



UNITED NATIONS  
NATIONS UNIES

**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

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OR: ENG

**Before:** Judge Inés Mónica Weinberg de Roca, Presiding  
Judge Khalida Rachid Khan  
Judge Lee Gacuiga Muthoga

**Registrar:** Adama Dieng

**Date:** 9 October 2007

**THE PROSECUTOR**

v.

**Protais ZIGIRANYIRAZO**

**Case No. ICTR-2001-73-T**

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**DECISION ON MOTION TO VARY THE DEFENCE WITNESS LIST**

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

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**Office of the Prosecutor:**

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**Defence Counsel:**

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## INTRODUCTION

1. The Defence requests that the Chamber allow it to add four witnesses and remove 15 witnesses from its revised witness list.<sup>1</sup> The Prosecution filed a response in opposition to the Defence Motion,<sup>2</sup> and the Defence replied to the Prosecution.<sup>3</sup> One of the four proposed additional witnesses, Dr. Bernard Lugan, is offered as an expert, and the Defence has filed a Notice of the filing of his expert report pursuant to Rule 94 *bis* of the Rules of Procedure and Evidence.<sup>4</sup> The Prosecution objects to Dr. Lugan's qualifications and opposes the admission of his statement.<sup>5</sup>

## DISCUSSION

2. Rule 73 *ter* (E) of the Rules of Procedure and Evidence allows the Defence to move the Trial Chamber to vary its witness list "if it considers it to be in the interests of justice". Trial Chambers have allowed either party to vary its witness list upon a showing of good cause and where the requested variance is in the interests of justice.<sup>6</sup> Relevant factors include the materiality and probative value of the testimony in relation to existing witnesses and allegations in the Indictment; the complexity of the case; prejudice to the opposing party; justifications for the late addition of witnesses; and delays in the proceedings.<sup>7</sup>

3. The Defence seeks to add BNZ117, BNZ119, and BNZ120 as factual witnesses, and Dr. Bernard Lugan as an expert witness. The Defence explains that it discovered BNZ120 in May 2007, BNZ117 in late March 2007, and BNZ119 in April 2007. The Defence submits that BNZ120 is necessary to contradict Prosecution witness Michel Bagaragaza regarding the alleged presence of the Accused in Rubaya on 9 April 1994 as well as allegations that the Accused led a group of Presidential Guard to eliminate Tutsi

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<sup>1</sup> Motion to Vary the Defence Witness List Prior to the November 2007 Hearings, filed 20 August 2007 ("Defence Motion").

<sup>2</sup> Prosecutor's Response to the Defence Motion to Vary the Witness List, filed 24 August 2007 ("Prosecution Response").

<sup>3</sup> Reply to Prosecutor's Response to Motion to Vary the Defence Witness List Prior to the November 2007 Hearings, filed 26 August 2007 ("Defence Reply").

<sup>4</sup> Notice of the Filing of Expert Report of Dr. Bernard Lugan, filed 27 August 2007 ("Notice of Expert Report").

<sup>5</sup> Prosecutor's Notice of Objection to Qualifications and Statement of Dr. Bernard Lugan, filed 7 September 2007 ("Prosecution Objection to Expert Qualifications").

<sup>6</sup> Decision on the Defence Motion to Vary the Defence Witness List to Add M. Gaspard Musabyimana, 13 April 2007 (TC), para. 2; Decision on the Defence Motion to Vary the Defence Witness List (TC), 28 March 2007, para. 3 (citing *Prosecutor v. Karemera et al.*, Decision on Prosecutor's Motion to Vary its Witness List (TC), 2 October 2006, para. 3; *Prosecutor v. Musema*, Decision on the Prosecutor's Request for Leave to Call Six New Witnesses (TC), 20 April 1999, paras. 4, 13; *Prosecutor v. Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, para. 13).

<sup>7</sup> Decision on the Defence Motion to Vary the Defence Witness List to Add M. Gaspard Musabyimana, 13 April 2007 (TC), para. 2; Decision on the Defence Motion to Vary the Defence Witness List (TC), 28 March 2007, para. 3 (citing *Prosecutor v. Bagosora et al.*, Decision on Bagosora Motion to Present Additional Witnesses and Vary its Witness List (TC), 17 November 2006, para. 2; *Prosecutor v. Mpambara*, Decision on the Prosecution's Request to Add Witness AHY (TC), 27 September 2005, para. 4).

survivors of the attack at Kesho Hill; BNZ117 is necessary to contradict Prosecution witness AVY on the alleged presence of the Accused at an April 1994 meeting at Gisenyi Stadium; BNZ119 is necessary to contradict Prosecution evidence regarding the existence of a roadblock near the house of the Accused in Kiyovu; Dr. Lugan's testimony is necessary to contradict Prosecution witnesses Dr. Alison Des Forges, Sagahutu, and Mr Mfizi, among others, and the Defence submits that his expert evidence will contradict the Prosecution's theory of conspiracy.<sup>8</sup>

4. The Prosecution opposes the Defence Motion, arguing that the proposed testimonies of BNZ120, BNZ117, and BNZ119 are duplicative and their evidence would be of little probative value. The Prosecution, however, does not point to a single prior Defence witness who has testified specifically on the events and issues listed above, presumably leaving this analysis for the Chamber. The Prosecution challenges Dr. Bernard Lugan's expertise regarding the *Akazu* and the genocide, and suggests that his proposed testimony is also duplicative.

5. Regarding the materiality and probative value of the proposed additional witnesses, the Chamber notes that the proposed testimonies of BNZ117, BNZ119, and BNZ120 are material to issues raised in the Indictment and responsive to allegations made by Prosecution witnesses. The subjects to be treated by Dr. Lugan also concern—at least in part—issues raised in the Indictment and allegations made by Prosecution witnesses.

6. The Defence Motion includes an approximate schedule for the appearance of witnesses for the final session of these proceedings, which is scheduled to commence on 19 November and conclude on 14 December 2007. This schedule includes the appearance of 11 witnesses, including the four proposed additional witnesses. The Defence estimates that it can possibly fit the testimony of these 11 witnesses into three of the four weeks allotted for completion of the Defence case. Moreover, the Defence proposes to drop 15 witnesses from its revised witness list. As such, the Chamber is satisfied that the addition of witnesses BNZ117, BNZ119, BNZ120, and Dr. Lugan will not delay the proceedings.

7. The Chamber is also satisfied that the Prosecution will not be prejudiced by the addition of these witnesses. The Defence Motion was filed on 20 August 2007, three months prior to the commencement of the next session. In confidential annexes to the Defence Motion, the Defence provided the Prosecution with will says and the identities of BNZ117, BNZ119, and BNZ120, as well as the CV and a summary of the subjects to be treated by Dr. Lugan.<sup>9</sup> The Defence filed Dr. Lugan's proposed expert report on 27 August 2007.<sup>10</sup> The Chamber considers nearly three months to be an adequate period for the Prosecution to prepare to cross-examine these witnesses.

8. The Chamber allows the Defence to vary its witness list to add witnesses BNZ117, BNZ119, BNZ120 and Dr. Bernard Lugan because their addition does not prejudice the Prosecution and will not cause undue delay. The Chamber reserves its

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<sup>8</sup> Defence Motion, paras. 27-28; 36-37; 44, 46; 48-49.

<sup>9</sup> Defence Motion, Annexes A, B, C1 & C2, and D.

<sup>10</sup> Notice of Expert Report.

decisions on Dr. Lugan's qualification as an expert and on its acceptance of his statement into evidence until after the *voir dire*.

9. The Chamber also accepts the Defence's removal of witnesses BBB, PP2, BJPC, Willy Biot, BCA, RDP69, BBBB, AT, AAB, Arusha3, LRS, Arusha4, Srl, Abc, and Arusha1.

10. The Defence submits that it is still looking for other witnesses. The Chamber reiterates that the upcoming session, scheduled to commence on 19 November 2007 and to close on 14 December 2007, is the final session allotted for this case. The Chamber expressed this position during the Status Conference of 13 April 2007, and Defence Counsel stated that he was committed to act within this framework.<sup>11</sup>

11. The Prosecution called 24 witnesses against the Accused. To date, the Defence has brought 35 witnesses, and is scheduled to bring 11 more witnesses in the November-December 2007 session, including the Accused, for a total of 46 witnesses. The Chamber is authorised to limit the length of time and the number of witnesses allocated to the defence case. Investigations and the search for witnesses cannot continue for an indefinite period of time. Remaining mindful of the rights of the Accused and having considered the complexity of the Accused's case, the Chamber notes that the upcoming session is adequate for the Accused to conclude the presentation of his defence.<sup>12</sup> The Defence should therefore prepare to close its case by 14 December 2007, and should manage its evidence to ensure that those witnesses most vital to its case will complete their evidence within this time frame, as no additional time will be allocated.

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<sup>11</sup> T. 13 April 2007, pp. 1-2.

<sup>12</sup> *Cf.*, *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List (AC), 21 August 2007.

**FOR THE FOREGOING REASONS, THE CHAMBER**

**GRANTS** the Defence Motion;

**ORDERS** the Defence to file its revised witness list including witnesses BNZ117, BNZ119, BNZ120, and Dr. Bernard Lugan and removing witnesses BBB, PP2, BJPC, Willy Biot, BCA, RDP69, BBBB, AT, AAB, Arusha3, LRS, Arusha4, Srl, Abc, and Arusha1 within 7 days from the date of this Decision.

Arusha, 9 October 2007.

Inés Mónica Weinberg de Roca  
Presiding Judge

Khalida Rachid Khan  
Judge

Lee Gacuiga Muthoga  
Judge

[Seal of the Tribunal]