SCSL-2004-14-T

(8790-8842)

8790

164

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Judge Benjamin Mutanga Itoe, Presiding Judge
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Mr. Robin Vincent

Date filed: 28 July 2004

THE PROSECUTOR **Against** **SAM HINGA NORMAN**
MOININA FOFANA
ALLIEU KONDEWA

Case No. SCSL – 2004 – 14 – T

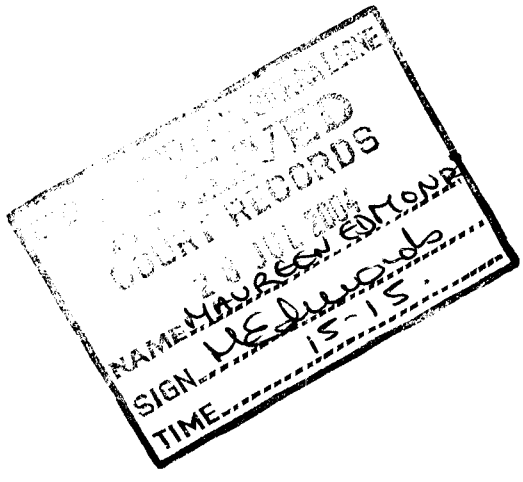
PROSECUTION REQUEST FOR LEAVE TO CALL ADDITIONAL EXPERT WITNESS DR. WILLIAM HAGLUND

Office of the Prosecutor:
Luc Côté
James C. Johnson
Bianca E. Suciu

Standby Counsel for Sam Hinga Norman
Bu-Buakei Jabbi
John Wesley Hall
Quincy Whitaker
Tim Owen

Defence Counsel for Moinina Fofana
Michel Pestman

Defence Counsel for Allieu Kondewa
Charles Margai



SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

THE PROSECUTOR **Against** **SAM HINGA NORMAN**
MOININA FOFANA
ALLIEU KONDEWA

Case No. SCSL – 2004 – 14 – T

PROSECUTION REQUEST FOR LEAVE TO CALL ADDITIONAL EXPERT WITNESS DR. WILLIAM HAGLUND

I. BACKGROUND

1. On 1 April 2004, the Trial Chamber issued the "Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial" ("the Order"). On 26 April 2004, pursuant to the Order, the Prosecution filed a "Witness List", which included a summary of the expected testimony of each witness.

2. On 5 May 2004, the Prosecution filed a "Modified Witness List", which included a summary of the expected testimony of each witness. The Modified Witness List totals 154 witnesses.

3. The Prosecution disclosed to the Defence the un-redacted Expert Report of Dr. William Haglund on 5 July 2004. The name of expert witness William Haglund is not included on the list.

4. On 14 July, the Prosecution filed with the Court pursuant the Rule 94 *bis* the Forensic Report for the Office of the Prosecutor Special Court for Sierra Leone 28 October-8 December 2003 (the "Expert Report") prepared by Mr. William Haglund.

5. On 16 July 2004, the Trial Chamber issued the "Order for Compliance of Prosecution with Rule 94 *bis*" ordering the Prosecution to seek leave of the Court to add Mr. William Haglund to the initial witness list and to show good cause to

cause to disclose the full statement of the expert witness outside the time limits prescribed in Rule 66(A)(ii).

6. The Prosecution hereby respectfully requests the Trial Chamber leave to vary the Modified Witness List. For the reasons outlined below, the Prosecution submits that the proposed additional expert witness meets the standard of "good cause" and that the Court should therefore allow his addition to the Modified Witness List.

II. PROSECUTION'S SUBMISSIONS

7. As a preliminary point and in order to clarify for the Court the circumstances that lead to the lateness of the present request to add Mr Haglund as a witness, the Prosecution deems it important to explain its interpretation of Rule 94 *bis* prior to the "Order for Compliance of Prosecution with Rule 94 *bis*".

8. Rule 94 bis (A) reads as follows: "*Notwithstanding the provisions of Rule 66 (A)* [...] *the full statement of any expert witness called by a party shall be disclosed to the opposing party as early as possible and shall be filed with the Trial Chamber not less than twenty one days prior to the date on which the expert is expected to testify.*" The Prosecution construed the terms of this Rule as creating an exception to the regular disclosure rule which would normally require the Prosecution to show good cause for disclosure beyond the 60 days period before the commencement of trial. Hence, it was the Prosecution' belief that disclosure of the Expert Report to the Defence as soon as possible after having received possession of the Report and the subsequent filing of said report with the Court was fully in compliance with Rule 94 *bis* (A).

9. Second, pursuant to paragraphs (B) and (C) of Rule 94 *bis* the statement of an expert witness may be admitted into evidence without calling the witness to testify in Court if the Defence files a notice to the Trial Chamber, within fourteen days of the filing of the statement by the Prosecution, to the affect that it accepts the statement of the expert witness. Rule 73 *bis* (E) states: "*After the commencement of the Trial, the Prosecutor may, if he considers it to be in the*

interests of justice, move the Trial Chamber for leave [..] to vary his decision as to which witnesses are to be called". Based on its interpretation of these Rules, the Prosecution deemed it necessary to wait until the Defence files its notice regarding its intention to challenge or not the Expert Report before being able to assess whether the expert witness will be called to testify. Accordingly, had the Defense expressed at the end of the fourteen day period the need to cross-examine the witness, the Prosecution would have then proceeded to request leave of the Trial Chamber to add this witness on the witness list pursuant to Rule 73 *bis* (E).

10. However, the Prosecution stands corrected by the Trial Chamber's "Order for Compliance of Prosecution with Rule 94b *bis*" of 16 July 2004 and as stated above, is hereby adopting the procedure thereof ordered in respect to the addition of Dr. William Haglund on the witness list.

A. Factual background of the expert report of Dr. William Haglund

11. The Expert Report which was finalized on 27 February 2004, describes forensic assessment and investigations of five grave sites around the country, conducted by Dr. William Haglund and his forensic team between 28 October and 8 December 2003. A total of fourteen victims were recovered from the sites and the report purports to identify the victims and the cause of death of each individual. The two gave sites relevant to the present case are located at Mohiboima in the District of Bo.

12. Due to security concerns and past experienced problems with receiving items in the mail in Sierra Leone, the Expert Report was sent to the US home address of Alan W. White, Chief of Investigations of the Special Court for Sierra Leone, who personally delivered it to Freetown on 22 April[1]. The report was then filed with the Evidence Unit of the Office of the Prosecutor but due to a backlog in work in the Evidence Unit the Expert Report was not processed until June 2004.[2]

[1] See Declaration of Alan W. White, Chief of investigations, annex A.
[2] *Id.*

13. As a result, the Prosecution team received possession of the Expert Report on the second week of June 2004. The full un-redacted Expert Report was disclosed to the Defence teams on 5 July 2004.

B. Good Cause

14. The international ad hoc tribunals have considered several factors in making a determination for "good cause" for adding witnesses. These factors include the complexity of the case[3]; the materiality of the evidence to be presented by the additional witnesses;[4] whether any prejudice is caused to the Accused by adding witnesses to the witness list;[5] and the timeliness of the disclosure of the evidence to the defence[6]. With regard to this last consideration, while it does not constitute a determining factor in deciding whether to grant the request,[7] the tribunals have considered circumstances including: whether the evidence has just recently become necessary or available;[8] whether the additional witnesses stemmed from on-going or fresh investigations;[9] and whether they had previously been unwilling to testify.[10]

15. Regarding the materiality of the evidence the Trial Chamber in *Delalic* expressed: "*Where the testimony of a witness is important to the Prosecution or the Defence, the Trial Chamber will ensure that such witness is heard, subject, naturally, to the limits prescribed in the Statute of the International Tribunal and Rules*".[11] In

---

[3] *Prosecutor v. Nahimana et al*, ICTR-99-52-I, "Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures", 14 September 2001 ('*Nahimana* ,14 September 2001'), paras 11, 14, 19. See also *Prosecutor v. Nahimana et al*, ICTR-99-52-I, "Decision on the Prosecutor's Oral Motion for Leave to amend the list of selected witnesses", 26 June 2001 ('*Nahimana*, 26 June 2001'), para 20.

[4] *Nahimana* ,14 September 2001, paras. 19-20; *Prosecutor v. Bagasora et al*, ICTR-98-41-T, "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73*bis*(E)", 21 May 2004 ('*Bagasora*, 21 May 2004'), para. 8.

[5] *Nahimana*, 26 June 2001, paras. 19-20; *Bagasora*, 21 May 2004, para. 8.

[6] *Bagasora*, 21 May 2004, para. 9.

[7] *Bagasora*, 21 May 2004, para. 11.

[8] *Prosecutor v. Delalic et al*, ICTY-96-21-T, "Decision on Confidential Motion to Seek Leave to Call Additional Witnesses", 4 September 1997 ('*Delalic*, 4 Sep. 1997'), para. 10.

[9] *Nahimana*, 26 June 2001, para. 20; *Bagasora*, 21 May 2004, para. 10.

[10] *Nahimana* , 14 September 2001, para. 12.

[11] *Delalic*, 4 Sep. 1997', para. 7.

Prosecutor v Nahashima[12] the Trial Chamber granted the addition of two expert witnesses onto the witness list despite the late disclosure of their reports, on the basis that that their testimonies were relevant for the determination of core issues of the case.

16. In relation to the possibility of prejudice being caused to the Accused, the international criminal tribunals have considered whether the Defence will have adequate time to prepare for the testimony of additional witnesses, taking into consideration when that witness will be called;[13] how far into the trial the case has proceeded;[14] and the possibility of consequential delays to the proceedings.[15]

17. In conclusion, it has been established that requests to vary the witness list is a matter of the Trial Chamber's discretion. However, the ICTY/ICTR expressed on several occasions that a "flexible approach" should be adopted when considering the management of witnesses in order to facilitate the truth finding process.[16]

1. <u>The evidence was disclosed in a timely manner</u>

18. The Prosecution submits that the full Expert Report was disclosed to the defence *"as early as possible"*, in accord with the requirement stipulated in Rule 94 *bis*.

19. As stated by the Prosecution at the Pre-trial Conference[17] and Status Conference[18], the Prosecution was not at that point in possession of any expert statements. Instead, the Prosecution pledged to disclose the identities of such witnesses and their reports as soon as practically possible, suggesting as a tentative date the end of the first trial session.

---

[12] *Nahimana* ,14 September 2001.
[13] *Prosecutor v. Nyiramasuhko* et al, ICTR-97-29-T, "Decision on the Prosecutor's Motions for Leave to Call Additional Witnesses and for the Transfer of Detained Witnesses", 24 July 2001, para. 13, where the Trial Chamber notes that "this witness should not be called to testify at trial before several months so that the Defence should have sufficient time to examine this piece of evidence".
[14] *Bagasora*, 21 May 2004, para. 10; *Prosecutor v. Milosevic*, IT-02-54-T, "Decision on Prosecutor's Request to Call Witness C-063", 18 February 2004, para. 5, where the request was denied partly due to the late stage of proceedings.
[15] *Nahimana*, 14 September 2001, para. 19.
[16] See *Delalic*, 4 Sep. 1997, para 7; and *Prosecutor v Ntagerura*, ICTR-99-46-T "Decision on Defence for Ntagerura's Motion to Amend its Witness List Pursuant to Rule 73 Ter (E)", 4 June 2002, para 10.
[17] Held on 28 April 2004. See pages 5, 15-16.
[18] Held on 1 June 2004. See pages 25-26.

20. The Prosecution team was provided with a copy of the Expert Report on the second week of June 2004. Following the analysis of the report, the Prosecution formed its intention to use Mr. William Haglund as an expert witness. However, in light of the fact that the Report identified a Prosecution witness by name, the Prosecution was unable to disclose to the defence the full un-redacted Expert Report, until protective measures were implemented for the respective witness, in accord with the Trial Chamber's "Decision on Prosecution Motion for Modification of Protective Measures for Witnesses" dated 8 June 2004. As such, the un-redacted Expert Report was disclosed to the Defence teams on 5 July 2004.

21. In view of the above stated reasons, the Prosecution argues that disclosure to the Defence of the Expert Report was done in a timely manner and at the earliest possible opportunity.

2. <u>The evidence is material and the case is complex</u>

22. The Prosecution submits that the testimony of expert witness Dr. William Haglund or, in the alternative and subject to Rule 94 *bis* B) and C) the Expert Report, is of significant importance in the proof of crimes committed in Bo, a crime base that is at the heart of Prosecution's case.

23. Fist, the Prosecution asserts that this evidence is essential as it adduces independent and real proof of the death of four civilian victims. These victims were found in two different gravesites in Bo Town. The alleged perpetrators of the killings of the victims are identified as being kamajors and the date of the event was determined to have been February 1998. This evidence is of scientific nature and is additional to the testimony of witnesses TF2-030 and TF2-156 who will testify to the killings of the said victims by the Kamajors.

24. Second, and most importantly, the Prosecution submits that it will adduce evidence to the effect that the three accused persons were closely involved in the planning of the February1998 attack on Bo during which these crimes were perpetrated by their subordinates, the Kamajors. The Prosecution purports to

prove through the theory of command responsibility, direct responsibility or joint criminal enterprise that the three CDF indictees bear individual criminal responsibility for the killing of each of the victims covered in the Expert Report. Accordingly, the Prosecution submits that the Expert Report is of valuable significance to meet the threshold for proving beyond a reasonable doubt that the above proposed civilian killings in the Bo crime base were committed.

25. In light of the materiality of this evidence to prove an important aspect of its case and the Prosecution's "*duty under the Statute to present the best available evidence to prove its case*"[19], the Prosecution submits that it would be contrary to the interests of justice to exclude this witness's testimony.

3. There is no prejudice being caused to the accused

26. The Prosecution submits that granting the present request to add Dr. William Haglund to the witness list will not in any way prejudice the rights of the accused. The Prosecution emphasizes that its request is being brought at a very early stage in the proceedings as only four Prosecution witnesses have thus far testified. Further, in light of the CDF trial sessions that run in sessions of alternate months and given Prosecution's intention to call Dr. William Haglund at a much later stage in the trial, the Defence will benefit from ample time to prepare and conduct its own investigations in relation to the Expert Report.

27. Additionally, it is important to note that even though disclosure of the forensic report to the Defence was made on 5 July 2004, the Defence was put on notice of the killings of the victims mentioned in the report as early as November 2002 and November 2003 following the disclosure of the statements of witnesses pseudonymed TF2-030 and TF2-156. Consequently, it is submitted that the evidence adduced by expert witness Dr. William Haglund is not novel *per se* as it does not have the effect of taking the defence by surprise. As such, there are no indications that the addition of the expert witness prejudices the accused' rights,

[19] '*Nahimana*, 26 June 2001', para 20.

nor will it unduly delay the proceedings in this case and therefore the present request should be granted.

28. Finally, the Prosecution respectfully submits that in deciding the present request, the Trial Chamber should consider the seriousness of the crimes charged, the difficulties and complexities of investigating and prosecuting cases involving crimes against humanity and war crimes and the necessity for the Trial Chamber to be in possession of all factors that would assist to evaluate the culpability of the accused persons.

III. CONCLUSION

29. Based on the arguments above, the Prosecution submits that good cause has been shown so as to allow the addition of the expert witness to the Modified Witness List.

30. The Prosecution is anticipating to call two additional expert witnesses to testify in the CDF trial. Upon receipt of their expert reports, the Prosecution will follow the procedure ordered by the Trial Chamber in its "Order for Compliance of Prosecution with Rule 94b *bis*" namely: to seek leave to add the additional witnesses on the list and to show good cause to disclose their full statements outside the time limits prescribed in Rule 66(A)(ii).

Filed in Freetown, 28 July 2004.

For the Prosecution,

Luc Côté
Chief of Prosecutions

Raimund Sauter
Trial Counsel

PROSECUTION'S INDEX OF AUTHORITIES

Annex A:

1) Declaration of Alan W. White, Chief of investigations.

Annex B:

2) *Prosecutor v. Nahimana et al*, ICTR-99-52-I, "Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures", 14 September 2001.
3) *Prosecutor v. Nahimana et al*, ICTR-99-52-I, "Decision on the Prosecutor's Oral Motion for Leave to amend the list of selected witnesses", 26 June 2001.
4) *Prosecutor v. Bagasora et al*, ICTR-98-41-T, "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73*bis*(E)", 21 May 2004.
5) *Prosecutor v. Delalic et al*, ICTY-96-21-T, "Decision on Confidential Motion to Seek Leave to Call Additional Witnesses", 4 September 1997.
6) *Prosecutor v. Nyiramasuhko* et al, ICTR-97-29-T, "Decision on the Prosecutor's Motions for Leave to Call Additional Witnesses and for the Transfer of Detained Witnesses", 24 July 2001.
7) *Prosecutor v. Milosevic*, IT-02-54-T, "Decision on Prosecutor's Request to Call Witness C-063", 18 February 2004.
8) *Prosecutor v Ntagerura,* ICTR-99-46-T "Decision on Defence for Ntagerura's Motion to Amend its Witness List Pursuant to Rule 73 Ter (E)", 4 June 2002.

Annex A:

1. Declaration of Alan W. White, Chief of investigations.

SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

PHONE: +1 212 963 9915 Extension: 178 7100 or +39 0831 257100 or +232 22 236527

FAX: Extension: 174 6998 or +39 0831 236998 or +232 22 295998

20 July 2004

MEMORANDUM FOR PROSECUTIONS

SUBJECT: Dr. William Haglund's Forensic Report

On March 25, 2004 I spoke with Dr. William D. Haglund, Director, International Forensic Program, Physicians for Human Rights regarding the status of the Sierra Leone Forensic Report. Dr. Haglund advised the report was complete and he wanted instructions on where the report should be sent. I advised him that we had experienced problems with receiving items in the mail so I suggested that he express mail the report and related materials to my home residence in North Carolina. I advised him that I would be in the United States on April 2, 2004 and I would hand carry the report back to Sierra Leone.

On April 2, 2004 I returned to the United States and upon arrival I took possession of the Sierra Leone Forensic Report which was located at my residence in North Carolina. On April 22, 2004 I returned to Sierra Leone and hand delivered the report to Mr. Peter Halloran, Investigations Commander, with instructions to have it logged in with the Evidence Unit.

The Chief of the Evidence Unit went on emergency leave for 6 weeks and was unable to process the report until he returned in late May 2004. Unfortunately, the Assistant Evidence Custodian post was vacant at the time and as a result there was no one who could process the report until the Chief of the Evidence Unit returned. Due to a backlog of work in the Evidence Unit the report was not processed until June 2004.

Alan W. White, Ph.D.
Chief of Investigations

Annex B:

2. *Prosecutor v. Nahimana et al*, ICTR-99-52-I, "Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures", 14 September 2001.

8803

TRIAL CHAMBER I

Original: English

Before:
Judge Navanethem Pillay
Judge Erik Møse
Judge Asoka de Z. Gunawardana

Registrar: Ms Marianne Ben Salimo

Decision date: 26 June 2001

THE PROSECUTOR
v.
FERDINAND NAHIMANA
HASSAN NGEZE
JEAN BOSCO BARAYAGWIZA

(Case No. ICTR-99-52-I)

DECISION ON THE PROSECUTOR'S ORAL MOTION FOR LEAVE TO AMEND THE LIST OF SELECTED WITNESSES

Office of the Prosecutor:
Mr Stephen Rapp
Mr William T. Egbe
Mr Alphonse Van
Ms Charity Kagwi
Ms Simone Monasebian
Mr Elvis Bazawule

Counsel for the Accused:
Ms Diana Ellis
Mr John Floyd III
Mr Alfred Pognon

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

SITTING as Trial Chamber I, composed of Judge Navanethem Pillay, presiding, Judge Erik Møse and

8804

Judge Asoka de Zoysa Gunawardana;

BEING SEIZED of the Prosecution's oral motion, dated 4 June 2001, for leave to amend the list of selected witnesses for the balance of the trial pursuant to Rule 73*bis*(E) and considering the Prosecution's summary of anticipated testimony of additional prosecution witnesses, dated 7 June 2001;

HAVING HEARD the Parties in closed session on 11, 12 and 13 June 2001; and having received a written summary from Counsel for the Accused Ferdinand Nahimana, dated 11 June 2001.

INTRODUCTION

1. On 27 June 2000 the Prosecutor filed a list ("the initial list") of 97 selected witnesses. It was amended on 4 August 2000. A list of more than 300 witness statements from 221 witnesses disclosed to the Defence was filed on 16 August 2000.

2. On 16 October 2000 the presiding Judge issued a Scheduling Order according to which the Prosecution was obliged to provide a list of exhibits and related witnesses four days in advance of each week's hearing. The trial commenced on 23 October 2000.

3. On 22 February 2001 the Trial Chamber made an oral order to the Prosecution to present a schedule of witnesses to be called to testify. Counsel for the Prosecution responded on 26 February 2001 that there would be 40 additional Prosecution witnesses to be called to testify. He made the commitment that they would as far as possible be from the list of 97 witnesses.

4. On 25 April 2001 the Chamber requested the Prosecution to indicate when a final list of witnesses would be provided. Counsel for the Prosecution answered that such a list would be presented on 27 April 2001. On 2 May 2001 he stated that, at that stage of the trial, it was impossible to provide a final list of witnesses, but he undertook to schedule witnesses to be called during the trial until the judicial recess in July 2001.

5. The Prosecution submitted a revised list of witnesses on 4 June 2001 and indicated its intention to present an oral motion under Rule 73*bis* of the Rules of Procedure and Evidence ("the Rules"). During the Status Conference on 11 June 2001 the Chamber decided, following representations from Counsel for Ferdinand Nahimana, to hear the oral motion in court, but in a closed session.

SUBMISSIONS BY THE PARTIES

The Prosecution

6. Counsel for the Prosecution argued that the Prosecution has the burden to prove its case beyond reasonable doubt and must therefore be able to present the best and most effective witnesses. Consequently, pursuant to Rule 73*bis* (E), the Prosecution requested leave to vary the initial list of 97 witnesses ("the initial list") in the following way:

a) Retaining eight more witnesses from the initial list;
b) Not calling the remaining 55 in the initial list;
c) Adding 25 new witnesses, two of whom are investigators;
d) Adding two new expert witnesses.

7. Among the 55 witnesses that the Prosecution does not intend to call are two deceased witnesses and

7805

seven who are reluctant to testify due to fear for their security. The testimonies of the additional witnesses contain probative evidence in relation to the indictments. Counsel for Prosecution explained that some of the additional witnesses stem from on-going investigations; some of them are expected to counter the alibi notice from Ferdinand Nahimana; some will replace witnesses that the Prosecution does not intend to call; and some will corroborate evidence led so far during the trial.

8. Counsel for the Prosecution submitted that the new list represents its final determination of witnesses as requested by the Defence. This implies that the actual number of witnesses will be reduced from 97 to 71 and that the whole trial will be shortened. In addition, he argued that it is not the intention of the Prosecution to call the witnesses until the Defence has had proper disclosure and sufficient time to prepare.

9. The Prosecution's request also included two more expert witnesses, namely Jean-Pierre Chrétien and Marcel Kabanda. The Chamber was informed that these persons had not been willing to testify initially, but that they are now available. Their testimonies will cover electronic and print media.

The Defence

10. Counsel for Hassan Ngeze submitted that his client would suffer substantial prejudice if the motion submitted by the Prosecution were granted. It would also be a violation of due process and fundamental fairness. On several occasions earlier, the Prosecution had assured the Defence that what the Prosecution had presented so far was all the material relevant to the case.

11. Counsel also argued that the additional witnesses will present new facts, which he had not been able to contradict during his previous cross-examinations. This would cause substantial prejudice to the strategy of the Defence.

12. Counsel for Ferdinand Nahimana questioned the relevance of Rule 73*bis* to this case. The decisive criterion is not "the interests of justice" but whether the Prosecution has shown "good cause" under Rule 66(A)(ii) for the late disclosure of the witness statements. Difficulties in the Prosecution's office or unsubstantiated allegations pertaining to the security of witnesses are not "good cause". Disclosure has been improper, incomplete and late. Witness statements of some of the witnesses have not been received at all.

13. Counsel argued that the varying of the initial list of witnesses would cause delays in the proceedings. The Prosecution had stated that only 47 witnesses would be called. The additional witnesses would also cause prejudice to the Accused. The Defence would not have adequate time to prepare as required under Article 20 of the Statute. Moreover, the Defence is entitled to have all the evidence before the trial so as to have a comprehensive view of the entire case.

14. Counsel for Nahimana also submitted that the Prosecution has had sufficient time to make the necessary inquiries as it had received notice of alibi well in advance of the trial in conformity with Rule 67. Counsel noted that by presenting witness AEN, the Prosecutor failed to challenge the alibi. It is contrary to a fair trial if the Prosecution is allowed to replace two weak witnesses by another stronger one.

15. Counsel for Jean Bosco Barayagwiza associated himself with the submissions made by the Defence for the two other Accused. He argued, *inter alia*, that some aspects to be testified to by the new witnesses are clearly not covered by the indictment, especially in respect of the presence of his client at roadblocks.

8806

DELIBERATIONS

Applicable Provisions

16. The Prosecution's motion is based on Rule 73*bis* (E) of the Rules, which states:

> "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." [1]

17. It follows from case law that the final decision as to whether it is in the interests of justice to allow the Prosecution to vary its list of witnesses rests with the Chamber. In the case of *The Prosecutor v. Alfred Musema*, former Trial Chamber I found that it was in the "interests of justice" to allow the Prosecutor to vary her initial witness list by calling four new witnesses. However, leave was denied in relation to one witness who was not an eye-witness to the events.[2] In the *Goran Jelisic case*, the ICTY held "it to be in the interests of justice that any evidence necessary to ascertain the truth be presented to it and be subject to examination by the parties". However, such interests must not prejudice the principle that the accused has the right to trial without undue delay. The Chamber therefore allowed the additional witnesses but ruled that the Prosecution could only call one of two witnesses as both were to testify to the same facts as a witness already on the initial list. The Prosecutor was ordered to choose between the two latter.[3]

18. In the present case, the parties had different views on the relationship between Rule *73bis* (E) and Rule 66. The latter provides that the Prosecution shall disclose to the Defence no later than 60 days before trial copies of all witnesses the Prosecution "intends to call to testify at trial". However, upon "good cause" shown, a Trial Chamber may order that copies of statements of additional prosecution witnesses be made available to the Defence within a prescribed time". Therefore, whereas Rule *73bis* (E) relates to variation and addition of witnesses during the trial, Rule 66 - according to its wording - deals with disclosure at the pre-trial stage. In *The Prosecutor v. Ignace Bagilishema*, this Trial Chamber stated that the purpose of Rule 66 is to give the Defence sufficient notice and adequate time and, at the same time, to ensure that relevant Prosecution evidence is not excluded merely on procedural grounds. [4] The principle of "good cause" was, therefore, also applied at the trial stage. The Chamber notes that the need for the Defence to have a clear and cohesive view of the Prosecution's strategy and to be able to make appropriate preparations was also stressed in *The Prosecutor v. Tihomir Blaskic*. However, that case only dealt with pre-trial disclosure of a list of witnesses.[5]

19. The Rules do not define the term "interests of justice", but the Chamber is of the opinion that it refers to a discretionary standard applicable in determining a matter given the particularity of the case. When a Trial Chamber has granted leave to call new prosecution witnesses under Rule 73*bis*, statements of such witnesses will form part of the case against the Accused. It follows that the Chamber in its determination will bear in mind also the question of "good cause".

20. In assessing the "interests of justice" and "good cause" Chambers have taken into account such considerations as the materiality of the testimony, the complexity of the case, prejudice to the Defence, including elements of surprise, on-going investigations, replacements and corroboration of evidence. The Prosecution's duty under the Statute to present the best available evidence to prove its case has to be balanced against the right of the Accused to have adequate time and facilities to prepare his Defence and his right to be tried without undue delay.

8807

Factual Witnesses

21. On 21 May 2001 the Prosecution tendered a list of 13 witnesses to be called from May through August 2001. The Defence raised no objection to these 13 witnesses, of whom two have now testified. The Chamber notes that there is no dispute between the parties concerning this group of witnesses, who were all on the initial list.

22. Eight witnesses - GF, SA, AAN, ABH, AAO, AFK, AFM and AFP - were on the initial list of 97 witnesses, but the Prosecution had not informed Defence that they would be called before the present motion was introduced. Defence Counsel conceded that they had read the statements of these witnesses, but that the statements had not been used during cross-examination in the way the Defence would have done had it been certain that these witnesses would be called.[6] The Chamber does not find this convincing. It is clear that until the present motion was filed the Prosecution had not submitted a final list of witnesses. In February 2001 the Prosecution indicated that 47 witnesses would be called. By May 2001 it identified a limited number of further witnesses out of 47. Under these circumstances, Defence was under notice that further witnesses from the list of 97 would be called. Consequently, the Chamber allows the Prosecutor to call these eight witnesses to testify at trial.

23. In addition to these witnesses, the Prosecution's amended list of witnesses of 4 June 2001 contains 25 new factual witnesses. Two of these witnesses (Nos. 24 and 25) are ICTR investigators: Aaron Musonda and Kaiser Rizwi. The Defence did not address these investigators during the hearing, with the exception of Counsel for Ngeze, who explicitly stated that the calling of these two witnesses had been anticipated.[7] Consequently, the Chamber allows that these two investigators be called.

24. The Prosecutor has submitted that some witnesses are no longer available. Two witnesses - AAH and FK - are deceased. Seven are reluctant to testify due to fear of security. These are witnesses AC, AEO, AGS, AN, AX, FD and FT. The Chamber has no reason to doubt the information provided by the Prosecution and takes the view that it is in the interests of justice to allow their replacement. The Prosecutor has submitted that those witnesses will be replaced by ABC, ABM, ADO, AHD, AHH, AM/AFO, DCD, DCH, GHK and QAX. Thus, the Chamber holds that it is in the "interests of justice" to allow their testimony and that there is "good cause" for the disclosure of their statements.

25. Witness AHE, AHJ and AZZ are called to counter the notice of alibi from the Accused Nahimana. The Chamber allows these testimonies. Notice of alibi was filed in conformity with Rule 67, but shortly before commencement of trial. It is understandable that the Prosecution needed time to investigate. Therefore, the inclusion of these witnesses in the list would be justified both on good cause and in the interests of justice.

26. Witness AFT is called to replace witness AX and to counter the alibi. Another witness, AHD, is also called to replace AX. There appears to be a duplication of testimony. Furthermore, the main part of AFT's testimony appears to fall outside the temporal jurisdiction of the Tribunal. Therefore, the Chamber disallows witness AFT.

27. Nine witnesses - ABC, ABM, ABU, ADO, AEI, AFF, AFI, LAG and QAX – were not on the initial list. However, their statements were among the 300 statements disclosed on 16 August 2000, well in advance of the 60-day deadline in Rule 66(A)(ii). The Chamber has already granted leave to call Witnesses ABC, ABM, ADO and QAX in order to replace other witnesses, see para. 25 above. In relation to the remaining five witnesses, the Chamber will balance the need for the Defence to have sufficient notice of the case against the Accused, and the interests of justice under Rule *73bis*.

28. The Prosecutor must have had a view on how it would prove its case at the stage of confirmation of the indictment. Before the trial, it selected 97 witnesses out of the 300 statements and informed the Defence, who was relying on this information to prepare their defense. The Chamber has carefully considered the summaries of the proposed testimony of the five witnesses, in particular whether disallowing them will prejudice the Prosecution. The Chamber has decided to allow three witnesses: ABU is expected to testify in respect of the involvement of all three Accused in the CDR. Witness AEI apparently heard Barayagwiza stating at a meeting that Tutsi should be massacred. Witness LAG is expected to testify that Ngeze and Barayagwiza played a leading role during a meeting where people were beaten. On the other hand, the Chamber does not grant leave to call witness AFF, who is a journalist collaborating on the same publication as one of the new expert witnesses. Similarly, AFI is a journalist who worked in Rwanda in 1994. Her statement mainly contains indirect evidence and would seem to be of limited value for the Chamber.

29. Some of the witness statements were disclosed in May 2001. The Chamber recalls that Rule 66 (C) envisages that the Prosecution may undertake further or on-going investigations. It would run counter to this provision if the Chamber were to exclude all testimonies which were the product of on-going investigations. In the present case, the Prosecution could hardly have disclosed these statements earlier. The Chamber will consider each case on its merits bearing in mind the materiality of the testimony to the case and the potential prejudice of the late disclosure to the Defence. Witnesses AHB and AHC are called to corroborate AAJ's testimony about Jean Bosco Barayagwiza's alleged involvement in the distribution of weapons. The Chamber is of the view that paragraphs 5.17 and 5.23 of the indictment give sufficient notice in this regard. However, in order to avoid duplication the Chamber will allow the Prosecution to call one of these witnesses.

30. Witness AHF, whose statement was also disclosed for the first time in May 2001, is called as a replacement for ADT in relation to meetings attended by Nahimana in 1992 and 1993. The Chamber sees limited need for further evidence in relation to this period and disallows this witness.

31. AHI's statements were disclosed on 9 April 2001. The Chamber notes that the Prosecutor has disclosed six statements based on on-going investigations and that the witness is anticipated to testify on Ngeze's superior responsibility. This is material to the case and has not been covered by witnesses so far.

32. The Defence has generally argued that they are taken by surprise by late disclosure and have lost opportunities to cross-examine earlier witnesses on matters arising from the new testimonies. The Chamber notes that considerable time will pass before any of these witnesses will be called. This will allow Defence adequate time for preparation. In relation to previous cross-examination, the Defence may apply for leave to recall witnesses for further cross-examination.

33. The present decision implies that the Prosecution will be allowed to call more witnesses than 47, indicated by the Prosecution in February 2001, but less than 97, which was the original number on the initial list. This will require more time for the trial. Defence stressed that this is unreasonable, particularly in view of the Prosecution's previous statement that it anticipated conclusion of its case by 23 July 2001. However, the Chamber observes that the length of the trial and delays are attributable not only to the number of OTP witnesses but also to the extensive cross-examination by Defence Counsel. The Chamber intends to exercise greater control over the examination-in-chief and cross-examination as a way of achieving a more expeditious trial (see also Rule 90(F)(ii) of the Rules.)

Expert witnesses

8809

34. According to Rule 94*bis* the Prosecutor shall disclose to the opposing party the full statement of an expert witness to be called as early as possible. It shall be filed with the Trial Chamber not less than twenty-one days prior to the date on which the expert is expected to testify.

35. The Chamber observes that on the initial list it was indicated that the Prosecution would call Alison Des Forges, historical expert, and Mathias Ruzindana, socio-linguistic expert. The present motion introduces two additional experts, Marcel Kabanda and Jean-Pierre Chrétien. They are experts concerning print media and electronic media, respectively. The Prosecution has explained that these two witnesses were not previously available.

36. The Chamber notes that considerable parts of the indictments refer to the Accused persons' alleged involvement in the 1994 media apparatus in Rwanda. Such testimonies of the expert witnesses are relevant for the determination of the case. Even if their testimony may take some time, it is important that the core issues of the case are thoroughly dealt with. Moreover, in conformity with its previous practice, the Chamber will seek to limit the time for questioning of all expert witnesses and focus on issues arising from their written reports.

37. The Chamber is not convinced that the Defence is taken by surprise. It is true that the Defence cannot instruct their potential experts without knowing the parameters to be given by the Prosecution expert witnesses. The Chamber notes, however, that the Prosecution experts will not be testifying in the near future, and that further time will elapse before the experts for the Defence will give evidence. This being said, the Chamber is anxious to ensure that the reports of the experts be made available to the Defence as soon as possible. It follows from Rule 94 that the intention is that as soon as the Prosecution comes into possession of the expert reports it should disclose them as early as possible and not wait until 21 days before their respective testimony.

FOR ALL THE ABOVE REASONS,THE TRIBUNAL,

GRANTS leave to the Prosecution to call the eight witnesses "GF", "SA", "AAN", "ABH", "AAO", "AFK", "AFM" and "AFP", who were on its initial list of witnesses;

GRANTS leave to the Prosecution to call two investigators, Aaron Musanda and Kaiser Rizwi.

GRANTS leave to the Prosecution to vary its initial list of witnesses by adding the replacement witnesses "ABC", "ABM", "ADO", "AHD", "AHH", "AM/AFO", "DCD", "DCH", "GHK" and "QAX";

GRANTS leave to the Prosecution to vary its initial list of witnesses by adding counter alibi witnesses "AHE", "AHJ" and "AZZ";

GRANTS leave to the Prosecution to vary its initial list by adding witnesses "ABU", "AEI" and "LAG", whose statements were previously disclosed;

DENIES leave to the Prosecution to vary its initial list by calling witnesses "AFF" and "AFI", whose statements were previously disclosed;

GRANTS the Prosecution leave to vary its initial list by calling witness "AHI" and either witness "AHB" or "AHC";

DENIES leave to the Prosecution to vary its initial list by adding witness "AHF", whose statement was recently disclosed;

8810

DENIES leave to the Prosecution to vary its initial list by adding witnesses "AFT";

ORDERS the Prosecution, in cases where it has not done so, to disclose the witness statements in both working languages to the Defence within 15 days from the date of this decision;

GRANTS leave to the Prosecution to vary her initial list of witnesses by adding the expert witnesses Jean-Paul Chrétien and Marcel Kabanda;

ORDERS the Prosecutor to disclose as early as possible and not later than the date to be fixed at the Status Conference to be held on 26 June 2001 the full reports of the four expert witnesses, Alison Des Forges,Mathias Ruzindana, Jean-Paul Chrétien and Marcel Kabanda.

DECIDES that should the Prosecution fail to comply with the deadlines imposed in this order it will be barred from calling the witnesses concerned.

Done in Arusha, this 26th day of June 2001,

Navanethem Pillay	Erik Møse	Asoka de Z. Gunawardana
Presiding Judge	Judge	Judge

[1] As amended on 31 May 2001.

[2] Decision of 20 April 1999 (ICTR-96-13-T).

[3] Decision of 27 April 1999 (Case No. IT-95-10-T).

[4] Decision of 2 December 1999 (Case No. ICTR-96-1-T).

[5] Decision of 27 January 1997 (Case No. IT-95-14 PT).

[6] **See, in particular, transcripts of 11 June p. 117 (Floyd) and of 12 June 2001 pp. 127-128 (Ellis).**

[7] Transcripts of 12 June 2001 p. 82.

Annex B:

3. *Prosecutor v. Nahimana et al*, ICTR-99-52-I, "Decision on the Prosecutor's Oral Motion for Leave to amend the list of selected witnesses", 26 June 2001.

8812

TRIAL CHAMBER I

OR: ENG

Before:
Judge Navanethem Pillay, presiding
Judge Erik Møse
Judge Asoka de Z. Gunawardana

Registry: Mr. Adama Dieng

Decision of: 14 September 2001

THE PROSECUTOR
v.
FERDINAND NAHIMANA
HASSAN NGEZE
JEAN BOSCO BARAYAGWIZA

(Case No. ICTR-99-52-I)

DECISION ON THE PROSECUTOR'S APPLICATION TO ADD WITNESS X TO ITS LIST OF WITNESSES AND FOR PROTECTIVE MEASURES

The Office of the Prosecutor:
Mr. Stephen Rapp
Mr. William Egbe
Mr. Alphonse Van
Ms. Charity Kagwi
Ms. Simone Monasebian
Mr. Elvis Bazavule

Counsel for the Accused:
Mr. Jean-Marie Biju-Duval
Ms. Diana Ellis
Mr. John Floyd III
Mr. René Martel
Mr. Giacomo Barletta Caldarera
Mr. Alfred Pognon

8813

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

SITTING as Trial Chamber I, composed of Judge Navanethem Pillay, presiding, Judge Erik Møse and Judge Asoka de Z. Gunawardana;

BEING SEIZED OF an *ex parte* application, dated 11 June 2001, and filed with the Trial Chamber pursuant to Rule 66 (C) of the Rules of Procedure and Evidence ("the Rules") for the addition of a new Witness X, to the Prosecution's witness list, and for special protective measures for him;

CONSIDERING additional written submissions from the Prosecution and written submissions from the Defence teams;

CONSIDERING the *inter partes* hearings of the motion on 5 and 6 September 2001;

HEREBY DECIDES the said Prosecution motion.

INTRODUCTION

1. On 26 June 2001, the Trial Chamber decided the Prosecutor's oral motion of 4 June 2001 pursuant to Rule 73 bis (E) for the variation of the Prosecution witness list. In its decision, the Chamber granted the Prosecution leave to add several witnesses to its list of witnesses. The motion was heard by the Chamber in closed sessions on 11-13 June 2001. During the hearing, it became known to the Defence that the Prosecution had filed the present motion concerning Witness X.[1] Following the judicial recess the Trial Chamber decided that the motion should be served on the Defence and that it should be heard in *inter partes* hearings.

SUBMISSIONS OF THE PARTIES

The Prosecution

2. The Prosecution submitted, *inter alia*, that Witness X had been assisting the Prosecutor in its investigation and tracking of suspects for sometime. He has protective status in a host country and recently reconsidered his previous unwillingness to testify, provided that appropriate security precautions are employed for him. Although the Prosecutor was aware of X, she formed the intention to use him as a witness in this case, in June-August 2001.

3. According to the Prosecution, Witness X's testimony is highly material as illustrated by the documents submitted to the Chamber and also disclosed to the Defence. For instance, the Prosecutor submits that Witness X's testimony, relating to the 22 non exhaustive areas presented in a memorandum of 28 August 2001 will rebut points raised in the Defence's pre-trial brief such as Nahimana's involvement with the CDR, the relationship between Radio Rwanda and RTLM, the accused's involvement in false "communiqué", his being head of RTLM, his participation with the Interhamwe and his attitude towards Tutsis and the CDR relations with MRND.[2] The case at hand is complex in that most of the things happened behind closed doors. For the Prosecution to prove its case, it will be necessary to adduce evidence from an insider. Counsel for the Prosecution stated that they had recently contacted Witness X and the Prosecution is now convinced of the inescapable necessity of this witness to the Prosecution's case.

4. Witness X is a key witness whose testimony will be the equivalent of six witnesses and thereby result in the Prosecution dispensing with six witnesses.

5. It is in the interests of justice to call Witness X based on criteria set out in the Trial Chamber's decision of 26 June 2001 for the assessment of "interests of justice" and "good cause", namely, materiality of the testimony, complexity of the case, minimization of prejudice to the Defence, ongoing investigations, replacements and corroborative evidence.

6. With regard to the disclosure of material to the Defence in terms of Rule 66 (A) (ii), nine transcripts of the interviews with Witness X in a redacted form, have now been served upon the Defence. Furthermore, the Defence have had notice of Witness X's testimony by the identification of the 22 non exhaustive paragraphs in the Indictment against Ferdinand Nahimana and also by the fact that Witness X is anticipated to cover the testimony of six witnesses whose statements had been disclosed to the Defence some time ago. The Defence, therefore cannot claim to be caught by surprise or to be prejudiced in the preparation of the case it has to meet.

The Defence

7. Defence Counsel submitted that the Prosecution's attempt to bring in a new witness at this stage of the trial, and after a final list of witnesses had been determined by the Chamber in its decision of 26 June 2001, is a willful violation of the Accused's rights to a fair and expeditious trial and their right to a timely disclosure as prescribed by Rule 66 (A) (ii). The conditions for new evidence under Rule 73 *bis* are not met.

8. The Prosecutor was aware of the existence of this witness long before this trial date was fixed, and was also in possession of exculpatory material obtained from the witness. Her failure to give notice of the witness and comply with her disclosure obligations was without good cause and by reason therefore, she is not entitled to the relief claimed.

9. The Prosecution should not be allowed to call Witness X, whose existence has been disclosed to the Defence nine months after the commencement of the trial.

10. The element of surprise resulting from the late disclosure will cause serious prejudice to the Defence in the preparation of their case. The Prosecution should not be allowed to call a new witness in spite of previous statements that its list was final.

DELIBERATIONS OF THE CHAMBER

Whether Witness X shall be added to the Prosecution's witness list

11. The Chamber is guided by its reasoning set out in its decision of 26 June 2001, where it stated:

> "17. It follows from case law that the final decision as to whether it is in the interests of justice to allow the Prosecution to vary its list of witnesses rests with the Chamber. ...
>
> 19. The Rules do not define the term "interests of justice", but the Chamber is of the opinion that it refers to a discretionary standard applicable in determining a matter given the particularity of the case. When a Trial Chamber has granted leave to call new prosecution witnesses under Rule 73*bis*, statements of such witnesses will form part of the case against the Accused. It follows that the Chamber in its determination will bear in mind also the question of "good cause".
>
> 20. In assessing the "interests of justice" and "good cause" Chambers have taken into account such considerations as the materiality of the testimony, the complexity of the case, prejudice to the Defence, including elements of surprise, on-going investigations, replacements and corroboration of evidence. The Prosecution's duty under the Statute to present the best available evidence to prove its case has to be balanced

against the right of the Accused to have adequate time and facilities to prepare his Defence and his right to be tried without undue delay." 7815

12. Regarding the materiality of the evidence, the Chamber notes that Witness X has been identified as an important or key witness for the Prosecution. It is also argued that he is uniquely placed as an insider in the higher echelons of authority to give direct evidence pertaining to the activities of the Accused, as alleged in the Indictment. His past assistance to the investigation work of the Prosecution has rendered him particularly vulnerable to threats and fears of assassination attempts. According to the Prosecution, he has recently overcome his reluctance to testify for reasons of security, by agreeing to do so under special protective measures.

13. The Chamber has been informed by the Parties that the witness is capable of giving both direct and indirect testimony of events in question. It sees no purpose in assessing whether the anticipated indirect testimony outweighs the direct testimony or vice-versa and adopts the view that as long as a witness of the stature of X is available and capable of giving relevant direct testimony on crucial allegations, the Chamber should not exclude such direct testimony. Furthermore, the Chamber has no basis for concluding that the Prosecution has violated its obligations under Rule 68 to provide the Defence with exculpatory evidence.

14. The Chamber observes that the media case is a particularly complex case. It is further noted that Witness X will replace some of the Prosecution witnesses who are now unavailable. It is recalled that all testimonies before the Tribunal are voluntary.

15. The Chamber notes that the Defence has had notice of the nature of the testimony that will be led from Witness X, by reference to the 22 specific areas indicated by the Prosecutor and has also had the benefit of the statements of other witnesses already disclosed to the Defence.

16. The Defence in fact acknowledges an absence of the element of surprise: Counsel for Nahimana stated that "Witness X is not a witness who we can argue, is talking about matters that take us by surprise".[3]

17. The purpose of the disclosure requirements set out in Rule 66 A (ii) is to enable the Defence to have sufficient notice of the case for which it has to prepare. This aim is not frustrated by late disclosure, in this instance, for the reason that the Defence is not caught by surprise as to the nature of the evidence to be given by Witness X and is not unduly prejudiced. Under these circumstances, the fact that the witness is added several months into the trial is not decisive. The lapse of time from June, when the Prosecution lodged the present motion, and now, cannot be held against the Prosecution.

18. The Chamber notes, moreover that if Witness X were to testify, he would be replacing six listed Prosecution witnesses, who would then be abandoned by the Prosecutor. The implication of this fact is that the calling of Witness X will not cause undue delay in the trial proceedings.

19. The Trial Chamber considers that these considerations, namely, the materiality of the anticipated testimony, the lack of the element of surprise to the Defence, and no resultant delays to the trial proceedings, contribute to a finding of "good cause" in terms of Rule 66 A (ii).

20. In assessing the imperatives of "interests of justice" and "good cause" the Chamber has applied the criteria set out in its order of 26 June 2001 cited above as well as contextual considerations such as the seriousness of the charges, non-compellability of witness testimony and the need for protection of witnesses which it has balanced with the dictates of due process and fundamental fairness.

3816

21. As stated above, the final decision as to whether it is in the interests of justice to allow the Prosecution to vary its witness list rests with the Chamber. Furthermore, the Trial Chamber is additionally empowered *proprio motu* to order either party to produce additional evidence or itself summon witnesses and order their attendance, pursuant to Rule 98. The disclosure provisions of Rule 66 A (ii) provides for subsequent disclosure.

22. Consequently, the Trial Chamber grants the Prosecution leave to add Witness X to the list of its witnesses.

Measures of Protection Requested by the Prosecutor

23. In its application of 11 June 2001, the Prosecution requested a wide range of protective measures for Witness X. Subsequently, in connection with the hearing on 5 September 2001, the Prosecution submitted a revised outline of the prayers for relief (listed as *litrae* a to k). Some of the requests contained in the application of 11 June 2001 were not included in the revised list, for instance that Witness X shall testify through image- or voice-altering devices, or that all sessions dealing with Witness X be closed.

24. The Chamber notes that some of the requested measures for protection in relation to Witness X are in conformity with the usual practice of witness protection within the Tribunal. It is requested that the witness shall testify under a pseudonym as a protected witness and that his image not be recorded on video (*litra* b); that portions of the testimony that are intrinsically related to his identity and that of those related to him shall be heard in closed session (*litra* c); and that there be no disclosure of his whereabouts or those of his family (*litra* g). The Chamber grants these requests and also orders other measures usually adopted in relation to all Prosecution and Defence witnesses under Rule 75 of the Rules.

25. The Prosecution has also requested that it shall be given the opportunity to propose redactions to the transcripts of Witness X's statements in closed session, before they are released to the public (*litra* e). The Chamber recalls that transcripts from closed sessions are not public, but grants the request in case the question should arise to make them available to persons other than the parties. Furthermore, the Prosecution has requested that portions of Witness X's testimony that are intrinsically related to the integrity of ongoing investigations be conducted in closed session (*litra* d). The Chamber considers this in conformity with the interest of justice, see Rule 73 (A) (iii).

26. The Prosecution has requested that the name, age, former employment, place of birth of Witness X shall be disclosed to the Defence only 30 days before the appearance of the witness (*litra* f). The Chamber notes that the Defence has received the nine redacted transcripts of previous interviews of the witness that the Prosecution intends to rely on and therefore is in a position to commence their preparations now even if the Prosecution has not provided the Defence teams with the identity of the witness. In view of the security considerations that apply in the present case, it is not unreasonable that the identity of the witness is disclosed 30 days before he gives his testimony. For the same reasons, the Chamber also accepts that the said nine transcripts be disclosed in unredacted form to the Defence 30 days before the appearance of Witness X (*litra* i).

27. The Chamber has noted statements from one Defence Counsel to the effect that all Defence teams already know Witness X's identity. If this is correct, the two 30 day periods will only have a limited effect on the preparations of Defence. However, the Chamber does not have sufficient information to verify whether Counsel's assertion is correct.

28. The Chamber does not accept the Prosecution's request that only certain members of the Defence may have access to the information concerning the identity of Witness X and the nine transcripts from the interviews with him unless special permission is given by the Prosecution or the Chamber (*litrae* f and i, see also j). It is understood that the Defence operates as a team. The Chamber considers that Defence Counsel, as officers of the Court, are responsible for ensuring that documents are not made available to persons who do not form part of the Defence teams and that their clients do not disclose documents or information to other detainees or any other person. In view of revelations made by Ngeze to the Chamber, the Chamber makes an explicit order to this effect.

29. In addition to the said nine transcripts on which the Prosecution relies in the present case, there are 17 transcripts which pertain to other accused and which are being used for ongoing investigations in other cases. The Prosecution has requested that there be no disclosure of these transcripts, but that if the Defence so requests the Judges be given the opportunity to review those 17 transcripts out of the presence of the Defence (*litra* h).

30. According to Rule 66 (A) (ii) the Prosecution is under an obligation to disclose previous statements of witnesses that will be called at trial. Rule 66 (C) provides, however, that when disclosure may prejudice on-going investigations or for any other reasons be contrary to the public interest the Prosecution may apply to the Trial Chamber to be relieved from the obligation to disclose such information. When making such an application the Prosecutor shall provide the Trial Chamber, and only the Trial Chamber, with the information or materials that are sought to be kept confidential. This Chamber has not yet received such documentation and requests the Prosecutor to submit forthwith the 17 transcripts to the Chamber. Consequently, the Chamber reserves this issue for decision at a later date when it has had the opportunity to review the material.

31. The Prosecution has also requested that Witness X be permitted to testify at a location other than Arusha (*litra a*). The Prosecution argued that Witness X has escaped death and has been under direct threats of execution. The security risk is extremely high because of his role as an informant and his unique insider position in 1994. He has been moved from the African continent and is now under stringent security measures in a Western country. It is submitted that it is not possible to provide for the necessary security measures in Arusha, but that Witness X should testify in The Hague.

32. Counsel for Ngeze and Barayagwiza did not oppose the change of venue. However, all Counsel insisted on the Accused's right to participate in the proceedings. Moreover, Counsel for Nahimana argued that the Prosecution had not demonstrated the crucial need for it. It would be wrong to create the impression that Arusha is good enough for "ordinary", but not for "important" witnesses. It would also be impracticable to split the Defence team and not to provide for ready access to voluminous documents available only in Arusha.

33. On the basis of the available material the Chamber accepts that Witness X is in a particularly vulnerable position and that special security measures are required in connection with his testimony. It is undisputed by the parties that the Tribunal's Rules allow for the change of venue. Reference is made to Resolution 955 (1994) para. 6, according to which the Tribunal may meet away from its seat when it considers it necessary for the efficient exercise of its functions. Rule 4 provides that a Chamber or a Judge may exercise their functions away from the Seat of the Tribunal, if so authorized by the President in the interests of justice. Moreover, Rule 71 (D) provides that a deposition may be given by means of a video conference. It also follows from case law from the ICTY that a witness may be heard by way of a video link, provided that certain conditions are met. Reference is made in particular to *The Prosecutor v. Tadic*, the *Kodic and Cerkez* case and the *Zejnil Delali et al.* case.

34. The Chamber does not see any reason to decide a change of venue in the sense that the entire

8818

Chamber, Counsel for the Prosecution and the Defence, the Accused as well as the legal and administrative staff shall sit away from the seat of the Tribunal. The choice is between adopting stringent security measures in Arusha and have X testify here, or arranging for the testimony of Witness X to be given by way of a two way closed circuit video link-up between Arusha and the selected venue. During the hearing of this motion, the Prosecution focused on The Hague as an appropriate place.

35. It follows from case law, with which the Chamber agrees, that certain conditions must be fulfilled for the video solution to be utilised in the present case. The Chamber is of the opinion that the testimony is sufficiently important, that it will be in the interests of justice to grant the application for a video link solution, and that the Accused will not be prejudiced in the exercise of his right to confront the witness. The crucial question is whether the witness is unable or unwilling to come to the Tribunal.

36. The Chamber's preference is that witnesses should be heard at the Tribunal's seat in Arusha. This has been the practice in relation to all witnesses who have so far given testimony at the ICTR. No incidents relating to their safety have been reported. As already mentioned, the Chamber acknowledges that the present witness is in a very special situation which requires particularly stringent security measures. The documentation provided by the Prosecution concerning the risk in case the witness gives testimony in Arusha relates to the security measures which are adopted in relation to all witnesses. The Chamber considers that it may be possible to adopt sufficient measures to ensure that Witness X can testify here in Arusha.

37. Even if this were so, the information provided to the Chamber suggests that Witness X may be unwilling to testify in Africa out of concern for his security. However, it does not follow clearly from the documentation that his position will be maintained if he is given thorough explanations about the extraordinary measures that will be taken during his stay here (such as moving around from place to place, special locations etc). The Chamber is anxious to avoid testimonies outside Arusha unless such a solution is absolutely necessary.

38. Consequently, the Chamber directs the Witness and Victims Support Section to provide Witness X with the necessary information regarding security measures in order to ascertain whether he is willing to testify in Arusha, and to report back to the Chamber forthwith. In the event that he maintains his position the Chamber authorises the alternative procedure of a video link solution in The Hague. The Registry is directed to make the necessary arrangements for this alternative.

FOR THE ABOVE REASONS THE CHAMBER, BY A MAJORITY

1. **GRANTS** leave to the Prosecution to call a new witness, who shall be referred to by the pseudonym of Witness X;

2. **DECIDES** that Witness X shall be subject to all the measures of protection granted to other Defence and Prosecution Witnesses in the present case;

3. **DECIDES** that the Prosecution shall be given the opportunity to propose redactions to the transcripts of Witness X's statements in a closed session before they are released to the public;

4. **DECIDES** that portions of Witness X's testimony that are intrinsically related to ongoing investigations be conducted in a closed session;

5. **DECIDES** that the name, age, former employment and place of birth of Witness X shall be disclosed to the Defence 30 days before the witness testifies;

6. **DECIDES** that nine transcripts from interviews with Witness X shall be disclosed in unredacted form to the Defence 30 days before the witness testifies;

7. **ORDERS** the Prosecution to submit forthwith to the Chamber the seventeen transcripts from interviews with Witness X and reserves its decision on disclosure until the Chamber has had an opportunity to review the said transcripts;

8. **ORDERS** Defence Counsel to take the necessary measures to prevent the disclosure by the Accused of documents relating to Witness X and information therefrom to other detainees or any other persons;

9. **DIRECTS** the Registry to clarify whether Witness X is willing to testify in Arusha under stringent security measures, and to report to the Chamber forthwith;

10. In the event of an affirmative response, **DIRECTS** the Registry to make necessary arrangements to ensure the protection of Witness X during his stay in Arusha;

11. In the event of a negative response, **DIRECTS** the Registry to make the necessary arrangements for Witness X to give his testimony by means of video-link conference in The Hague.

Arusha, 14 September 2001

Navanethem Pillay	Erik Møse
Presiding Judge	Judge

Judge Asoka de Z. Gunawardana attaches a dissenting opinion.

---

[1] See transcripts of 11 June 2001 pp. 23-24.

[2] See paras. 4.1, 4.4, 5.1-5.3, 5.9, 5.11, 5.14, 5.17, 5.22 and 5.25.

[3] Transcript of 5 September 2001 pp. 112-113.

Annex B:

4. *Prosecutor v. Bagasora et al*, ICTR-98-41-T, "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73*bis*(E)", 21 May 2004

8821

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

TRIAL CHAMBER I

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
UNITED NATIONS
NATIONS UNIES

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 21 May 2004

THE PROSECUTOR
v.
Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON MOTION TO COMPEL THE PROSECUTION TO COMPLY WITH THE CHAMBER'S DECISION OF 1 MARCH 2004

The Office of the Prosecutor Counsel for the Defence
Barbara Mulvaney Raphaël Constant
Drew White Paul Skolnik
Segun Jegede Jean Yaovi Degli
Fatou Bensouda Peter Erlinder
Christine Graham André Tremblay
Rashid Rashid Kennedy Ogetto
Gershom Otachi Bw'Omanwa

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED of the "Motion to Compel the Prosecutor to Immediately Comply With the Chamber's Decision of 1 March 2004", etc., filed by the Defence for Ntabakuze on 5 April 2004;

CONSIDERING the Prosecution "Response", filed on 5 May 2004; the "Reply", filed by the Defence for Ntabakuze on 17 May 2004; the Prosecution "Second Response", filed on 20 May 2004; and the oral submissions of the parties on 6 May 2004;

HEREBY DECIDES the motion.

1. On 8 April 2003, Trial Chamber III, then seized of this case, ordered the Prosecution to "to file a revised and final list, not exceeding one hundred witnesses whom she intends to call". In its decision of 1 March 2004, Trial Chamber I ordered the Prosecution "to comply with [the 8 April Order] by filing a list of all its witnesses, not to exceed one hundred in number, not later than 12 March 2004".

2. On 12 March 2004 the Prosecution filed an eight-page document which, in addition to listing one hundred "witnesses", also listed seven "Rule 92bis witnesses". The Prosecution argues that it does not "intend to call" its Rule 92bis witnesses, as the admission of their statements and attendance for cross-examination is dictated by court order, not the intention of the Prosecution. Therefore, they were properly excluded from the list of one hundred witnesses, in accordance with the language of the 8 April Order.

3. The Chamber considers it clear that the Prosecution's list is in conformity with neither the wording nor the spirit of the 1 March 2004 order, which requires the Prosecution to file "a list of all its witnesses, not to exceed one hundred in number". The Prosecution itself refers to these individuals as "92bis witnesses" in its filing of 12 March 2004, and Rule 92bis confirms that a person whose statement is admitted thereunder is, indeed, a "witness".

4. The words "all" and "witnesses" are not ambiguous. The Prosecution has violated the order in the decision of 1 March 2004, and the Chamber considers this violation to be obvious.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Prosecution to comply with the Chamber's order of 1 March 2004 by filing a list of all its witnesses, not to exceed one hundred in number, by 28 May 2004.

Arusha, 21 May 2004

Erik Møse Jai Ram Reddy Sergei Alekseevich Egorov
Presiding Judge Judge Judge

[Seal of the Tribunal]

Annex B:

5. *Prosecutor v. Delalic et al*, ICTY-96-21-T, "Decision on Confidential Motion to Seek Leave to Call Additional Witnesses", 4 September 1997.

8824

IN THE TRIAL CHAMBER

Before: Judge Adolphus G. Karibi-Whyte, Presiding

Judge Elizabeth Odio Benito

Judge Saad Saood Jan

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 4 September 1997

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

DECISION ON CONFIDENTIAL MOTION TO SEEK LEAVE TO CALL ADDITIONAL WITNESSES

The Office of the Prosecutor

Mr. Eric Ostberg

Ms. Teresa McHenry

Mr. Giuliano Turone

Counsel for the Accused

Ms. Edina Residovic, Mr. Ekrem Galijatovic, Mr. Eugene O'Sullivan, for Zejnil Delalic

Mr. Zeljko Olujic, Mr. Michael Greaves, for Zdravko Mucic

Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic

Mr. John Ackerman, Ms. Cynthia McMurrey, for Esad Landzo

8825

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On 4 July 1997 a "Motion to Seek Leave to Call Additional Witnesses" (Official Record at Registry Page Number ("RP") D3968-D3986) (the "Motion") was filed by the Office of the Prosecutor ("the Prosecution") for consideration by this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("International Tribunal"). The Defence for the accused Zejnil Delalic filed its "Response to the Motion" on 17 July 1997 (RP D4023-D4026) (the "Response") and the Prosecution subsequently filed a "Reply Regarding Motion to Seek Leave to Call Additional Witnesses" on 5 August 1997 (RP D4125-D4128) (the "Reply").

Oral argument was heard on the Motion on 18 July 1997, and the Trial Chamber issued an *Order on the Motion by the Prosecution for Leave to Call Additional Witnesses*, on 1 August 1997 (RP D4121-D4123) (the "Order"), which granted the Prosecution the right to call "as many of the witnesses identified by numbers 8 through to 14 as may be necessary to verify the procedure and chain of custody for the seized material that the Prosecution seeks to introduce as evidence." Further, the Order deferred the ruling on whether to grant leave to call additional witnesses 1 through to 7 until a later date.

On 7 August 1997, the Trial Chamber orally rendered its decision on the Motion, insofar as it relates to witnesses 1 through to 7, during an open session of the trial proceedings, and reserved its written decision for a later date.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the Prosecution and the Defence for the accused Zejnil Delalic, as well as the oral arguments of the Defence for the other three accused persons,

HEREBY ISSUES ITS WRITTEN DECISION.

II. DISCUSSION

1. In the Motion, the Prosecution seeks leave to call fourteen additional witnesses. Having dealt with those witnesses numbered 8 to 14 in the Order, the present Decision will discuss only those numbered 1 to 7.

2. The Prosecution argues that its request to call the witnesses numbered 1 to 7, coming four months after the date set by the Trial Chamber for the disclosure of the names and particulars of witnesses to the Defence (see *Scheduling Order* of 25 January 1997, RP D2674-D2675), is a result of circumstances which it could not anticipate. These are, first, the necessity to authenticate certain documents requires the testimony of witnesses 1 to 5, and secondly, witnesses 6 and 7 could not previously be traced or had not agreed to testify.

3. The Defence for the accused Zejnil Delalic ("the Defence") objects on the basis that the attempt to bring additional witnesses at this stage is unfair to the defence. In addition, the Defence contends that the Prosecution has not fully complied with its disclosure obligations concerning the statements of witnesses 6 and 7. It further submits that it will have to recall many of the Prosecution witnesses who have already testified for the Prosecution in this case in order to cross-examine them on the character of witnesses 6 or 7.

8826

4. Rules 66 and 67 of the Rules of Procedure and Evidence (the "Rules") are the relevant provisions on the disclosure obligations of the Prosecution. A literal reading of Sub-rule 67(A) indicates that the Prosecution must reveal, as early as reasonably practicable and prior to the commencement of trial, in this case 10 March 1997, the names of the witnesses that it intends, at that time, to call. In the present situation the Prosecution's submission is simply that, whilst this was not prior to the commencement of the trial, it did reveal their names as soon as it formed the intention to call these additional witnesses in proof of the guilt of the accused persons, as required by Sub-rule 67(A)(i).

5. In a letter dated 5 December 1996, the Prosecution notified the Defence for all four accused persons that, barring agreement between them as to the authentication of certain documents, it would call additional witnesses for authentication purposes. On 13 May 1997, the Prosecution revealed the names of these possible witnesses, namely witnesses numbered 1 to 5 in the Motion. Prior to the commencement of the trial, the Prosecution had no intention of calling these witnesses and thus had no obligation under Sub-Rule 67(A). The Trial Chamber is satisfied that the Prosecution informed the Defence as soon as it formed the intention to call these additional witnesses 1 to 5, and acted *bona fides* at all times.

6. With regard to the witnesses numbered 6 and 7, the Prosecution notified the Defence for all four accused persons, on 13 May 1997, that it may call them. The Prosecution subsequently disclosed the transcripts of its interviews with these witnesses, on 10 July 1997. It is the contention of the Defence that this was contrary to Rule 66 of the Rules, which requires disclosure of Prosecution witness statements "as soon as practicable". The Trial Chamber is satisfied with the reply of the Prosecution that it has fully complied with its obligations by disclosing these statements to the Defence as soon as it had formed the intention to call these witnesses, interviewed them, and created a full transcript of their statements. The Prosecution has also stated in its Reply that one of these witnesses will not be called until at least September, giving the Defence adequate time to prepare for his testimony.

7. The Trial Chamber is enjoined to utilise all its powers to facilitate the truth finding process in the impartial adjudication of the matter between the parties. It is thus important to adopt a flexible approach when considering the management of witnesses. Where the testimony of a witness is important to the Prosecution or the Defence, the Trial Chamber will ensure that such witness is heard, subject, naturally, to the limits prescribed in the Statute of the International Tribunal ("the Statute") and Rules. In the present case, these two particular witnesses, 6 and 7, are deemed material to the Prosecution and it would be contrary to the interests of justice to exclude their testimony. The rights of the accused enunciated in Article 21 of the Statute are in no sense affected by the adoption of such a flexible approach. The terms of Sub-rule 66(A) have been satisfied by the Prosecution's disclosure of the witness statements as soon as it was possible and practicable. Full consideration will, naturally, be given to arguments put forward by Counsel for all four accused persons in future in support of any application for measures required to safeguard fairness to the accused.

8. The Motion refers to one final matter which calls for some comment. The Prosecution has raised the issue of proof of internationality of armed conflict and the protected status of the detainees in the Celebici camp. It has drawn attention to aspects of the *Opinion and Judgment* in the case of Prosecutor v. Dusko Tadic, (IT-94-1-T) of 7 May 1997, (RP D17338-D17687) which deal with the applicability of Article 2 of the Statute and informs the Trial Chamber that, in light of this, it may call additional witnesses.

9. It is axiomatic that the jurisdictional prerequisites for the crimes which form the subject-matter of the jurisdiction of the International Tribunal are to be satisfied by the Prosecution in the presentation of its case. This proposition needs no explanation and since the beginning of the trial, it has been incumbent upon the Prosecution to lead sufficient evidence in order to discharge its burden. The Trial Chamber and

8827

the Defence must, of necessity, operate on the presumption that the original witness list contains the names of all witnesses who the Prosecution regards as necessary for the proof of each aspect of its case.

10. Normally, and at this stage of the trial, the Prosecution is not expected to call witnesses additional to those on its original witness list. As stated above, there may arise exceptional circumstances where, subsequent to the filing of the witness list, further important witnesses become necessary, known or available to the Prosecution, and the Trial Chamber will consider these circumstances when brought to its attention. However, the Prosecution ought not to surprise the Defence with additional witnesses whose testimony was forseeably required prior to the commencement of trial and who were accessible to the Prosecution. As has been indicated, the matter before us is not such a case. It is also to be noted that, should the Prosecution indeed seek to call any more additional witnesses, leave must be sought from the Trial Chamber in good time, and the matter will be given due consideration after hearing the reasons why these witnesses are now deemed necessary and were not so deemed previously.

III. DISPOSITION

For the foregoing reasons, **THE TRIAL CHAMBER**, being seized of a Motion filed by the Prosecution,

PURSUANT TO RULE 54,

HEREBY GRANTS the Motion to call additional witnesses numbered 1 through to 7.

Done in English and French, the English text being authoritative.

Adolphus
Godwin
Karibi
-
Whyte

Presiding
Judge

Dated this fourth day of September 1997

At The Hague

The Netherlands

[Seal
of
the
Tribunal]

Annex B:

6. *Prosecutor v. Nyiramasuhko* et al, ICTR-97-29-T, "Decision on the Prosecutor's Motions for Leave to Call Additional Witnesses and for the Transfer of Detained Witnesses", 24 July 2001.

8829

OR: ENG

TRIAL CHAMBER II

Before:
Judge William H. Sekule, Presiding
Judge William C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 24 July 2001

The Prosecutor v.

Pauline NYIRAMASUHUKO & Arsène Shalom NTAHOBALI
(Case No. ICTR-97-21-T),

Sylvain NSABIMANA & Alphonse NTEZIRYAYO
(Case No. ICTR-97-29-T)*, Joseph KANYABASHI *(Case No. ICTR-96-15-T)

and Élie NDAYAMBAJE *(Case No. ICTR-96-8-T)*

DECISION ON THE PROSECUTOR'S MOTIONS FOR LEAVE TO CALL ADDITIONAL WITNESSES AND FOR THE TRANSFER OF DETAINED WITNESSES

The Office of the Prosecutor:
Silvana Arbia
Japhet Mono
Jonathan Moses
Adesola Adeboyejo
Gregory Townsend
Manuel Bouwknecht

Counsel for Ndayambaje:
Pierre Boulé
Isabelle Lavoie

Counsel for Nyiramasuhuko:
Nicole Bergevin
Guy Poupart

Counsel for Ntahobali:
Jesse Kiritta

Counsel for Nsabimana
Josette Kadji
Charles Patie Tchakounte

Counsel for Nteziryayo

8830

Counsel for Kanyabashi:
Michel Marchand
Michel Boyer

Titinga Frédéric Pacere
Richard Perras

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge William C. Matanzima Maqutu and Judge Arlette Ramaroson, pursuant to Rule 73 of the Rules of Procedure and Evidence (the "Rules");

BEING seized of the "Prosecutor's Motion for the transfer of detained witnesses pursuant to Rule 90*bis*" ("the Motion") including three annexes filed on 6 April 2001;

CONSIDERING that the Prosecutor filed an Ex-Parte version of Annex 3 to the Prosecutor's Motion, disclosing the identity and the location of the detained witnesses on 9 April 2001;

CONSIDERING the "Réponse à la Requête du Procureur pour le transfert de témoins détenus dans les prisons rwandaises (Article 73, paragraphe D) du Règlement)" by Counsel for Kanyabashi (the "Reply by Kanyabashi"), filed on 17 April 2001;

BEING FURTHER SEIZED of the "Prosecutor's Supplemental Motion for the Transfer of Detained Witnesses under Rule 90*bis*", by which the Prosecutor seeks to add four detained witnesses to the list and which also replies to the objections raised by Accused Kanyabashi to her first Motion (the "Supplemental Motion"), filed on 16 May 2001;

CONSIDERING the "Réponse à la Requête supplémentaire du Procureur pour le transfert de personnes détenues, sous l'Article 90*bis* du réglement de procédure et de preuve" filed by Counsel for Nyiramasuhuko on 21 May 2001 (the "Reply by Niyramasuhuko"); the "Réponse à la requête supplémentaire du Procureur demandant le transfert de témoins détenus aux termes de l'Article 90*bis*", filed by Counsel for Kanyabashi on 21 May 2001 (the "Supplemental reply by Kanyabashi"); and the "Response to Prosecutor's Supplemental Motion for the Transfer of Detained Witnesses under Rule 90*bis*" (the "Reply by Ntahobali"), filed by Counsel for Ntahobali on 22 May 2001;

CONSIDERING the "Prosecutor's Reply to the Defence Responses to the Prosecutor's Supplemental Motion for the Transfer of Detained Witnesses under Rule 90*bis*" filed on 24 May 2001;

CONSIDERING Annexes 1 to 3 to the Prosecutor's Supplemental Motion for the Transfer of Detained Witnesses under Rule 90*bis*, filed on 30 May 2001;

CONSIDERING the said unredacted Annexes 1 to 3 filed Ex-Parte Under seal on 31 May 2001;

CONSIDERING that, pursuant to Rule 73 of the Rules, the instant Motions are decided on the basis of the written briefs only, as filed by the Parties;

SUBMISSIONS OF THE PARTIES

1. In her Motion, the Prosecutor prays the Chamber to order the transfer to the United Nations Detention Facilities (the "UNDF") of 24 detained witnesses FAB, FAD, FAG, FAH, FAI, FAK, FAL,

FAM, FAN, FAO, FAQ, FAR, FAS, FAT, FAU, QAF, QAG, QAH, QBU, QBV, QBX, QBY, QBZ and QCB that she intends to call to testify at Trial, until such time as the Chamber is satisfied that their presence is no longer required, pursuant to Rule 90*bis* of the Rules.

2. The Prosecutor filed (Annex I to the Motion), a letter dated 6 April 2001 from the Minister of Justice of the Republic of Rwanda to the Deputy Prosecutor of the Tribunal, confirming that the presence of these detained witnesses is not requested in any criminal proceedings during the period in which they are required by the Tribunal, and that the transfer would not extend their detention period. The said letter responded to a correspondence (Annex II to the Motion) by the Deputy Prosecutor to the Minister of Justice dated 2 April 2001 in which the Deputy Prosecutor required, *inter alia*, the presence of the detained witnesses in Arusha "on various dates over the period of the next twelve months"(Annex III to the Motion is an *ex-parte* list disclosing identity and location of detained witnesses).

3. Counsel for Kanyabashi replied, *inter alia*, that the Prosecutor's Motion did not provide enough information as to the conditions of detention of these witnesses, the duration for which these witnesses would remain in Arusha, and if these witnesses will be allowed to communicate with each other after having given their testimony. Counsel for Kanyabashi requests that the duration of the transfer be analysed in view of these factors and that detained witnesses should be prohibited from communicating with one another.

4. The Prosecutor replied to the Defence that the issue of the lack of specificity of the duration of the transfer of detained witnesses at the UNDF, as well as any extension, is for the Trial Chamber to decide. The Prosecutor adds that it is the practice of the Registry's Witness and Victims Support Section (WVSS) "to bring a small group of detained witnesses shortly before the testimony of the first witness, and return this small group together, as practicable, and in light of the Trial recess". As to the issue of bias and undue influence over the witnesses, the Prosecutor stresses that, as the practice requires, the detained witnesses will be transferred to the UNDF, and that any issue in relation to alleged bias is irrelevant and premature at this stage of the proceedings. Finally, the Prosecutor advocated that for the "purpose of judicial economy" a single order should be issued by the Court for the transfer of all detained witnesses.

5. In her Supplemental Motion, the Prosecutor indicated that "due to an oversight", she omitted four (4) detained witnesses designated by the pseudonyms FAC, FAW, RV and TQ. Thus the total number of detained witnesses for which the order is sought would be twenty-eight (28). The Prosecution indicated that they would soon file a letter from the Republic of Rwanda with regard to the four additional witnesses to demonstrate that the conditions of Rule 90*bis* are satisfied. Furthermore, the Prosecutor gave notice of her intention to call two (2) detained witnesses, with the pseudonyms FAW and RV who do not appear on her list of intended witnesses filed on 12 April 2001, and sought to add them to the said list pursuant to Rule 73*bis* (E). On 30 May 2001, the Prosecutor filed a letter from the Rwandan Minister of Justice attesting that the presence of these latter detained witnesses was not requested in any criminal proceedings during the period in which they were required by the Tribunal, and that the transfer would not extend their detention period.

6. In their replies to the Supplemental Motion, Counsel for Nyiramasuhuko submitted *inter alia* that, witnesses FAW and RV do not appear in the final list of witnesses that the Prosecutor intends to call at Trial pursuant to Rule 73*bis* (B)(iv) of the Rules, and that the said list could not be modified *proprio motu*, by way of a "Notice". On the contrary, a proper Motion under Rule 73*bis* (E) should be brought to that effect, on the basis of which the Chamber will decide. Moreover, Counsel submitted that the Prosecutor has not complied with Rule 66 (A)(ii) of the Rules in respect to her disclosure obligation in relation to witness FAW according to Counsel for Nyiramasuhuko and Kanyabashi, and in relation to both witnesses FAW and RV according to Counsel for Ntahobali.

7. In her reply, Nyiramasuhuko additionally filed a Counter-Motion to obtain from the National Authorities in Rwanda, statements of detained witnesses. This separate request will be decided upon by the Trial Chamber in a subsequent Decision.

8. The Prosecutor replies to the Defence's responses that the Defence rightly stated that they had not received a copy of the statement of Witness FAW which constituted a newly discovered evidence (the statement is dated 12 April 2001), but represents that on 23 May 2001, she filed a copy of the said statement in a redacted form in light of her pending motion seeking the harmonisation of disclosure deadlines. With regard to Witness RV, the Prosecutor replies to Counsel for Ntahobali that she has complied with her disclosure obligation on 14 March 2001 and that the omission of that witness on her Witness list is a simple mistake on her part. In relation to the addition of FAW and RV to the Witness List, the Prosecutor argues that pursuant to Rule 73*bis* (E) of the Rules, "before the commencement of Trial, due notice of adding witnesses satisfies the requirements of the Statute and the Rules".

9. In the alternative, the Prosecutor moves before the Trial Chamber under Rules 54, 73 and 73*bis* of the Rules for leave to add FAW and RV to her witness list and adds that these witnesses are not to be called to testify at Trial for several months.

DELIBERATIONS

On the additional witnesses

10. The Chamber notes that the Prosecutor has filed the list of witnesses she intends to call at Trial in the pre-trial Brief on 11 April 2001, in accordance with Rule 73*bis* (B)(iv) of the Rules but notes that Witnesses QBX, FAW and RV are not included in the said list, and that several Defence Counsel have opposed the addition of FAW and RV to the said list.

11. The Chamber recalls that the final list of witnesses to be called at Trial is the list filed by the Prosecutor with the pre-trial brief on 11 April 2001. Nevertheless, the Chamber emphasises that Rule 73*bis* (E) of the Rules was amended during the Plenary held on 30-31 May 2001 and reads as follows: "After commencement of Trial, the Prosecutor, if he considers it to be in the interest 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." The Chamber will therefore review the Prosecutor's Alternative Motion to vary her witness list by adding witnesses FAW and RV.

12. In the "Decision on Motion by the Defendants on the Production of Evidence by the Prosecution" of 8 September 1997 (The *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T), the International Criminal Tribunal for ex-Yugoslavia emphasised that "it cannot place a cut-off date on the disclosure of evidence by the Prosecution [...] This is necessarily so when the prosecution continues to discover new evidence that is relevant to its case and it must, in such circumstances, disclose such evidence, when in form of a witness statement, as soon as practicable, in accordance with Sub-rule 66 (A)". The Prosecutor argues that the statement of Witness FAW is newly discovered evidence bearing a date of 12 April 2001, that is after the filing of the Witness List by the Prosecutor and that after having assessed this new evidence, the statement was disclosed to the defence on 23 May 2001 in a redacted form.

13. The Chamber accepts that the statement of Witness FAW can constitute newly discovered evidence and duly considers that, according to the Prosecutor, this witness should not be called to testify at trial before several months so that the Defence should have sufficient time to examine this piece of

evidence filed on 23 May 2001. The Chamber grants the Prosecutor's request to add Witness FAW to the list of witnesses she intends to call at trial and will subsequently review the Prosecutor's request for an order of transfer pertaining to the said witness.

14. Pertaining to Witness RV, the Chamber notes that the Prosecutor acknowledges that Witness RV was inadvertently omitted from the Witness List filed on 11 April 2001 whereas statements of the said witness were disclosed to the Defence on 14 March 2001. The Chamber accepts that the Prosecutor has fulfilled in good faith her disclosure obligation and that, this being completed, the Defence should not be prejudiced by adding Witness RV to the Witness List as the witness' statement pertaining to the latter was disclosed in compliance with Rule 66(A)(ii). Having granted leave to add Witness RV to the Witness List, the Chamber will subsequently review the Prosecutor's request for an order for transfer of that witness.

15. Witness QBX is not listed in the pre-trial Brief and the Prosecutor did not file a Motion to add that witness to her list. The Chamber finds that it cannot verify if the disclosure obligation pertaining to that Witness was fulfilled in accordance with Rule 66(A)(ii) and will therefore not review the request pertaining to that witness.

On the order for transfer of Detained Witnesses

16. Rule 90*bis*(B) of the Rules requires that a transfer order shall be issued only after prior verification that the following conditions are met:

A(i) the presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;

(ii) the transfer of the witness does not extend the period of his detention as foreseen by the requested State@.

17. On the basis of the official documentation from Rwandan authorities provided by the Prosecutor concerning the detained witnesses she intends to call to testify at trial, the Chamber is satisfied that the conditions have been met in the present case to order the temporary transfer of (27) detained witnesses with the pseudonyms FAB, FAC, FAD, FAG, FAH, FAI, FAK, FAL, FAM, FAN, FAO, FAQ, FAR, FAS, FAT, FAU, QAF, QAG, QAH, QBU, QBV, QBY, QBZ, QCB, TQ, FAW and RV to the seat of the Tribunal in Arusha, from the time when they are due to testify at trial and for a period not exceeding two months (*See* "Decision on the Prosecutor's Motion for the transfer of Detained Witnesses pursuant to Rule 90*bis*", of 23 August 2000 in The *Prosecutor v. Bagambiki et al. And Ntagerura*, Case No. ICTR-99-46-I). Mindful of the practical arrangements necessary for the organisation of the transfer of detained witnesses, the Chamber requests from the Prosecutor in co-operation with the Registry, that it be informed in advance of the dates at which these detained witnesses could in practice come to testify at trial. From this date of transfer, the Chamber decides that the detained witnesses should remain at the UNDF for a period not exceeding two months.

19. In reply to the Defence objection to the possible communication between detained witnesses transferred at the same time to the UNDF, the Chamber considers that Rule 90(G) of the Rules provides for a right to cross-examine on "matters affecting the credibility of a witness" so that Counsel for the Defence can, at Trial, test the credibility of detained witnesses like any other Prosecution witnesses if they so wish to do (*See* "Decision on the Prosecutor's Motion for the transfer of Detained Witnesses pursuant to Rule 90*bis*", of 23 August 2000 in The *Prosecutor v. Bagambiki et al. And Ntagerura*, Case No. ICTR-99-46-I).

8834

FOR THE ABOVE REASONS, THE TRIBUNAL,

GRANTS the Prosecutor's Motion for leave to add Witness FAW and RV to her Witness List;

GRANTS the Prosecutor's Motion and Supplemental Motion to order the transfer of 27 detained witnesses ;

DENIES the Prosecutor's request pertaining to Witness QBX;

I. ORDERS, pursuant to Rule 90*bis* of the Rules, that the 27 detained witnesses with the pseudonyms FAB, FAC, FAD, FAG, FAH, FAI, FAK, FAL, FAM, FAN, FAO, FAQ, FAR, FAS, FAT, FAU, QAF, QAG, QAH, QBU, QBV, QBY, QBZ, QCB, TQ, FAW and RV shall be transferred temporarily to the Tribunal=s Detention Facilities in Arusha from the time when they are due to testify at trial, at a date which has to be subsequently specified by the Prosecutor, and for a period not exceeding two months;

II. REQUESTS the Government of Rwanda to comply with this order and to arrange for the transfer in liaison with the Registrar and the Tanzanian Government;

III. INSTRUCTS the Registrar to:

A.- Transmit this order to the Governments of Rwanda and Tanzania;

B.- Ensure the proper conduct of the transfer, including the supervision of the witnesses in the UNDF; and to

C.- Remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the length of the temporary detention and, with the shortest delay, inform the Trial Chamber of any such change.

Arusha, 24 July 2001

William H. Sekule, **Winston C. Matanzima Maqutu** **Arlette Ramaroson**

Presiding Judge Judge Judge

(Seal of the Tribunal)

Annex B:

7. *Prosecutor v. Milosevic*, IT-02-54-T, "Decision on Prosecutor's Request to Call Witness C-063", 18 February 2004.

Case No.: IT-02-54-T

8836

IN THE TRIAL CHAMBER

Before:
Judge Richard May, Presiding
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar:
Mr. Hans Holthuis

Decision of:
18 February 2004

PROSECUTOR

v.

SLOBODAN MILOSEVIC

DECISION ON PROSECUTION'S REQUEST TO CALL WITNESS C-063

The Office of the Prosecutor

Ms. Carla Del Ponte
Mr. Geoffrey Nice
Mr. Dermot Groome

The Accused

Mr. Slobodan Milosevic

Amici Curiae

Mr. Steven Kay, QC
Mr. Branislav Tapuskovic
Prof. Timothy L.H. McCormack

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the International Tribunal"),

BEING SEISED of a confidential "Prosecution's Request to Call Witness C-063", filed on 20 January

8837

2004 ("Motion"), in which the Prosecution seeks permission to call this witness,

CONSIDERING the Trial Chamber's ruling subsequent to the filing of the Prosecution's pre-trial material for the Croatia and Bosnia part of these proceedings that it would only allow the admission of additional material by the Prosecution on good cause being shown,[1]

CONSIDERING that this witness appeared neither on the Prosecution's final witness list, nor in its omnibus motion for the admission of certain witnesses,[2]

NOTING that despite the witness agreeing to testify on 10 December 2003, this Motion was not filed until 20 January 2004, a matter of weeks prior to the close of its case, in circumstances in which the Accused had been put on notice by the Prosecution of its intention to call a number of substantial and important Prosecution witnesses, and that the witness whilst identified as a potential Prosecution witness was not scheduled to testify in its confidential "Witness Schedule to End of Prosecution Case",

CONSIDERING that, in all the circumstances, the Accused has not been given a sufficient opportunity to prepare for the testimony this witness could give,

CONSIDERING the Trial Chamber does not, therefore, accept that the Prosecution has shown good cause such that the witness should be added to the witness list,

PURSUANT TO Rules 54 and 73 *bis* of the Rules of Procedure and Evidence

HEREBY DENIES THE MOTION.

Done in English and French, the English text being authoritative.

Patrick Robinson
Judge

Dated this eighteenth day of February 2004
At The Hague
The Netherlands

[Seal of the Tribunal]

1. "Decision on Prosecution Request for Agreement of Trial Chamber to Amend Schedule of Filings", 18 April 2002, p.3.
2. "Decision on Prosecution's Fourth Omnibus Motion for Leave to Amend the Witness List and Request for Protective Measures", 21 November 2003.

Annex B:

8. *Prosecutor v Ntagerura,* ICTR-99-46-T "Decision on Defence for Ntagerura's Motion to Amend its Witness List Pursuant to Rule 73 Ter (E), 4 June 2002.

8839

2002 WL 32341942 (UN ICT (Trial)(Rwa))

International Criminal Tribunal for Rwanda
Trial Chamber III

Before: Presiding Judge Lloyd George Williams Q.C., Judge Yakov Ostrovsky, Judge Pavel Dolenc

Registrar: Mr. Adama Dieng

Date: 4 June 2002

THE PROSECUTOR
v.

ANDRÉ NTAGERURA, EMMANUEL BAGAMBIKI, SAMUEL IMANISHIMWE

DECISION ON DEFENCE FOR NTAGERURA'S MOTION TO AMEND ITS WITNESS LIST PURSUANT TO RULE 73 TER (E)

ICTR-99-46-T

The Office of the Prosecutor: Mr Richard Karegyesa, Ms Holo Makwaia, Ms Andra Mobberley

Counsel for the Accused: Mr Benît Henry, Mr Hamuli Rety, Mr Vincent Lurquin, Mr Seydou Doumbia, Ms Marie-Louise Mbida, Mr Pierre Fofe

Original: English

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"), sitting as Trial Chamber III, composed of Judges Lloyd George Williams Q.C., presiding, Yakov Ostrovsky and Pavel Dolenc (the "Chamber");

BEING SEISED of Ntagerura's "Urgent Motion for Leave to Amend the List of Defence Witnesses Filed on 14 January 2002, Pursuant to Rule 73(A) and 73 ter (E)" filed 23 April 2002 (the "Motion");

CONSIDERING the "Prosecutor's Response to the Defence Request to Modify the List of Defence Witnesses Filed on 14 January 2002 Pursuant to Article [sic] 73(A) and 73 ter (E) of the Rules of Procedure and Evidence" filed 29 April 2002 (the "Prosecutor's Response");

8840

NOW CONSIDERS the matter solely on the basis of the briefs of the parties, pursuant to Rule 73(A) of the Rules of Procedure and Evidence (Rules).

Defence Submissions

1. The Defence of Ntagerura seeks to add a single witness to its list of witnesses. At the request of the Chamber, the Defence has withdrawn a number of witnesses who were originally contained in its **witness list** filed 14 January 2002.

2. The proposed witness, identified by pseudonym HR2, was only contacted by the Defence after 14 January 2002 because of the exigencies of the trial schedule. Defence Counsel indicates that he is seeking to obtain a written statement from the witness to submit to the Chamber pursuant to Rule 73 bis and to the Order of 23 November 2001.

3. The Defence anticipates that this witness is prepared to testify during the hearings scheduled for 1 to 25 July 2002. He is expected to testify about "the relationship between the MRND and opposition members of the Nsengiyaremye government, as well as on their role in the attempt to establish the Broad-Based Transitional Government (BBTG) and its institutions. He will also testify on the collaboration between members of government from the MRND and those from other parties during the Arusha Accords." The Defence indicates that this witness could provide eye-witness testimony that would counter the evidence provided by the Prosecutor's expert, Professor Guichaoua, which was not contained in his expert report disclosed to the Defence pursuant to Rule 94 bis.

4. The Defence indicates that his examination-in-chief would be expected to last two hours.

5. The Defence maintains that it would be in the interests of justice to permit the Defence to add this witness. Relying on an elaboration of the meaning of "interests of justice" in Prosecutor v. Nahimana, Decision on the Prosecutor's Oral Motion for Leave to Amend List of Selected Witnesses, 26 June 2001, the Defence asserts that this witness is essential for its case and assures the Chamber that the evidence will not duplicate that given by any other witness. Since the Defence was not given notice of this issue in the Guichaoua Report, it is crucial that the Defence be permitted to challenge this unexpected evidence. To exclude this witness would violate the Accused's right to make full answer and defence.

Submissions of the Prosecutor

6. The Prosecutor opposes the Defence Motion, arguing that Guichaoua did not introduce any new evidence and the Defence has not identified any such evidence. The Prosecutor observes that the Defence did not make any objections to the content of his evidence on this basis. Moreover, the Defence had four months after Guichaoua testified in which to incorporate this witness onto the original list. The Prosecutor also relied on the fact that the Defence did not challenge this evidence of Guichaoua in its motion for exclusion of evidence.

8841

7. The Prosecutor also notes that if the new evidence is character evidence then it duplicates other testimonies.

Deliberations

8. Rule 73 ter (E) permits the Defence, if it considers it to be in the interests of justice, to seek leave to add a witness to its list after the commencement of the trial.

9. The Chamber notes that the Defence has not provided the Chamber with a witness statement, explaining that this statement is not yet available. However, the Chamber also observes that the Motion contains a brief explanation of what the witness is expected to testify about and an estimate of the length of testimony.

10. The adding of a witness to the **witness list** is a matter for which the Chamber should adopt a flexible approach in the exercise of its discretion. The Defence has indicated that there were difficulties contacting the witness in time and that the evidence the witness is expected to give is important to its case. In addition, the Defence has, with leave of the Chamber, removed a number of witnesses from its original **witness list**, resulting in considerable saving of judicial time. Taking all the circumstances into consideration, the Chamber is prepared to allow the Defence to **vary** the list of witnesses by adding Witness HR2 to the original **witness list**.

11. Witness HR2's evidence shall, however, be confined to factual matters as opposed to character evidence, as the Defence has already led a substantial amount of evidence on the character of the accused.

12. The Chamber therefore:

(a) Grants the Defence leave to add Witness HR2 to its **witness list**;

(b) Orders that the Defence file with the Prosecutor and the Chamber, within five days from the date of this Decision, the summary of facts on which Witness HR2 will testify and the estimated length of expected testimony; and

(c) Orders that the Defence provide the Chamber with a copy of the written statement of Witness HR2, within ten days of this Decision.

Arusha, 4 June 2002.

Lloyd George Williams, Q.C., Judge, Presiding

Yakov Ostrovsky, Judge

Pavel Dolenc, Judge

8842

2002 WL 32341942 (UN ICT (Trial)(Rwa))

Seal of the Tribunal

END OF DOCUMENT