

ICTR-00-56-T
11-02-05
(18841-18835)

18841
Mump



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka De Silva, Presiding
Judge Taghrid Hikmet
Judge Seon Ki Park

Registrar: Mr Adama Dieng

Date: 11 February 2005

JUDICIAL RECORDS/ARCHIVES
2005 FEB 11 P 2:01

The PROSECUTOR
v.
Augustin NDINDILYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU

Case No. ICTR-2000-56-T

**DECISION ON PROSECUTION MOTION TO VARY ITS LIST OF
WITNESSES: RULE 73 BIS (E) OF THE RULES**

The Office of the Prosecutor:

Mr Ciré Aly Bâ
Ms Ifeoma Ojemeni Okali
Mr Segun Jegede
Mr Alphonse Van
Mr Moussa Sefon
Mr Tambadou Abubacarr
Ms Faria Rekkas (Case Manager)
Ms Anne Pauline Bodley (Case Manager)

Counsel for the Accused:

Mr Gilles Saint-Laurent and Mr Ronnie Mac Donald for **Augustin Bizimungu**
Mr Christopher Black for **Augustin Ndingilyimana**
Mr André Ferran and Ms. Danielle Girard for **François-Xavier Nzuwonemeye**
Mr Fabien Segatwa for **Innocent Sagahutu**

[Handwritten signature]

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

SITTING as Trial Chamber II composed of Judge Asoka De Silva, Presiding, Judge Taghrid Hikmet, and Judge Seon Ki Park (the "Chamber"),

BEING SEIZED of :

i. The « *Requête du Procureur en variation de sa liste de témoins : Article 73 bis E) du Règlement de procédure et de preuve* » filed on 16 December 2004 (« Prosecutor's Motion »);

ii. The « *Requête additionnelle du Procureur en variation de sa liste de témoins : article 73bis E) du Règlement de procédure et de preuve* » filed on 28 December 2004 (« Prosecutor's Additional Motion »);

HAVING RECEIVED the :

i. « *Réponse à la Requête du Procureur en variation de sa liste de témoins : Article 73 bis E) du Règlement de procédure et de preuve* » filed by Counsel for Sagahutu on 5 January 2005 (« Sagahutu's Response »);

ii. « *Requête aux fins d'obtention de délais pour répondre à la Requête du Procureur en variation de sa liste de témoins* » filed by counsel for Nzuwonomeye on 5 January 2005 (« Nzuwonomeye's Motion »);

iii. « *Réplique du Procureur à la réponse formulée par le Conseil d'Innocent Sagahutu sur la Requête en variation de témoins des 15 et 28 décembre 2004* » filed on 6 January 2005 (the « Prosecutor's Reply »);

iv. « *Reponse aux requêtes du Procureur en variation de sa liste de témoins* » filed by Counsel for Nzuwonomeye on 11 January 2005 (« Nzunomeye's Response »);

v. « *Requête afin d'obtenir un délai supplémentaire pour répondre à la requête du procureur en variation de sa liste de témoins* » filed by Counsel for Bizimungu on 10 January 2005 (« Bizimungu's Motion »);

vi. « *Defence Response to the Prosecution Motion Seeking to Amend the Witness List* » filed by Counsel for Nindiliyimana on 18 January 2005 (« Nindiliyimana's response »);

vii. the « *Réplique du Procureur à la réponse formulée par le Conseil d'Innocent Sagahutu sur la Requête en variation de Témoins des 15 et 28 décembre 2004* » filed on 26 January 2005 (the « Prosecutor's Reply »);

viii. « *Réplique du Procureur aux observations du Conseil d'Augustin Nindiliyimana déposées le 27 janvier 2005 (cf. Requête en variation de sa liste des témoins, déposée par le Procureur le 15 décembre 2004)* » filed by the Prosecution on 31 January 2005 (« Prosecution rejoinder »)

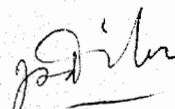
CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 73*bis* (E) of the Rules;

NOW DECIDES the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73(A) of the Rules.

PRELIMINARY MATTER:

On the Time Limit for the Defence to File its Response

1. Pursuant to Rule 73(E), a responding party shall file its response within five days from the date on which Counsel received the Motion.
2. Pursuant to Rule 73(B), where a time limit is expressed in days, Saturdays, Sundays and public holidays shall be counted as days, but should the time limit expire on such a day, it shall be automatically extended to the subsequent working day.
3. The Defence for Sagahutu submits that the time limit for filing its Response expired on 3 January 2005. However, its response was filed on 5 January 2005.
4. The Defence for Nzuwonemeye filed on 5 January 2005 a Motion for Extension of Time Limit within which to file its Response. The Defence submits that it received the Prosecutor's Additional Motion on 29 December 2004. According to this time frame, the time limit for filing a response expired on 3 January 2005. However, the Defence only filed a response on 11 January 2005. The Chamber's holds, in accordance with generally accepted practice, that if the Defence wishes to apply for extension of time, it ought to have done so within the time limit set for filing the response. Having failed to do so, and having filed the response out of time, neither the motion for extension of time nor the Response filed by Nzuwonemeye can be considered by the Chamber.
5. The Defence for Bizimungu filed a motion for extension of time on 10 January 2005. It argues that Lead Counsel did not know about the Prosecutor's motions, filed on 16 December and 28 December, until 4 January. It is the Chamber's view that since the office of Lead Counsel was open from 3 January, it had an obligation to respond to the motion from that day. Furthermore, it is the responsibility of Counsel to make sure that they have made arrangements to receive service of documents in their absence. The Chamber concludes that Bizimungu's application for extension of time was filed out of time and cannot be considered by the Chamber.
6. The Defence for Nindiliyimana filed a response on 18 January 2005 in which it argues that it did not receive the Prosecutor's Motion until 11 January 2005. It further argues that it only received the Prosecutor's Motion in French when the working language of Lead Counsel for the Defence is English. For these reasons, the Defence for Nindiliyimana argues that the time limit to file a response does not begin to run until an English translation of the Motion is served on the Defence.
7. The Chamber notes the Defence argument, but is satisfied that Lead Counsel for Nindiliyimana is also conversant with the French language. The Chamber further notes that on 18 January 2005, it was seized of a Motion entitled "Requête Confidentielle et en



Extrême Urgence D'Augustin Nindiliyimana aux fins de Prendre acte que le Temoin YAOC est un Temoin Potential de la Defense et D'empecher au Procureur Tout Contact ulterieur avec Lui", a 6-page document which was entirely written in French and signed by Lead Counsel. This confirms that Lead Counsel is sufficiently conversant with the French Language to enable him to discharge the duties of Defence Counsel including responding to Prosecution motions. The Chamber expresses its disapproval of conduct whereby Counsel choose to discharge their functions in one language when it suits them, and on other occasions purport to insist on the other language of the Tribunal as his "working language". It is the Chamber's view that the argument of Counsel for Nindiliyimana is a dilatory tactic and warns Counsel to desist from such behaviour in future. In addition, the Chamber wishes to note that by his own admission, Lead Counsel for Nindiliyimana received the Prosecution Motion on January 11. Defence was therefore obliged to file its response not later than 17 January 2005. Having failed to do so, the response was filed out of time and the Chamber will not consider it.

8. For these reasons, the Trial Chamber concludes that the responses filed by Counsel for Nindiliyimana, Sagahutu and Nzuwomeye, and the Motion for Extension of time filed by Counsel for Bizimungu were all filed out of time. The Chamber will therefore not consider them, nor will the Chamber consider the Prosecutor's reply to the Defence responses.

SUBMISSIONS OF THE PARTIES

Motions by the Prosecution

9. The Prosecution seeks leave from the Chamber to add two new witnesses, Witnesses XXQ and ATZ, to the list that was filed with its Pre-Trial Brief on 17 June 2004.

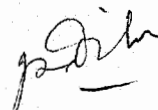
10. The Prosecution indicates that it does not wish to call seven witnesses listed in the 17 June 2004 list: i.e. Witnesses GFB, GFH, BW, GFE, GFK, GHI and GFW.

11. The Prosecution quotes Rule 73bis(E) in support of its Motion.

12. The Prosecution adds that the statement of Witness ATZ whom the Prosecution had not been able to find, was only taken on 9 September 2004 and disclosed to the Defence on 6 October 2004 after translation. The Prosecution indicates that Witness XXQ only recently accepted to cooperate with its Office and was the last witness to be called for the Prosecution in the Military I trial.

13. The Prosecution argues that it is in the interest of justice to allow those two witnesses to be heard in view of the specificity and importance of their testimonies against Accused Augustin Bizimungu and Augustin Nindiliyimana: Witness XXQ will testify on paragraphs 22, 23, 24, 25 and 27 of the Indictment, Witness ATZ will testify on paragraphs 22, 51, 53, 73, 74, 75, 93 and 99 of the Indictment and both testimonies will shed light on the specific intent required for the crime of Genocide.

14. The Prosecution submits that it is in the interest of judicial economy to only call two witnesses while dropping seven others and that it will not prejudice the rights of the



Accused as those witnesses will be called at the close of the Prosecution Case. The Prosecution indicates that the statement of Witness ATZ was disclosed to the Defence on 6 October 2004 while the transcripts of the testimony of Witness XXQ of October 2004 are attached to the Motion.

15. In its Additional Motion and for the same reasons as developed in the earlier Motion, the Prosecution seeks leave to add one more witness, Prosecution Witness AWC, to the list that was filed with its Pre-Trial Brief on 17 June 2004.

16. The Prosecution submits that the statement of this Witness was made in May 2004, but was only received by the Office of the Prosecution in December 2004. At the time of the Additional Motion, this statement had not yet been translated. The Prosecution submits that this delay was caused by the departure from the Office of the Prosecution of the two investigators who interviewed Witness AWC.

17. The Prosecution submits that the translated copy of this statement will be disclosed to the Defence as soon as possible.

18. The Prosecution submits that witness AWC will testify on Paragraphs 22, 103, 104, 105, 106, 107 and 118 of the Indictment.

HAVING DELIBERATED

On Leave to Amend the Prosecution List of Witnesses

19. The Chamber recalls Rule 73bis (E) of the Rules:

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.

20. The Chamber recalls that this Tribunal has held that the Prosecutor should be allowed to reinstate its list of witnesses, after consideration of several factors:¹ the materiality of the testimony, the complexity of the case, the prejudice to the Defence (including the element of surprise), on-going investigations, replacements and corroborations of evidence.² In addition, the Trial Chamber in the case of *The Prosecutor v. Bagosora et al.* expanded on these factors, and considered that Rule 73bis(E) requires a "close analysis" of each witness, including the:

sufficiency and time of disclosure of witness information to the Defence; the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictments; and the ability of the Defence to make an effective cross-examination of the proposed testimony, given its novelty or

¹ *The Prosecutor v. Théoneste Bagosora et al*, Case No. ICTR-98-41-T, "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E)", 21 May 2004, para. 8-12.

² *Id.* at para. 8 (quoting *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, "Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses", 26 June 2001, para. 19-20).

other factors; and the justification offered by the Prosecution for the addition of the witnesses.³

21. The Trial Chamber concurs with the reasoning of the Trial Chamber in the case of *The Prosecutor v. André Ntagerura et al.*, which held that the Tribunal should adopt a flexible approach in the exercise of its discretion relating to the matter of adding witnesses to a witness list.⁴

22. The Chamber should also consider factors such as the reasons for adding witnesses, date on which the Prosecution declared its intention to call the proposed witnesses, the stage of the trial proceedings, whether the late discovery of the witnesses arose from fresh investigations, and whether the Defence will have adequate time to make an effective cross-examination.⁵

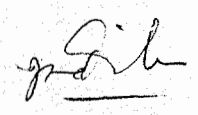
23. The Chamber considers that the fact that the request was made at this stage of the proceedings when only four prosecution witnesses have been called out of a list of over one hundred, and that the Prosecution has indicated that the additional witnesses will be called at the end of the Prosecution case, favour allowing the Prosecution to vary its list of witnesses. The Chamber notes also that the proposed variation will promote judicial economy by reducing the total number of witnesses scheduled for trial.

24. Although the Chamber will grant the Prosecution motion to add the three witnesses, a word of caution remains in order here. The Chamber looks askance at the reasons given by the Prosecution for the delay regarding witness AWC. The Chamber refuses to accept as excusable a state of affairs in which the Prosecution Section of the Office of the Prosecutor (OTP) and the Investigation Section of the same office are so disconnected as to permit a seven-month delay purportedly between the taking of a statement and its being brought to the attention of Prosecuting Counsel. The OTP is one office and the Chamber refuses to condone apportionment of blames between or among the different sections of the OTP. There is a collective responsibility for the OTP. Nor does the Chamber accept as excusable the cryptic reference to the departure of two investigators as explaining the failing here. The lapse simply should not have been allowed to occur.

NOTING THE FOREGOING REASONS,

THE TRIAL CHAMBER GRANTS the Motion and allows the Prosecution to vary its list of witnesses by adding witnesses XXQ, ATZ and AWC and deleting witnesses GFB, GFH, BW, GFE, GFK, GHI and GFW.

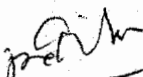
³ *Id.* at para. 9 (quoting *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, "Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis(E)", 26 June 2003, para. 14).
⁴ *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46T, "Decision on Defence for Ntagerura's Motion to Amend Its Witness List Pursuant to Rule 73ter (E)", 4 June 2002, para 10.
⁵ *Bagosora et al.*, Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis (E), 21 May 2004, paras. 9-10; *Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis (E) (TC), 26 June 2003, paras. 14-22.



1835

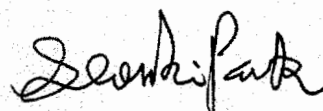
Prosecutor v Ndindiyimana et al, Case No. ICTR-2000-56 -T

Arusha, 11 February 2005


Asoka De Silva
Presiding Judge


Taghrid Hamet
Judge

[Seal of the Tribunal]


Seon Ki Park
Judge