

ICTR-99-50-T
03-09-2004
(16341-16334)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

16341
Mwanja

Or: ENG

TRIAL CHAMBER II

Before: Judge Khalida Rachid Khan, Presiding
Judge Lee Gacuiga Muthoga
Judge Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 3 September 2004

The PROSECUTOR

v.

Casimir BIZIMUNGU

Justin MUGENZI

Jérôme-Clément BICAMUMPAKA

Prosper MUGIRANEZA

Case No. ICTR-99-50-T

JUDICIAL RECORDS/ARCHIVES
ICTR
2004 SEP - 3 P 12: 28

**DECISION ON PROSECUTOR'S VERY URGENT MOTION PURSUANT TO
RULE 73BIS(E) TO VARY THE PROSECUTOR'S LIST OF WITNESSES FILED
ON 25 MAY 2004**

Office of the Prosecutor:

Mr. Paul Ng'arua
Mr. Ibukunolu Babajide
Mr. Justice Bwonwonga
Mr. Elvis Bazawule
Mr. Shyamlal Rajapaska
Mr. William Mubiru
Mr. Olivier Des Schutter

Counsel for the Defence:

Ms. Michelyne C. St. Laurent and Ms. Alexandra Marcil for Casimir Bizimungu
Mr. Howard Morrison, Q.C., and Mr. Ben Gumpert for Justin Mugenzi
Mr. Pierre Gaudreau and Mr. Michel Croteau for Jérôme-Clément Bicamumpaka
Mr. Tom Moran for Prosper Mugiraneza

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short, (the "Trial Chamber");

BEING SEIZED of the "Prosecutor's Very Urgent Motion Pursuant to Rule 73bis(E) to Vary the Prosecutor's List of Witnesses Filed on 25 May 2004", filed on 12 August 2004 (the "Motion");

NOTING

- 1) The "*Réponse de Casimir Bizimungu à la requête du Procureur visant à obtenir la permission d'ajouter le témoin GTC sur la liste finale de témoins*", filed on 17 August 2004 (the "Response");
- 2) The "*Réponse amendée et confidentielle de Casimir Bizimungu à la requête urgente du Procureur visant à obtenir la permission d'ajouter le témoin GTC sur la liste consolidée et finale de témoins*", filed on 23 August 2004 (the "Amended Response");
- 3) The "*Fait additionnel à la Réponse amendée et confidentielle de Casimir Bizimungu à la requête urgente du Procureur visant à obtenir la permission d'ajouter le témoin GTC*", filed on 25 August 2004;

TAKING INTO CONSIDERATION

- 1) The list of witnesses filed by the Prosecutor with his Pre-Trial Brief on 20 October 2003 (the "Initial Witness List");
- 2) The "Final List of Prosecution Witnesses Pursuant to Status Conference of 4 June 2004", filed on 9 June 2004 (the "Final Witness List");

ARGUMENTS OF THE PARTIES

Prosecution Submissions

1. The Prosecutor seeks leave, pursuant to Rule 73bis(E), to reinstate Witness GTC in the Prosecutor's witness list. This witness was in the Prosecutor's witness list filed on 20 October 2003.
2. The Prosecutor submits that in construing Rule 73bis(E), the Tribunal has adopted a flexible approach in the exercise of its discretion. In the case of *The Prosecutor v. Ntagerura et al.*, the Trial Chamber held that "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".¹

¹ *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-T, "Decision on Defence for Ntagerura's Motion to Amend Its Witness List Pursuant to Rule 73ter (E)", 4 June 2002, para 10.



3. According to the Prosecutor, it is in the interest of justice that the list of witnesses be varied by the addition of Witness GTC. The Prosecutor argues that he has had to review his case in view of the exclusion of nine witnesses² who would have testified to crimes committed by Casimir Bizimungu. The Prosecutor has identified Witness GTC as a witness who will testify to relevant facts implicating Casimir Bizimungu and which will affect the determination of the case. Witness GTC was an eyewitness to events implicating Casimir Bizimungu; this material fact should be taken into account in allowing the Motion.³

4. The Prosecutor contends that he has disclosed to the Defence all the statements of Witness GTC and therefore submits that the instant application will not prejudice the Defence in the preparation of its case. The Defence will not suffer from any surprise and the application will not cause undue delay in the trial of the Accused.

5. The Prosecutor intends to call Witness GTC in October 2004, to give the Defence adequate time to carry out further investigations and prepare for cross-examination. The Prosecutor notes that such an arrangement has been taken into account in the past to allow variation of a party's list of witnesses.⁴

6. The Prosecutor anticipates that the length of the examination-in-chief of Witness GTC will be about four hours. The Prosecutor undertakes to limit his examination-in-chief bearing in mind the principles of relevance and brevity.

7. The Prosecutor attaches a "Summary of Anticipated Testimony of Witness GTC" and a list of witnesses for the session beginning 13 September 2004. This list includes Witness GTC. According to that summary, Witness GTC will testify that he was a member of the youth wing of the CDR political party and that he was trained in the use of weapons in the house of Hassan Ngeze and at the premises of CDR, both located in Gisenyi. He will also testify about a speech given by Casimir Bizimungu at the Umuganda Stadium in mid-May 1994 and about the subsequent killing of Tutsi in Gisenyi using some of the arms distributed at the stadium. The Witness should also testify to the criminal activities of Casimir Bizimungu's accomplices like Hassan Ngeze and Bikindi.

Defence Submissions

8. The Defence objects to the addition of Witness GTC to the Prosecutor's witness list, arguing that such a variation of the witness list is not in the interest of justice as it does not meet the requirements necessary to decide whether a witness list may be varied

² "Decision on Prosecutor's Interlocutory Appeals against Decision of the Trial Chamber on Exclusion of Evidence", 25 June 2004.

³ *The Prosecutor v. Musema*, "Decision on the Prosecutor's Request for Leave to Call Six New Witnesses", 20 April 1999, para. 11; *The Prosecutor v. Nahimana et al.*, "Decision on the Prosecutor's Oral Motion to Amend the List of Selected Witnesses", 26 June 2001, para. 20.

⁴ *The Prosecutor v. Nahimana et al.*, "Decision on the Prosecutor's Oral Motion to Amend the List of Selected Witnesses", 26 June 2001, para. 32, 37.

pursuant to Rule 73bis(E) of the Rules. These requirements were stated in the Decision rendered by the Trial Chamber on 23 June 2004.

9. The Defence asserts that the composition of the Prosecutor's witness list has been discussed many times by the Parties and that the Trial Chamber has already rendered several decisions on Prosecutor's motions for leave to vary witness list. On 19 May 2004, the Chamber ordered the Prosecutor to file a consolidated and final list of witnesses. On 9 June 2004, the Prosecutor filed a "Final List of Prosecution Witnesses Pursuant to Status Conference of 4 June 2004". The Defence underscores that Witness GTC was not in this final list. Accordingly, the Motion does not comply with the Decision of 19 May 2004.

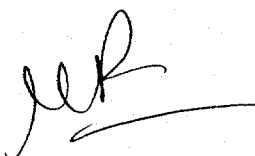
10. The Defence further claims that the Motion was knowingly filed late without good cause being shown. According to the Defence, the Prosecutor's decision to add Witness GTC arises from the exclusion of nine witnesses decided by the Appeals Chamber on 25 June 2004.⁵ This exclusion was decided on the basis of two decisions rendered on 19 January 2004 and 3 February 2004 by this Chamber. The Prosecutor should therefore have considered the addition of Witness GTC since those decisions, or at least before the adjournment of trial on 9 July 2004.

11. The Defence submits that, if granted, this late Motion would cause an important prejudice for the Defence as the Prosecutor requested an addition and not merely a substitution of witnesses. It would be extremely difficult for Counsel to leave Arusha during the next trial session to conduct investigations on the meeting held at Umuganda Stadium in Gisenyi. The Defence also claims that such a variation of the witness list could delay the presentation of the Defence case scheduled for January 2005. This variation would challenge the Accused's right provided under Article 20(4)(b) and (e) of the Statute, namely the right to have adequate time and facilities for the preparation of his defence and the right to examine the witnesses against him.

12. The Defence argues that, according to the decisions previously rendered by the Trial Chamber and the Appeals Chamber, the burden of proving the factors to be considered to decide whether the variation of witness list may be granted lies with the Prosecutor.⁶ The Prosecutor has notably failed to prove the materiality of the testimony of Witness GTC. The fact that Witness GTC was an eyewitness to events implicating Casimir Bizimungu is not relevant since these events are not specifically pleaded in the indictment. The Defence recalls that the Prosecutor had sought an amendment of the indictment regarding the implication of Casimir Bizimungu in the distribution of weapons in the *Préfecture* of Gisenyi. The leave to file an amended indictment was denied by the Trial Chamber considering that the proposed amendments contained an

⁵ "Decision on Prosecutor's Interlocutory Appeals against Decision of the Trial Chamber on Exclusion of Evidence", 25 June 2004.

⁶ "Decision on Mugiraneza Interlocutory Appeal against Decision of the Trial Chamber on Exclusion of Evidence", 15 July 2004, para. 13.



expansion of the charges beyond the scope of the current indictment and involved substantial changes which would cause an incurable prejudice to the Accused.⁷

13. The Defence challenges the credibility of Witness GTC and the probative value of his testimony, arguing that the Witness did not implicate Casimir Bizimungu in his first statements. The Defence adds that Witness GTC has testified before the Tribunal in the *Media* case in September 2001, notably on the distribution of weapons in the *Préfecture* of Gisenyi and that his testimony did not implicate Casimir Bizimungu. The Defence points out that since he was convicted in Rwanda, Witness GTC cooperates with the Rwandan judicial authorities and that the fact that Witness GTC is currently detained in Rwanda challenges the probative value of his testimony.⁸

14. In its Amended Response, the Defence notes that several documents relating to Witness GTC, filed on 10 August 2004, were disclosed on 17 August 2004, that is after the Defence had filed its Response to the Motion. This disclosure includes notably: the English version of the statements of Witness GTC, dated 17 April 2002 and 11 September 2003; a Judgement of the *Tribunal de première instance de Gisenyi*, dated 25 May 2001; an incomplete document called Criminal Investigation Report; a document called Appeal, available only in Kinyarwanda; a document called Record of Confession, Plea of Guilty and Request for Pardon, which does not concern Witness GTC. As these documents are not recent, the Defence contends that this disclosure is manifestly late, incomplete and might contain exculpatory evidence that should have been disclosed at an earlier stage of the proceedings.

DELIBERATIONS

15. Rule 73bis(E) of the Rules of Procedure and Evidence reads as follows:

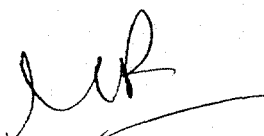
(E) After commencement of Trial, the Prosecutor, if he considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called.

16. In previous decisions, this Tribunal has held that the Prosecutor should be allowed to reinstate its list of witnesses, after a consideration of several factors.⁹ These factors include the materiality of the testimony, the complexity of the case, the prejudice to the Defence (including the element of surprise), on-going investigations, replacements and

⁷ "Decision on the Prosecutor's Request for Leave to File an Amended Indictment", 6 October 2003. This decision of the Trial Chamber was upheld by the Appeals Chamber, See: "Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment", AC, 12 February 2004.

⁸ *The Prosecutor v. Ntagerura et al.*, Judgement, 25 February 2004

⁹ *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E)", 21 May 2004, para. 8-12.



corroborations of evidence.¹⁰ In addition, in the case of *The Prosecutor v. Bagosora et al.*, the Trial Chamber expanded on these factors, and considered that Rule 73bis(E) requires a “close analysis” of each witness, including the:

sufficiency and time of disclosure of witness information to the Defence; the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictments; and the ability of the Defence to make an effective cross-examination of the proposed testimony, given its novelty or other factors; and the justification offered by the Prosecution for the addition of the witnesses.¹¹

17. The Trial Chamber concurs with the reasoning of the Trial Chamber in the case of *The Prosecutor v. André Ntagerura et al.*, which held that the Tribunal should adopt a flexible approach in the exercise of its discretion relating to the matter of adding witnesses to a witness list.¹²

18. The Chamber notes that the Defence has objected to the Motion on the basis of lateness of the addition of Witness GTC in the Prosecutor’s list and on the basis of the lack of probative value of the Witness’ testimony, particularly, the fact that the events witnessed by GTC are not specifically covered by the indictment. The Chamber has further noted that the Defence submits that the disclosure of several documents relating to the testimony of Witness GTC was manifestly late.

19. Regarding the time and facilities for the preparation of the Defence and the ability to conduct an effective cross-examination of the proposed testimony, the Trial Chamber recalls that Witness GTC was included in the initial witness list filed by the Prosecutor on 20 October 2003 and that he was only withdrawn from this list on 25 May 2004. Consequently, the Trial Chamber is of the view that the addition of this Witness does not constitute an addition *per se* but is to be considered as a reinstatement. In addition, the Chamber notes that according to the Prosecution and uncontested by the Defence, the unredacted statements of Witness GTC dated 16 April 2003, February/March 2001, 17 April 2002 and 11 September 2003 were disclosed on 8 October 2003. Therefore, the Chamber finds that the Defence has had enough time and sufficient notice of the content of his prospective testimony to prepare an effective cross-examination of Witness GTC, and will not be prejudiced by his reinstatement in the Prosecutor’s witness list. However, the Trial Chamber finds that in view of the time factor, Witness GTC should be called towards the end of the Prosecution case.

20. Regarding the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictment, the Chamber notes that Witness GTC is

¹⁰ *Id.* at para. 8 (quoting *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, “Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses”, 26 June 2001, para. 19-20).

¹¹ *Id.* at para. 9 (quoting *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, “Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis(E)”, 26 June 2003, para. 14).

¹² *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46T, “Decision on Defence for Ntagerura’s Motion to Amend Its Witness List Pursuant to Rule 73ter (E)”, 4 June 2002, para 10.

expected to testify notably to a speech allegedly given by Casimir Bizimungu and to a distribution of weapons which allegedly took place in his presence at the Umuganda Stadium around mid-May 1994. The Chamber recalls that these specific facts were included in the amended indictment proposed by the Prosecutor and rejected in its entirety by the Chamber in the Decision of 6 October 2003. The Appeals Chamber upheld this Decision on 12 February 2004, considering that some of the proposed amendments contained an expansion of the charges beyond the scope of the indictment.¹³

21. The Trial Chamber recalls that the addition of a witness cannot be used as an opportunity to modify substantially the charges against the Accused. However, the Trial Chamber considers that the proposed testimony of Witness GTC could supply relevant information on certain facts which are sufficiently pleaded in the current indictment, particularly the power structure of the Youth Wings, the training of the militias, the meetings organized by Cabinet Members throughout Rwanda, the distribution of weapons by civilian and military authorities, the instigation and assistance in committing massacres of the Tutsi population in several *Préfectures*, including Gisenyi, before and during the events referred to in the indictment, notably in paragraphs 5.3, 5.19, 5.22 and 6.30.

22. Regarding the credibility of Witness GTC, the Trial Chamber finds that at this stage, to wit during the determination of whether a witness may be reinstated or added to the Prosecutor's witness list pursuant to Rule 73bis(E), the credibility of a witness is not a factor to be considered. The Defence will have the opportunity to challenge the credibility of Witness GTC in cross-examination. Therefore, the Chamber rejects the Defence's arguments in that respect.

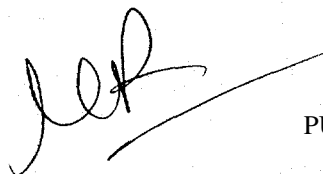
23. Accordingly, the Trial Chamber finds that the prospective testimony of Witness GTC meets the requirements stated in the case of *The Prosecutor v. Bagosora et al.* regarding the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictment as well as the ability of the Defence to conduct an effective cross-examination of the proposed testimony. Therefore, the Trial Chamber considers that the Defence will not be prejudiced by the reinstatement of Witness GTC in the Prosecutor's witness list.

FOR THE ABOVE REASONS, THE TRIBUNAL:

GRANTS the Motion and


ALLOWS the Prosecutor to reinstate Witness GTC in the Prosecutor's witness list:

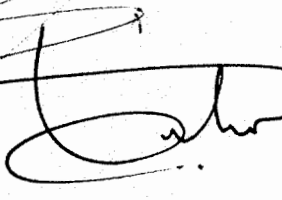
¹³ *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme Bicomumpaka, Prosper Mugiraneza*, Case No. ICTR-99-50-I: "Decision on the Prosecutor's Request for Leave to File an Amended Indictment", 6 October 2003; "Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment", AC, 12 February 2004.



Arusha, 3 September 2004


Khalida Rachid Khan
Presiding Judge


Lee Gacuiga Muthoga
Judge


Emile Francis Short
Judge

