



OR: ENG

TRIAL CHAMBER III

**Before Judges:** Dennis C. M. Byron, Presiding  
Gberdao Gustave Kam  
Robert Fremr

**Registrar:** Adama Dieng

**Date:** 7 September 2007

ICTR-01-63-T  
7-9-2007  
(2183-2180)

THE PROSECUTOR

v.

Siméon NCHAMIHIGO

Case No. ICTR-2001-63-T

1001 SEP -7 P 2:05  
A. Byron 07/09/2007  
JUDGE: DENIS TURCOTTE

**DECISION ON THE DEFENCE MOTION FOR LEAVE TO AMEND ITS WITNESS LIST AND FOR ADMISSION OF A JUDGEMENT RENDERED BY A RWANDAN COURT**

*Rule 73bis of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Alphonse Van  
Lloyd Strickland  
Madeleine Schwarz  
Adama Niane

**Defence Counsel:**

Denis Turcotte  
Benoît Henry

## INTRODUCTION

1. The trial in this case began on 25 September 2006. The Prosecution closed its case on 29 January 2007. The second session of the Defence case commenced on 27 August 2007 during which Witness RBN1 is scheduled to testify.

2. On 20 August 2007, the Defence moved the Chamber, under Rule 73 *ter* (E) of the Rules of Procedure and Evidence ("Rules"), to grant permission to vary its witness list by removing Witness RBN1 and by adding Witness RDCB.<sup>1</sup> The Defence also seeks the admission, pursuant to Rule 89(C) of the Rules, of the Judgement delivered by the Cyangugu Court of Appeal in the case of *Laurent Ntimgura et al.* The Prosecution opposes the application.<sup>2</sup>

## DISCUSSION

3. Pursuant to Rule 73 *ter* (E) of the Rules, the Defence may, after the commencement of its case and if it considers it to be in the interests of justice, move the Trial Chamber for leave to vary its list of witnesses to be called. According to the established jurisprudence, the Chamber can order the variation if it is to be in the interests of justice to do so, considering the rights of the accused to have adequate time and facilities to prepare his case, his right to be tried without undue delay, and the materiality of the testimony.<sup>3</sup> When assessing the interests of justice, the Chamber has considered various factors, such as, the probative value of the proposed testimony in relation to that of existing witnesses and allegations in the indictment, the complexity of the case, any prejudice to the opposing party, including the need for the opposing party to have adequate time to conduct investigations and prepare an effective cross-examination, the reasons for adding witnesses, the date on which the proposed witnesses would be called, and the stage of the trial proceedings.<sup>4</sup>

4. In the present case, the Prosecution opposes the addition of Witness RDCB to the Defence witness list. It argues that even if this witness will testify only for 15 minutes, it would be difficult to complete the testimony of all 25 Defence witnesses by 21 September

<sup>1</sup> *Requête de la Défense en modification de sa liste de témoins à décharge et en admission en preuve du jugement Laurent Ntimgura et Consorts de la Cour d'appel de Cyangugu*, filed on 20 August 2007.

<sup>2</sup> Prosecutor's Response filed on 23 August 2007.

<sup>3</sup> *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Decision on the Prosecutor's Request for Leave to Call Six New Witnesses (TC), 20 April 1999, par. 4 and 13; *Prosecutor v. Bagosora, Kabiligi, Ntahakuze, Nsengiyumva*, Case No. ICTR-98-41-T, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis(E) (TC), 26 June 2003, par. 13.

<sup>4</sup> *The Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, Case No. ICTR-98-44-T, Decision on Variance of the Prosecution Witness list, 13 December 2005, para 11.

2007, as scheduled, given the time-estimates for the examination of the witnesses. The Prosecution also contends that it will be severely prejudiced by such amendment to the Defence witness list since it did not get the identifying information of the Defence witnesses 30 days prior to the trial session. In the Prosecution's view, with the addition of Witness RDCB at this late stage, the Prosecution would again not have the benefit of disclosure of personal information of a witness in a timely manner that would allow for proper investigation prior to trial.

5. Contrary to the Prosecution's contention, the Chamber is satisfied that the proposed variation of the Defence list is in the interests of justice. As explained by the Defence, the anticipated testimony of Witness RDCB will bear on the alleged direct involvement of the Accused in the death of five Tutsi and has therefore probative value in relation to the allegations against the Accused.<sup>5</sup> It also appears, according to the explanations provided by the Defence, that the anticipated testimony of RDCB will be the sole evidence adduced by the Defence to rebut the testimony of Prosecution Witness BRD who testified on those deaths. The Chamber is also satisfied that the Defence filed its request within reasonable time as it explains that it is only as a result of recent investigations completed a few days before the filing of its motion, that it became aware of this new witness.

6. The Chamber is further of the view that the addition of Witness RDCB to the Defence witness list will not prejudice the Prosecution. The experience of this trial session has shown the ability of the Prosecution to conduct investigations and prepare the cross-examination of the Defence witnesses despite the late disclosure of their identifying information. Where necessary, the Chamber will be ready to consider granting additional time for the Prosecution to prepare the cross-examination of the witness.

7. In addition, the Chamber notes that the Defence suggests removing from its list Witness RBN1, who was scheduled to testify for one hour and a half, and to replace the witness by Witness RDCB, who will testify for 15 minutes. This will also contribute to ensure that the Accused be tried without undue delay. The Chamber therefore finds in the interests of justice to add Witness RDCB to the Defence witness list and to remove Witness RBN1 from the said list.

8. In the same motion, the Defence also moves the Chamber to admit into evidence the Judgement delivered on 24 July 2002 by the Cyangugu Court of Appeal in the case of

<sup>5</sup> The Defence refers to allegations pleaded at paragraphs 27, 36, 52 and 55 of the Amended Indictment, concerning the death of two Tutsi students named Uzier and Innocent, and the death of three Tutsi girls named Joséphine Mukashema, Marie and Hélène.

*Laurent Ntimugura et al.* The Defence explains that Witness RBN1 – for which it seeks the removal from the Defence list by the same motion – indicated her refusal to testify in this case because she found that she has already given her testimony to this event to the Cyangugu Court of Appeal in the case of *Laurent Ntimugura et al.* The Defence submits that the said Judgement has probative value and is relevant to the allegations contained at paragraphs 21, 26 and 54 of the Indictment. It contends that it is in the interests of justice and the rights of the accused to admit into evidence the said Judgement.

9. Under Rule 89(C) of the Rules, the Chamber has broad discretion to admit any relevant evidence which it deems to have probative value. After reviewing the said Judgement and considering that determinations of courts of any State are not binding on the Tribunal,<sup>6</sup> the Chamber, however, finds that the Defence fails to show its relevancy as well as its probative value.

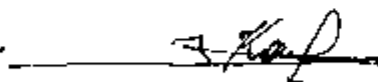
**FOR THOSE REASONS, THE CHAMBER**

- I. **GRANTS** in part the Defence Motion and
- II. **ALLOWS** the Defence to add the witness known under the pseudonym RDCB to its witness list and to remove the witness known under the pseudonym RBN1 from the same list;
- III. **DENIES** the remainder of the Motion.

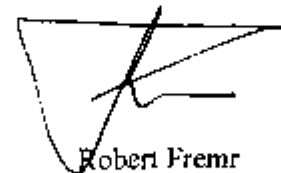
Arusha, 7 September 2007, done in English.



Dennis C. M. Byron  
Presiding Judge



Gbordao Gustave Kam  
Judge



Robert Fremr  
Judge

[Seal of the Tribunal]



<sup>6</sup> See Rule 12 of the Rules of Procedure and Evidence.