



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

ORIGINAL: ENGLISH

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Sergei Alekseevich Egorov
Judge Florence Rita Arrey

Registrar: Adama Dieng

Date: 4 February 2008

THE PROSECUTOR

v.

Hormisdas NSENGIMANA

Case No. ICTR-2001-69-T

DECISION ON PROSECUTION MOTION FOR VARYING THE WITNESS LIST

The Prosecution

Wallace Kapaya
Sylver Ntukamazina
Brian Wallace
Iskandar Ismail
Jane Mukangira

The Defence

Emmanuel Altit
David Hooper

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Florence Rita Arrey;

BEING SEIZED OF the “Prosecutor’s Motion for Varying the Witness List (under Rule 73 *bis* (E) of the Rules of Evidence and Procedure)”, filed on 6 December 2007;

CONSIDERING the Defence Response, filed on 12 December 2007, the Prosecution Reply, filed on 17 December 2007; and oral submissions on 14 January 2008;

RECALLING the Chamber’s oral decision of 15 January 2008 to grant the Motion;

HEREBY PROVIDES written reasons for its oral decision.

INTRODUCTION

1. The first session of the Nsengimana trial took place between 22 June and 29 June 2007, during which five Prosecution witnesses were heard. A second trial session commenced on 14 January 2008 and is expected to conclude in the first half of February 2008. The Prosecution seeks to add Witness BXM to its witness list. It argues that the potential testimony would be of probative value to the case and not be repetitive, without prejudicing the Defence through novelty or insufficient notice. The Prosecution also wishes to withdraw four witnesses, namely Witnesses CAU, BVU, BSW and expert witness Ms. Rakhiya Omaar, who are either unwilling or unable to testify.¹

2. The Defence argues that the testimony of Witness BXM does not relate to the charges in the Indictment, would be repetitive of the testimony of other witnesses, and would prejudice the Defence by not allowing sufficient time for the preparation of cross-examination. The Defence does not object to the withdrawal of Witnesses CAU, BVU and BSW, but argues that it should be provided with witness statements of Ms. Omaar before giving submissions on her proposed withdrawal from the witness list.²

DELIBERATIONS

3. Rule 73 *bis* (E) of the Rules of Procedure and Evidence states that after the commencement of trial, the Prosecutor may, if he considers it to be in the interests of justice, 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. According to case law, the Chamber may grant such a motion where it considers it to be in the interests of justice, and where there is “good cause” to do so, considering factors such 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.³

4. Case law has established that these considerations require a close analysis of each witness, including “the sufficiency and time of disclosure of witness information to the

¹ Prosecution Motion, paras. 5, 8, 14-15; Prosecution Reply, paras. 13-14.

² Defence Response, paras. 4-6, 13, 14-15, 19.

³ *Prosecutor v. Nahimana*, ICTR-99-52, “Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses” (TC), 26 June 2001, paras. 19-20.

Defence; the probative value of the proposed testimony in relation to existing witnesses and allegation in the indictment; and the ability of the Defence to make an effective cross-examination of the proposed testimony, given its novelty or other factors; and the justification offered by the Prosecution for the addition of the witnesses”.⁴ The task of the Chamber has been described as balancing the Prosecution’s duty under the Statute to present the best available evidence to prove its case 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.⁵

5. According to the Prosecution, the potential testimony of Witness BXM is of probative value in two respects. Firstly, the witness will give evidence about the killing of three Tutsi priests of Nyanza Parish. This event is included in paragraphs 13, 34, 45 and 47 of the Indictment. Only Witness CAW has testified to this event.⁶ The Prosecution submits that the proposed testimony will not be repetitive because it will focus on the abduction of the priests from the Nyanza Orphanage and the transportation to the place of their subsequent execution. Witness CAW did not testify to these aspects.⁷ The Chamber observes that if the present motion is granted, only two witnesses will testify to the killing of the three priests. Witness BXM’s testimony is aimed at complementing and corroborating the evidence of Witness CAW, not repeating it.

6. The second part of Witness BXM’s testimony will, according to the Prosecution, give details about planning meetings conducted as part of a joint criminal enterprise to commit genocide of which the Accused is alleged to have been a member. Reference is made to paragraph 10 of the Indictment. Particular planning meetings, described in paragraphs 20, 27 and 35 of the Indictment, are stated as occurring on 6 April 1994, late April/early May 1994 and early May, 1994 respectively.

7. The statement of Witness BXM includes meetings dated “around 12 April 1994” and “one week later”, which would be approximately 19 April 1994.⁸ The first meeting may shed light on a possible intention by the Accused to act “in concert” with other members of the joint criminal enterprise, whilst the 19 April meeting might arguably fall under the “late April/early May 1994” meeting in the Indictment. While the testimonies of Witnesses CBE, CAZ, CAW, CGP, CAO and CAY include planning meetings, the Prosecution submits that the evidence of Witness BXM will constitute a link between the formulation of plans during the meetings and the actual execution of those plans with the killing of the priests.⁹

8. The Chamber accepts that the two aspects of the proposed testimony are material and intended to corroborate or supplement previous testimony without being repetitive. It is

⁴ *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, “Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E)”, 26 June 2003, para. 14; *Prosecutor v. Nahimana*, ICTR-99-52, “Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses” (TC), 26 June 2001; *Prosecutor v. Ndindiliyimana*, ICTR-00-56-T, “Decision on Prosecution Motion to Vary its List of Witnesses: Rule 73 Bis (E) of the Rules” (TC), 11 February 2005; *Prosecutor v. Zigiranyirazo*, ICTR-01-73-T, “Decision on the Defence Motion to Vary the Defence Witness List to Add M. Gaspard Masabyimana” (TC), 13 April 2007.

⁵ *Prosecutor v. Nahimana*, ICTR-99-52, “Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses” (TC), 26 June 2001, para. 20.

⁶ According to the Pre-Trial Brief, also Witness CAO was to provide evidence about the killings but his testimony on 14 and 15 January 2008 did not include this event.

⁷ Prosecution Motion, paras. 9, 12, 13; Pre-Trial Brief, para. 191; Prosecution Response, para. 13; Witness BXM’s statement, pp. 4-6; T. 14 January 2008, p. 80.

⁸ Prosecution Motion, para. 10; Indictment, paras. 20, 27 and 35; Pre-Trial Brief, paras. 107-110; Witness BXM’s statement, p. 4.

⁹ Pre-Trial Brief, paras. 107, 108; T. 14 January 2008, pp. 80-81, 83.

evident that any change to the witness list at this stage will place a certain additional investigatory and preparatory burden on the Defence. However, the two matters are not new and do not appear overly complex. The motion with Witness BXM's statement was filed on 6 December 2007 and granted on 15 January 2008. The witness will be the last to testify during the present second session. In the Chamber's view, this will give the Defence sufficient time to prepare for cross-examination. The entire testimony is not expected to take more than one day and will not lead to any delay. The trial segment will at any rate be concluded by the middle of February, which is within the period available for the hearing of the Prosecution case. Consequently, the Chamber is of the view that Witness BXM should be added to the witness list.¹⁰

9. In relation to the removal of Witnesses CAU, BVU, BSW and expert witness Ms. Omaar from the witness list, the Chamber notes that one witness is too exhausted to testify, whereas three witnesses are not willing to give evidence. The Prosecution has primary responsibility for preparing the case against the Accused as it sees fit. There are gains to be made in terms of judicial economy and the efficiency of the trial by allowing this variation. The lack of statement concerning the anticipated evidence of Ms. Omaar is not prejudicial to the Defence. Her withdrawal relieves the Defence of the burden of preparing for the testimony. Furthermore, the Defence is free to contact her directly in the event it believes that her evidence may be of value to its case.

FOR THE ABOVE REASONS, THE CHAMBER

CONFIRMS its oral decision of 15 January 2008 to allow the Prosecution to add Witness BXM to its witness list, and to withdraw Witnesses CAU, BVU, BSW and Ms. Rakhiya Omaar from the list.

Arusha, 4 February 2008

Erik Møse
Presiding Judge

Sergei Alekseevich Egorov
Judge

Florence Rita Arrey
Judge

[Seal of the Tribunal]

¹⁰ The Defence cannot be heard with its submission that the Motion should be dismissed because it was only filed in English, or that the Defence had limited time to respond (Response, paras. 2 and 3). The Defence team is bilingual and also made oral submissions on 0. 14 January 2008.