



UNITED NATIONS
RATONNA 0018

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

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

Registrar: Adama Dieng

Date: 4 December 2008

The PROSECUTOR

v.

Augustin NDINDILYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU

Case No. ICTR-00-56-T

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DECISION ON NDINDILYIMANA'S MOTION TO RECALL IDENTIFIED PROSECUTION WITNESSES AND TO CALL ADDITIONAL DEFENCE WITNESSES

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Mr Fabien Segatwa and Mr Seydou Doumbia for Innocent Sagahutu

INTRODUCTION

1. On 22 September 2008, the Chamber ruled that the Prosecution had violated its disclosure obligations under Rule 68 of the Rules of Procedure and Evidence ("Rules") with respect to a large number of documents that were in his possession and ordered the Prosecution to immediately disclose the relevant documents to the Defence.¹ The Chamber also ruled that the Defence teams could, if they wish, file Motions to recall identified Prosecution Witnesses for further cross-examination on the basis of the exculpatory material or seek leave to call additional Defence witnesses.

2. On 6 October 2008, the Defence for Ndindiliyimana filed a Motion requesting the Chamber to recall a total of 20 identified Prosecution witnesses to confront them with the disclosed exculpatory statements that were not at the Defence's disposal when they cross-examined those witnesses during the Prosecution's case. The Defence seeks to recall Prosecution Witnesses FAV, GFM, GFS, GFT, GFR, KF, GCB, WG, DBJ, GLJ, ATW, ZA, ANA, ANH, EK, ANC, AMW, KJ, Dr. Alison des Forges and General Dallaire.² The Prosecution opposes the recall of Prosecution Witnesses GCB, GLJ, DBJ, ATW, ZA, WG, Dr. Alison des Forges and General Dallaire.³

3. Ndindiliyimana also requests the Chamber to call NB, PCK, CR, JDT, JVN, LR, JH, FU, DM, NC, JPB and AD as additional Defence witnesses. These persons are authors of the exculpatory statements in respect of which the Chamber found the Prosecution to have been in violation of its Rule 68 obligations. The Prosecution opposes calling NB and CR as additional witnesses and avers that the Defence has not demonstrated the relevance of their potential testimony to this case.

4. Furthermore, the Defence submits that it is not in the interests of justice, the accused or the Tribunal to prolong this trial. Therefore, the only fit and just remedy is to admit the exculpatory information from the newly disclosed statements and to direct a verdict of acquittal on all charges. The Defence further submits that an order for the provisional release of the Accused Ndindiliyimana should be made pending a decision on the recall of the aforementioned witnesses. The Prosecution opposes the admission into evidence of the disclosed statements and submits that the admission of such statements will not assist the Chamber in its deliberations. Moreover, the Prosecution argues that the admission of the statements will contravene Rules 89, 90 and 92bis of the Rules. The Prosecution also opposes the request for provisional release of the Accused.

DELIBERATIONS

Recall of Prosecution Witnesses and Calling Additional Defence Witnesses

5. The Chamber notes that the determination of a suitable remedy for the Prosecution's violation of the Rule 68 obligation is a matter that falls within the Chamber's inherent power and responsibility to secure justice and ensure a fair trial for the Accused persons.⁴ According to the Tribunal's jurisprudence, a Chamber may order the recall of a witness when the party

¹ Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations pursuant to Rule 68, 22 September 2008 ("Rule 68 Decision").

² Augustin Ndindiliyimana's Motion to Recall Prosecutor (sic) Witnesses Against him and to Call 12 More Witnesses for the Defence, filed on 6 October 2008, ("Ndindiliyimana's Motion").

³ The Prosecutor's Consolidated Response to Motions filed by Accused François-Xavier Nzuwonemeye, Augustin Ndindiliyimana and Augustin Bizimungu, in compliance with the Trial Chamber's Order in the "Decision on Defence Motions Alleging Violations of the Prosecutor's Disclosure Obligations Pursuant to Rule 68" dated 22 September 2008, filed on 13 October 2008 ("Prosecutor's Response").

⁴ Rule 68 Decision, para. 61.



seeking such recall demonstrates "good cause" in the sense of a substantial reason amounting in law to a legal excuse for failing to perform a required act.⁵ To determine whether good cause has been shown, the Chamber must assess: (1) the purpose for which the witness will testify; and (2) the reasons why the witness was not questioned on these matters earlier.⁶ Moreover, in determining whether to recall a witness, the Chamber must consider the right to be tried without undue delay as well as concerns of judicial economy. The Chamber must only recall a witness in the most compelling circumstances where the evidence is of significant probative value and not of a cumulative nature.⁷

6. The Chamber further notes that the fact that it found the Prosecution to have violated its Rule 68 disclosure obligation does not mean that the Chamber will automatically grant the remedies sought by the Accused. In determining the Defence requests, the Chamber will take into consideration the rights of the Accused to a fair trial including the right to examine witnesses called for and against them, and the right to be tried without undue delay.

7. With respect to the request for additional witnesses, the Chamber recalls that it may, in exceptional circumstances, permit a Party to re-open its case for the introduction of new evidence where the Party demonstrates that with reasonable diligence, the evidence could not have been identified and presented during its case in chief.⁸ In exercising its discretion whether to grant a request for additional witnesses, the Chamber will take into account the probative value of the evidence and the need to ensure a fair trial. Furthermore, the Chamber will consider the advanced stage of the trial at which the request is made, the potential delay in the trial and the effect of bringing new evidence against one accused in a multi-defendant case.⁹ The Chamber notes that in this case, the request to introduce new evidence comes from the Defence. The Chamber will therefore have to take into account the rights of the other co-accused to a trial without undue delay, as they are each entitled to the same rights as if they were being tried separately.¹⁰

The Nyaruhengeri Events

8. The Defence for Ndindiliyimana seeks to recall Prosecution Witnesses FAV, GFM, GFS, GFT and GFR in order to confront them with the disclosed statements of JH, DM and

⁵ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Motion to Recall Prosecution Witness AOB for Cross-Examination (TC), 19 September 2005, para. 2; Decision on Nsengiyumva Motions to Call Doctors and to Recall Eight Witnesses (TC), 19 April 2007, para. 16; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Recall Prosecution Witness Ahmed Mbonyunkiza (TC), 25 September 2007, para. 5.

⁶ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Emergency Motion to Recall Witnesses for Further Testimony (TC), 5 June 2008, para. 9.

⁷ *Bagosora et al.*, Decision on the Prosecution Motion to Recall Witness Nyanjwa (TC), 29 September 2004, para. 6; *Bizimungu et al.*, Decision on Prosper Mugiraneza's Emergency Motion to Recall Witnesses for Further Testimony (TC), 5 June 2008, para. 10.

⁸ *Prosecutor v. Delalic et al.*, Case No. IT-96-21-A, Judgement (AC), 20 February 2001, paras. 283, 288; *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Prosecution Joint Motion for re-opening its Case and for reconsideration of the 31 January 2006 Decision on the Hearing of Witness Bagaragaza via Video-link, 16 November 2006 (TC), paras. 15, 16; citing *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex (TC), 13 December 2005, para. 12; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Nyiramasuhuko's Motion for Disclosure of Documents under Rule 68 and for Re-opening of her Case, 29 April 2008 (TC), para. 49.

⁹ *Delalic et al.*, Judgement (AC), 20 February 2001, para. 283; *Prosecutor v. Nchamihigo*, Case No. ICTR-01-63-T, Decision on Defence Motion in Order to Admit into Evidence the Certified Copy Conform to the Original of the Extrajudicial Declaration of Prosecution Witnesses (TC), 14 August 2007, para. 7.

¹⁰ Rule 82 (A) of the Rules provides that "In joint trials, each accused shall be accorded the same rights as if he were being tried separately."

AD which refer to the activities of gendarmes stationed at Ndindiliyimana's residence at Nyaruhengeri commune during the 1994 events in Rwanda.

9. The Chamber notes that JH's statement indicates that gendarmes stationed at Ndindiliyimana's residence in Nyaruhengeri were not responsible for the crimes that took place at Nyaruhengeri as alleged in paragraphs 73, 74 and 75 of the Indictment. This contradicts the Prosecution evidence given by: Witness FAV who, among other things, blames gendarmes at Ndindiliyimana's residence for supplying weapons and participating in the attack on Kansi Parish; Witness GFS who told the Chamber that gendarmes guarding Ndindiliyimana's house supplied weapons to *Interahamwe* and collaborated with the latter to attack refugees at Kansi parish; and Witness GFR who also blames those gendarmes for inciting *Interahamwe* to kill Tutsis in Nyaruhengeri, for supplying weapons with which Tutsis were killed, and for participating in the attack on Kansi parish. The Chamber finds that the inconsistencies between the evidence of these witnesses and the statement of JH is a plausible reason to recall Witnesses FAV, GFS and GFR and further cross-examine them based on JH's statement.

10. The Chamber notes the request to recall Prosecution witnesses FAV, GFM, GFS, GFT and GFR in order to confront them with the disclosed statements of DM and AD. The Chamber has reviewed the statements of AD and DM and does not find their contents to be relevant to the events at Nyaruhengeri. The Chamber notes that AD stated that he was not aware of the conduct of the gendarmes guarding Ndindiliyimana's residence at Nyaruhengeri nor was he aware of the massacres at Kansi Parish. The Chamber notes that DM stated he did not go out to the field and had not been to Nyaruhengeri commune in particular. He further stated that he did not hear that gendarmes stationed at Ndindiliyimana's residence in Nyaruhengeri committed any atrocities. The Chamber notes that the identified Prosecution witnesses testified to events that they witnessed at Nyaruhengeri and therefore cross-examining them further on the basis of the statements of AD and DM will not serve any discernible evidential purpose since the authors of these statements do not claim to have witnessed the events in question. The Chamber also notes that the Defence for Ndindiliyimana seeks to call AD and DM as additional witnesses. The Chamber has already held that the statements of AD and DM are not relevant to the events that unfolded in Nyaruhengeri. The Chamber therefore denies the Defence request to call AD and DM as additional witnesses.

11. The Chamber finds that in view of the similarity between the evidence of the Prosecution witnesses that the Defence intends to recall, recalling all five of the identified witnesses will protract the proceedings unnecessarily. The Chamber is of the view that recalling Prosecution witnesses FAV, GFS and GFR will suffice for the purposes of redressing the prejudice suffered by the Defence as a result of the Prosecutor's violations of his Rule 68 disclosure obligations.

12. Given the serious nature of the allegations facing the Accused in relation to the events at Nyaruhengeri commune, the Chamber further finds that it will be in the interests of justice and a fair trial to allow Ndindiliyimana's Defence to call JH as an additional witness. The Chamber notes that the existence of JH's statement became known to the Defence after the Prosecution's late disclosure pursuant to the Chamber's Order. Therefore, even with the exercise of reasonable diligence, the Defence could not have called him to testify earlier.

Nyamirambo and Kigali Ville Events

13. Ndindiliyimana seeks to recall Prosecution Witnesses GCB and WG on the basis of JDT's statement that the Accused Ndindiliyimana sent a telegram to the commander of the



Gendarmerie in Nyamirambo requesting him to do everything to prevent people from killing each other following President Habyarimana's death. The Defence submits that this contradicts GCB and WG's evidence that gendarmes collaborated with *Interahamwe* to kill Tutsis at St. André, in Nyamirambo area. The Chamber does not agree with the Defence submission. JDT's statement about the telegram, even if true, does not necessarily suggest that gendarmes did not collaborate with *Interahamwe* to commit crimes in Nyamirambo. It is noteworthy that neither Prosecution Witness GCB nor WG spoke about a telegram from Ndindiliyimana or about the internal workings of the gendarmerie force. In addition, the Defence has not shown how any of these witnesses could have known about a telegram from the gendarmerie Chief of Staff addressed to another senior officer. Moreover, the Chamber recalls that Prosecution Witness WG was extensively cross-examined by Counsel for Ndindiliyimana on this particular issue and was confronted with the statement of Defence Witness DH 91 in relation to the role of the gendarmes in the events that unfolded in the Nyamirambo area. Consequently, further cross-examining Witnesses WG and GCB on the contents of JDT's statement will be of little or no probative value to the Chamber. The Chamber finds that the Defence has failed to show good cause for the recall of Prosecution Witnesses GCB and WG. The request is therefore denied.

14. Ndindiliyimana seeks to recall Prosecution Witness GLJ for further cross-examination on the basis of JVN's statement in which he describes certain actions by the préfet of *Kigali-rurale* in 1994. The Defence submits that the description of the préfet's actions refutes GLJ's evidence about crimes alleged against the gendarmes in Nyamirambo area. The Chamber notes that in its original Motion alleging violation of the Prosecution's Rule 68 obligations, Ndindiliyimana's Defence did not seek the disclosure of this statement and never alleged that it was the subject of a disclosure violation. However, even if that were not the case, the Chamber does not find that this aspect of JVN's statement warrants the recall of Witness GLJ. The fact that a certain local government officer allegedly prevented gendarmes from operating in his prefecture in a bid to give the *Interahamwe* free rein, does not *per se* contradict Prosecution evidence that gendarmes under Ndindiliyimana's command actually committed crimes in Nyamirambo. The Defence has therefore failed to show good cause for Witness GLJ's recall and the request is denied.

15. With regards to the request to recall Prosecution Witness ATW, the Chamber notes that the Defence makes a blanket statement that this witness testified about collaboration between the gendarmes and the *Interahamwe* at St. Famille and Muhima areas of Kigali. The Defence does not demonstrate how this testimony is relevant to any of the exculpatory statements, nor does it seek any specific remedy in respect of Witness ATW. The Chamber therefore finds that the Defence has failed to show good cause for recalling Witness ATW.

16. With regards to the request to recall Prosecution Witness ZA, the Chamber notes that the Defence for Ndindiliyimana has made no attempt to furnish the Chamber with any reasons to justify the calling of Witness ZA. Furthermore, the Chamber notes that the Prosecution does not intend to use Witness ZA's testimony relating to the killing of refugees at St. Famille to incriminate the Accused Ndindiliyimana.¹¹ This obviates the need to recall Prosecution Witness ZA.

17. Ndindiliyimana's Defence refers to LR's statement which states that "the Gendarmerie provided its own protection" and also sought to protect the refugees at the Hotel Mille Collines, St. Famille, St. Paul, St. Michel and other locations where displaced persons were being sheltered. However, the Defence does not connect this statement to the

¹¹ See T. 24 May 2006, p. 33.

Chamber's Rule 68 Decision, the evidence of any of the prosecution witnesses, and fails to say how it intends to use this statement. The Defence merely requests that LR be called as an additional Defence witness. The Chamber reiterates that it is the responsibility of the moving party to formulate its submissions fully and clearly. The Appeals Chamber has frequently held that the Tribunal cannot be expected to consider a party's submissions in detail if they are "obscure, contradictory, vague or if they suffer from other formal and obvious deficiencies."¹² Although the Appeals Chamber has stated this standard with respect to submissions on appeal, the Chamber has no doubt that it is equally applicable to submissions before the Trial Chamber. Having failed to clearly articulate its arguments about LR's statement, the Defence has not convinced the Chamber that a good cause exists to call LR as an additional witness.

Kacyiru Events

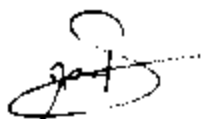
18. The Defence for Ndindiliyimana requests the recall of Prosecution Witness KF so as to confront him with JVN's statement. Ndindiliyimana submits that Witness KF testified about the presence of *Interahamwe* in the Kacyiru gendarmerie camp, that Tutsi were killed inside the camp and that the gendarmes provided the *Interahamwe* with weapons. The Chamber has already noted above that in his original Motion alleging that the Prosecution had violated its obligation to disclose exculpatory material, Ndindiliyimana never referred to JVN's statement.¹³ However, the Chamber has considered the significance of Prosecution Witness KF's evidence relating to the allegations in the Indictment against Ndindiliyimana. Upon review of JVN's statement, the Chamber notes that in 1994, JVN was particularly well-positioned to know about events at Kacyiru camp and of any possible connections between the gendarmerie and *Interahamwe*. Since his statement appears to contradict material aspects of Witness KF's evidence, the Chamber finds that in order to discover the truth about the Kacyiru camp events, it is necessary to recall Witness KF for further cross-examination on the basis of JVN's statement. The Defence has demonstrated good cause to warrant the recall of Prosecution Witness KF. In addition, the Chamber recalls Witness KF's evidence that the Kacyiru gendarmerie received a telegram from Ndindiliyimana asking them to collaborate with the *Interahamwe* and to provide the latter with weapons. This evidence is contradicted by JDT's statement that he was informed by a certain Lieutenant that Ndindiliyimana had sent a telegram asking gendarmes to do everything to prevent the civilian population from killing each other after the death of the President. In light of these contradictions, the Chamber will allow Ndindiliyimana's Defence to call JVN and JDT as additional witnesses.

Nyanza Events

19. Ndindiliyimana's Defence seeks to further cross-examine Prosecution Witnesses ANA and ANH on the basis of JVN's statement that the préfet of *Kigali-rurale* prevented gendarmes from operating in his area. The Defence submits that JVN's statement illustrates the power of local authorities in Rwanda in 1994 and reflects the gendarmerie's lack of control. Therefore, the Defence requests the recall of Witnesses ANA and ANH, who were local administrators in 1994 and who testified about killings committed by gendarmes in collaboration with the *Interahamwe*. The Chamber disagrees with the Defence submission. Witnesses ANA and ANH testified about events in Nyanza which is a different geographic

¹² *Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-A, Judgement (AC), 29 August 2008, para. 12; *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgement (AC), para. 12; *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-A, Judgement (AC), 21 May 2007, para. 10; *Prosecutor v. Ndindabahizi*, Case No. ICTR-01-71-A, Judgement (AC), 16 January 2007, para. 12; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, Judgement (AC), 23 May 2005, para. 7.

¹³ Paragraph 14 above.



location from *Kigali-rurale*. The fact that JVN's statement contains a reference to the ability of one local administrator in one part of the country to prevent gendarmes from operating in his area, does not necessarily mean that other local administrators in Rwanda enjoyed similar powers. The Chamber finds that little or no probative value will result from recalling Witnesses ANA and ANH for further cross-examination on the basis of JVN's statement. The Defence request in this respect is therefore denied.

Kicukiro Events

20. The Defence for Ndindiliyimana requests the recall of Prosecution Witness Lemaire who, in his testimony, blamed the gendarmes for allowing the *Interahamwe* to carry out attacks against refugees in the Kacukiro area. The Defence seeks to further cross-examine Prosecution Witness Lemaire on the basis of JPB's statement that the refugees at *Ecole Technique Officielle* ("ETO") declined Ndindiliyimana's offer to send gendarmes for their protection.

21. The Chamber has reviewed JPB's statement in light of Prosecution Witness Lemaire's testimony. The Chamber finds that little or no probative value will accrue from further cross-examining Witness Lemaire on the basis of JPB's statement. Witness Lemaire's testimony refers to a range of facts that he had observed around ETO such as the fact that gendarmes manning a roadblock located about a kilometre away from ETO, did not appear to do anything to prevent the *Interahamwe* from attacking the refugees who were sheltering at ETO. This factual observation cannot be disputed by a statement that refers to Ndindiliyimana's alleged intention to help the refugees at ETO by offering to send gendarmes to protect them at ETO. The Chamber finds that the Defence has not shown good cause to warrant the recall of witness Lemaire. This request is therefore denied.

22. The Chamber also denies the Defence request to call JPB as an additional witness. A close review of JPB's statement shows that he did not know as a matter of fact that Ndindiliyimana promised to send gendarmes to protect refugees at ETO. JPB states that "it appears that the Chief of Staff of gendarmerie, Colonel Ndindiliyimana, was contacted. He is said to have promised to send gendarmes to ETO after the departure of the Belgians."¹⁴ While this statement seems to suggest that Ndindiliyimana intended to send gendarmes to protect the refugees at ETO, it does not warrant calling JPB as a witness. The essence of the statement is not different from other evidence before the Trial Chamber that Ndindiliyimana saved Tutsi people in various locations in Rwanda during the 1994 events. The Defence request to call JPB as an additional witness is therefore denied.

Gitarama Events

23. The Defence for Ndindiliyimana requests that Prosecution Witnesses ANC and AMW be recalled for further cross-examination on the basis of NC, FU and CR's statements. FU and CR's statements refer to the meeting that was held between senior military officers including Ndindiliyimana and Rusatira and members of the interim government at Murambi in Gitarama during the events of 1994. According to FU and CR's statements, Ndindiliyimana exhorted members of the Government to call on the population to stop the killing of civilians by the *Interahamwe*. The Chamber notes that the statements refer to a fact that is not broached in the testimony of the identified Prosecution witnesses and therefore cross-examining the aforesaid witnesses with these statements will not serve any discernible

¹⁴ Unofficial translation from French. Statement of JPB dated 29 May 1997, «Il semble que le chef d'Etat major de la gendarmerie, le colonel Ndindiliyimana, ait été contacté. Il aurait promis d'affecter des gendarmes à l'ETO après le départ des belges. »

evidential purpose. The Chamber, however, notes that the statements could be relevant to the allegation that Ndindiliyimana was part of a conspiracy to commit genocide against the Tutsi. Therefore, the Chamber will grant Ndindiliyimana's request to call FU and CR as additional witnesses. Furthermore, the Chamber finds that the prospective testimony of FU and CR will be of probative value in assessing the credibility of the Prosecution witnesses pertaining to the events that transpired at Gitarama.

24. With the regards to the request to call NC as an additional witness and the related request to recall Prosecution Witnesses ANC and AMW for further cross examination on the basis of NC's disclosed statement, the Chamber notes that NC's statement relates to Ndindiliyimana's evacuation of Tutsi civilians from Kigali to Gitarama where he sought accommodation for them at *Hotel Tourisme Sport*. The Chamber notes that it has already heard a significant amount of evidence relating to Ndindiliyimana's protection of Tutsi refugees at that location in Gitarama. Therefore calling NC as an additional witness or recalling Prosecution Witnesses ANC and AMW for further cross-examination on the basis of NC's statement, would not serve any further evidential purpose. The requests to recall Witnesses ANC and AMW and to call NC as an additional witness are therefore denied.

Request to Recall Prosecution Witnesses Des Forges and General Dallaire and other witnesses

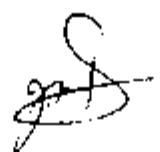
25. The Chamber notes that the Defence for Ndindiliyimana also requests the recall of Prosecution Witnesses General Dallaire and Dr. Des Forges in order to cross-examine them on the basis of JVN's statement. The Defence contends that the said Prosecution Witnesses gave testimony which was favourable to the Accused Ndindiliyimana regarding his attitude towards the implementation of the Arusha Accords. The only reason advanced by the Defence for the recall of the aforementioned witnesses is to seek to reinforce their earlier testimony regarding Ndindiliyimana.

26. The Chamber is not persuaded by the Defence argument. As stated before, there must be compelling circumstances to warrant the recall of a witness. The Chamber finds that reinforcing earlier testimony that was favourable to the Accused, is not a good reason to recall a witness. The request to recall Prosecution Witnesses Dallaire and Dr. Des Forges is therefore denied.

27. The Chamber notes that the Defence for Ndindiliyimana also submits that it is necessary to recall Prosecution Witness KJ. The Chamber, however, notes that the Defence has not put forth any reasons to justify the recall of Prosecution Witness KJ. The Chamber also notes the request to call PCK and NB as additional witnesses. Again, the Chamber notes that the Defence for Ndindiliyimana has made no attempt to furnish the Chamber with any reasons to justify the calling of PCK and NB as additional witnesses. For these reasons, the Chamber denies the requests.

Admission of the Disclosed Exculpatory Statements in lieu of Calling Additional Witnesses

28. In addition to, or as an alternative to the remedies requested above, the Defence for Ndindiliyimana requests the admission of the exculpatory statements that were recently disclosed by the Prosecution. The Defence submits that recalling all the Prosecution Witnesses and all the additional witnesses will adversely affect the expeditious conduct of the proceedings and will further extend the detention of the Accused. The Prosecution opposes the request for the admission of the disclosed exculpatory statements. It argues that recalling selected Prosecution witnesses and hearing additional Defence witnesses will not affect the expeditious conduct of the proceedings since the prospective testimony of the identified



witnesses will be exclusively limited to the areas that were the subject of the Rule 68 violation. Moreover, the Prosecution submits that the admission of the statements will contravene the requirements of Rules 89, 90 and 92bis of the Rules.

29. The Chamber notes that for evidence to be admitted before the Tribunal, it must satisfy the requirements of relevance and probative value stipulated in Rule 89(C) of the Rules. These must be weighed against the potential prejudice that may be caused to the accused person by admitting the evidence. Where, in the Chamber's assessment, the prejudicial effect of the proposed evidence is likely to outweigh its probative value, the Chamber will exercise its discretion against admitting the evidence.¹⁵ The Chamber notes that material relating to the credibility of witnesses is *prima facie* relevant and probative.¹⁶

30. The Defence makes a blanket assertion that in order to avoid further delay in this trial, all the statements, in respect of which the Trial Chamber found the Prosecution to have breached its Rule 68 disclosure obligation, be admitted into evidence. As stated in the Chamber's earlier decision on this matter, the admission of these statements would have to be based, *inter alia*, on a determination that it would be impossible or impractical to recall Prosecution witnesses or additional Defence witnesses without effectively re-opening the entire case.¹⁷ Since the Chamber has availed the Defence with an opportunity to recall a number of prosecution witnesses and also to call a number of additional witnesses, it would be inappropriate at this stage to admit the statements as requested by the Defence. The Defence request to admit the twelve witness statements listed in Annex 3 to the Chamber's Rule 68 Decision is therefore denied.

31. Finally, with respect to the Defence request for the provisional release of Ndindiliyimana, the Chamber recalls that Rule 65(B) stipulates certain conditions for granting provisional release including that notice be given to both the host country and the country to which the Accused seeks to be released.¹⁸ None of those conditions have been fulfilled. Moreover, the Chamber has considered that the trial of the Accused which commenced in 2004, is nearing completion. In the circumstances, the Chamber finds that it would be inappropriate to grant provisional release to the Accused Ndindiliyimana.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Defence request to recall Prosecution Witnesses FAV, GFS, GFR and KF for further cross-examination solely by Counsel for Ndindiliyimana on the points delineated in this Decision;

ORDERS the Parties not to contact any of the recall witnesses before they appear in court;

¹⁵ *Muvunyi*, Decision on the Prosecutor's Motion to Admit Documents Tendered During the Cross-Examination of Defence Witness Augustin Ndindiliyimana (TC), 28 February 2006, para. 12; *Bagosora et al.*, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole (TC), 13 September 2004, para. 7; *Nyiramasuhuko v. The Prosecutor*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 7.

¹⁶ *Bizimungu et al.*, Decision on Jerome Bicomumpaka's Confidential and Amended Motion to Admit Rwandan Judicial Records into Evidence (TC), 10 June 2008, para. 11.

¹⁷ Rule 68 Decision, para. 62.

¹⁸ *Prosecutor v. Nsengimana*, Case No. ICTR-01-69-AR65, Decision on Application by Hormisdas Nsengimana for Leave to Appeal the Trial Chamber's Decision on Provisional Release (AC), 23 August 2005; *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-I, Decision on Defence request for Provisional Release (TC), 5 June 2007, para. 2.



GRANTS the request to call Witnesses JH, JVN, CR, FU and JDT as additional witnesses;

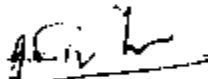
ORDERS the Prosecution to provide the Registry with the contact details of all the recall and additional witnesses;

ORDERS that the Chamber will hear all the Witnesses from 16 to 27 February 2009;

DIRECTS the Registry to make suitable arrangements to facilitate the travel and timely arrival of all the above witnesses in Arusha during that period and to facilitate all necessary contact and preparation between Ndindiliyimana's Defence and the additional witnesses;

DENIES the Motion in all other respects.

Arusha, 4 December 2008, done in English.


Asoka de Silva

Presiding Judge


Taghrid Hikmet

Judge




Seon Ki Park

Judge

[Seal of the Tribunal]