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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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ICTR-01-70-T
10-09-2007

(3339-3332)

OR: EN

TRIAL CHAMBER II

Before: Judge Asoka de Silva, Presiding
Judge Taghrid Hikmet
Judge Seon Ki Park

Registrar: Mr Adama Dieng

Date: 11 September 2007

JUDICIAL NOTICE
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ICTR

THE PROSECUTOR

v.

Emmanuel RUKUNDO

Case No. ICTR-2001-70-T

DECISION ON THE DEFENCE MOTIONS FOR ADDITIONAL TIME TO
DISCLOSE WITNESSES' IDENTIFYING INFORMATION, TO VARY ITS
WITNESS LIST AND FOR VIDEO-LINK TESTIMONY, AND ON THE
PROSECUTION'S MOTION FOR SANCTIONS

Office of the Prosecutor:

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INTRODUCTION

1. The trial against Emmanuel Rukundo commenced on 15 November 2006. After presenting 18 witnesses, the Prosecution closed its case on 12 March 2007.

2. On 7 May 2007, the Chamber ordered the Defence to begin its case on 2 July 2007.¹ The Chamber further ordered the Defence to disclose the identifying information of the witnesses they intended to call at least 21 days before the start of the case.² Following a stay of proceedings granted by the Chamber, the Defence case commenced on 9 July 2007.³ On 18 July 2007, the Chamber issued a warning to Lead Counsel for Rukundo pursuant to Rule 46(A) of the Rules of Procedure and Evidence for having failed to disclose the witnesses' identifying information despite several oral and written reminders.⁴ The Chamber again reminded the Defence to immediately comply with the Chamber's Order of 18 July 2007 in a Scheduling Order following a Status Conference on 24 July 2007.⁵

3. On 24 July 2007, the Defence filed a motion requesting additional time for disclosure and seeking leave to vary its witness list pursuant to Rule 73ter(E) of the Rules.⁶ On 27 July 2007, the Prosecution filed a response opposing the motion.⁷ The Defence filed a supplement to its motion containing updated information of the witnesses concerned.⁸ On 16 August 2007, the Defence filed another motion, requesting the video-link testimony of certain witnesses⁹, which was opposed by the Prosecution.¹⁰ The Defence filed a reply to the Prosecution response to the motion for video-link.¹¹ Although ordered by the Chamber on 4 September 2007 to submit any final documentation for this motion by 5 September 2007, the Defence only filed the additional information on 6 September 2007.¹² The Prosecution filed an additional response on 7 September 2007.¹³

4. The Prosecution submitted a related request on 3 September 2007 asking for a ruling that the Defence remains in violation of the Chamber's Orders and for the exclusion of certain witnesses whose information was disclosed towards the end of August 2007.¹⁴ As the

¹ Scheduling Order following the Pre-Defence Conference (TC), 7 May 2007.

² *Id.*

³ Decision on the Motions relating to the Scheduled Appearances of Witness BLP and the Defence Investigator (TC), 4 July 2007.

⁴ Order on Disclosure of Identifying Information of Defence Witnesses (TC), 18 July 2007.

⁵ Scheduling Order Following the Status Conference Held on 24 July 2007 (TC), 24 July 2007.

⁶ Requête en extrême urgence aux fins de modification de la liste des témoins, filed on 24 July 2007 ("First Defence Motion").

⁷ Prosecutor's Response to Defence Request for Leave (sic.) Vary Witness List, filed on 27 July 2007 ("Prosecution Response to First Defence Motion").

⁸ Éléments complémentaires à la requête de la Défense aux fins de modification de sa liste de témoins, filed 31 August 2007.

⁹ Requête aux fins d'autoriser des témoins à décharge à déposer par voie de vidéoconférence, filed on 16 August 2007 ("Second Defence Motion").

¹⁰ Prosecutor's Response to Defence Request for Deposition of Defence Witnesses GSA, SLA, SLB, MCB and TMH by video link, filed on 21 August 2007 ("Prosecution Response to Second Defence Motion").

¹¹ Conclusions en Duplique et Récapitulatives à la Requête aux fins d'autoriser les témoins à décharge à déposer par voie de Vidéoconférence, filed on 28 August 2007 (Defence Reply).

¹² Éléments Complémentaire à la requête aux fins d'Autoriser les Témoins à Décharge à Déposer par Voie de Vidéoconférence, filed on 6 September 2007 (Defence Supplemental Submission).

¹³ Prosecution's Response to Defence Motion for Witnesses to Testify Via Video-Link, filed on 7 September 2007.

¹⁴ The Prosecutor's Motion to Sanction the Defence for Repeated Violations of Orders of this Trial Chamber, filed 3 September 2007.

trial session had already begun and brief arguments were heard on 3 September 2007, the Chamber ordered the Defence to file its response to the Prosecution motion of 3 September 2007 by 5 September 2007.¹⁵ The filing was late.¹⁶

DELIBERATIONS

5. As a preliminary matter, the Chamber notes that since the issues mentioned in the three motions are linked, it will serve judicial economy to address them in one Decision.

6. The Chamber also notes that it issued several orders to compel the Defence to meet its disclosure obligations. Even in complying with these obligations, the Defence did so in a piecemeal fashion spanning until a few days before the start of the second trial session of the Defence case. The Defence has also continually asked for delays to substantiate its motions and did so on at least two occasions. The Chamber strongly discourages the practices of piecemeal disclosure and belated substantiation of motions. To sanction such a stand, the Chamber will not consider the late filings of 6 September 2007 by the Defence, in respect of the motion for video-link and the Prosecutor's motion for sanction.

Additional Time for Disclosure

7. The Defence requests the Chamber to grant it additional time to disclose the identifying information of Witnesses TMG, TMF, EVD, NYD, SLC and SJB until 15 August 2007 and the identifying information of Witness SJA until 28 August 2007. To support its motion, the Defence cites several difficulties in finalising its witness list, including the arrest of the Defence investigator, the refusal of witnesses to testify due to security concerns, the need to find substitute witnesses for those who refuse to testify and several administrative difficulties. The Defence submits that it is in the interests of justice to provide it with adequate time and opportunity to gather the necessary resources to prepare its case.

8. The Chamber recalls its Scheduling Order of 7 May 2007, ordering that the Defence disclose the identifying information of witnesses 21 days prior to the start of its case, that is, on 11 June 2007. The Chamber notes that if the Defence required more time for disclosure, it should have sought leave from the Chamber to do so before 11 June 2007. Since then, the Defence has been in continuous violation of the Chamber's Order of 7 May 2007. The Defence has also continuously been in violation of the Chamber's Orders of 18 July 2007 and 24 July 2007. The Defence has not provided an adequate explanation for its failure to comply with the Chamber's Orders and now asks for even more time to comply. Although it appears that all of the disclosure information has now been filed, the Chamber deplors the late compliance. The request for additional time is therefore denied.

Variation of the Defence Witness List

9. Concerning the request to vary its witness list, the Defence proposes the addition of Witnesses SAE and DIV. The Defence further requests the addition of Witnesses SJD, SLD, RUE and BCD who can substitute for Witnesses SJB, SLC, RUB and BCC respectively. It submits that Witnesses MCD, GSD, CNE, SLC, SJB, BCC, NYE, RUB and TMF will no longer testify in the case. The Defence contends that the proposed modifications are essential for the Accused's defence, and that they will not cause undue prejudice to the Prosecution. In the supplemental filing, the Defence informs the Chamber that it was not able to get to Rwanda until 23 August 2007 for reasons out of its control. The Prosecution responds that it

¹⁵ T. 4 September 2007 (French), p. 79.

¹⁶ Conclusions en réplique à la requête du Procureur aux fins de sanctionner la Défense pour violations répétées des ordonnances de la Chambre, filed on 6 September 2007.

will be prejudiced if the Chamber grants the current application to vary the Defence's witness list because it was done halfway through the trial. It further argues that the Prosecution is already disadvantaged by the Defence's non-compliance with the Chamber's Orders for the disclosure of witness' identifying information.

10. With respect to the Defence's request to vary its witness list, the Chamber recalls that, in accordance with Rule 73ter (E), it has the discretion grant leave to the Defence to vary its witness list if it considers it to be in the interests of justice. Trial Chambers in other cases before this Tribunal have taken the following factors into account in determining variations to the witness list: justifications for the late variation of witness list; the materiality and probative value of the testimony in relation to existing witnesses and allegations in the indictment; the complexity of the case; the potential prejudice to the opposing party; and delays in the proceedings.¹⁷

11. The Chamber agrees however, that Witness RUE be substituted for RUB since there was only some confusion between the witnesses. It further notes that the summary in the Pre-Defence brief for RUB is the same for RUE, and that the Prosecution had sufficient notice of these facts. The Chamber understands that it is necessary to investigate credibility issues of the individual and orders that Witness RUE testify towards the end of the trial session which will give the Prosecution over three weeks to complete this task. This delay in time will avoid any real prejudice to the Prosecution.

12. For the proposed substitution of Witness SLD for Witness SLC, the Chamber notes that Witnesses SLA, SLB and SLC are expected to testify on the events at the St. Léon Minor Seminary. Witness SLC subsequently, for alleged reasons of security, rescinded the promise to testify. Witnesses SLA and SLB are subject to the requests for video-link.¹⁸ The Chamber finds, after reviewing Witness SLD's proposed testimony, that it may be material to the Defence case. SLD is expected to testify on the same events as Witness SLC, the content of whose testimony should be familiar to the Prosecution. Again, in scheduling the testimony towards the end of the Defence case, the Prosecution will be given additional time to avoid any prejudice that would result from the late disclosure of SLD's identifying information.

13. Witness BCC allegedly revoked his promise to testify as a result of the Defence investigator's arrest and the Defence was able to find Witness BCD to substitute on the same facts to which Witness BCC would have testified, as a witness to the Accused's alleged involvement in repulsing the attack at the Nyabikenke trading centre. Following the Defence investigator's arrest, Lead Counsel for Rukundo consistently notified the Chamber that several of her witnesses were very fearful for their security and were refusing to testify. The Chamber accepts the Defence's explanation regarding the reasons for its late departure to Rwanda in late August, which was when Witness BCD was located and his/her identification information disclosed. The Chamber also finds that Witness BCD's potential testimony may be relevant to the charges against the Accused and accepts that he/she be placed in the list. Further, since the Prosecution had sufficient notice of the facts to which Witness BCD will testify, and if the witness is called towards the end of the trial session, there should be no prejudice to the Prosecution to cross-examine this witness.

14. According to the Defence, Witness SJB also refused to testify following the Defence investigator's arrest. The Defence found Witness SJD on 25 August 2007. He/she was

¹⁷ *Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Defence Motion to Vary the Defence Witness List (TC), 28 March 2007, para.3; *Prosecutor v. Théoneste Bagosora et al.*, Decision On Bagosora Motion To Present Additional Witnesses And Vary Its Witness List (TC), 17 November 2006, para. 2.

¹⁸ See the Chamber's decision on this request *infra* at para. 24.



allegedly a direct witness to the aftermath of what happened to the Rudahunga family including being victimized from the same acts. Again, similarly to the reasoning above, the Chamber finds that Witness SJD's prospective testimony may be relevant to the Defence case and a presentation of the evidence towards the end of the Defence case would alleviate the Prosecution handicap.

15. The Defence requests that Witness SAE, whose proposed testimony was not included in the Pre-Defence Brief, and who is not being called as a substitute witness, be added as a witness in its case. The Defence explains that by the witness' position in Kabgayi at the time of the events alleged in the Indictment, the witness could directly refute Rukundo's responsibility for the removal of refugees from several locations in Kabgayi. Witness SAE's personal identification information was disclosed to the Prosecution on 24 July 2007, over one month prior to the witness' prospective testimony. Due to the probative value of the proposed testimony to the Defence case, and given the fact that the Defence has already disclosed to the Prosecution the witness' identification, thereby giving it reasonable time to prepare, the Chamber finds that it should add Witness SAE to the Defence witness list.

16. In its submission of 31 August 2007, the Defence requested that Witness DIV, whose identity was disclosed on 29 August 2007, be added to the witness list. Although the Defence indicates the position that Witness DIV held in the events in Rwanda in 1994, the Chamber notes that the witness will not be called to counter any direct allegations against the Accused and will serve primarily as a character witness on how the Accused assisted others during the month of June 1994. The Chamber notes that it has already heard several other witnesses and even more witnesses are slated to testify on issues of character and how the Accused assisted others throughout the events in Rwanda. Moreover, Witness DIV's proposed testimony is not sufficiently probative at this stage to justify the late addition to the Defence's witness list. The request to add Witness DIV to the witness list is consequently denied.

17. Regarding Witness TMC, the Chamber accepts that the witness' summary was inadvertently excluded from the Pre-Defence Brief and notes that it was subsequently included in a Corrigendum to the Pre-Defence Brief. The Chamber therefore accepts Witness TMC as already being on the Defence witness list and finds no need to make an addition to the witness list.

18. Finally, the Chamber also accepts the Defence's submission to withdraw Witnesses MCD, GSD, CNE, SLC, SJB, BCC, NYE, RUB and TMF from the witness list as being in the interests of justice and for reasons of judicial economy.

Request for Sanctions

19. The Prosecution's motion filed on 3 September 2007 asks the Chamber to exclude the testimonies of Witnesses TMG, EVD, SJD, BCD, and DIV due to the Defence's continuous violations of the Chamber's Orders and the Defence's delay in disclosing their identities and summaries of potential evidence. The Defence explains in its response that it had difficulty receiving permission from the Registry to go on mission to Rwanda. As a result, the team only arrived in Rwanda at the end of August. The Defence reiterates that it disclosed the required information as soon as it was available.

20. As a result of the Chamber's evaluation of the individuals proposed to be added to the witness list, including the consequence of the Defence's late disclosure of identifying information, the Chamber has in effect, responded to the Prosecution's motion for sanctions, except for the request regarding Witnesses TMG and EVD. The Pre-Defence Brief submitted on 1 June 2007 included a summary of Witnesses TMG and EVD's proposed testimonies.



Although it is true that the Defence only disclosed the entirety of Witness TMG's identification information on 27 August 2007 and Witness EVD's on 29 August 2007, the Defence did disclose what it had regarding the witnesses, including the witness' name, profession, and where the witness presently lives and lived in 1994 in a letter to the Prosecution filed on 27 July 2007. The Chamber finds that the summary in the Pre-Defence Brief and the initial details of Witnesses TMG and EVD's identification submitted over one month ago are sufficient notice for the Prosecution to prepare for cross-examination. The Prosecution request to exclude Witnesses TMG and EVD is therefore denied.

Testimony via Video-Link

21. In its second motion, the Defence requests the Chamber to grant that the testimonies of Witnesses SLA, SLB, MCB, GSA and TMH be heard via video-link. The Defence also requests permission to submit the supporting documentation for the requests regarding Witnesses TMH and SLB within ten days of the filing of the Motion, and later asks to have until 30 August 2007 for this task. It was only on 6 September 2007, that the Defence submitted an e-mail from WYSS stating that Witnesses TMH and SLB were to testify via video-link.

22. The Prosecution claims that the Defence motion for video-link testimony is without justification, since the Defence has not established the exceptional circumstances necessary for the authorisation of video-link testimony.

23. With respect to the Defence request for video-link testimony, the Chamber recalls the general principle articulated in Rule 90(A) that "witnesses shall [...] be heard directly by the Chamber." Nonetheless, the Chamber has the discretion to hear testimony by video-link in lieu of physical appearance for purposes of witness protection under Rule 75, or where it is in the interests of justice to do so. In determining the interests of justice, the Chamber has to assess the importance of the testimony, the inability or unwillingness of the witness to travel to Arusha, and whether a good reason has been adduced for that inability and unwillingness. The burden of proof lies with the party making the request.¹⁹

24. The Chamber notes the Defence submission that Witnesses SLA and SLB are the only two witnesses who will testify on the allegations against the Accused regarding the ordering, instigating, aiding or abetting the killings of Tutsi refugees at the Saint Léon Minor Seminary. The Defence also submits that both Witnesses SLA and SLB will refute the allegations of sexual assault levelled by Prosecution Witness CCH. The Chamber therefore recognises the importance of the testimony of these two witnesses. The Chamber takes further note of the Defence submission and supporting documentation²⁰ from Witness SLA who is willing to testify only by video-link because of security concerns affecting his family in Rwanda, following the arrest of the Defence investigator and the disclosure of the witness's status as a Defence witness. In light of the importance of SLA's testimony and the documentation of his unwillingness to travel to Arusha, the Chamber finds that a sufficient

¹⁹ *Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-T, Decision on the Prosecutor's Urgent Motion for Witnesses BPA, BLR and BLN to give Testimony Via Video-link (TC), 14 February 2007; *Prosecutor v. Augustin Bizimungu et al.*, Case No. ICTR-00-56-T, Decision on the Prosecution Request for Witness Romeo Dallaire to Give Testimony by Video-Link (TC), 15 September 2006, para. 13; *Prosecutor v. Théoneste Bagasora et al.*, Case No. ICTR-98-41-T, Decision on Nsengiyumva Motion for Witness Higaniro to Testify by Video-Conference (TC), 29 August 2006, para. 3; *Prosecutor v. Sylvain Nsabimana et al.*, Case No. ICTR-98-42-T, Decision on Sylvain Nsabimana's Extremely Urgent – Strictly Confidential – Under seal Motion to Have Witness AGWA testify via Video-link, 17 August 2006, para. 8.

²⁰ Annexe 1 : Courriel adressé par le témoin SLA à la Défense le 23 juin 2007



showing has been made that video-link testimony is necessary. The Chamber recalls that the Defence indicated that it would provide similar justification for the video-link testimony, which was only filed on 6 September 2007. As noted above, the Chamber is not considering this submission. Even if the Chamber were to consider the submitted justification of 6 September 2007, it would not have granted the Defence request. The submission only consisted of a sentence from WVSS stating that Witness SLB will testify via video-link, which the Chamber views as insufficient documentation to warrant an order in this case.

25. The Chamber recalls that Witness GSA is scheduled to give material testimony on the events at the Kabgayi Major seminary. The Chamber considers that it is important to hear Witness GSA, in addition to the other witnesses who will also testify on the same set of allegations, including Witnesses GSB, GSC and SJC. The Chamber notes the Defence submissions and attached correspondences²¹ indicating the difficulties encountered by Witness GSA to leave his place of work in order to travel to testify before the Tribunal. The Chamber therefore grants that Witness GSA's testimony be heard by video-link.

26. The Defence submits that Witness MCB will testify on the role of military chaplains and the allegations of extremism and Witness TMH will testify on allegations relating to Nyakibanda Seminary prior to 1994, and the character of the Accused. The Chamber notes that the Defence has already called and intends to call more witnesses to cover the same issues. The Chamber recalls that in the first session of the Defence case, Witnesses NYA, NYC and EVB testified on the events at the Nyakibanda Seminary, and Witnesses TMA and EVB testified on the role of military chaplains. According to the Pre-Defence Brief and the information tendered on the witnesses to testify in the upcoming session, it is apparent that Witnesses RUA and NYD will give evidence on the Nyakibanda Major Seminary allegations and Witnesses MCC, BCA and RUC will testify on the role of military chaplains and against the allegations of extremism. The Chamber finds therefore that the potential testimonies of Witnesses MCB and TMH would be cumulative at best, and is not inclined to make provision for video-link testimony to hear these two witnesses.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence request for additional time in disclosing the witnesses identifying information and **ORDERS** that any remaining disclosure be done immediately;

GRANTS IN PART the Defence request to vary the witness list pursuant to Rule 73ter (E) permitting the addition of Witnesses RUE, SLD, BCD, SJD, SAE, and TMC and deletion of Witnesses MCD, GSD, CNE, SLC, SJB, BCC, NYE, RUB and TMF, and **DENIES** all other aspects of the motion for variation;

GRANTS IN PART the Defence request for video-link testimony by allowing Witnesses SLA and GSA to testify via video-link, and **DENIES** all other aspects of the motion; and

INSTRUCTS the Registry, in consultation with the Parties, to make the appropriate arrangements for the video-link testimony of Witnesses SLA and GSA.

ORDERS that each party have one representative at the location of the witness' testimony when taken via video-link.

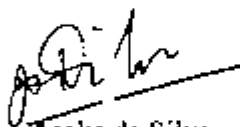
²¹ Annexe 3: Echange de courriels entre GSA et le Conseil principal



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CONSIDERS moot the Prosecution's motion for sanctions concerning the witnesses excluded by the other motions at issue in the decision and **DENIES** the remainder of the motion.

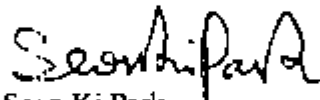
Arush, 11 September 2007



Asoka de Silva
Presiding Judge



Taghrid Hikmet
Judge



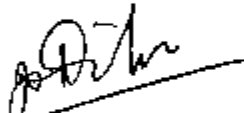
Seon Ki Park
Judge



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Arusha, 11 September 2007


Asoka de Silva
Presiding Judge


Taghrid Hikmet
Judge


Seon Ki Park
Judge

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