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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

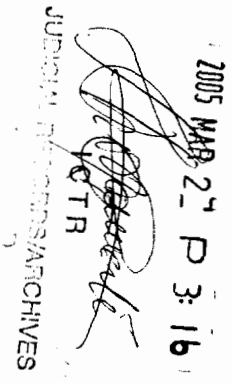
TRIAL CHAMBER II

ICTR-00-55A-T
24-03-2005
(2302-2298)

Before: Judge Asoka de Silva, Presiding
Judge Flavia Lattanzi
Judge Florence Rita Arrey

Registrar: Mr Adama Dieng

Date: 24 March 2005



THE PROSECUTOR

vs.

THARCISSE MUVUNYI

ICTR-2000-55A-T

DECISION ON PROSECUTOR'S VERY URGENT MOTION PURSUANT TO RULE 73*bis* (E) FOR LEAVE TO VARY THE PROSECUTOR'S LIST OF WITNESSES FILED ON 19 JANUARY 2005

Office of the Prosecutor

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

SITTING as Trial Chamber II composed of Judge Asoka de Silva, Presiding, Judge Flavia Lattanzi and Judge Florence R. Arrey (the "Chamber");

BEING SEISED of the "Prosecutor's Very Urgent Motion Pursuant to Rule 73*bis* (E) for Leave to Vary the Prosecutor's List of Witnesses Filed on 19 January, 2005" filed on 28 February 2005 (the "Motion");

BEING FURTHER SEISED of the "Prosecutor's Corrigendum to its Very Urgent Motion Pursuant to Rule 73*bis* (E) for Leave to Vary the Prosecutor's List of Witnesses Filed on 19 January, 2005" filed on 1 March 2005 (the "Corrigendum Motion");

CONSIDERING the "Defendant's Response to the Prosecutor's Very Urgent Motion Pursuant to Rule 73*bis* (E) for Leave to Vary the Prosecutor's List of Witnesses Filed on 19 January, 2005" filed on 1 March 2005 (the "Response");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion pursuant to Rule 73*bis* (E) of the Rules on the basis of written submissions filed by the Parties.

SUBMISSIONS OF THE PARTIES

The Prosecution

1. The Prosecution submits that in view of the decision of the Trial Chamber dated 23 February 2005 denying the Prosecutor's application to streamline the current indictment and drop two charges, it is now under an obligation to call witnesses who will support all the paragraphs in the current Muvunyi indictment.

2. To this end, the Prosecution submits that in addition to the 20 witnesses listed on 19 January 2005, it intends to call 29 more witnesses, namely witnesses AFV, YAM, QCL, QCS, YAF, ADP, BV, CCS, QBM, QBU, QBV, QCC, QCP, QDC, QO, TM, XR, YAB, YAC, YAD, YAE, YAG, YAH, YAJ, YAL, YAR, YAS, QBP, and QY.

3. Attached to the Prosecution's Motion is Annexure "A", which includes a summary of statements by each of the additional 29 witnesses, the charges and the specific paragraph/s each witness will support, and an estimate of the length of their evidence-in-chief.

4. The Prosecution also filed the Corrigendum Motion to which it attached Annexure "B", a table showing the status of disclosure detailing the pseudonyms, dates of the statements, and the dates of disclosure.

5. The Prosecution relies on the jurisprudence of the Tribunal in the *Ntagerura* case to submit that in construing Rule 73*bis* (E), the Tribunal has adopted a flexible approach in the exercise of its discretion.[1]

6. The Prosecution submits that allowing its initial list of witnesses to be varied as proposed is in the interests of justice and in compliance with the Trial Chamber's decision dated 23 February 2005.[2]

7. The Prosecution submits that the variation of the initial list of witnesses does not prejudice the Defence in the preparation of its case because the Prosecution has disclosed to the Defence all the statements of the witnesses that it seeks leave to add to the list of witnesses.

8. Additionally, the Prosecution submits that the application will not cause undue delay in the trial of the accused since the Prosecution will call the 29 witnesses 21 days after disclosure of their unredacted statements and after the first session of the trial. The Prosecution submits that this gives the Defence adequate time to prepare its case.

9. The Prosecution therefore prays that the Chamber grant its motion to vary the list of witnesses by adding 29 more witnesses.

The Defence Response

10. The Defence asserts that the Prosecution's attempt to revise its witness list by more than doubling the number of proposed witnesses, and waiting until literally hours before the start of the trial to do so, is without basis and should be dismissed by the Chamber.

11. The Defence also asserts that the Prosecution has failed to justify *why* it is seeking to increase the number of witnesses less than six weeks after it filed its witness list of 19 January 2005, noting that if the number of witnesses went from 20 to 49, it would represent a 145 percent increase in the number of witnesses.

12. The Defence states that the Prosecution's witness list was actually finalized and filed together with the Prosecution's Pre-Trial Brief on 25 January 2005; that the Defence relied on that list to prepare its case; and that doubling the number of witnesses amounts to a different trial for Muvunyi.

13. The Defence argues that Rule 73*bis* (E) is an inappropriate vehicle because it applies only to variation in the Prosecution's witness list *after* the commencement of trial, whereas in the instant case, the Prosecution filed its motion *before* the commencement of trial.

14. Relying on the Tribunal's jurisprudence in the *Bizimungu* case, the Defence points to a four-part test used by Trial Chambers to guide their discretion. The elements of the test include: a) sufficiency and time of disclosure of witness information to the

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[1] *The Prosecutor v Ntagerura et al*, ICTR-1996-10A-TC, "Decision on Defence for Ntagerura's Motion to Amend its Witness List Pursuant to Rule 73*bis* (E)", 4 June 2002, para. 10.

[2] *The Prosecutor v Tharcisse Muvunyi*, ICTR-2000-55A-PT, "Decision on the Prosecutor's Motion for Leave to File an Amended Indictment", 23 February 2005.

Defence; b) the probative value of the proposed testimony in relation to existing witnesses and the allegations in the indictment; c) the ability of the defence to make an effective cross-examination, given its novelty or other factors; and d) the justification offered by the Prosecution for the addition of witnesses.[3]

15. The Defence therefore concludes that the Prosecution has failed to meet the standards set by the Tribunal and urges the Chamber to exercise its discretion and deny the Prosecution's Motion to increase the number of witnesses from 20 to 49.

HAVING DELIBERATED,

16. The Chamber recalls Rule 73*bis* (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.

17. The Chamber also recalls its Decision of 23 February 2005 denying the Prosecution's application to streamline the current indictment and drop two charges. The Chamber is unable to see how that decision created an 'obligation' on the Prosecution to seek to vary its list of witnesses in the way now sought by the Prosecution. It must be recalled that the Chamber stated as follows in Paragraph 31 of that decision:

> [A] Prosecutor who no longer intends to prosecute an accused on certain counts of the indictment needs no amendment of the indictment to achieve that end. He could, instead, simply declare, at the opening of the trial, that he will not present any evidence on those counts. At the eve of trial, such a declaration might prove a more efficient way of achieving what was intended by a motion to amend the indictment aimed at dropping the counts in question.

18. The Chamber notes that the existing Pre-Trial Brief was filed on the basis of the current Indictment, before the Motion for amendment was decided. Therefore, the Prosecution was supposed, at the time of the filing of the Pre-Trial Brief, to have covered all counts presented in the Indictment with its list of witnesses.

19. The Chamber further notes that the Motion for amendment of the Indictment having been denied entirely, nothing is supposed to have changed in the way the Prosecution should present its case. There are no additional counts or new allegations to prove which could justify the adding of witnesses at this stage of the proceedings.

20. Moreover, after examining the proposed summary of the witness statements attached to the Prosecution's Motion as Annexure "A", the Chamber is of the view that the additional witnesses' testimony will not specifically relate to the charge of rape, and that only two of the 29 witnesses will testify on other inhumane acts as crimes against humanity. The majority of the additional witnesses, apparently, will be called to

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[3] *Prosecutor v. Bizimungu*, No. ICTR-99-50-T, "Decision on Prosecutor's Very Urgent Motion Pursuant to Rule 73*bis* (E) to Vary the Prosecutor's List of Witnesses Filed on 25 May 2004, 3 September 2004, para. 16.

testify in support of the other charges that are already covered by witnesses listed in the Pre-Trial Brief.

21. The preceding arguments notwithstanding, the Chamber is minded, in the interests of justice, to exercise its discretion in favour of partially granting the Motion. The Chamber concurs with the reasoning of the Trial Chamber in *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. The Chamber also concurs with the decision in *Nahimana et al.* which held as follows:

> 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.[4]

22. Noting, however, that the Motion apparently arose out of the Chamber's Decision of 23 February 2005 denying the Prosecution leave to file an amended Indictment, the Chamber directs the Prosecution to reformulate its witness list to include only those additional witnesses who will support the two counts the Prosecution sought to withdraw, namely Count 4 ("rape as ... a crime against humanity") and Count 5 ("other inhumane acts as ... a crime against humanity").

FOR THE FOREGOING REASONS,

THE TRIAL CHAMBER GRANTS the Motion in part by directing the Prosecution to present only those additional witnesses who will support Count 4 and Count 5.

Arusha, 24 March 2005

Asoka de Silva	Flavia Lattanzi	Florence Rita Arrey
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

[4] *Prosecutor v. Nahimana et al.*, ICTR-99-52-T, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses (TC), 26 June 2001, paras. 19-20.