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SCSL-04-15-T
(18091 - 18111)

18091

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

Hon. Justice Pierre Boutet, Presiding
Hon. Justice Benjamin Itoe,
Hon. Justice Bankole Thompson

Registrar: **Mr. Lovemore Green Munlo**

Date filed: **22 February 2006**

The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL – 04 – 15 – T

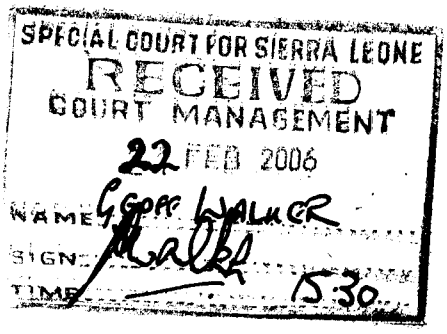
DEFENCE REPLY TO PROSECUTION RESPONSE TO DEFENCE MOTION REQUESTING THE EXCLUSION OF EVIDENCE ARISING FROM THE ADDITIONAL INFORMATION PROVDED BY WITNESS TF1-113, TF1-108, TF1-330, TF1-041 AND TF1-288

Office of the Prosecutor

Desmond De Silva QC
James C Johnson
Peter Harrison
Nina Jorgensen

Defence

Wayne Jordash
Sareta Ashraph
Chantal Refahi



Public Document

Reply

1. The Prosecution Response ("The Response") fails to address the issues which underpin the Defence Motion ("The Motion"), and which continue on a weekly basis) to undermine the rights of the accused to a fair trial pursuant to Article 17 of the Statute of the Special Court of Sierra Leone ("The Statute"). There is no authority or precedent for a "rolling" "piece meal" disclosure programme in any jurisdiction, court or ad hoc Tribunal which would allow a Prosecuting authority to investigate throughout the trial, with the sole aim of moulding and adding to its case to fit the evidence as it unfolds. It is contrary to every known principle of fairness in any criminal justice system and makes a fair trial impossible. The Prosecution fail to address this point directly because to do so would involve an admission to this allegation, which would expose their manipulation of the trial process.

2. The Prosecution have turned the trial into a process of attrition, which denies the Accused the right to a fair trial. The Defence cannot succeed in proving the Accused innocent – not because he is guilty – but because the Prosecution have a ready supply of unreliable insider witnesses whose sole aim is to assist the Prosecution's rolling disclosure program.

3. The complete absence of precedent for this wholly unfair piece - meal disclosure program is clear from (i) the jurisprudence relied upon by the Defence in its Motion and (ii) an analysis of the Prosecution Response which reiterates irrelevant or marginal considerations, carefully avoiding any admission of its improper practice. In the following paragraphs the Defence will analyse these considerations and highlight this approach by the Prosecution. It is submitted that the Prosecution ought not to be permitted to avoid the issues, which need to be engaged with, if their responsibility to act pursuant to Article 17 of the Statute is not completely forgotten.

Prosecution Assertions

Refer to paragraphs 3, 23 and 24 of the Response.[1]

4. It is unclear what the Prosecution are attempting to assert in these paragraphs beyond the fact that it would prefer it if the Defence did not object to its continuous disclosure programme. Is it the Prosecution claim that all evidence, which they manage to obtain through their so-called proofing sessions, is admissible, irrespective of what material facts are alleged, what its legal characterisation or consequence *might* or be how far the trial has progressed? The Prosecution stance appears to be intentionally opaque. On the one hand the Prosecution accept that "new" evidence is subject to discretionary exclusion and yet, in its determination to jealously guard its "claimed right" to keep seeking out new evidence and relying upon it (according to how they perceive their case to be progressing) they argue that the Defence ought not to request discretionary exclusion.

5. The Defence submit that it would be unprecedented for any court to take the stance that all evidence served at any stage of the proceedings is admissible. Rule 89(C) does not state that if evidence is relevant, "it is admissible".[2] It states that, "(a) Chamber may admit any relevant evidence". The Chamber is expected to exercise its discretion in relation to all relevant evidence. The Rules of Procedure and Evidence circumscribe the discretion, which in turn are designed to ensure that Article 17 of the Statute and the guarantees therein are assured. Hence Rule 66 is supposed to assist in controlling the timing of disclosure of the Prosecution case. All the jurisprudence at the ICTY and the ICTR suggests this should be promptly and prior to the commencement of the trial.[3]

6. The Prosecution stance that, even if the evidence was new, the appropriate remedy is always an adjournment is simply a device by which they seek to maintain their unfair practice of moulding their case according to whether they

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[1] Para. 8 of the Response quoting *Prosecutor v. Sesay et al*, SCSL-04-15-T-396, "Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and TF1-122, 1st June 2005 Trial Chamber Ruling, para. 24, (1st June 2005 Ruling).
[2] See para 13 of the Prosecution Response: *Prosecutor v Sesay et al*, SCSL-2004-15-T-483, "Prosecution Response to Defence Motion Requesting the Exclusion of Additional Evidence of Witness TF1-113, TF1-108, TF1-330, TF1-041, TF1-288" dated 17 February 2006
[3] See paras. 4 – 6, 12 of the Defence Motion.

consider they have done enough to convict the first accused. In attempting to protect this improper practice they seek to diminish the Accused's rights pursuant to Article 17 of the Statute to the sole guarantee in Article 17(4)(b), that is, the right to "have adequate time" for the preparation of his case. The fact that the Accused has not *yet* argued that actual prejudice has been suffered in terms of insufficient time to prepare for the testimony does not obviate the need to consider the effect of the late disclosure on all the rights, which are supposed to be guaranteed pursuant to Article 17. The Accused has rights which extend beyond this expedient reduction, not least of which is his right to be informed promptly the nature and cause of the charge against him (Article 17(4)(a)[4], and to have adequate facilities for the preparation of his defence (Article 17(4)(b).

Prosecution Assertions

Refer to paragraphs 12, 13 and 14 of the Response.

7. The Prosecution appear to either misunderstand the Defence arguments or have once again opted to ignore them[5]. The Defence reiterate that it has no objections to proofing sessions[6]. It has no objections to the continuance of on-going investigations. It accepts that new information must be disclosed to the Defence. The Defence are at a loss to know how many times it must agree with these propositions before the Prosecution stop re-iterating them. These propositions are not in doubt. The unfairness, which the Defence are attempting to highlight, does not concern these propositions and the Prosecution do a disservice to the administration of justice by insisting on repeating these propositions and not addressing the real issues. The pertinent question concerns what happens to the evidence subsequently obtained and whether the Prosecution can properly rely upon the fruits of these ongoing investigations without giving appropriate notice of the factual and legal

[4] See para. 12 of the Defence Motion, quoting from *Prosecutor v. Nyiramusuuhuko*: "Decision on Defence Motion for Disclosure of Evidence", dated 1st November 2000 para. 38.
[5] See para. 4 – 11 of *Prosecutor v Sesay et al*, SCSL-2004-15-T-468 "Defence Reply to the Prosecution Response to the Defence Motion Requesting the Exclusion of Evidence relating to TF1-117", dated 26th January 2006 where the Defence have already stated in explicit terms that it does not allege that the general practice of proofing is impermissible, "when conducted fairly and with due regard to the Rule 66 of the Rules and Article 17 of the Statute of the Special Court".
[6] See para. 4 – 11 of the Defence Reply to the Prosecution Response to the Defence Motion Requesting the Exclusion of Evidence relating to TF1-117, dated 26th January 2006.

characterisations therein (or put more simply for the avoidance of doubt whether the Prosecution ought to be able to lead this evidence as part of their case). The fact that the Prosecution refuse again and again to address these points speaks volumes about the merits of their position and practice.

8. It is the Defence submission that the Prosecution are attempting to ignore the real argument because it is inconvenient. It would rather the issues were reduced to a consideration of whether proofing, or reinvestigating is permissible or whether it has a duty to prosecute fully. Thus they quote selectively from the case of Ddayambaje noting that the Trial Chamber held that "where new evidence has come to light she (the Prosecutor) is obliged to present this evidence at trial" but yet fail to take into account the next paragraph which makes clear that the Prosecution obligation to prosecute fully is (naturally) restricted by the need to ensure at all times that the Accused's rights to a fair trial pursuant to Article 17 (or at the ICTR Article 20) is sacrosanct. The Defence submit that this is self evident. As noted in the case of *Nahimana;* "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."
   In the same case the Trial Chamber (with Judge Pillay presiding), also noted "the need for the Defence to have a clear and cohesive view of the Prosecution strategy and to be able to make appropriate preparations". It can therefore be safely presumed that the Trial Chamber did not have in mind a "strategy" which involved continuous investigation and continuous reliance upon hundreds of new factual allegations throughout the Prosecution case![7]

9. The Defence notes further the failure of the Prosecution to address the following essential points:
   (a) That by serving a Pre-trial brief with only a small proportion of the factual allegations contained within actively misled the Defence and the

[7] *Prosecutor v. Nahimana*, Case No. ICTR-99-52-I, "Decision on the Prosecutor's Oral Motion For Leave to Amend the List of Selected Witnesses", 26th June 2001, para. 20

Court. The Prosecution suggest that it has not misled the Defence[8] but offer no reasonable explanation for its incomplete brief (or why it has not sought to supplement the brief). The Prosecution have failed to address the consequences of a brief, which purported to comply with the Trial Chamber order of the 13th February 2004 (obliging them to address the "factual and legal issues in the case") but in fact provides no notice of the majority of the case (factually and legally) now being pursued.[9] The "explanation" offered, that "there are numerous reasons why a witness may expand on a statement previously made"[10] may explain the addition to the overall case but is irrelevant to a proper consideration of the *impact* on the Accused's trial of hundreds of factual allegations of which the Prosecution failed to provide notice, in the indictment, the Pre-trial Brief or the original witness statements.

(b) It is noteworthy that the Trial Chamber, at the time of the alleged order, considered that the filing of the Pre-trial brief at "an earlier stage in the pre-trial process than after the Pre-trial Conference" (as provided by Rule 73 *ter*) would advance the "rights of an Accused to a fair and expeditious trial" It is submitted that the Prosecution have failed, not only in their duty to disclose their case in a Pre-trial Brief, but have compounded that failure by refusing to deal fairly with the allegation that their Pre-trial Brief has prejudiced the rights of the Accused to a fair trial.

(c) That due to the breadth of the indictment there was a greater responsibility on the Prosecution to be concise and comprehensive in their Pre-trial Brief and [11]

(d) The allegation that the real reason why the witnesses in this case are expanding their testimony in this case is because the Prosecution are actively seeking to bolster its case to plug the weakness as they become apparent and to mould the case as it develops. The Prosecution offers theoretical reasons (for example increased confidence in Special Measures) but fail to admit (or deny) this central allegation of improper practice.

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[8] See para. 14 of the Response.
[9] See pp. 2 of the Order.
[10] See para. 14 of the Response.
[11] Paragraph 10 –11 of the Motion.

Prosecution Assertion

Refer to paragraph 15 of the Response.

10. The Prosecution Response implies that (i) the only notice, which the Prosecution are obliged to provide from the outset of the case, are the charges on the indictment and (ii) the only Article 17 consideration arising from the disclosure of any new, additional, fresh or "never before notified" factual allegation is whether the Accused has been afforded a reasonable opportunity to investigate the allegation. This is clearly wrong and at odds with every single piece of jurisprudence in the evolving jurisprudence of the ad hoc tribunals and any mature national jurisdiction. The Prosecution fail to produce a single authority or precedent for their improper practice. Moreover the Prosecution's attempts to constrain an interpretation of the law or to distinguish the facts of cases such as Delic,[12] Blagojevic,[13] Bagaosra[14] or any other case at the ICTY or ICTR is transparently without merit. It is unarguable that every single case *without exception* is predicated upon one immovable and essential guarantee: that an Accused has the right to know the case against him from the outset and not only the legal characterisation of the allegations but the factual allegations themselves[15]. In the case of Bizimungu[16] the Trial Chamber noted that an Indictment "should contain a statement of material facts setting out the specific acts with which the Accused is charged, in sufficient detail to enable him to prepare his defence..." As the Trial Chamber later ruled, "(T)his forms the essence of a fair trial".[17]

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[12] See para. 15 of the Prosecution Response.
[13] See para. 16 of the Prosecution Response.
[14] See para. 18 of the Prosecution Response.
[15] In the case of *Prosecutor v Delic,* the Trial Chamber noted, "Pursuant to Article 18(4) of the Rules, an indictment must contain a concise statement of the facts of the case and the crime or crimes with which the accused is charged. These provisions should be interpreted in conjunction with the rights of the accused pursuant to Article 21(2) and Article 21(4)(a) and (b) of the Statute, which provide for the right of an accused to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. This right translates into an obligation on the part of the Prosecution to plead the material facts underpinning the charges against the Accused".
[16] *Prosecutor v. Bizimungu*, ICTR-99-50-T "Decision on Motion From Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAB, GKC, GKD and GFA", 23rd January 2004, para. 12.
[17] *Prosecutor v. Bizimungu*, ICTR-99-50-T "Decision on Motion From Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses AEI, GKE, GKF and GKI, 3rd February 2004", para. 2. See also paragraphs 5, 10 and 12 of the Motion for other examples.

11. The Defence rely upon every single case at the ad hoc tribunals, which demonstrate that it is trite law that the Prosecution are obliged to provide notice of the factual and legal allegations, which form the basis of the Prosecution case. The Prosecution's attempt to obscure this fact is regrettable. This obfuscation is never more apparent that when the Prosecution seek to derive some positive support for their position in the jurisprudence.

Examples

12. The Prosecution suggest that Blagojevic[18] supports the proposition that "new information... is admissible but that it must be disclosed with enough advance notice"[19] and yet the Trial Chamber in that case was not asked to consider whether the proofing information was admissible but were considering whether the Defence ought to be given more time to allow new information to be translated into the Accused's language. The Prosecution's reliance upon this decision as authority for the proposition that, "new information gathered in this way was admissible"[20] is plainly wrong.

13. The Prosecution suggestion that the principle expounded in *Delic*[21] (that an Accused must be able to proceed with preparing his case in full knowledge of all the charges[22]) is not applicable to the present case because the Trial Chamber made this statement in the context of "concerns over unfair prejudice and undue delay that might result if the indictment were amended at too late a stage of the proceedings"[23] is startling. Is the Prosecution suggesting that this principle does not apply to all criminal trials? Or perhaps the Prosecution are suggesting that prejudice to an Accused in a criminal trial could only ever arise from the late amendment of an indictment and not, as in this case, the piece meal and continuous disclosure of hundreds of freshly disclosed factual allegations of crime moulded to fit the evidence as it unfolds?

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[18] *Prosecutor v. Blagojevic and Jokic*, IT-02-60-T, "Decision on Prosecution's unopposed Motion for Two day Continuance for the Testimony of Momir Nikolic", 16th September 2003.
[19] Para. 16 of the Response.
[20] Para. 16 of the Response.
[21] *Prosecutor v. Delic*, IT-04-83-PT, "Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment", 13th September 2005, para. 6.
[22] Para. 5 of the Motion.
[23] Para, 15 of the Response.

14. The Prosecution in their Response then go on to suggest that the Trial Chamber in the case of *Hallovic* has limited the definition of a "new charge",[24] to the imposition of criminal liability on a basis that was not previously reflected in the indictment. This assertion is misleading. The Trial Chamber in that case noted that the "term "charge" is very wide in scope and the fundamental nature of the right to a fair trial should prompt courts to prefer a "substantive, rather than formal, conception" of the term".[25] As further noted in the paragraph 30 of *Hallovic*, the key focus is whether exists a basis for conviction "that is factually and/or legally distinct from any already alleged in the indictment".

15. In this regard the case of *Krnojelac* is apposite.[26] In this case, arguably two of the finest jurists in the ad hoc tribunals, Judge David Hunt and Judge Antonio Cassese (along with the Learned Judge Florence Mumba), found that the presence or absence of new counts in the indictment did not determine whether the Prosecution had sought to add new charges,

> "(T)he Trial Chamber has obtained the impression that the prosecution may have taken the opportunity to add new charges for which leave is required pursuant to Rule 50(A). It is true, as the prosecution says, that no new counts have been added to the indictment. But that is only because of the pleading style adopted by the prosecution in this case: each count has been pleaded only in the terms of the Statute, and thus in terms of absolute generality, leaving it to the material facts pleaded in respect of that count to reveal specific details which are required... and which should, strictly, have been pleaded in the count itself"[27]

> "In some cases in the proposed amended indictment, it is at least arguable that there has been an insertion of entirely new factual allegations in support of

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[24] *Prosecutor v. Hallovic*, IT-01-48-PT, "Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, Trial Chamber", 17th December 2004, para. 30.
[25] Supra. para. 30 quoting from *Deweer v. Belgium*, (1979-80) 2 E.H.R.R.439, at paras. 42,44.
[26] *Prosecutor v. Krnojelac*, IT-27-95-PT, "Decision on Prosecutor's Response to Decision of 24 February 1999", 24th February 1999, para. 20.
[27] Supra para. 19.

existing counts, either in substitution for or in addition to the factual situations which had been pleaded in the original indictment. Even though the count remains pleaded in the same terms of the Statute, these substitutions may nevertheless amount effectively to new charges".[28]

16. How much worse is the situation for the unfortunate accused in this trial? Denied the factual allegations in the indictment, denied them in the Pre-trial Brief, denied them in the original witness statements, and facing an avalanche of "so called proofing notes" on a weekly basis containing hundreds of fresh allegations, which apparently, in some unspecified way, now support the Prosecution case. It is telling that the Trial Chamber in *Krnojelac*[29] invited the Defence to complain about the covert amendment of the indictment in a situation, which undoubtedly provided much greater notice than in the present case. The Defence are accordingly under an absolute duty to complain of the continuing prejudice in this case.

Conclusion

17. In the context of the Prosecution's repeated and continuous disclosure of hundreds of new factual allegations it is clear that the Prosecution have created several hundred new ways in which the Accused may be convicted. It is clear that the import and meaning of these hundreds of factual allegations, when considered in light of the principle of "effective interpretation" is that the Prosecution have created many new charges (or new factual liabilities) without giving the Defence any or any adequate notice. In the context of this Motion it is clear that there continues to be a wholesale breach of Article 17 of the Statute and the evidence therefore ought to be excluded as "new".

Dated this 22nd February 2006

pp. Wayne Jordash
pp. Sareta Ashraph
Chantal Refahi

[28] Supra para. 20.
[29] Supra. para. 20.

Index of Authorities

Cases

Prosecutor v. Jean-Bosco Barayagwiza, ICTR-97-19-1, "Decision from the Appeals Chamber with separate opinion of Judge Shahabuddeen", Appeal Chamber Decision, 3rd November 1999 (available on ITCR website).

Prosecutor v. Sesay et al, SCSL-04-15-T-396, "Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and TF1-122", Trial Chamber Ruling on 1st June 2005

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Prosecutor v Sesay et al, SCSL-04-15-T-468, "Reply to the Prosecution Response to the Defence Motion Requesting the Exclusion of Evidence relating to TF1-117", dated 26th January 2006.

Prosecutor v Nahimana, ICTR-99-52-I, "Decision on the Prosecutor's Oral Motion For Leave to Amend the List of Selected Witnesses", 26th June 2001 (available on ITCR website).

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Prosecutor v. Bizimungu, ICTR-99-50-T-0748 "Decision on Motion From Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAB, GKC, GKD and GFA", 23rd January 2004 (available on ITCR website).

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Prosecutor v. Blagojevic and Jokic, Case No. IT-02-60-T, "Decision on Prosecution's unopposed Motion for Two day Continuance for the Testimony of Momir Nikolic", Case No. IT-02-60-T, 16th September 2003 (available on ITCY website).

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United Nations
Nations Unies

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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 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 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.

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 73*bis* (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.

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

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;

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.