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(4723 - 4707)

4723
Mwami



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 28 January 2010

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL OFFICE
2010 JAN 28
2010

DECISION ON PROSECUTION MOTION FOR LEAVE TO VARY ITS
WITNESS LIST

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Brian Wallace
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Defence Counsel

Mr. Peter Herbert
Ms. Mylène Dimitri

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

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa and Mparany Rajohnson (the "Trial Chamber");

BEING SEIZED of the "Prosecutor's Extremely Urgent Motion for Leave to Vary the List of Witnesses to be Called and Extension of Witness Protection Orders," filed confidentially on 22 December 2009 (the "Motion");

CONSIDERING:

- (a) the "Defence Response to Prosecutor's Extremely Urgent Motion for Leave to Vary the List of Witnesses to be Called and Extension of Witness Protection Orders," filed confidentially on 29 December 2009 (the "Response");
- (b) the "Prosecutor's Reply to the Defence Response to the Prosecutor's Extremely Urgent Motion for Leave to Vary the List of Witnesses and for Extension of Witness Protection Orders," filed confidentially on 4 January 2010 (the "Reply");

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 the written briefs filed by the Parties.

INTRODUCTION

1. On 19 March 2009, the Prosecution first submitted its witness list, as part of its Pre-Trial Brief. On 22 April 2009, the Prosecution then filed an amended witness list, and an amended Pre-Trial Brief on 25 May 2009 containing a list of 16 witnesses. On 23 August 2009, the Prosecution added Witness ANAQ to its Witness List.
2. On 25 September 2009, the trial commenced based on the Prosecution's witness list of 25 May, with the addition of ANAQ. Between 23 September and 22 October 2009, the Chamber heard six Prosecution witnesses. On 22 October 2009, the case was adjourned until 25 January 2010 for the resumption of the Prosecution's case.
3. The Prosecution filed the instant Motion on 22 December 2009 along with unredacted witness statements.

SUBMISSIONS OF THE PARTIES

Prosecution Motion

4. The Prosecution requests the Chamber's leave to vary its list of witnesses under Rule 73 *bis* (E) by adding witnesses AFS, ANS, ANAU, ANAR, and ANAT and dropping witnesses ANAB, ANAI, and ANAQ, as well as extending the protective measures for Prosecution witnesses to the newly-requested witnesses.¹

5. The Prosecution notes that Rule 73 *bis* (E) provides that the Prosecutor may move to "reinstate the list of witnesses or to vary his decision as to which witnesses are to be called" even after the commencement of trial.² The Prosecution submits that caselaw calls for a "flexible approach" to the Trial Chamber's exercise of its discretionary authority in this regard, based on a case-by-case analysis of the facts before the Chamber.³ Variation should be permitted when (i) to do so would be in the interests of justice, and (ii) the moving party can show good cause why a witness was not added at an earlier stage of the proceedings, considering the materiality of the newly proffered testimony, the complexity of the case, and possible prejudice to the Defence.⁴ The Prosecution notes that these are not rules which govern a Chamber's discretion, but guidelines which can facilitate the exercise of that discretion.⁵ The Prosecution further points to *Prosecutor v. Goran Jelisić*, where the ICTY held it is "in the interests of justice that any evidence necessary to ascertain the truth be presented to [the Trial Chamber] and be subject to examination by the parties."⁶

6. The Prosecution first argues that granting the Motion would be in the interests of justice. The Prosecution recalls that the Defence filed a notice of alibi after the commencement of trial on 23 September 2009, which was in violation of Rule 67 (A)(ii) of the Rules insofar as it was filed after the commencement of trial and did not provide identifying information for any alibi witnesses.⁷ The Prosecution suggests such defects prejudice its ability to present its case effectively.⁸

7. The Prosecution submits that while carrying out additional investigations, it discovered that Witness ANAQ died in Gisenyi prison in October 2009, that Witness ANAI subsequently expressed his unwillingness to testify in writing, and that Witness ANAB recently informed the Prosecution that he is unwilling to testify.

¹ Motion, para. 1.

² Motion, para. 5 (quoting Rule 73 *bis* (E)).

³ Motion, para. 6 (citing *Prosecutor v. Ntagurera et al.*, Case No. ICTR-99-46-T, Decision on Defence for Ntagurera's Motion to Amend its Witness List pursuant to Rule 73*ter* (E), 4 June 2002, para. 10; and *Prosecutor v. Ndindiliyimana et al.*, Case no. ICTR-00-56-T, Decision on Prosecution Motion to Vary its List of Witnesses, 11 February 2005, para. 21.

⁴ Motion, para. 7-8 (citing *Prosecutor v. Gotovina et al.*, Case No. ICTY-06-90-T, Decision on Cermak's Defence Motion to add to its Rule 65 *ter* (G) Witness List, 17 July 2008, para. 3; and *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, 26 June 2001, para. 20.

⁵ Motion, para. 10.

⁶ Motion, para. 11, citing *Prosecutor v. Goran Jelisić*, Case No. IT-95-10, Decision of 27 April 1999.

⁷ Motion, para. 13.

⁸ Motion, para. 14.

8. The Prosecution submits that it received information about the death of Witness ANAQ and the refusal of Witness ANAI to testify in early December 2009, and the refusal of Witness ANAB to testify in November 2009. The Prosecution maintains that the evidence of witnesses ANAR, ANAS, and ANAT became available on 9 December 2009, and the evidence of witnesses AFS and ANAU became available only when the Prosecution discovered they are suitable replacements for portions of witnesses ANAI and ANAQ's anticipated testimony, and relevant to the Defence alibi.⁹ The Prosecution discloses unredacted witness statements given by each new witness, and avers that its conduct is consistent with Rule 67(D) of the Rules.¹⁰

9. Witness ANAQ was expected to testify as to paragraphs 17, 18, 20, 21, 30, 46, 50 and 52 of the Indictment; Witness ANAI to paragraphs 10, 11, 12, 13, 14, 32, 33, 34, 35, 36, 37, 56, 57, 58, 59, and 60; and Witness ANAB to paragraphs 4, 5, 15, and 38.¹¹

10. The Prosecution further submits that the witnesses to be added will give testimony relevant to the Indictment, address some of the testimony which would have been given by Witnesses ANAI and ANAQ, corroborate other witnesses' testimony, assist in rebutting the alibi, will not prejudice the Defence, and will advance the interests of judicial economy.¹²

11. The Prosecution avers that the requested witnesses' testimonies are relevant and have probative value. Witness AFS will prove allegations in paragraphs 17, 18, 26, 43, 52, and 55 of the Indictment, replacing the proposed testimony of Witness ANAQ, and that the Witness will rebut the alibi.¹³ Witness ANAS will prove allegations in paragraphs 16, 17, 18, 37, and 60 of the Indictment, as well as establishing the relationship between the Accused and Faustin Bagango.¹⁴ Witness ANAU will prove allegations in paragraphs 16, 17, and 18 of the Indictment, and provide testimony generally relevant to allegations in paragraphs 19 and 20 of the Indictment.¹⁵ Witness ANAR will prove and corroborate the allegations contained in paragraphs 19, 20, and 22 of the Indictment.¹⁶ Witness ANAT will prove the allegations in paragraphs 16, 17, 18, 24, 37, 41, 49, and 60 of the Indictment.¹⁷

12. The Prosecution submits that Witness AFS will corroborate witnesses ANAE, ANAF, ANAG, ANAJ, ANAK, and ANAL and address the alibi¹⁸; Witness ANAS will corroborate witnesses ANAF, ANAJ, ANAK, and address the alibi¹⁹; Witness ANAU will corroborate witnesses ANAE, ANAF, ANAG, ANAJ, ANAK, ANAL, and ANAM,

⁹ Motion, para. 47.

¹⁰ Motion, paras. 46-48.

¹¹ Motion, para. 15.

¹² Motion, para. 16.

¹³ Motion, para. 17.

¹⁴ Motion, paras. 18-20.

¹⁵ Motion, paras. 21-22.

¹⁶ Motion, paras. 23-24.

¹⁷ Motion, paras. 25-26.

¹⁸ Motion, para. 27.

¹⁹ Motion, para. 28.

and the testimony should be consistent with that of witnesses AFS and ANAS²⁰; Witness ANAR will complement the testimony of witnesses ANAE and ANAL and corroborate the testimony of witnesses ANAG and ANAM, as well as addressing the alibi²¹; and Witness ANAT will complement the testimony of witnesses ANAE and ANAL and corroborate the anticipated testimony of Witness ANAG, and address the alibi.²²

13. The Prosecution further avers that if it is not allowed to replace the testimonies of ANAQ and ANAI with the testimony of witnesses AFS, ANAS, ANAU, ANAR, and ANAT, it will be unable to fulfill its right and duty to present evidence whenever available, without prejudice to the rights of the Accused, to prove the allegations in the Indictment, as well as violating the principles of justice and fairness.²³

14. Specifically, Witnesses ANAS and ANAT will replace the anticipated testimony of Witnesses ANAI and ANAQ regarding the killings of certain prominent Tutsis and the Accused providing money and weapons to members of the *Interahamwe* militia. Moreover, the evidence of Witness ANAU would replace Witness ANAQ's anticipated testimony regarding Faustin Bagango carrying out orders given by the Accused and distributing weapons on his behalf. Finally, the evidence of Witnesses AFS and ANAT would replace the anticipated testimony of Witnesses ANAI and ANAQ regarding the anti-Tutsi policies of the Accused.²⁴

15. The Prosecution suggests calling Witnesses AFS, ANAS, ANAU, ANAR, and ANAT at the end of its case, which it avers is the remedy provided for by the jurisprudence of the Tribunal, and submits that this will remove any potential prejudice. Moreover, the Prosecution submits that as the witnesses will not testify to any new issues, the Defence will suffer no surprise.²⁵

16. The Prosecution avers that it seeks to remove three witnesses and add five very short new witnesses, which will not bring any significant change to the length of the Prosecution's case or affect the Trial Chamber's scheduling of the case. The Prosecution submits that the requested witnesses' examinations-in-chief are estimated to last no more than one hour per witness, whereas the dropped witnesses' anticipated testimonies were very lengthy. Accordingly, judicial economy would be increased by granting the Motion.²⁶

Defence Response

17. The Defence objects to the Motion in its entirety, and submits that if the Motion is granted, it will be detrimental to the case and highly prejudicial to the Accused's right to

²⁰ Motion, para. 29.

²¹ Motion, para. 30.

²² Motion, para. 31.

²³ Motion, paras. 32-34.

²⁴ Motion, para. 35.

²⁵ Motion, paras. 37-41.

²⁶ Motion, paras. 42-44.

a fair trial.²⁷ The requested witnesses' testimonies are irrelevant, lack probative value, and constitute new allegations amounting to charges not pleaded in the Indictment.²⁸

18. The Defence questions the circumstances under which these new witnesses became available to the Prosecution, and asserts that if the Prosecution was aware of them previously, their identities should have been disclosed to the Defence. The Defence demands strict proof as to the manner in which the new witnesses came to light.²⁹

19. The Defence further notes that the ICTY Rules provide for exclusion of evidence if the probative value of the evidence is outweighed by the need to ensure a fair trial.³⁰

20. Regarding Witness AFS, the Defence notes that the witness' statement is dated 1 August 1999 and that the witness could consequently have been included in the original list. Moreover, the witness' statement should have been disclosed as exculpatory.³¹ Turning to the specifics of the proposed testimony, the Defence submits that Witness AFS need not testify as to Paragraphs 17 and 18 of the Indictment, because four other witnesses are supposed to testify to those paragraphs.³² Under those circumstances, and despite the loss of the testimony of Witness ANAQ, Witness AFS' testimony on the subject is repetitious, of no probative value, and will not serve the interests of justice or judicial economy.³³ Witness AFS' statement does not refer to Nyamunini, whose death is addressed in paragraphs 26 and 43 of the Indictment, and so the witness cannot testify on the subject, and moreover that none of the three dropped Prosecution witnesses were to testify on these paragraphs.³⁴ Witness AFS' statement does not address paragraphs 52 or 55 of the Indictment, and that none of the dropped witnesses were to testify to paragraph 55. Finally, Witness AFS' statement contains a new allegation regarding a meeting on 8 April 1994, which is different from the meetings Witness ANAQ was supposed to testify about.³⁵ Consequently, Witness AFS does not replace the dropped witnesses.³⁶

21. The Defence notes that Witness ANAS's statement is dated 9 December 2009. The Defence submits that ANAS' statement discusses events not pleaded in the Indictment, including: (1) An alleged meeting at the Nyamyumba communal office in January 1994; (2) The alleged killing of a named person at Gahinga roadblock; (3) Instructions to the *Interahamwe* to target various Tutsis not named in the Indictment; And (4) a meeting in Gitarako³⁷ at the end of April 1994.³⁸ Moreover nothing in Witness ANAS' statement

²⁷ Response, para. 9.

²⁸ Response, page 3.

²⁹ Response, para. 10-11.

³⁰ Response, para. 12 (citing Rule 89(D) of the ICTY Rules).

³¹ Response, para. 15.

³² The Defence specifies Witnesses ANAD, ANAE, ANAF, and ANAJ. Response, para. 16.

³³ Responses, paras. 17-18.

³⁴ Response, para. 19 (noting also that one witness placed the death of Nyamunini outside the temporal jurisdiction of this Tribunal, see T. 30 September 2009 p. 72).

³⁵ Response, paras. 24, 26.

³⁶ Response, para. 27.

³⁷ The Defence refers to "Gitarako" and "Kitraco" interchangeably. For clarity, the Chamber has used "Gitarako" throughout.

³⁸ Response, paras. 29-33.

was covered by any of the dropped witnesses.³⁹ Further, Witness ANAS' testimony about the appointment of Bagango is repetitive, and notes that the Accused is not charged with superior responsibility pursuant to Article 6(3) of the Statute for crimes committed by Bagango or any other subordinate in any event.⁴⁰ The Defence further maintains that Witness ANAS' proposed testimony as to a meeting at Gitarako in April 1994 will not corroborate Witness ANAK, since that witness placed the meeting "between the end of 1992 and beginning of 1993," and that the witness' proposed testimony as to a roadblock at Cyanika-Gisa will not corroborate any of the dropped witnesses, who never mentioned such a roadblock.⁴¹

22. As to Witness ANAU, the Defence notes that this witness' statement is dated 3 December 2007 and consequently infers that the Prosecution's failure to disclose it previously constitutes a deliberate and flagrant breach of Rule 68 (A) of the Rules.⁴² The Defence notes a second statement by the witness dated 10 December 2009. The witness' proposed testimony as to paragraphs 19 and 20 of the Indictment is not probative and is highly prejudicial, since Witness ANAU's statement does not mention the Accused in the context of discussing events like those described in paragraphs 19 and 20 of the Indictment. Rather, the witness describes Kabuga and Nsengiyumva as distributing weapons and using a different mode of transportation than that referred to in the Indictment.⁴³ Regarding paragraph 16 of the Indictment, the Defence notes that the witness does not implicate the Accused personally transporting weapons.⁴⁴ Regarding paragraphs 17 and 18 of the Indictment, the Defence submits that this allegation has been discussed by many witnesses and submits that additional testimony on the subject does not serve judicial economy.⁴⁵ Moreover, the Defence avers, Witness ANAU's statement addresses allegations not pleaded in the Indictment, including: (1) two killings at Butotori camp, and (2) a meeting at Gitarako a few days before the death of Habyarimana; and (3) that Bagango distributed weapons at a roadblock outside the brewery under the Accused's orders to find and kill Tutsi.⁴⁶ The Defence asserts that these new allegations constitute new charges and undermine the right of the Accused to a fair trial.⁴⁷

23. With regard to Witness ANAR, the Defence notes the witness' statement was given on 10 December 2009 and lacks certain information. The Defence submits that the statement is only eight lines long and refers to an event not pleaded in the Indictment or Pre-Trial Brief – specifically the alleged distribution of weapons at the home of the CDR president in Rubavu Cellule in February 1994. Moreover, this testimony cannot corroborate any other witness since no other Prosecution witness has testified or is expected to testify to such a distribution, and cannot replace the lost testimony of

³⁹ Response, para. 32.

⁴⁰ Response, para. 34.

⁴¹ Response, para. 35-37 (citing T. 19 October 2009, p. 56-57).

⁴² Response, para. 38.

⁴³ Response, para. 38.

⁴⁴ Response, para. 39.

⁴⁵ Response, para. 41.

⁴⁶ Response, paras. 42-43.

⁴⁷ Response, para. 44.

Witnesses ANAB, ANAI, or ANAQ since none of them were supposed to testify to such a distribution.⁴⁸

24. Regarding Witness ANAT, the Defence avers that the witness' statement is brief and perfunctory, and notes it is dated 10 December 2009. The Defence submits that the statement contains a new allegation related to a meeting at Gitarako a few days before the death of President Habyarimana, which is not pleaded in the Indictment and as to which none of the dropped witnesses were supposed to testify. Moreover, the witness' proposed testimony regarding paragraphs 24 and 49 of the Indictment does not replace Witnesses ANAB, ANAI or ANAQ, none of whom were supposed to testify to the roadblock at Cyanika-Gisa which the witness' statement mentions.⁴⁹

25. The Defence submits that the proposed new witnesses do not substitute for Witnesses ANAI and ANAQ, as they will testify to only six of the 23 paragraphs that the dropped witnesses were supposed to testify about. Moreover none of the witness' statements touches on any allegation as to which Witness ANAI was supposed to testify, and while witnesses' proposed testimony touches on certain events to which Witness ANAQ was supposed to testify, the proposed testimony lacks probative value.⁵⁰ Specifically, Witnesses ANAS and ANAT's proposed testimonies regarding the death of Safari Nyambwega does not implicate the Accused; none of the five witnesses' statements reflects a meeting at Gitarako in May 1994, though Witnesses ANAS, ANAT, and ANAU refer to meetings at Gitarako on other dates; and none of the new witnesses' proposed testimony covers any of the other specific factual allegations as to which Witness ANAQ was supposed to testify.⁵¹ Moreover, Witness ANAB's statement is not covered by any of the new witnesses.⁵²

26. In addition, the Defence asserts that the removal of witnesses cannot serve in and of itself as a basis to add new witnesses, and that only straight substitutions of witnesses are permitted by the Tribunal's jurisprudence.⁵³

27. Regarding the Prosecution's assertion that the proposed testimonies will corroborate other witnesses' testimony, for instance on the appointment of *bourgmestre* Bagango, the Defence submits that the Tribunal's jurisprudence does not permit the addition of witnesses to provide repetitive and duplicative testimony.⁵⁴ Moreover, several of the Prosecution's assertions in this regard are inaccurate.⁵⁵

⁴⁸ Response, paras. 45-48.

⁴⁹ Response, paras. 49-51.

⁵⁰ Response, paras. 52-54.

⁵¹ Response, paras. 55-57.

⁵² Response, para. 58.

⁵³ Response, para. 59 (citing *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-42-T, Decision on the Defence Motion to modify the list of Defence witnesses for Arsene Shalom Ntahobali, 26 August 2005, at para. 39, and *Prosecutor v. Ndindiyimana et al.*, Case No. ICTR-2000-56-T, Decision on Sagahutu's request to vary his witness list, 26 May 2008, para. 6).

⁵⁴ Response, paras. 60-63.

⁵⁵ Response, para. 64.

28. The Defence contests the Prosecution's submissions that the new witnesses are necessary to rebut the alibi. Contrary to the Prosecution's arguments, the Defence notice of alibi was filed prior to the start of trial. Moreover, while the specifics of alibi witnesses were not detailed in the notice of alibi, the Chamber had previously held that the Defence did not need additional time to file such a notice because "information about where the Accused was at the times specified in the Indictment should be within the personal knowledge of the Accused."⁵⁶ Consequently, the Chamber implicitly held that the Defence could file a notice of alibi without witness information and supplement it when such information became available.⁵⁷ Further, the Defence asserts that only one of the five witnesses falls into the alibi notice category and that, while the Prosecution alleges the Defence notice of alibi was defective, the Prosecution has filed no motion in this regard in the three months since the notice was filed.⁵⁸

29. The Defence submits that the Prosecution has not proved it acted diligently. In this regard, the Defence cites the *Niyitigeka* Appeals Decision for the proposition that the Prosecution had an obligation to disclose notes of questions asked and answers given during interviews with its witnesses, that Witnesses AFS and ANAU were not shortlisted after giving statements prior to the start of trial, and that the Prosecution did not speedily inform the Chamber of its intention to withdraw Witness ANAB.⁵⁹

30. The Defence asserts it will be prejudiced if the motion is granted, and the Prosecution will not be prejudiced if it is denied. The Defence submits that the new witnesses and new allegations will create an accelerated Prosecution case and impose an additional workload which will cause an unbearable situation for the Defence, which may be required to cross examine the witnesses unprepared.⁶⁰ Moreover, judicial economy will not be favoured because certain portions of the new witnesses' testimony will be repetitive.⁶¹ The Defence estimates cross-examination would take between five and eight days, due to inadequacies in the witness statements.⁶² Moreover, various new allegations are raised in the new witnesses' statements, and the Defence will have to conduct new investigations to properly litigate the new allegations. The Defence asserts that this cannot be completed during the presentation of the Prosecution case.⁶³

31. In the alternative, should the Chamber grant the Motion, the Defence requests that, after the completion of the previously-listed Prosecution witnesses, trial be adjourned until June 2010 for the hearing of the new witnesses. In this regard, the Defence points to several previous decisions, including two rendered by this Chamber in the *Butare* case.⁶⁴

⁵⁶ Response, paras. 66-69.

⁵⁷ Response, para. 70.

⁵⁸ Response, para. 72.

⁵⁹ Response, paras. 73-78.

⁶⁰ Response, paras. 79-81.

⁶¹ Response, para. 82.

⁶² Response, para. 83.

⁶³ Response, paras. 84-85.

⁶⁴ Response, paras. 90-94 (citing *inter alia* *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecutor's Motion to Drop and Add Witnesses, 30 March 2004, at para. 36; and Decision on Prosecutor's Motion for Leave to Call Additional Witnesses and the Transfer of Detained Witnesses, 24 July 2001, at para. 13).

The Defence notes that it concluded an investigative mission in Rwanda and several European countries in mid-December, and asserts that had it known about the proposed testimonies at that time, it could have investigated them, but now must conduct another investigation related to these five witnesses. The Defence asserts that such a mission must take place before the witnesses testify, and notes its Investigator will be on another mission starting 4 January 2010.⁶⁵

32. The Defence notes four of the five new witnesses are detainees or convicted persons related to the events of 1994, and consequently have judicial records and previous statements which the Defence submits will not be turned over by the Rwandan authorities before 25 January 2010.⁶⁶ The Defence notes that the documents will subsequently need to be translated, and that its present lack of such documents unfairly compromises its ability to investigate witnesses.⁶⁷

33. The Defence does not object to the removal of witnesses ANAB, ANAI, and ANAQ from the Prosecution's witness list, but asks that the protective measures be removed from these witnesses.⁶⁸ The Defence also offers specific submissions as to two of the requested witnesses. The Defence notes that it had met with Witness ANAU and intended to call the witness. It asks that protective measures for Defence witnesses be applied to that witness, and that all meetings with the Witness take place in the presence of a representative of the Defence.⁶⁹ The Defence notes that it and the Prosecution both met with Witness ANAU on the same day, and asserts portions of the evidence given by the witness to the Parties are contradictory. Consequently, the Defence requests a joint meeting with the Prosecution and witness ANAU to obtain a full statement.⁷⁰ Secondly, the Defence notes that Witness AFS appears to be Witness ANAF's spouse, and requests the right to recall ANAF to continue cross-examining that witness regarding Witness AFS' evidence.⁷¹

34. Thus, the Defence prays the Chamber deny the Motion except for the deletion of the dropped witnesses, and in the alternative, grant an extension of time before calling the new witnesses; preclude the Prosecution from examining the new witnesses on allegations outside the scope of the Indictment; issue an order allowing the Defence to meet with Witness ANAU in the presence of the Prosecution; order the recall of Witness ANAF; order the Prosecution to disclose to the Defence any judiciary file, *gacaca* record, previous statements and testimonies of the new witnesses as soon as possible; order the Prosecutor to disclose to the Defence the French translation of the newly disclosed witness statements of witnesses ANAS, ANAU, ANAR, and ANAT; and order that the decision on protective measures no longer applies to the dropped witnesses.⁷²

⁶⁵ Response, paras. 97-100.

⁶⁶ Response, paras. 103-104.

⁶⁷ Response, paras. 106-107.

⁶⁸ Response, para. 111.

⁶⁹ Response, para. 112-113.

⁷⁰ Response, paras. 114-115.

⁷¹ Response, para. 116.

⁷² Response, paras. 117-118.

Prosecution Reply

35. The Prosecution avers that the Defence allegations that the new witnesses were procured by the Rwandan government are baseless and irresponsible.⁷³

36. The Prosecution submits that the Defence has misunderstood the nature of the dropped witnesses' testimonies, and that the new witnesses are proper substitutes.⁷⁴

37. As to Witness AFS, the Prosecution asserts that the witness' statement is not exculpatory and does not represent a breach of the Prosecution's Rule 68 obligations. The witness' testimony is relevant to the joint criminal enterprise asserted by the Indictment, as was Witness ANAQ's, and corroborates other witnesses who testify on the criminal alliance between the Accused and Faustin Bagango. The witness' proposed testimony will support the relevant paragraphs of the Indictment, and replace Witness ANAQ's testimony corroborating the Accused's pattern of conduct of distributing weapons at roadblocks, as well as in several other aspects, and help rebut the alibi.⁷⁵ The witness' statement does not create new allegations, but attests to a pattern of conduct and a joint criminal enterprise which are alleged in the Indictment.⁷⁶

38. Regarding Witness ANAS, the Prosecution submits that this witness will replace particular information to which the dropped witnesses would have testified, and that differences such as the name of the roadblock are immaterial. Moreover Witness ANAS' proposed testimony is similar to the testimony of dropped Witness ANAI in that both witnesses mention seven Tutsi who were listed to be killed, all of whom are mentioned by name in the Indictment.⁷⁷ Moreover, Bagango was the Accused's *de facto* subordinate, and that Witness ANAS will corroborate Witness ANAK's testimony as to his appointment.⁷⁸ The witness would replace Witness ANAQ's anticipated testimony about a meeting in Gitaraco, and that the difference in dates is insignificant.⁷⁹ Finally, the witness will corroborate the Investigator and Witness ANAN as to the Cyanika-Gisa roadblock.⁸⁰

39. Regarding Witness ANAU, the Prosecution submits that it did not breach its disclosure obligations in failing to disclose the witness' statement.⁸¹ Moreover, the

⁷³ Reply, para. 4.

⁷⁴ Reply, para. 5.

⁷⁵ Reply, paras. 6-14.

⁷⁶ Reply, para. 15.

⁷⁷ Reply, paras. 16-18.

⁷⁸ Reply, paras. 20-21.

⁷⁹ Reply, para. 22.

⁸⁰ Reply, para. 23.

⁸¹ Reply, para. 24.

witness' proposed testimony will support the conspiracy count in the Indictment and the existence of a joint criminal enterprise, as well as replacing Witness ANAQ's anticipated testimony about a meeting in Gitaraco and offering an additional perspective on Bagango's appointment as *bourgmestre*.⁸² The witness' proposed testimony will corroborate testimony about the Bralirwa roadblock, and the distribution of weapons by Bagango.⁸³

40. Regarding Witness ANAR, the Prosecution suggests Witness ANAR's proposed testimony is relevant to proving the joint criminal enterprise asserted in the Indictment.⁸⁴

41. Regarding Witness ANAT, the Prosecution suggests the witness' proposed testimony will replace witnesses ANAI and ANAQ insofar as the witness will support some of the series of events to which ANAI would have testified, including the names of Tutsi who were eventually killed, and support the testimony of dropped witness ANAQ regarding the Gitaraco meeting.⁸⁵ Moreover, the witness' proposed testimony will corroborate the Investigator and the anticipated testimony of witness ANAN on the Cyanika-Gisa roadblock.

42. Summarising the new witnesses' replacement of anticipated testimonies by the dropped witnesses, the Prosecution submits that their evidence is substantially similar, though it will not be on all fours, and that an objective analysis will reveal such similarities. Moreover, the Prosecution submits, the new witnesses' anticipated testimonies will provide similar corroboration to existing testimonies to what the dropped witnesses' anticipated testimonies would have provided.⁸⁶

43. The Prosecution asserts that the alibi notice provided by the Defence is defective and prejudicial to the Prosecution case, and submits that the law does not require the Defence to speak to potential alibi witnesses before providing their names and identities to the Prosecutor. It further avers that the Defence is misinterpreting the Chamber's decision of 17 September 2009.⁸⁷

44. The Prosecution reiterates its allegations regarding diligence.⁸⁸

45. The Prosecution reiterates that the Defence will not be prejudiced, and notes that it will provide *gacaca* and other records of the new witnesses to the Defence as soon as they are available.⁸⁹ Moreover, the Defence is fully staffed and granting a lengthy adjournment to prepare for cross-examination of the new witnesses, as the Defence requests, would be inordinate.⁹⁰

⁸² Reply, paras. 25-26.

⁸³ Reply, para. 27.

⁸⁴ Reply, paras. 28-29.

⁸⁵ Reply, paras. 30-32.

⁸⁶ Reply, paras. 34-36.

⁸⁷ Reply, paras. 37-40.

⁸⁸ Reply, para. 41.

⁸⁹ Reply, para. 43.

⁹⁰ Reply, para. 44.

46. The Prosecution requests that the Chamber order the Defence to cease contact with witness ANAU and disclose all statements to the Prosecutor, and opposes the meeting proposed by the Defence.⁹¹ The Prosecution further opposes the Defence request to recall witness ANAF.⁹²

DELIBERATIONS

47. As a preliminary matter, the Chamber notes that the portion of the Motion related to dropping Witnesses ANAB, ANAI, and ANAQ is unopposed, and therefore it is granted as it is in the interest of judicial economy. Regarding the protective measures for these witnesses, the Chamber determined in the *Butare* case that variation in the protective measures for dropped witnesses should be the subject of a separate and timely motion.⁹³ No such motion is currently before it.

48. As Witnesses ANAI and ANAQ are consequently removed from the Prosecution witness list, the Prosecution motion for transfer of those detained witnesses is moot and the Chamber will issue no separate decision on the matter.⁹⁴

49. Rule 73*bis* (E) permits the Prosecution to “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” after the commencement of trial, if the Prosecutor believes it to be in the interests of justice. Whether to grant such a motion is a matter for the Trial Chamber’s discretion, which is best exercised flexibly.⁹⁵

50. The Chamber rejects the Defence contention that only a “straight substitution” of new witnesses who will testify about matters identical to the anticipated testimony of dropped witnesses is permitted under the *Ndindiliyimana et al.* decision. Rather, in that decision, a different panel of Trial Chamber II concluded that where the change in witnesses constituted a straight substitution, no delay was likely and it should be permitted – that is, that the straight substitution of witnesses was a sufficient, but not a necessary, condition for finding that one of the criteria for granting a motion to vary was satisfied. The established test for considering a motion to vary looks into “the materiality and probative value of the testimony in relation to existing witnesses and allegations in the indictment, the complexity of the case, prejudice to the opposing party, justifications proffered for the late addition of witnesses and potential delays to the proceedings that

⁹¹ Reply, para. 45.

⁹² Reply, para. 46.

⁹³ *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-42-T, Decision on Prosecutor’s Motion to Drop and Add Witnesses, 30 March 2004, para. 42. The Chamber subsequently granted an unopposed motion to meet with two of the dropped witnesses in the absence of a representative of the Prosecution, thus varying the protective measures. *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-42-T, Decision on Joseph Kanyabashi’s Request to Meet SW and FAT and all other Persons whose Identities were not Disclosed to the Defence, 23 November 2004.

⁹⁴ Prosecutor’s Motion For an Order Transferring Detained Witnesses ANAI and ANAQ Pursuant to Rules 73, 90 *bis* and 54 of the Rules of Procedure and Evidence, filed 1 December 2009.

⁹⁵ *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.

might result from the variation of the witness list.⁹⁶ Chambers have also considered ongoing investigations, as well as replacements and corroboration of evidence.⁹⁷ This Chamber will apply the same test in determining whether the Prosecution has shown good cause for the sought variance, and whether that variance is in the interests of justice.⁹⁸

51. Here, the Chamber notes that the instant case is complex in some respects, though in other respects it is a single-Accused case with a manageable number of witnesses. However, the Chamber considered the complexity of the case in its decisions setting the date for the commencement of trial.⁹⁹ The Chamber considers that the added witnesses will not significantly increase the complexity of the case, nor is the case so complex as to require significant additional preparation time for the Defence to understand the new witnesses' proposed testimony in the context of the Prosecution case. Indeed, motions to vary have been granted in cases which were significantly more complex in terms of size, length, and number of Accused persons.¹⁰⁰

52. The Prosecution's reason for the variance is that the witnesses will replace one witness who has died in jail in Rwanda, and another who then became unwilling to testify.¹⁰¹ While the testimonies may not be totally identical to those of the dropped witnesses, the Chamber considers that the added witnesses will functionally replace the dropped witnesses. Witnesses AFS and ANAR will replace the dropped witnesses' anticipated testimonies regarding the Accused's pattern of conduct, as well as the conspiracy and joint criminal enterprise alleged by the Indictment. The Chamber further considers that Witnesses ANAS, ANAT and ANAU will replace particular testimonies which the dropped witnesses would have offered.¹⁰² Moreover, the witnesses might be relevant to disproving any alibi defence and supporting the Prosecution's assertion that the Accused was involved in a conspiracy and a joint criminal enterprise with Faustin Bagango, among others. These elements are within the scope of the Indictment. Thus, the testimonies are relevant and material in at least some respects.

⁹⁶ *Prosecutor v. Nindliyiimana et al.*, Case No. ICTR-2000-56-T, Decision on Sagahutu's request to vary his witness list, 26 May 2008, paras. 5-6 (citations omitted).

⁹⁷ *Prosecutor v. Nindliyiimana et al.*, 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), 21 September 2005, para. 32 (citation omitted).

⁹⁸ See, e.g., *Prosecutor v. Karemera et al.*, Decision on Prosecutor's Motion to vary its Witness list, 2 October 2006, para.3.

⁹⁹ See Decision on Trial Date, 12 June 2009; Decision on Defence Extremely Urgent Motion for Reconsideration of the Trial Chamber's Decision on the Trial Date, 15 July 2009.

¹⁰⁰ See, e.g., *Prosecutor v. Nindliyiimana et al.*, 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), 21 September 2005; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-42-T, Decision on Prosecutor's Motion to Drop and Add Witnesses, 30 March 2004.

¹⁰¹ The Prosecution suggests the requested witnesses would replace Witnesses ANAI and ANAQ, but not Witness ANAB.

¹⁰² Requested Witnesses ANAS and ANAT, like Dropped Witness ANAI, will testify regarding Tutsis listed to be killed. Requested witnesses ANAS, ANAT, and ANAU, like Dropped Witness ANAQ, will testify about a meeting in Gitaraco.

53. With respect to the issue of prejudice and the issue of preparation time in particular, in other cases, the Chambers in question concluded any prejudice could be cured by hearing the new witnesses at the end of the Prosecution case, to give the Defence time to prepare and conduct investigations.¹⁰³ Moreover, the Chamber notes that the Defence misquotes the 30 March 2004 Decision in the *Butare* case to support a separate hearing for added witnesses months after the conclusion of the Prosecution's case. Rather, in that decision the Chamber merely directed that the witnesses would be heard at the end of the Prosecution's case.¹⁰⁴

54. Here, the Prosecution's current witness list estimates that the requested witnesses will be heard during the weeks of 22-26 February and 2-6 March 2010.¹⁰⁵ This would provide the Defence approximately two months of preparation time since the filing of the Motion and the concomitant disclosure of unredacted witness statements. The Chamber is of the view that hearing the requested witnesses at the end of the Prosecution case constitutes adequate time for the preparation of the Defence. Accordingly, the request for more time is denied.

55. With respect to the Defence request for the other records of the witnesses, the Chamber notes that the Prosecution represents that it will provide the *gacaca* and other records of the new witnesses to the Defence as soon as they are available.¹⁰⁶ To facilitate Defence preparation and ensure a fair and speedy trial, the Chamber encourages the Prosecution to do as it has promised and the Defence to use its own resources to obtain the documents. Regarding translations, the Chamber notes that the Prosecution disclosed unofficial translations to the Defence on 5 January 2010, and represented that it has forwarded all statements to the Language Services Section for official translation.¹⁰⁷

56. Regarding the Parties' submissions on the witnesses' proposed testimonies, the Chamber is mindful of the jurisprudence requiring notice of allegations. The Chamber will not convict the Accused on the basis of a fact not pleaded in the Indictment, but may admit evidence not pleaded in the Indictment or Pre-Trial Brief to the extent it is relevant. The Chamber will consider specific notice allegations at the appropriate stage of trial.¹⁰⁸

57. At this stage, the Chamber will consider whether certain portions of the proposed testimonies are repetitive and consequently, witnesses should not be permitted to testify on them because calling a large number of witnesses to testify on the same precise

¹⁰³ See, e.g., *Prosecutor v. Nindiyimana et al.*, 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), 21 September 2005; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-42-T, Decision on Prosecutor's Motion to Drop and Add Witnesses, 30 March 2004.

¹⁰⁴ Decision on Prosecutor's Motion to Drop and Add Witnesses, 30 March 2004, para. 38.

¹⁰⁵ Revised Order of Appearance of Prosecution Witnesses, filed 24 December 2009.

¹⁰⁶ Reply, para. 43.

¹⁰⁷ See Disclosure of Unofficial Translation of Statements of Proposed Witnesses and Death Certificate of Witness ANAQ, 5 January 2010.

¹⁰⁸ See *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-AR73.2, Decision on the Appeals by Pauline Nyiramasuhuko and Arsene Shalom Ntahobali on the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible,' 2 July 2004 (AC), paras. 14-15.

allegation is unnecessary and serves neither justice nor judicial economy.¹⁰⁹ The Chamber however is of the view that the proposed testimonies may have new perspectives on the allegations in paragraphs 17 and 50 of the Indictment.

58. With regard to the dispute between the Parties regarding the notice of Alibi and the Chamber's 17 September 2009 decision, the Chamber notes that this issue is the subject of a separate Motion and will address it there.¹¹⁰ Further, the Chamber notes that the Defence allegation that the Prosecution violated its Rule 68(A) disclosure obligations regarding the statements of Witnesses AFS and ANAS is unsubstantiated. The Defence requests for a joint meeting with the Prosecution, the Defence, and Witness ANAU; as well as its request to recall Witness ANAF, have not been formally raised before the Chamber and should be the subject of a separate motion. Accordingly they will not be considered.

FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS the Motion;

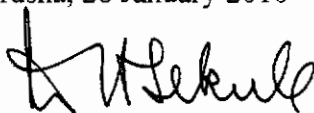
ORDERS that Witnesses ANAB, ANAI, and ANAQ be dropped from the Prosecution list and Witnesses AFS, ANAR, ANAS, ANAT, and ANAU be added;

ORDERS that the protective measures set out in the Chamber's 7 May decision be applied to the new Witnesses;

URGES the Prosecution to disclose to the Defence any *gacaca* or other records regarding the new Witnesses as soon as possible;

DIRECTS that the added witnesses will testify at the end of the Prosecution's case.

Arusha, 28 January 2010



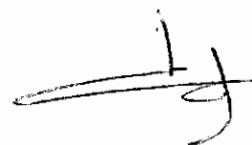
William H. Sekule

Presiding Judge



Solomy Balungi Bossa

Judge



Mparany Rajohnson

Judge

¹⁰⁹ See *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Joseph Kanyabashi's Motions for Modification of his Witness List, the Defence Responses to the Scheduling Order of 13 December 2006 and Ndayambaje's Request for Extension of Time within which to Respond to the Scheduling Order of 13 December 2006, 21 March 2007, para. 35, affirmed *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007 para. 16.

¹¹⁰ Prosecutor's Motion for an Order to Compel the Accused to Disclose Particulars of his Alibi, filed on 7 January 2010.