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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: 14 September 2001

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THE PROSECUTOR
v.
FERDINAND NAHIMANA
HASSAN NGEZE
JEAN BOSCO BARAYAGWIZA

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

SEPARATE AND DISSENTING OPINION OF JUDGE ASOKA DE Z GUNAWARDANA ON THE PROSECUTOR'S APPLICATION TO ADD WITNESS X TO ITS LIST OF WITNESSES AND FOR PROTECTIVE MEASURES

Office of the Prosecutor:

Mr Stephen Rapp
Ms Simone Monasebian

Counsel for the Accused:

Ms Diana Ellis QC
Mr John Floyd III
Mr Giacomo Caldarera

SEPARATE AND DISSENTING OPINION OF JUDGE ASOKA DE Z GUNAWARDANA ON THE PROSECUTOR'S APPLICATION TO ADD WITNESS X TO ITS LIST OF WITNESSES AND FOR PROTECTIVE MEASURES

1. I regret that I can not agree with the decision of the majority, to grant the Prosecution leave to amend its list of witnesses by adding Witness X.

The legal basis of the motion

2. The Prosecution has made this application under Rule 73 *bis* (E) where it is stated that, "the Prosecutor may, 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."

The legal significance of Rule 66 and its consequential application

3. The provision in Rule 66 (A) requires that, "no later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial" should be made available to the defence. This is a specific requirement envisaged by the Rules of the Tribunal, to be observed by the Prosecutor. This specific requirement can only be mitigated upon good cause being shown; for Rule 66 states that, "upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the defence within a prescribed time." Thus it is clear that only in the *specific circumstance* of where good cause is shown by the Prosecution, may the addition of witnesses be permitted.

4. At this point, it may be trite to quote the Trial Chamber in *Prosecutor v Blastic*, "the Rules support the idea that all the names of Prosecution witnesses must be disclosed at the same time in a comprehensive document which thus permits the Defense to have a clear and cohesive view of the Prosecution's strategy and to make the appropriate preparations."[1]

[1] Decision on the Production of Discovery Materials, 27 January 1997.

5. This is not the first instance that the Prosecution has moved to vary the list of Prosecution witnesses in this case. It has done so on several occasions prior to this; the chronology of the relevant applications for variation of the list of witnesses and the disclosures is as follows:-

i. End of March - Prosecution disclosed over 300 statements from 221 witnesses.
ii. 28 June 2000 - Prosecution forwarded final list of 97 witnesses to Defence.
iii. 7 August 2000 - Prosecution forwarded amended final list to Defence.
iv. 11, 12, and 13 June 2001 - Prosecution applied to add additional witnesses to its list; but Witness X was not included in this motion. At the hearing of this motion, the Prosecution submitted that the new list represents its final list of witnesses. However, Witness X was not on that list. The Trial Chamber allowed the addition of new witnesses by its decision of 26 June 2001.
v. 11 June 2001- Prosecution filed its present motion to add Witness X to the witness list.
vi. 10 July 2001 – Prosecution applied to call witness AFI. The Chamber refused this motion.

6. It may be noted that the Prosecution had not listed Witness X on the initial list of 97 witnesses to be called, and had not disclosed any statement of Witness X to the defence, despite having disclosed over 300 statements from 221 other witnesses. Therefore, the main issue to be decided is whether the Prosecution has shown good cause, to enable the Chamber to grant leave to call Witness X now.

The requirement of good cause

7. Mr Rapp, Senior Trial Attorney for the Prosecution, submitted that, pursuant to Rule 66, the Prosecution is only required to furnish copies of statements of witnesses who the Prosecution *intends* to call, to testify at trial. And that in the instant case the Prosecution had no such intention with regard to Witness X, since Witness X was not willing to be a witness prior to June 2001. Mr Rapp stated "when we saw his statements, when we saw what information we had, we sought to try to convince this [...] individual to appear as a witness, something, frankly, opposed by the chief of investigations because of his value for ongoing investigations and arrests. And we were able to obtain the consent of that witness. [...] So, up

to now, up until these last several months [...] this witness was not available to us."[2] Thus the alleged unwillingness of Witness X to give evidence in this trial was proffered as an excuse for the Prosecution not listing Witness X before, and as constituting good cause in moving to call that witness now.

8. However, it appears that this position is not borne out when one considers the following facts:-

i. According to the affirmation of the Prosecution's Operations Commander, dated 16 August 2001, he and the Chief of Investigations were initially against making the application to include Witness X in this trial, but, upon reviewing the present state of the Prosecution's case, are *now* convinced of the necessity of Witness X to the Prosecution's case.

ii. It is to be observed that, in the statement/declaration recorded from Witness X, it is not reflected that he was previously unwilling to be a witness.

iii. It appears from the supplemental affirmation of the Prosecution Operations Commander, dated 6 August [sic] 2001, that Witness X had in fact been listed as a witness in a prior trial but was not used because of security reasons.

iv. It is also pertinent to note that Ms Ellis, Counsel for Nahimana, pointed out that Witness X had been treated as a witness by the Prosecution right from the beginning, and his interviews have been recorded as far back as March 1997.

9. It is clear from the above that Witness X had been available to be listed as a witness for the Prosecution for some time, even prior to June 2001. Nowhere in the three affirmations by Prosecution's Operations Commander does it state that, despite the Prosecution's request, the witness was unwilling to testify in this case, prior to June 2001. Rather, it appears that the decision by the Prosecution to include Witness X as a witness in this trial, was taken only recently, not because of any reluctance on the part of the witness, but because of the present state of the Prosecution's case.[3]

10. The second ground proffered by the Prosecution is that Witness X will provide more direct testimony than the other witnesses who are currently listed. In this regard the Prosecution submitted a document, dated 10 September 2001, indicating which aspects of Witness X's evidence were expected to be more direct than the evidence of the seven witnesses who Witness X would replace. According to this document, Witness X will be able to provide more direct evidence than the witnesses currently listed. However, it is to be observed that some of the witnesses who have given evidence already have testified to

[2] Transcripts 5 September 2001, at page 32 and 33 (closed session)
[3] See, Affirmation of the Prosecution Operations Commander, dated 16 August 2001, at paragraph 4.

matters on which Witness X is also expected to testify. In any event, the Prosecution's argument is mitigated by its own submission (in the very same document where it argued that Witness X will provide more direct testimony) that, "a consideration of whether relevant probative evidence is direct or indirect, is best left to the time of evaluation of the evidence after in-court testimony."[4]

11. In the application of Rule 66 in the Bagilishema case, the fact that some witnesses were discovered as a result of on-going investigations, was held to be good cause.[5] In that case the Court granted leave to rely on *only* one of four categories of statements, namely, those statements that had been obtained after the trial had commenced, as a result of further investigations that had been carried out, following an amendment to the indictment.[6] It was noted that the indictment was amended on 17 September 1999 and the said statements were taken on 17, 18, 22 and 23 September 1999. Thus it can be seen that the addition of witnesses had been allowed on the basis that those witnesses had been revealed by ongoing investigations on the charges in the indictment of that case. But the position in the instant case is very different. The transcripts of the interviews of Witness X had been available from 1997. Thus, Witness X was not discovered due to any on-going investigations. This position is confirmed by the averment by the Prosecution that, "the circumstances surrounding Witness X are exceptional as he falls under the special category of witness. [...] It will prejudice further and ongoing investigation of *other persons* if any information regarding the identity and address of this witness is revealed."[7] (Emphasis added) The fact that there may be ongoing investigations involving Witness X, in relation to other accused persons, will not constitute good cause, in the instant case.

Violation of Rule 68

12. The Defence Counsel for Nahimana submitted that the interview transcripts of Witness X contain exculpatory material and, therefore, the Prosecutor has breached her disclosure

[4] Prosecutor's document, dated 10 September 2001, footnote 3

[5] Similarly in Blastic, the Court was of the view that the addition of statements "should be limited to new developments in the investigations." With regard specifically to the addition of new witnesses who's statement had not been disclosed to the defence in conformation with the disclosure timelines, the Chamber noted that the addition of statements or witnesses "must never result in the rights of the defence being circumvented." Decision of 27 January 1997.

[6] Prosecutor vs Ignace Bagilishema, Decision of 2 December 1999.

[7] Prosecutor's *Ex Parte* Application to the Trial Chamber Sitting in Camera for Relief from Obligation to Disclose the Existence, Identity and Statements of New Witness X, dated 11 June 2001, at paragraph 1.

obligations under Rule 68. On 11 September 2001, the Defence submitted a document that provided examples of exculpatory material contained in the nine interview transcripts of Witness X (attached as "Annex A").

13. I am of the view that, the said breach of Rule 68 by the Prosecutor, provides a further reason why the present motion should be denied.

Conclusion

14. For these reasons, I would deny the "Prosecutor's Ex Parte Application to the Trial Chamber Sitting in Camera for Relief from Obligation to Disclose the Existence, Identity and Statements of New Witness X," dated 11 June 2001.

15. Accordingly, the issue of adopting witness protection measures for Witness X, would not arise.

Done in Arusha, on this fourteenth day of September 2001,

Asoka de Z. Gunawardana
Judge
International Criminal Tribunal for Rwanda