



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

ICTR-98-42-T
30-03-04
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OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr Adama Dieng

Date: 30 March 2004

JUDICIAL RECORDS
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The PROSECUTOR v. Elie NDAYAMBAJE
The PROSECUTOR v. Joseph KANYABASHI
The PROSECUTOR v. Pauline NYIRAMASUHUKO & Arsène Shalom NTAHOBALI
The PROSECUTOR v. Sylvain NSABIMANA & Alphonse NTEZIRYAYO

[Joint Case No. ICTR-98-42-T]

DECISION ON PROSECUTOR'S MOTION TO DROP AND ADD WITNESSES

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

SITTING as Trial Chamber II, composed of Judges William H. Sekule, Presiding, Arlette Ramaroson and Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the "Prosecutor's Motion to Drop and Add Witnesses", filed on 12 January 2004 (the "Motion");

NOTING:

- a) The "Prosecutor's Ex-Parte Supplementary Motion to Disclose Witness Statements", filed on 12 January 2004;
- b) The "*Réponse de Sylvain Nsabimana à la Requête du Procureur aux Fins de Retrait et d'Adjonction des Témoins à Charge*", filed on 12 January 2004, ("Nsabimana's Response");
- c) The "*Réponse Préliminaire de Pauline Nyiramasuhuko à la Prosecutor's Motion to Drop and Add Witnesses*", filed on 20 January 2004, ("Nyiramasuhuko's Response");
- d) The "*Réponse Préliminaire de Joseph Kanyabashi à la Requête du Procureur Demandant de Reviser Sa Liste de Témoins*", filed on 16 January 2004, ("Kanyabashi's Response");
- e) The "Prosecutor's Reply to Kanyabashi's *Réponse Préliminaire à la Requête du Procureur Demandant de Reviser Sa Liste*", filed on 20 January 2004, ("Prosecutor's Reply to Kanyabashi");
- f) The "Prosecutor's Reply to *Réponse de Sylvain Nsabimana à la Requête du Procureur aux Fins de Retrait et d'Addition de Témoins à Charge*", filed on 26 January 2004, ("Prosecutor's Reply to Nsabimana");
- g) The "Prosecutor's Reply to *Réponse Préliminaire de Pauline Nyiramasuhuko à la Prosecutor's Motion to Drop and Add Witnesses*", filed on 26 January 2004, ("Prosecutor's Reply to Nyiramasuhuko");
- h) The "*Réponse de Pauline Nyiramasuhuko à la Requête du Procureur aux Fins de Retirer et d'Ajouter des Témoins à Sa Liste de Témoins*", filed on 9 February 2004, ("Nyiramasuhuko's Reply");
- i) The "Prosecutor's Reply to Nyiramasuhuko's Response to His Motion to Add and Drop Witnesses on the Witness List", filed on 13 February 2004 ("Prosecutor's Reply to Nyiramasuhuko");
- j) The "*Réponse à la Requête du Procureur Demandant de Réviser Sa Liste de Témoins*", filed on 13 February 2004 ("Kanyabashi's Response");
- k) The "Prosecutor's Reply to Kanyabashi's *Réponse à la Requête du Procureur Demandant de Reviser Sa Liste*", filed on 20 February 2004 ("Prosecutor's Reply to Kanyabashi");
- l) The "*Réponse d' Elie Ndayambaje à la Requête du Procureur aux Fins de Retrait et d'Ajouter des Témoins à Sa Liste de Témoins*", filed on 20 February 2004 ("Ndayambaje's Response");
- m) The "*Réponse de Arsène Shalom Ntahobali à la Requête du Procureur pour Retirer de Sa Liste de Témoins Trente Témoins et y Ajouter Trois Nouveaux Témoins*", filed on 23 February 2004 ("Ntahobali's Response");
- n) The "*Réponse de Alphonse Nteziryayo à la Requête du Procureur aux Fins de Retrait et d'Adjonction de Témoins*", filed on 23 February 2004 ("Nteziryayo's Response");



- o) The "Prosecutor's Consolidated Reply to Ndayambaje and Ntahobali's Response to His Motion to Add and Drop Witnesses on the Witness List", filed on 24 February 2004 ("Prosecutor's Consolidated Reply to Ndayambaje and Ntahobali");
- p) The "Duplique à la Prosecutor's Reply to Kanyabashi's *Réponse à la Requête du Procureur Demandant de Réviser Sa liste de Témoins*", filed on 26 February 2004 ("Kanyabashi's Second Reply");
- q) The "*Réponse Additionnelle de Sylvain Nsabimana à la Requête du Procureur Datée du 12 Janvier 2004 aux Fins de Retrait et d'Adjonction de Témoins à Charge*", filed on 2 March 2004 ("Nsabimana's Second Response");
- r) The "Prosecutor's Reply to Nteziryayo's Response to His Motion to Add and Drop Witnesses on the Witness List", filed on 3 March 2004 ("Prosecutor's Response to Nteziryayo");
- s) The "Prosecutor's Reply to *Réponse Additionnelle de Sylvain Nsabimana à la Requête du Procureur Datée du 12 Janvier 2004 aux Fins de Retrait et d'Adjonction des Témoins à Charge*", filed on 8 March 2004 ("Prosecutor's Response to Nsabimana");
- t) The "Prosecutor's Reply to Kanyabashi's *Duplique* Relating to the Prosecutor's Motion to Add and Drop Witnesses", filed on 10 March 2004 ("Prosecutor's Reply to Kanyabashi");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Rules 54, 73 and 73 *bis* (E);

NOW CONSIDERS the Motion based solely on the written briefs filed by the Parties, pursuant to Rule 73 (A) of the Rules.

ARGUMENTS OF THE PARTIES

The Prosecution

1. The Prosecution moves, pursuant to Rules 54, 73 and 73 *bis* (E) of the Rules, that the Trial Chamber:
 - a) Order the deletion of the following 30 witnesses from its witness list: (1) **FAD**; (2) **FAJ**; (3) **FAO**; (4) **FAQ**; (5) **FAR**; (6) **FAT**; (7) **FAW**; (8) **QAK**; (9) **QAS**; (10) **QCA**; (11) **QN**; (12) **QR**; (13) **RD**; (14) **RF**; (15) **RG**; (16) **RJ**; (17) **RM**; (18) **SL**; (19) **SM**; (20) **SQ**; (21) **TX**; (22) **TY**; (23) **QBR**; (24) **QAG**; (25) **QBM**; (26) **ST**; (27) **SW**; (28) **FAF**; (29) Expert Binaifer Nowrojee; (30) Expert Rony Zachariah.
 - b) Order the addition of the three following witnesses to its witness list: (1) **FA**; (2) **FCC**; and (3) a socio-linguistic expert witness, Mr. Evariste Ntakirutimana.
2. The Prosecution has disclosed to the Defence, on 12 January 2004, the report of the proposed language expert and the redacted witness statements of the two proposed additional witnesses, FA and FCC.

3. The Prosecution submits: that it is in the interests of justice to add three witnesses that will enable it reduce the overall number of witnesses; and that the testimonies sought to be added are important to the trial.
4. According to the Prosecution's summary of the statement of proposed Witness FA, who is a female of Hutu ethnicity, FA saw events that occurred at the house of Pauline Nyiramasuhuko and at the roadblock in front of the house. FA meetings at Nyiramasuhuko's house. FA also saw Ntahobali kill several Tutsis at this roadblock with an axe and saw Nyiramasuhuko there at the time. FA saw Ntahobali drive Tutsis in a white vehicle to be killed at IRST. FA saw other killings by Ntahobali at this roadblock, where he was "chief of the *Interahamwe*". FA heard Ntahobali say to an *Interahamwe* named Kazungu, "Get up Kazungu. Let's go. Today we will start with killing [a Tutsi named] Rwamukwaya." FA heard Nyiramasuhuko say to the Presidential Guard that refugees at the Prefecture had not been "finished".
5. The Prosecution has submitted a summary of the statement of Witness FCC, a male of Hutu ethnicity, who allegedly witnessed, on or about 19 April 1994, Nsabimana's installation as *Préfet* of Butare. That same night, FCC saw soldiers kill Tutsis; FCC also found many dead bodies. FCC recalls that one or two days later, troops were airlifted from Kigali to Butare. FCC says that there was an inner circle of the Butare Security Council, consisting of about nine members who made the major decisions. FCC states that Nsabimana and Kanyabashi were members of the Butare Security Council, which held meetings in the former MRND palace from April to June 1994 in Butare town on an almost daily basis. On or about 23 June 1994, FCC saw Nteziryayo leading a security meeting. On another occasion, FCC heard Nteziryayo publicly invite Hutus to kill Tutsis. FCC states that, during Nsabimana's tenure, almost all Tutsis in Butare were killed. According to FCC, Ntahobali commanded one of the two factions of *Interahamwe* in Butare that carried out many attacks on Tutsis. FCC witnessed one incident in May 1994 when *Interahamwe* under Ntahobali's command attacked a family.
6. According to the Prosecution, the proposed expert witness will provide information in support of the count of direct and public incitement to commit genocide against persons in the Butare case. The Prosecution maintains that the expert will establish the causal link between the words spoken by the Accused at meetings and public places and the resultant action taken by the population. His testimony will also serve to strengthen the testimonies of the witnesses on this count and by so doing, ultimately, the case of the Prosecution.
7. The Prosecution submits that it is directed by the mandate of the Statute and considerations of judicial efficiency to produce the best available evidence with the fewest number of witnesses.
8. The Prosecution seeks to reduce the overall number of witnesses as well as to reduce the delay before judgment. The Prosecution argues that the granting of this Motion will advance the accused persons' rights to a trial without undue delay and will in no way prejudice their rights or hinder their ability to prepare their defence.
9. The Prosecution specifies that if the Trial Chamber is not inclined to grant its motion in all respects, the Trial Chamber should not construe the motion as a basis to strike any witnesses from the current list. Deletion of the 30 witnesses that the Prosecution now seeks to drop is strictly conditioned upon the addition of the other three proposed witnesses.

The Defence

10. Defence Counsel for Nsabimana does not object to the proposed deletion of 30 Prosecution witnesses. However, Counsel argues that the addition of three new witnesses would seriously disrupt his defence and that, therefore, the Chamber should dismiss the Prosecution's motion. The Defence argues that, contrary to the Prosecution's submission, it would suffer prejudice if the motion were granted because of the complexity of the case and the time and resources required to adduce additional evidence in relation to the new witnesses.
11. However, should the motion be granted, the Defence for Nsabimana requests that the Chamber adjust the court calendar, order the Prosecutor to disclose the full statements of the aforementioned witnesses without delay, and recommend that the Registry provide the Defence with means for further investigations.
12. Counsel for Nyiramasuhuko submits that an expert report must be based on extensive technical knowledge and that the Defence would also need to rely upon the expertise of a person working in the same field in order to evaluate the evidence submitted by the Prosecution's proposed expert witness.
13. Counsel for Nyiramasuhuko argues that the Prosecution has had in its possession the report prepared by the socio-linguistic expert Evarist Ntakirutimana since December 2002. To add this expert as a witness, two years after receipt of the report, constitutes grave negligence and causes prejudice to the Defence.
14. Counsel for Nyiramasuhuko acknowledges that the proposed deletion of 30 witnesses serves the interest of justice but argues that the deletion should not be conditioned on the addition of three new witnesses. To add the proposed Witnesses FA and FCC is unnecessary insofar as many other witnesses have testified or will testify about the same alleged events that both witnesses would address.
15. Counsel for Kanyabashi submits that, although FA's testimony would not directly affect the defense of his client, the addition of the witness should not be allowed because the testimony would unreasonably lengthen the proceedings. Counsel further argues that the disclosed redacted statements of proposed Witness FCC are vague and that, therefore, the scope of new evidence cannot be determined at this stage. Moreover, the proposed new witness will prejudice the Defence, compelling it to conduct new investigations and to recall former witnesses. As regards the socio-linguistic expert Evariste Ntakuritimana, the Defence alleges that his testimony is unnecessary.
16. Counsel for Kanyabashi submits that the Defence is entitled to meet freely with both Witnesses SW and FAT upon their deletion from the Prosecution witness list if it wishes to do so. The Defence objects to the presence of any representative from the OTP during any such meeting.
17. Counsel for Ndayambaje objects to the addition of three new witnesses requested by the Prosecution.
18. Counsel for Ntahobali objects to the addition of three new witnesses insofar as there is no link between their proposed testimonies and the proposed testimonies of 22 witnesses, who are currently on the Prosecution list, charging the Accused Ntahobali.

19. Counsel for Nteziryayo submits that, while the deletion of 30 witnesses from the Prosecution's list serves the interests of justice, this deletion cannot be conditioned on the addition of new witnesses. To add new witnesses requires that the Prosecution show good cause and demonstrate how the interests of justice are served. The Defence argues that these requirements have not been met. However, should the Chamber grant the Prosecution's motion to add the proposed three new witnesses, the Defence requests that these new witnesses not be called to testify for five months following disclosure of their identities to the Defence.

Prosecution Replies

20. The Prosecution submits that the proposed addition of three new witnesses will not prejudice the Accused in the case, as there will be ample time to prepare their defence.
21. In reply to the submissions presented by Counsel for Kanyabashi and Nyiramasuhuko, the Prosecution maintains that both SW and FAT are protected witnesses and, therefore, cannot meet with the Defence unless a representative from the OTP is present.
22. The Prosecution reiterates that the Defence will have ample time to conduct investigations insofar as it has no intention of calling proposed Witnesses FA and FCC to testify within the next two months or of calling the proposed expert witness until the end of the Prosecution's case.
23. The Prosecution further submits that the Replies submitted by Defence Counsel for Kanyabashi and Nyiramasuhuko were filed beyond the prescribed time limits, pursuant to Rule 73 (E).
24. The Prosecution argues that the statements of both Witnesses FA and FCC show specific factual circumstances which are crucial to the Prosecution's case and which allow the Prosecutor to present the best available evidence.
25. The Prosecution submits that the alleged prejudice to the Accused Ndayambaje is unfounded insofar as the Defence acknowledges that none of the proposed new witnesses would testify against Ndayambaje. The Prosecution asserts that Counsel for Nteziryayo also fails to show any specific prejudice suffered by the Accused, should the motion be granted.

HAVING DELIBERATED

26. The Chamber finds that the Prosecution has properly submitted its Motion to Drop and Add Witnesses, pursuant to Rules 54, 73, and 73 bis (E) of the Rules. Specifically, Rule 73 bis (E) provides: "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 its decision as to which witnesses are to be called".
27. The Chamber notes the Prosecution's argument that the addition of three proposed new witnesses will enable it to delete 30 witnesses from its initial list.

Addition of witnesses

28. Concerning the addition of Witnesses FA and FCC and the socio-linguistic expert Evariste Ntakuritimana, the Chamber recalls the jurisprudence of the Tribunal to the effect that "[t]he 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."¹ In that decision the Trial Chamber assessed the "interests of justice" and "good cause" before granting the addition of a witness in regard to: "[t]he materiality of the testimony, the complexity of the case, prejudice to the Defense, including elements of surprise, on-going investigations, replacements and corroboration of evidence [...] the presentation of the best available evidence [...] balanced against the right of the accused to have adequate time and facilities to prepare his Defense and his right to be tried without undue delay."²
29. The Chamber notes the Prosecution's submission that the expected testimonies of Witnesses FA and FCC and the socio-linguistic expert are the best available evidence to prove and support several counts involving conspiracy and complicity, charged in the Indictments against the Accused Nyiramasuhuko, Ntahobali and Nteziryayo, and to corroborate the testimonies of other witnesses.
30. The Chamber notes that Defence Counsel for all Accused have opposed the proposed addition to the Prosecution witness list, arguing, *inter alia*, that the addition of three new witnesses, at this stage of the trial, would disrupt their defence by requiring new investigations and would lengthen the proceedings. The Defence further submits that the proposed addition is unfounded since the expected testimonies of the new witnesses will not replace the testimonies of the deleted witnesses.
31. The Chamber also notes that, on 12 January 2004, the Prosecution disclosed to the Defence the report of the language expert as well as the redacted statements of proposed Witnesses FA and FCC.
32. Having reviewed the materiality of the evidence that the proposed witnesses are expected to address, the Chamber accepts that the testimonies of Witnesses FA and FCC could address specific factual circumstances which are relevant to the case.
33. The Chamber is of the view that it is in the interests of justice to add Witnesses FA and FCC and the linguistic expert to the Prosecution's witness list.
34. In regard to the Defence request that they be given adequate time to prepare for cross-examination of the three witnesses, the Chamber notes the Prosecution's submission that it will not call Witnesses FA and FCC to testify for at least two months following disclosure of their identities to the Defence or call the expert witness until the end of its case.
35. The Chamber further notes the request by counsel for Nteziryayo that the three new witnesses should not be called until five months have elapsed following disclosure of

¹ *Prosecutor v. Nahimana, Ngeze, Barayagwiza*, ICTR-99-52-T "Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses," of 26 June 2001

² *Ibid.*

their identities to the Defence. In the Chamber's opinion it is not possible to determine at this stage of the proceedings whether the Prosecution will not have closed its case five months following disclosure of the identities of the new three witnesses.

36. In consideration of the interests of the Accused and the fair administration of the proceedings, the Chamber finds that calling all three witnesses at the end of the Prosecution's case should provide the Defence sufficient time to prepare for the cross-examination of the three new witnesses.
37. The Chamber, therefore, grants the Prosecution's request to add FA, FCC, and the linguistic expert Evariste Ntakirutimana to its initial witness list.
38. Accordingly, the Chamber directs that the testimonies of Witnesses FA, FCC, and Mr Evariste Ntakirutimana be heard at the end of the Prosecution's case.
39. Furthermore, the Chamber is of the view that in order to avoid any delay which could prejudice the Defence in its preparation and pursuant to Rule 66 (A)(ii), the Chamber orders immediate disclosure by the Prosecution to the Defence of the non-redacted statements of the three new added witnesses.

Deletion of Witnesses

40. Concerning the deletion of witnesses from the Prosecution's initial list, it is the Chamber's opinion that the proposed deletion of 30 witnesses could significantly accelerate the proceedings and enhance judicial economy. Furthermore the Chamber notes that the Defence does not object to the deletion of witnesses sought by the Prosecution.
41. Therefore, the Chamber grants the Prosecution's request to delete the following witnesses from its initial list: FED, FAJ, FAO, FAQ, FAR, FAT, FAW, QAK, QAS, QCA, QN, QR, RD, RF, RG, RJ, RM, SL, SM, SQ, TX, TY, QBR, QAG, QBM, ST, SW, FAF, expert Binaifer Nowrojee and expert Rony Zachariah.
42. Regarding the request submitted by Counsel of Kanyabashi to meet freely with former Prosecution Witnesses SW and FAT, upon their withdrawal from the Prosecution list, the Chamber finds that the Defence should submit the issue in an separate and timely motion.

FOR THE ABOVE REASONS, THE TRIBUNAL,

GRANTS the Prosecution's Motion to add Witnesses FA, FCC, and socio-linguistic expert Evariste Ntakirutimana to its witness list; and

- i) **ORDERS** the Prosecution to immediately disclose to the Defence the non redacted statements of the three new added witnesses.
- ii) **DIRECTS** the Prosecution to call Witnesses FA, FCC, and Evariste Ntakirutimana to testify at the end of its case.



GRANTS the Prosecution's Motion to delete from its list Witnesses FED, FAJ, FAO, FAQ, FAR, FAT, FAW, QAK, QAS, QCA, QN, QR, RD, RF, RG, RJ, RM, SL, SM, SQ, TX, TY, QBR, QAG, QBM, ST, SW, FAF, expert Binaifer Nowrojee, and expert Rony Zachariah.

Arusha, 30 March 2004



William H. Sekule

Presiding Judge



Arlette Ramaroson

Judge



Solomy B. Bossa

Judge



[Seal of the Tribunal]