ICTR-00-56-T
21-9-2005
(20569 — 20561)

20569

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

**TRIAL CHAMBER II**

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

**Registrar:** Mr Adama Dieng

**Date:** 21 September 2005

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

***Case No. ICTR-00-56-T***

# DECISION ON THE PROSECUTION'S MOTION DATED 9 AUGUST 2005 TO VARY ITS LIST OF WITNESSES PURSUANT TO RULE 73*BIS* (E)

**Office of the Prosecutor:**
Mr Ciré Aly Bâ
Mr Alphonse Van
Ms Ifeoma Ojemeni Okali
Mr Segun Jegede
Mr Moussa Sefon
Mr Abubacarr Tambadou
Ms Faria Rekkas
Ms Anne Pauline Bodley

**Counsel for the Defence:**
Mr Gilles St-Laurent and Mr Ronnie MacDonald **for Augustin Bizimungu**
Mr Christopher Black and Ms Tiphaine Dickson **for Augustin Ndindiliyimana**
Mr Charles Taku **for François-Xavier Nzuwonemeye**
Mr Fabien Segatwa and Mr Seydou Doumbia **for Innocent Sagahutu**

**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 SEISED OF** the « *Requête du Procureur en variation de sa liste de témoins: Article 73bis E) du Règlement de Procédure et de Preuve* »[1], filed on 9 August 2005 (the "Motion");

**HAVING RECEIVED AND CONSIDERED** the

(i) « Reply of François-Xavier Nzuwonemeye's Defense in Opposition to the Prosecutor's Motion Dated August 9th, 2005 and Received on August 11th, 2005 to vary its list of Witnesses Pursuant to Rule 73bis (E) of the Rules of Procedure and Evidence », filed on 15 August 2005 ("Nzuwonemeye's Response")

(ii) « *Réponse d'Augustin Ndindiliyimana à la Requête du Procureur en Variation de sa liste de témoins du 9 Août 2005 (Art 73 du Règlement de Procédure et de Preuve)* »,[2] filed on 16 August 2005 ("Ndindiliyimana's Response")

(iii) « *Réplique du Procureur, suite à la réponse formulée par le Conseil de François-Xavier Nzuwonemeye sur sa requête du 9 Août 2005 (Requête sur le fondement de l'article 73bis E) du RPP)* »,[3] filed on 17 August 2005 (the "Reply")

**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;

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

## SUBMISSIONS BY THE PARTIES

### *The Prosecution*

1. The Prosecution requests for leave to vary its witness list pursuant to Rule 73*bis* (E).

2. The Prosecution's Motion seeks two amendments to the witness list: first, it proposes to replace the recently deceased Prosecution Witness HM with Witness ATW; second, it intends to add a new witness, ANC to its list. The Prosecution submits that if it is allowed to call Witness ANC, it will withdraw Prosecution Witnesses DAO, IG, CE, QZ, DAY and BA from its witness list.

3. The Prosecution submits that Prosecution Witness HM, whose death was announced to the Office of the Prosecutor on 20 June 2005, was supposed to testify on the events at CELA in April 1994, as narrated in paragraph 77 of the Amended Indictment of 23 August 2004. According to the Prosecution, HM would have been the only witness to testify on the said paragraph.

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[1] "The Prosecutor's Motion to Vary His List of Witnesses Pursuant to Rule 73 *bis* E) of the Rules of Procedure and Evidence".

[2] "Augustin Ndindiliyimana's Response to the Prosecutor's Motion to Vary His List of Witnesses Pursuant to Rule 73 *bis* E) of the Rules of Procedure and Evidence".

[3] "The Prosecutor's Reply to Nzuwonemeye's Response to the Prosecutor's Motion to Vary His List of Witnesses Pursuant to Rule 73 *bis* E) of the Rules of Procedure and Evidence".

4. The Prosecution argues that in light of the death of Witness HM, it seems indispensable to replace him with another survivor of the events at CELA, namely Witness ATW, whom Witness HM himself mentioned in his statement of 8 March 1998.

5. The Prosecution submits that the replacement sought will not generate any new allegations and therefore there will be no element of surprise for the Defence. Furthermore, the Prosecution submits that this will not cause a delay in the proceedings.

6. Concerning Witness ANC, the Prosecution submits that it has only recently found out about the existence of this witness, a former *gendarme* and member of the guard assigned to the Accused Augustin Ndindiliyimana from April 1994 to June 1994 and who signed a statement to the ICTR investigators on 29 June 2005.

7. The Prosecution submits that the investigators of the Office of the Prosecutor were never given access to the archives of the Rwandan *gendarmerie* relating to the events of 1994 and therefore had no information that would have allowed them to identify and locate Witness ANC.

8. According to the Prosecution, if added to the list, Witness ANC will testify on paragraphs 22, 25, 53 and 73 of the Amended Indictment of 23 August 2004 and particularly on the massacres committed at Kansi parish, in which the Accused Augustin Ndindiliyimana is alleged to have been heavily involved.

9. The Prosecution argues that Witness ANC is, as a direct witness of the events in 1994, able to contribute in a decisive manner to the pursuit of justice and the discovery of the truth.

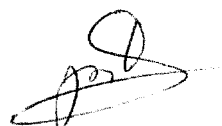
10. The Prosecution further argues that the inclusion of Witness ANC in place of Witnesses DAO, IG, CE, QZ, DAY and BA would contribute to judicial economy and enhance the efficiency and expeditious conduct of the proceedings. In addition, the Prosecution intends to call Witness ANC to testify only at the end of its case, which would, considering that there are more than sixty Prosecution witnesses left, give the Defence several months, if not a year, to conduct further investigations and prepare for cross-examination.

11. Finally, the Prosecution refers to Rule 98 of the Rules which enables the Chamber to summon witnesses and order their attendance and argues that the drafters of Rule 98 – which is rather inquisitorial and hardly known in the Common Law system – clearly made the discovery of truth the cornerstone of the proceedings. This is easily understandable according to the Prosecution, as this Tribunal is responsible for trying the most serious crimes committed by human beings, which subjects them to the most severe sanctions.

***Nzuwonemeye's Response***

12. In its Response, the Defence for Nzuwonemeye prays the Chamber to construe Rule 73*bis* (E) cautiously, in a manner favourable to the Defence, and to deny the Prosecutor's Motion in its entirety.





13. The Defence for Nzuwonemeye argues that the Prosecutor has generally failed to meet the criteria for an application under Rule 73*bis* (E) set out in the Decision by the Chamber in the present case rendered on 11 February 2005.[4] The Defence submits that among other things, the criteria include the obligation on the part of the Prosecution to amply justify any delay in bringing the application, particularly in a case where granting the application will be prejudicial to the Accused.

14. The Defence for Nzuwonemeye submits that the Prosecutor has failed to demonstrate that the application, if granted, will be in the interests of justice. On the contrary, argues the Defence it would result in a "momentous injustice" against Nzuwonemeye, who is jointly charged with the other Co-Accused persons of conspiracy and joint criminal enterprise.

15. The Defence for Nzuwonemeye further submits that the application, if granted, would defeat the letter and spirit of the rest of Rule 73*bis* which is intended to put the Accused on fair and reasonable notice to prepare his defence in order to answer the accuser(s).

16. The Defence for Nzuwonemeye refers to the above-mentioned Decision of Trial Chamber II in the present case and points out that the Prosecution's motion at the time to vary his witness list was granted with a "word of warning". The Defence submits that to allow the Prosecution to now call the proposed witnesses without any cogent reasons as to why the application was not brought together with the earlier motion, will be prejudicial to the Defence in the sense that it will give the Prosecution an unfair and undue advantage to strengthen its case at this late stage of the proceedings and after several months of public hearings.

17. Concerning proposed Witness ATW, Defence for Nzuwonemeye submits that apart from the fact that the Prosecution has improperly combined the application for the removal of the deceased Witness HM from the list with one for substitution, it would not be in the interest of judicial economy to call this witness since he would testify along the same lines as Witness BK, who is listed to testify this session. The Defence for Nzuwonemeye further submits that the Prosecution has not advanced any reasons why since 8 March 1998, when it knew about the existence of Witness ATW, it did not make any effort to add him to the witness list.

18. Concerning proposed Witness ANC, Defence submits that the Prosecution has not given any compelling reasons as to how this witness and Witnesses DAO, IG, CE, QZ, DAY and BA are connected apart from the fact that the Prosecution is willing to exclude them from its list, should its application to call Witness ANC be granted.

19. The Defence for Nzuwonemeye argues that the lack of access to the archives of the *gendarmerie* of Rwanda has not prevented the Prosecution from identifying and locating witnesses with the same profile as the proposed witness, for example Witness KF who is listed to testify during the fourth session, and whose statement was disclosed to the Defence on 21 June 2005, and that with reasonable diligence the Prosecution would have been able to identify him.

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[4] *The Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye and Innocent Sagahutu*, ICTR-00-56-T, Trial Chamber II, "Decision on the Prosecutor's Motion pursuant to Rule 73*bis* (E) for the variation of the list of witnesses" rendered on 11 February 2005, para. 20.

***Ndindiliyimana's Response***

20. The Defence for Ndindiliyimana submits that the admission of the proposed witnesses would result in new allegations and new facts against the Accused not pleaded in the Amended Indictment of 23 August 2004 and therefore prays the Chamber to dismiss the Motion with the exception of allowing the Prosecution to withdraw Witnesses DAO, IG, CE, QZ, DAY and BA without any condition.

21. Concerning the proposed Witness ATW, the Defence for Ndindiliyimana submits that the Prosecution had known of the existence of this witness since March 1998 and had deliberately left him out of the witness list. The Defence for Ndindiliyimana alleges that it is not clear why the Prosecution had decided to do so, since in connection with other less serious allegations, the Prosecution will have at least two witnesses listed to testify. The Defence further alleges that at the time of the filing of the Pre-Trial Brief with the witness list as of June 2004, the Prosecution should have know from experience in other cases, that in a case of four Co-Accused persons, some witnesses might die, others might withdraw, while some others might disappear. The Defence submits that it constitutes a lack of diligence on the part of the Prosecution not to have listed at least a second witness concerning the events contained in paragraph 77 of the Amended Indictment of 23 August 2004 and that this is not the time to allow a correction.

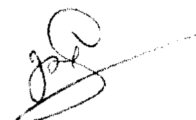
22. The Defence for Ndindiliyimana submits that, contrary to the Prosecutor's assertion, ATW's testimony, if allowed, would take the Defence by surprise since it is the first time that the Defence is aware that refugees, who so far have been presented as civilians, women, children and elderly, were armed with revolvers, rifles and traditional weapons.

23. The Defence for Ndindiliyimana further submits that, had the proposed witness been included in the initial witness list and his statement been communicated to the Defence in June 2004, that is, before the beginning of the proceedings, the Defence would have adjusted its cross-examination of the witnesses who have already testified to explore this new fact. On the one hand, it would have been possible to explore, in particular, with Witnesses DA, GFU, GAP, GFC, GFR, DCK, HP and GFD, who were soldiers or communal police officers or had knowledge of military issues in 1994, the aspect of armed combatants in Kigali and around CELA in 1994, their ammunition, the possible presence of infiltrators, combatants who used revolvers, rifles, etc. On the other hand, it would have been possible to explore with Witnesses UB, ANG and GLJ who in 1994 were local officials in Kigali not far away from CELA, issues such as the events of CELA, the infiltration, the weapons available at the centre, etc.

24. The Defence for Ndindiliyimana submits that the Accused is entitled to a full and plain Defence. To accept Witness ATW with this new fact would make it necessary to recall the above-mentioned witnesses to cross-examine them again with the goal of comparing their versions with the one given by Witness ATW in order to assess their credibility and weigh their testimonies. It is clear that to recall those witnesses would cause a considerable delay in the proceedings and a waste of the Tribunal's resources.

25. With regard to the proposed Witness ANC, the Defence for Ndindiliyimana submits that the Office of the Prosecutor has always had enough resources at its disposal to allow it to function. In addition, the Office has benefited from the co-operation of the Rwandan civilian and military authorities in the course of its investigations. In this context, the Prosecution has not shown that it took all necessary measures between 1995 and June 2005 to have access to





the archives of the Rwandan *gendarmerie*. The Defence for Ndindiliyimana also points out that the Prosecution should have been able to identify and locate Witness ANC even without access to the archives of the Rwandan *gendarmerie*, since it was able to identify and locate other witnesses who were members of the *gendarmerie* in 1994. Furthermore, Defence for Ndindiliyimana submits that the Prosecution had knowledge of the guard attached to Ndindiliyimana during the events in 1994, among other things, through statements by Witnesses AMW, ANB and ATZ.

26. The Defence for Ndindiliyimana further submits that admitting the testimony of the proposed witness would result in several new allegations and new sites of massacres that are not connected to the Amended Indictment of 23 August 2004. It is argued that in order for these to be taken into consideration, it would require an amendment of the current Indictment. The new allegations include the transportation and distribution of arms to the *Interahamwe* by Ndindiliyimana and the former Minister Karemera on 15 April 1994 in Kigali; two roadblocks that were allegedly simultaneously manned by *Interahamwe* and *Gendarmes;* an alleged direct responsibility of Ndindiliyimana for the massacre in Bisesero and an alleged direct and even disciplinary control by the Accused over the militias and the soldiers. The Defence for Ndindiliyimana argues that the inclusion of the proposed witness would make it necessary to recall almost all of the 28 witnesses that have been heard so far to cross-examine them on these new allegations and compare their versions with the one given by Witness ANC in order to assess their credibility and weigh their testimonies. This again would cause a considerable delay in the proceedings and a waste of the Tribunal's resources.

***Prosecution's Reply***

27. The Prosecution submits that the law provides for the possibility of varying the witness list and that is not a creation or a favour to one of the Parties in the proceedings.

28. The Prosecution recalls that the ultimate goal of the proceedings is the discovery of the truth and that the search for the truth, which has to be done with due respect for the rights of the accused person, depends often on external circumstances which sometimes favour and sometimes complicate its establishment. In this context, it is no coincidence that the Rules provide for calling new witnesses during the appeal and that even a review proceeding is contained in the Statute and the Rules.

29. The Prosecution submits that Witness ATW was not included in the initial witness list for reasons of judicial economy and because of the assumption that HM's testimony would be sufficient and credible and need not be corroborated. The Prosecution further submits that the Accused Nzuwonemeye is in no way concerned by paragraph 77 of the Amended Indictment of 23 August 2004.

30. The Prosecution underscores the importance of adding Witness ANC to its list because he belonged to the same armed force as the Accused Ndindiliyimana during the events of 1994 and because, as a Hutu, he could not be suspected of resentment or of harbouring a spirit of revenge against the Accused. The Prosecution argues that for these reasons Witness ANC would be one of the best persons to testify against the Accused.

## DELIBERATIONS



31. 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.

32. The Chamber notes that it may grant leave to the Prosecution to vary its witness list if it is "in the interests of justice." In assessing whether a proposed variation is "in the interests of justice", the Tribunal has in the past has taken the following factors into account: the materiality of the testimony; the complexity of the case; the element of "surprise" for the Defence and the ability to conduct an effective cross-examination of the proposed testimony; the justification offered by the Prosecution for the addition of the witness or witnesses; on-going investigations; as well as replacements and corroboration of evidence.[5]

33. The Chamber recalls its decision of 11 February 2005 in which it concurred with the reasoning of the Trial Chamber in the case of *The Prosecutor v. André Ntagerura et al.*, that the Tribunal should adopt a flexible approach in exercising its discretion relating to the matter of adding witnesses to a witness list.[6]

34. The Chamber notes the submission by the Defence for Ndindiliyimana that if the Motion is granted, it may be necessary to recall almost all of the witnesses who have testified so far for further cross-examination. The Chamber underscores that to grant of a motion brought under Rule 73*bis* (E) does not necessarily imply that every witness heard so far would have to be recalled. The issue of whether or not to recall a witness has to be determined by the Chamber on a case-by-case basis, taking all necessary factors into account, and upon application properly brought by any of the Parties.

35. The issue before the Chamber, rather, is to determine the extent of the element of surprise for the Defence, were the Prosecution to be allowed to call the afore-mentioned witnesses. This, of course, has to be considered in the light of the reasons offered by the Prosecution for the addition of Witnesses ATW and ANC at this stage of the proceedings and the relevancy of their testimony.

36. The Chamber notes that the redacted statement of Witness ATW, dated 10 March 1998 and the redacted statements of Witness ANC dated 17 May 2005, 20 May 2005 and 29 June 2005, were disclosed together with the Prosecutor's Motion on 9 August 2005. The Chamber notes the contents of all the statements. Furthermore, the Chamber recalls the Prosecution's statement that proposed Witnesses ATW and ANC will be called to testify at the end of the Prosecution's case in 2006. Therefore, the Chamber finds that the Defence will have sufficient notice of the content of their prospective testimony. The Chamber also finds that the Defence will have enough time to conduct investigations and prepare an effective cross-examination of Witnesses ATW and ANC. It is the Chamber's considered opinion that

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5 *The 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.

6 *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 73*ter* (E)", 4 June 2002, para 10.

any potential prejudice to the Defence will be remedied by the lapse of time between the amendment of the witness list and the date of testimony of the proposed witnesses.



37. The Chamber notes that proposed Witness ATW is, like the deceased Witness HM, a survivor of the massacre of refugees who had previously sought shelter at CELA in April 1994. That massacre is the subject matter of paragraph 77 of the Amended Indictment of 23 August 2004. The Chamber further notes that the only new fact brought forward by ATW's proposed testimony, that some of the civilians at the CELA had or were thought to have arms at their disposal, can sufficiently be explored during the cross-examination of proposed Witness ATW. In light of the aforementioned, the Chamber finds that it is in the interests of justice to allow the Prosecution to replace Witness HM by Witness ATW.

38. Regarding the probative value of the evidence of proposed Witness ANC in relation to existing allegations in the Amended Indictment, the Chamber notes that Witness ANC is expected to testify notably on Ndindiliyimana's role in the massacre of Tutsi refugees in the Kansi parish committed on 20 April 1994. This allegation is contained in paragraph 73 of the Amended Indictment. Witness ANC will also testify about Ndindiliyimana's alleged involvement in the distribution of weapons stockpiled at the Accused's private house to *Interahamwe* around 15 April 1994. Witness ANC is proffered as a direct witness to these events and a former member of the personal escort of the Accused Ndindiliyimana. It is the Chamber's considered opinion that his testimony on these matters will serve the interests of justice and assist the Chamber in ascertaining the truth about this aspect of the 1994 events in Rwanda.

39. The Chamber notes the Defence submissions regarding the Prosecution's lack of diligence in identifying and calling proposed Witness ANC. The Chamber, however, notes that given the fact that the Rwandan *gendarmerie* contained about 7,000 members during the events in 1994, the scope of the events and the number of persons involved in them, it is conceivable that the Prosecution might not discover certain potential witnesses even with the utmost diligence on its part. In addition, the Chamber considers that the Prosecution's proposal to withdraw Witnesses DAO, IG, CE, QZ, DAY and BA if allowed to add Witness ANC to its list will be contribute significantly to judicial economy.

**FOR THE ABOVE REASONS, THE CHAMBER**

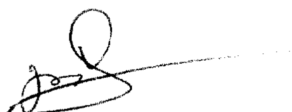
**GRANTS** leave to the Prosecution to vary its initial witness list by replacing the deceased Witness HM with Witness ATW, and by adding Witness ANC to its witness list.

**GRANTS** the Prosecution request to withdraw Witnesses DAO, IG, CE, QZ, DAY and BA from its initial witness list.

**ORDERS** the Prosecution, in accordance with paragraph 31 of the Chamber's Decisison dated 3 November 2004, to disclose to the Trial Chamber and the Defence the unredacted statements of Witnesses ATW and ANC no later than 35 days before the commencement of the session in which ATW and ANC will be called to testify.

**ORDERS** the Prosecution to file within 3 weeks of the date of this Decision an Addendum to the Pre-Trial brief providing a detailed factual summary of the proposed testimony of

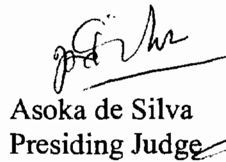
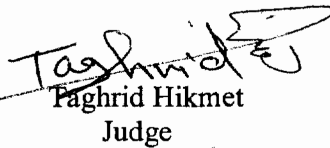




Witnesses ANC and ATW, the paragraphs upon of the Indictment on which they will testify and the estimated duration of each witness's testimony-in-chief.

**ORDERS** that Witnesses ANC and ATW shall be called during the final session for the presentation of the Prosecution case.

Arusha, 21 September 2005

| Asoka de Silva | Taghrid Hikmet | Seon Ki Park |
|---|---|---|
| Presiding Judge | Judge | Judge |

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