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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

ICIR-00-55A-T
28-03-2006
(3221-3217)

Before: Judge Asoka de Silva, Presiding
Judge Flavia Lattanzi
Judge Florence Rita Arrey

Registrar: Mr Adama Dieng

Date: 28 March 2006

THE PROSECUTOR

V.

THARCISSE MUVUNYI

ICTR-2000-55A-T

DECISION ON ACCUSED'S MOTION TO EXPAND AND VARY
THE WITNESS LIST

Office of the Prosecutor

Mr Charles Adeogun-Phillips, Senior Trial Attorney
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Counsel for the Defence

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II composed of Judge Asoka de Silva, Presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (the “Chamber”);

BEING SEIZED of the “Accused’s Motion to Expand and Vary the Witness List”, filed on 20 March 2006 (the “Motion”);

HAVING RECEIVED the

- i “Prosecutor’s Response to Accused’s Motion to Expand and Vary the Witness List Pursuant to Rule 73 *bis* (E)” (*sic*¹), filed on 23 March 2006 (the “Response”); and the
- ii “Defence Reply to the Prosecutor’s Response to the Accused’s Motion to Expand and Vary the Witness List Pursuant to Rule 73 *bis*”, filed on 24 March 2006 (the “Reply”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

NOW DECIDES the Motion pursuant to Rule 73 (A) of the Rules on the basis of written submissions filed by the Parties.

SUBMISSIONS OF THE PARTIES

*The Defence*²

1. The Defence requests the Chamber to grant it leave to expand and vary its list of witnesses by adding a person alternatively known as Witness AOG, Witness X, Witness D, and Witness 006. The Defence asserts that this person recently testified in the “Military II” case as a witness for the Prosecution and has also previously testified in the “Government II” trial.
2. According to the Defence, there is reason to believe that “this witness has exculpatory information pertinent to the outcome of this case”, including evidence that Colonel Gatsinzi was the Commander of ESO and that Muvunyi performed many acts that could show that he did not have actual authority to control soldiers in the Butare area.
3. The Defence submits that since AOG is “a highly protected witness for the Prosecution”, the Defence is unable to determine his actual location or even his real name. The Defence therefore requests the Chamber to order the Witness and Victims Support Section (WVSS) and/or the Office of the Prosecutor (OTP) to assist the Defence in locating Witness AOG and arranging for his testimony.
4. The Defence further submits that Witness AOG “testified that Muvunyi came to him begging for help in controlling violence” and that this shows that Muvunyi lacked actual authority within the meaning of Article 6 (3) of the Statute.

¹ Note that the correct provision governing the Defence’s right to vary its list of witnesses is Rule 73 *ter* (E).

² This is a summary of the primary arguments made in both the Motion and the Reply.



5. Should Witness AOG refuse to testify in this case, argues the Defence, the Chamber may issue a *subpoena* requiring him to testify. The Defence argues further that the Chamber has “ample authority under Rule 98 to order the Prosecutor to produce the witness and his evidence.”

The Prosecution

6. The Prosecution submits that the Defence has failed to show whether or not it has attempted in any way to contact AOG, or even whether AOG has indicated his willingness to testify on behalf of the Defence. The Prosecution further submits that the Defence has not shown whether it is aware of the likely content of AOG’s testimony in the context of this particular trial and that it is not sufficient for the Defence to merely imply that such testimony may be exculpatory.
7. According to the Prosecution, the Chamber should not be requested to issue a futile order, as it is possible that this “highly protected witness” could refuse to testify in this case.
8. The Prosecution asserts that the Defence request comes “too late in the day” to be meaningful for the purposes of this trial; that the application ought to have been made in a timely manner and at an appropriate stage in the proceedings; that the late notice is “highly prejudicial to the Prosecution”; that the Defence has failed to show the interest of justice that will be served or the existence of a good cause to guide the Chamber in determining whether or not to grant leave to vary the witness list; and that AOG’s proposed testimony will be neither new nor material, as most of the Defence witnesses so far have given testimony on matters similar to what is being proposed for AOG.
9. Finally, the Prosecution submits that the Defence has failed to assist the Chamber in making a determination on whether or not to allow this application by failing to produce the exculpatory testimony purportedly made by AOG in the “Military II” and “Government II” trials.

HAVING DELIBERATED

10. The Chamber recalls that pursuant to Rule 73 *ter* (E) of the Rules, after the commencement of the Defence case, the Defence may move the Chamber for leave to vary its list of witnesses, if it considers it to be in the interests of justice. The Chamber is mindful of the rights of the Accused as enshrined in Article 20 of the Statute, and in particular of the provisions of Article 20 (4) (e) guaranteeing the right of the Accused “to obtain the attendance and examination of witnesses on his or her behalf under the same circumstances as witnesses against him or her.”
11. The Chamber notes that in the jurisprudence of the Tribunal, a request for leave to vary the list of witnesses is evaluated in light of “the interests of justice” to be served by such a variation.³ In evaluating the interests of justice, Trial Chambers typically take into consideration such factors as the materiality of the proposed testimony, the complexity of the case, and the level of prejudice to the opposing Party, “balanced against the right of

³ *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, “Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali (Rule 73 *ter* (E) Rules of Procedure and Evidence)”, 26 August 2005, para. 31; *The Prosecutor v. Nahimana et al.* (“Media Case”), 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, paras. 16-20.



the accused to have adequate time and facilities to prepare his Defence and his right to be tried without undue delay.”⁴ Trial Chambers also look at the stage the proceedings have reached, the probative value of the proposed testimony, and the reason for the late discovery of the witness.⁵

12. The Chamber has considered the Defence submission that it has brought the Motion at this late stage in the proceedings because it learnt of Witness AOG only after his recent testimony in the “Military II” case. The Chamber has also given due consideration to the importance the Defence attaches to the proposed testimony of Witness AOG.⁶ In particular, the Chamber takes very seriously the Defence assertion that “this witness has exculpatory information pertinent to the outcome of this case.” In the Chamber’s view, should such an assertion prove to be true, it would have a significant impact on the continuation of these proceedings.
13. The Chamber notes that Witness AOG has previously testified before this Tribunal in at least three other trials,⁷ but that the Defence has not provided any material from any of those trials in support of its assertions.⁸ However, oral submissions by the Defence Counsel tend to indicate that the Defence request to have AOG added to its list of witnesses was motivated by the evidence the witness gave during his most recent appearance.⁹ Therefore, in the interests of justice and to facilitate the proceedings, the Chamber has gone out of its way and has undertaken a thorough review of the transcripts of the witness’s most recent testimony only.
14. Witness AOG testified by closed-video link from The Hague in the case of *The Prosecutor v. Ndindiliyimana et al.*¹⁰ (also known as the “Military II” case) from 20 February to 3 March 2006. Although AOG spent nine days testifying before the Trial Chamber in the “Military II” case, it was only in a small part of his testimony on the ninth and final day that he mentioned the name of the Accused Muvunyi. That was in answer to questions by Defence Counsel during cross-examination.¹¹
15. In the Chamber’s view, none of the statements made by Witness AOG in the *Ndindiliyimana* case is directly related to any of the charges appearing in the Indictment against Muvunyi. Additionally, many of the Defence witnesses who have testified thus far

⁴ *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, “Decision on Prosecutor’s Motion for Leave to Add a Handwriting Expert to His List of Witnesses”, 14 October 2004, para. 11; *Prosecutor v. Nahimana et al.* (“Media Case”), 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. 17.

⁵ *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, “Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E)”, 26 June 2003, paras. 14-22; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-I, “Decision on the Prosecution’s Motion to Vary the Witness List”, 27 August 2004, para. 7.

⁶ *The Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, “Decision on Kamuhanda’s Extremely Urgent Motion for Leave to Vary the List of Defence Witnesses (Rule 73 ter)”, 15 April 2003, para. 7.

⁷ In the cases of *The Prosecutor v. Bagosora et al.* around June 2004; *The Prosecutor v. Karemera et al.* around October 2005; and *The Prosecutor v. Ndindiliyimana et al.* in February – March 2006.

⁸ Although some of Witness AOG’s testimony in those proceedings may have been in closed session, there is no indication that the Defence has requested the Trial Chambers concerned for authorisation to obtain or review the transcripts.

⁹ *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, English transcript of 6 March 2006, p. 3.

¹⁰ Case No. ICTR-2000-56-1.

¹¹ *The Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, English Transcript of 3 March 2006, pp. 14-16, on cross-examination by Defence Counsel for Augustin Bizimungu and pp. 41-42, on cross-examination by Defence Counsel for François-Xavier Nzuwonemeye. (In closed session.)


in these proceedings have made similar general assertions about Muvunyi. Thus there is no indication from those transcripts that the proposed testimony of Witness AOG is material to this case.


16. Furthermore, the Chamber observes that this “highly protected witness” has always testified for the Prosecution in the past. Moreover, the Defence has not provided any reason for the Chamber to believe that even if the Defence were able to locate and interview the witness, he would be willing to testify in Muvunyi’s defence.
17. Additionally, in light of the very advanced stage of these proceedings, and considering the fact that the Defence has already called the final witness on its original list, the Chamber is of the view that it would not be in the interests of justice to allow the Defence Motion.


FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Motion in its entirety.

Arusha, 28 March 2006


Asoka de Silva
Presiding Judge


Flavia Lattanzi
Judge


Florence R. Arrey
Judge

[Seal of the Tribunal]

