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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

UNITED NATIONS  
NATIONS UNIES

OR: ENG

**TRIAL CHAMBER II**

**Before Judges:** Taghrid Hikmet, Presiding  
Seon Ki Park  
Joseph Masanche

**Registrar:** Adama Dieng

**Date:** 11 August 2009

**THE PROSECUTOR**

v.

**Gaspard KANYARUKIGA**

*Case No. ICTR-2002-78-I*

JUDICIAL  
2009 AUG 11 P 10:10  
PROSECUTES

**DECISION ON PROSECUTOR'S MOTION TO VARY HIS WITNESS LIST**

*Rule 73 bis(E) of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Holo Makwaia  
Althea Alexis-Windsor  
Mara Tidiane  
Lasana Dumbuya

**Defence Counsel:**

David Jacobs  
Claver Sindayigaya  
Marc Nerenberg

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## INTRODUCTION

1. The trial in this case is scheduled to commence on 31 August 2009.<sup>1</sup>
2. On 4 May 2009, the Prosecution filed a Pre-Trial Brief pursuant to Rule 73 *bis*(B) of the Rules of Procedure and Evidence ("the Rules").<sup>2</sup> In an annex to its brief, the Prosecution provided a list of the eleven Prosecution witnesses it intends to call, as well as summaries of their proposed testimony.<sup>3</sup>
3. On 31 July 2009, the Prosecution filed a Motion to add a witness pursuant to Rule 73, requesting leave to add an OTP investigator who will testify about certain photographs and documents that the Prosecution wishes to have admitted into evidence.<sup>4</sup>
4. On 4 August 2009, the Defence filed a response to the Prosecution motion.<sup>5</sup> The Defence submits that, because the trial in this case has not yet commenced, the Chamber does not have jurisdiction to decide the motion under Rule 73 *bis*(E), and that, even if Rule 73 *bis*(E) does apply, the Prosecution has not shown that the interests of justice would be served by the addition of the proposed witness.<sup>6</sup>
5. On 7 August 2009, the Prosecution filed a reply, asserting that, although Rule 73 *bis*(E) does not strictly apply to its request to add a witness before trial, the Rule is nevertheless relevant to the subject matter of the motion. The Prosecution further submits that its motion is timely, the investigator's testimony is material and the addition of the witness will not prejudice the Accused.<sup>7</sup>
6. On 10 August 2009, the Defence filed a rejoinder, arguing that the Prosecution had erred in presenting new arguments and facts in its reply and urging the Chamber not to consider these new submissions.<sup>8</sup>

## DELIBERATIONS

7. As a preliminary matter, the Chamber notes that the Prosecution's reply to the Defence response is more extensive than its original motion. The Chamber recalls that a moving party should set forth its request(s), and in detail all the legal and factual arguments supporting them, in its initial motion. A reply is not an appropriate place to reveal new information or to raise additional arguments that could have been raised in the first instance.<sup>9</sup> The Chamber finds that, in the instant case, the original motion should

<sup>1</sup> *Prosecutor v. Kanyarukiga*, Case No ICTR-2002-78-I, Scheduling Order (TC), 7 July 2009.

<sup>2</sup> The Prosecutor's Pre-Trial Brief, filed on 4 May 2009.

<sup>3</sup> The Prosecutor's Pre-Trial Brief, filed on 4 May 2009, appendices.

<sup>4</sup> Prosecutor's Motion to Add a Witness Pursuant to Rule 73, filed on 31 July 2009.

<sup>5</sup> Defence Response to the 31 July 2009 Prosecutor's Motion to Add a Witness Pursuant to Rule 73, filed on 4 August 2009.

<sup>6</sup> *Ibid.*

<sup>7</sup> Prosecutor's Reply to the Defence Response to the Motion to Add a Witness Pursuant to Rule 73, filed on 7 August 2009.

<sup>8</sup> Defence Rejoinder to the Prosecutor's Reply to the Defence Response to the Motion to Add a Witness Pursuant to Rule 73, filed on 10 August 2009.

<sup>9</sup> See, e.g., *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's 23<sup>rd</sup> Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Witness ALG (TC), 30 March 2009, para. 4. See also *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision

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have included *inter alia* the precise nature of the investigator's testimony and the fact that the investigator authored certain documents that the Prosecution seeks to admit into evidence.

8. In light of the imminent commencement of the trial, and in the interests of justice, the Chamber shall consider the Prosecution reply and, by extension, the Defence rejoinder. The Chamber warns the parties, however, that in the future it will not accept pleadings that do not conform to the procedural requirements described above.

9. Next, the Chamber notes that the Prosecution has omitted one of the eleven witnesses contained in its Pre-Trial Brief (Witness CNI) from the order of appearance filed on 31 July 2009.<sup>10</sup> However, because the Prosecution has not formally withdrawn witness CNI, the Chamber shall treat the Prosecution's present motion as a request to add a witness.

10. Rule 73 *bis*(E) of the Rules provides that, "[a]fter 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."

11. The Trial Chamber may grant a Prosecution motion for leave to vary its list of witnesses when it is considered to be "in the interests of justice." In determining whether a particular variation is in the interests of justice, the Tribunal has previously considered "the materiality of the testimony, the complexity of the case, [and] 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."<sup>11</sup>

12. These considerations require 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; 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 witness.<sup>12</sup>

13. The Chamber recalls that the trial in this case has not yet commenced. However, because of the proximity of the start of the trial and the Prosecution's previous disclosure of information about its intended witnesses, the Chamber finds that the rights of the

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on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List (AC), 21 August 2007, para. 11; *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115 (AC), 5 May 2006, para. 8.

<sup>10</sup> Letter from the Office of the Prosecutor to Defence Counsel for the Accused, Gaspard Kanyarukiga, filed on 31 July 2009.

<sup>11</sup> *Prosecutor v. 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 (TC), 26 June 2001, para. 20.

<sup>12</sup> *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis*(E) (TC), 26 June 2003, para. 14.

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Accused would best be served by applying Rule 73 *bis*(E)'s "interests of justice" test to the Prosecution's motion.<sup>13</sup>

14. With respect to the timeliness of the disclosure, the Chamber recalls that the motion in this case was filed on 31 July 2009, one month prior to the scheduled commencement of the trial. Moreover, according to the Prosecution, the photographs and documents, about which the investigator will testify, have already been disclosed.<sup>14</sup> Thus, the Chamber finds that the disclosure of witness information in this case has been sufficiently timely to allow the Accused to prepare his defence and to conduct an effective cross-examination.

15. Second, the Chamber finds that, because the Prosecution has three weeks in which to present its case, the addition of approximately four hours of testimony will not infringe the Accused's right to be tried without undue delay.

16. Finally, the Chamber accepts that the testimony of this witness is relevant to the proceedings in this case. In particular, the Chamber is satisfied that the witness's testimony may be necessary to lay the foundation for certain Prosecution exhibits. Moreover, the Chamber notes that the testimony of an investigator, as it relates to his specific duties, is unlikely to be cumulative of evidence proffered by other Prosecution witnesses.

17. Thus, for the foregoing reasons, the Chamber concludes that it would be in the interests of justice to hear the investigator's testimony in this case.

18. The Chamber cautions, however, that exhibits should generally be tendered through those witnesses who are best qualified to testify about their source and content. Thus, the investigator, Remy Sahiri, should testify about those exhibits which are products of his own work. Any photographs and documents that are not products of the investigator's work should be introduced through other Prosecution witnesses during the course of the trial.<sup>15</sup>

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<sup>13</sup> See Article 19(1) and Article 20 of the ICTR Statute.

<sup>14</sup> Prosecutor's Motion to Add a Witness Pursuant to Rule 73, filed on 31 July 2009, para. 8.

<sup>15</sup> See *Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-T, T. 16 March 2009 p. 21.



**FOR THESE REASONS**, the Chamber

**GRANTS** the Prosecution Motion to add Witness Remy Sahiri to the Prosecution Witness List.

Arusha, 11 August 2009

[read and approved by]

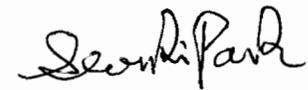


Taghrid Hikmet  
Presiding Judge  
[absent at the time  
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Seon Ki Park  
Judge

[read and approved by]



Joseph Masanche  
Judge  
[absent at the time  
of signature]

[Seal of the Tribunal]