



ICTR-99-52-T  
16-09-2002  
(29684-29681)

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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER I**

**Before:** Judge Navanethem Pillay, presiding  
Judge Erik Møse  
Judge Asoka de Zoysa Gunawardana

**Registrar:** Adama Dieng

**Date:** 16 September 2002

JUDICIAL RECORDS  
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**THE PROSECUTOR**  
v.  
**FERDINAND NAHIMANA**  
**JEAN-BOSCO BARAYAGWIZA**  
**HASSAN NGEZE**  
*Case No. ICTR-99-52-T*

**DECISION ON THE NGEZE DEFENCE'S MOTION TO STRIKE THE  
TESTIMONY OF WITNESS FS**

**Office of the Prosecutor:**

Mr Stephen Rapp  
Ms Simone Monasebian  
Ms Charity Kagwi  
Mr William Egbe

**Counsels for Hassan Ngeze:**

Mr John Floyd, III  
Mr Rene Martel

**Counsels for Jean-Bosco Barayagwiza:**

Mr Giacomo Barletta-Caldarera  
Mr Alfred Pognon

**Counsels for Ferdinand Nahimana:**

Jean-Marie Biju-Duval  
Diana Ellis

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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 (“the Chamber”);

**BEING SEIZED** of:

- (1) the “Motion To Strike Testimony of FS”, filed on 20 August 2002 by Counsels for Hassan Ngeze (“the motion”);
- (2) the Prosecutor’s “Response to the Ngeze Defense Motion to Strike Testimony of (Witness) FS”, filed on 6 September 2002 (“the response”); and
- (3) the “Opposition” filed on 12 September 2002 by Counsels for Jean-Bosco Barayagwiza (“the opposition”);

**CONSIDERING** the Statute of the Tribunal (“the Statute”), in particular Article 20, and the Rules of Procedure and Evidence (“the Rules”), in particular Rules 85, 89, 90 and 91;

**HEREBY DECIDES** the motion pursuant to Rule 73(A) of the Rules, that is, solely on the basis of the briefs filed by the parties.

**SUBMISSIONS OF THE PARTIES**

1. Counsels for Hassan Ngeze seek to strike the entire testimony of Witness FS, arguing that it is in contravention of Article 20(4)(e) of the Statute, in that the cross-examination of Witness FS is incomplete. Reference is also made to the principles of fundamental fairness and due process. In particular, it is contended that Witness FS was unable to provide the names of his wife and children killed in 1994, as requested in cross-examination, and that Witness FS refuses to return to Arusha to complete the cross-examination.
2. The Prosecution opposes the motion and requests, *inter alia*, that Witness FS be accorded the opportunity to return to complete the cross-examination and in any event, that his testimony be considered in full by the Chamber or at least for the purposes of Rule 98*bis*. The Prosecution argues that Defence Counsels had ample time for cross-examination, and that Counsels for Ngeze cross-examined Witness FS on all references he made to Ngeze in examination-in-chief. Further, the Prosecution maintains that Witness FS wrote down the names of his wife and children on a piece of paper later admitted under seal as Exhibit 3D-128. The Prosecution states that Witness FS was willing to return to testify but was prevented from doing so by the differences existing between the Tribunal and the Rwandan government at the time.
3. Counsels for Jean-Bosco Barayagwiza submit that the testimony of Witness FS should not be used against Barayagwiza as Barayagwiza did not have the benefit of representation at the time.

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**DELIBERATIONS OF THE CHAMBER**

1. Article 20(4)(e) of the Statute protects the right of an Accused to have examined the witnesses against him/her. Parallel provisions exist in the International Covenant on Civil and Political Rights (Article 14(3)(e)), the European Convention on Human Rights (Article 6(3)(d)) and the American Convention on Human Rights (Article 8(2)(f)). In addition, Rule 85(B) of the Rules provides for examination-in-chief, cross-examination and re-examination in each case.
2. It is an equally well-recognized principle that the right to cross-examination is not unlimited and is constrained by other considerations, for example, relevancy. The Rules in particular provide that cross-examination shall be limited to issues raised in examination-in-chief or those related to the credibility of the witness (Rule 90(G)).
3. According to Rule 90(F), the Chamber shall control the presentation of evidence by witnesses with a view towards effective ascertainment of the truth, and efficiency. Rule 89(B) grants a Chamber discretion, where a case falls outside Section 3 (Rules of Evidence), to apply evidentiary rules that are likely to result in a fair determination of the matter before it, and in an adherence to the spirit of the Statute and general principles of law.
4. It is not asserted by Counsels for Ngeze that Witness FS was not cross-examined, but rather that the cross-examination was incomplete. In this regard, the Chamber notes that the examination-in-chief of Witness FS was conducted from 9.30 a.m. to 12.30 p.m. on 7 February 2001. This was followed by cross-examination in open session, by Counsel for Ngeze Mr René Martel, from 3.00 p.m. to 5.30 p.m. on the same day, and by Lead Counsel for Ngeze Mr John Floyd from 9.30 a.m. to approximately 11.00 a.m. on 8 February 2001. Thereafter, Counsel for Ferdinand Nahimana Mr Jean-Marie Biju-Duval cross-examined the witness from approximately 11.00 a.m. to 12.30 p.m. and again from 3.00 p.m. to approximately 3.30 p.m. on the same day. There was further cross-examination by Mr Martel in closed session on 8 February 2001 from 4.42 p.m. to 5.50 p.m. In total, Witness FS was cross-examined for approximately seven hours, five hours of which by Counsels for Ngeze, which would have been sufficient for purposive cross-examination.
5. In addition, there was substantial cross-examination of issues raised by Witness FS in examination-in-chief and of matters relating to his credibility. During the closed session, Mr Martel acknowledged that he had finished his cross-examination.<sup>1</sup> Subsequently it was agreed that the cross-examination had been completed save for residual questions relating to the identity of Witness FS.<sup>2</sup> These questions do not relate to a fact in issue but are directed towards the credibility of Witness FS only. That these questions remain unanswered is a matter to be taken into account by the Chamber when weighing the probative value of Witness FS's testimony.
6. With respect to the provision of the names of the wife and children of Witness FS, the Chamber notes that contrary to the assertions made in the motion, these names were written on a piece of paper by the witness on 8 February 2001, as directed by the Chamber. This piece of paper was subsequently tendered by Mr Floyd himself on 12

<sup>1</sup> Transcripts of 8 February 2001, p. 151.

<sup>2</sup> Transcripts of 8 February 2001, p. 152.

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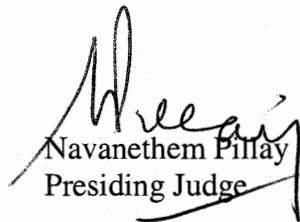
July 2002 for admission into evidence under seal as Exhibit 3D-128.<sup>3</sup> The veracity or otherwise of the information contained therein is again a matter for judicial consideration when evaluating the evidence.


7. The Chamber took note on Tuesday 6 February 2001 that Barayagwiza had terminated the mandate of his previous Counsels. Barayagwiza's present Counsel Mr Giacomo Barletta-Caldarera was placed on record on Monday 12 February 2001. The Chamber notes that Barayagwiza did not have Counsel on record in the intervening period comprising two court-sitting days, 7 and 8 February 2001, during which Witness FS's testimony was given, and will take this into account when assessing the evidence in its entirety.

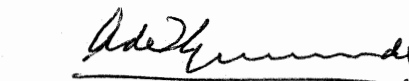
**FOR THE ABOVE REASONS, THE TRIBUNAL**

**DENIES** the motion and the opposition and **DIRECTS** that the full testimony of Witness FS remain on record.

Arusha, 16 September 2002

  
Navanethem Pillay  
Presiding Judge

  
Erik Møse  
Judge

  
Asoka de Zoysa Gunawardana  
Judge

[Seal of the Tribunal]

<sup>3</sup> Transcripts of 12 July 2002, p. 188.