Witness X had in fact been listed as a witness in a prior trial but was not used because of security reasons.

iv. It is also pertinent to note that Ms Ellis, Counsel for Nahimana, pointed out that Witness X had been treated as a witness by the Prosecution right from the beginning, and his interviews have been recorded as far back as March 1997.

9. It is clear from the above that Witness X had been available to be listed as a witness for the Prosecution for some time, even prior to June 2001. Nowhere in the three affirmations by Prosecution's Operations Commander does it state that, despite the Prosecution's request, the witness was unwilling to testify in this case, prior to June 2001. Rather, it appears that the decision by the Prosecution to include Witness X as a witness in this trial, was taken only recently, not because of any reluctance on the part of the witness, but because of the present state of the Prosecution's case.[3]

10. The second ground proffered by the Prosecution is that Witness X will provide more direct testimony than the other witnesses who are currently listed. In this regard the Prosecution submitted a document, dated 10 September 2001, indicating which aspects of Witness X's evidence were expected to be more direct than the evidence of the seven witnesses who Witness X would replace. According to this document, Witness X will be able to provide more direct evidence than the witnesses currently listed. However, it is to be observed that some of the witnesses who have given evidence already have testified to

[2] Transcripts 5 September 2001, at page 32 and 33 (closed session)
[3] See, Affirmation of the Prosecution Operations Commander, dated 16 August 2001, at paragraph 4.

matters on which Witness X is also expected to testify. In any event, the Prosecution's argument is mitigated by its own submission (in the very same document where it argued that Witness X will provide more direct testimony) that, "a consideration of whether relevant probative evidence is direct or indirect, is best left to the time of evaluation of the evidence after in-court testimony."[4]

11. In the application of Rule 66 in the Bagilishema case, the fact that some witnesses were discovered as a result of on-going investigations, was held to be good cause.[5] In that case the Court granted leave to rely on *only* one of four categories of statements, namely, those statements that had been obtained after the trial had commenced, as a result of further investigations that had been carried out, following an amendment to the indictment.[6] It was noted that the indictment was amended on 17 September 1999 and the said statements were taken on 17, 18, 22 and 23 September 1999. Thus it can be seen that the addition of witnesses had been allowed on the basis that those witnesses had been revealed by ongoing investigations on the charges in the indictment of that case. But the position in the instant case is very different. The transcripts of the interviews of Witness X had been available from 1997. Thus, Witness X was not discovered due to any on-going investigations. This position is confirmed by the averment by the Prosecution that, "the circumstances surrounding Witness X are exceptional as he falls under the special category of witness. [...] It will prejudice further and ongoing investigation of *other persons* if any information regarding the identity and address of this witness is revealed."[7] (Emphasis added) The fact that there may be ongoing investigations involving Witness X, in relation to other accused persons, will not constitute good cause, in the instant case.

Violation of Rule 68

12. The Defence Counsel for Nahimana submitted that the interview transcripts of Witness X contain exculpatory material and, therefore, the Prosecutor has breached her disclosure

[4] Prosecutor's document, dated 10 September 2001, footnote 3

[5] Similarly in Blastic, the Court was of the view that the addition of statements "should be limited to new developments in the investigations." With regard specifically to the addition of new witnesses who's statement had not been disclosed to the defence in conformation with the disclosure timelines, the Chamber noted that the addition of statements or witnesses "must never result in the rights of the defence being circumvented." Decision of 27 January 1997.

[6] Prosecutor vs Ignace Bagilishema, Decision of 2 December 1999.

[7] Prosecutor's *Ex Parte* Application to the Trial Chamber Sitting in Camera for Relief from Obligation to Disclose the Existence, Identity and Statements of New Witness X, dated 11 June 2001, at paragraph 1.

obligations under Rule 68. On 11 September 2001, the Defence submitted a document that provided examples of exculpatory material contained in the nine interview transcripts of Witness X (attached as "Annex A").

13. I am of the view that, the said breach of Rule 68 by the Prosecutor, provides a further reason why the present motion should be denied.

Conclusion

14. For these reasons, I would deny the "Prosecutor's Ex Parte Application to the Trial Chamber Sitting in Camera for Relief from Obligation to Disclose the Existence, Identity and Statements of New Witness X," dated 11 June 2001.

15. Accordingly, the issue of adopting witness protection measures for Witness X, would not arise.

Done in Arusha, on this fourteenth day of September 2001,

Asoka de Z. Gunawardana
Judge
International Criminal Tribunal for Rwanda