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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Byron, Presiding  
Gberdao Gustave Kam  
Vagn Joensen

**Registrar:** Adama Dieng

**Date:** 16 January 2009

**THE PROSECUTOR**

v.

**Callixte KALIMANZIRA**

*Case No. ICTR-05-88-T*

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**CONSOLIDATED DECISION ON PROSECUTION ORAL MOTION TO REDUCE  
DEFENCE WITNESS LIST AND DEFENCE MOTION TO VARY WITNESS LIST**

*Article 20 of the Statute of the Tribunal and Rule 73 ter of the Rules of Procedure and  
Evidence*

**Office of the Prosecutor**

Christine Graham  
Veronic Wright  
Ousman Jammeh  
Kartik Murukutla

**Defence Counsel**

Arthur Vercken  
Anta Guisse

## INTRODUCTION

1. The presentation of the Defence case commenced on 17 November 2008. The first trial session ended on 4 December 2008, after hearing 24 witnesses. The second and final trial session is scheduled to commence on 26 January 2009.<sup>1</sup> At the 4 December 2008 status conference, the Defence for Kalimanzira provided the Parties with a list of 29 witnesses which it intends to call during the second trial session. The Prosecution moved the Chamber to exclude Witnesses CA1, FJS, AK11, FCS, FAG, FG1, FG2, FG3, FVC, BB06, BB08 and MZ20 from the list because their complete identifying particulars had not been provided to date, leading the Prosecution to assume that these witnesses would not be called.<sup>2</sup> The Chamber granted the Defence five days to complete its response and decided it would make its ruling based on the information disclosed by that time.<sup>3</sup> In its response, the Defence indicated that it had provided the Prosecution with complete identifying information for eight of the 12 witnesses within 48 hours of the Prosecution's oral motion; it also provided incomplete information for the remaining four witnesses and requested an extension of time until 15 January 2009 to provide the missing information.<sup>4</sup> In its reply, the Prosecution acknowledged that some of the deficiencies had been rectified by the Defence, but maintained that the information was provided too late to remedy the prejudice it has suffered in being prevented from carrying out necessary investigations.<sup>5</sup>
2. On 11 December 2008, the Defence requested to vary its witness list by substituting Witnesses FAG and FAV – who can no longer present themselves in Arusha – for FAR and FAT, and adding Witnesses MVE, MVT, MDS, and RTE.<sup>6</sup> The Prosecution opposed the motion in its entirety.<sup>7</sup> The Defence has since withdrawn its request in respect of Witnesses MDS and RTE.<sup>8</sup>

<sup>1</sup> T. 4 December 2008 (Status Conference), p. 1.

<sup>2</sup> T. 4 December 2008 (Status Conference), pp. 12, 15-17 ("Prosecution Oral Motion"). The Prosecution requested the exclusion of Defence Witness FJS by electronic correspondence, sent on 4 December 2008 at 5:30pm.

<sup>3</sup> T. 4 December 2008 (Status Conference), p. 17.

<sup>4</sup> *Réponse de la défense à la requête orale du Procureur formulée le 4 décembre 2008*, filed confidential on 10 December 2008 ("Defence Response").

<sup>5</sup> Prosecution Reply to the Defence Response to Prosecution's Oral Motion of 4 December 2008, filed 15 December 2008 ("Prosecution Reply").

<sup>6</sup> *Requête en substitution et adjonction de témoins*, filed confidential on 11 December 2008 ("Defence Motion"); *Réplique de la défense de Callixte Kalimanzira à la "Prosecution Response to Defence Motion to Vary Its Witness List Filed on 11 December 2008"*, filed 18 December 2008 ("Defence Reply").

<sup>7</sup> Prosecution Response to Defence Motion to Vary Its Witness List Filed on 11 December 2008, filed 15 December 2008 ("Prosecution Response").

<sup>8</sup> By electronic correspondence, sent on 13 January 2009 at 7:09pm.

## DELIBERATIONS

### *Prosecution Oral Motion to Reduce Defence Witness List*

3. The Chamber notes that the Defence no longer intends to call Witness FAG to testify. The Prosecution motion to exclude this witness is therefore moot.

4. On 14 December 2007, the Chamber ordered the Defence to disclose identifying information of protected witnesses 30 days prior to the commencement of the Defence case, in order to allow the Prosecution adequate time to prepare, pursuant to Rule 69 (C) of the Rules of Procedure and Evidence ("Rules").<sup>9</sup> On 13 November 2008, the Chamber found that the identifying information provided was ten days late and incomplete, thereby ordering the Defence to correct all existent deficiencies in disclosures no later than 14 November 2008.<sup>10</sup>

5. The Defence is in violation of the Chamber's 13 November 2008 Order, and the Chamber finds it deplorable that the Defence would request an extension of time to fully comply with its order nearly one month after the deadline had passed. However, through various filings and electronic correspondence,<sup>11</sup> the Defence disclosed all the missing information in sufficient detail, except for Witness FG2, by 19 December 2008. At the time that the Chamber's orders were issued, it was not anticipated that the Defence case would run over two trial sessions separated by seven weeks. Such scheduling allows both Parties more preparation time than previously accounted for. Thus, the disclosures having been made more than thirty days before the commencement of the second trial session, the Chamber does not accept the Prosecution's assertion that it has been irremediably prejudiced and prevented from carrying out necessary investigations.

6. Under the present circumstances, the rights of the Accused enshrined at Article 20 of the Statute of the Tribunal and the interests of justice outweigh any prejudice that may have been suffered by the Prosecution.

### *Defence Motion to Vary Witness List*

<sup>9</sup> *Kalimanzira*, Decision on Defence Motion for Protective Measures (TC), 14 December 2007.

<sup>10</sup> *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-T ("*Kalimanzira*"), Consolidated Decision on Prosecution Motion Concerning Defence Compliance with Rule 73ter and Defence Motions to Vary Witness List, 13 November 2008.

<sup>11</sup> The Defence gradually disclosed all identifying particulars for 11 witnesses in four parts: (i) for Witnesses AK11, FAG, FCS, FJS, FVC and MZ20 by electronic correspondence, sent on 6 December 2008 at 7:01am; (ii) for Witnesses CA1 and BB06 by electronic correspondence, sent on 6 December 2008 at 1:04pm; (iii) for Witness BB08 in the Defence Response, p. 3 (the Chamber notes that the names for BB08's mother and father were not provided, but finds that the rest of the information was sufficient for the purposes of preparing for this particular witness); and (iv) for Witnesses FG1 and FG3 by electronic correspondence, sent on 19 December 2008 at 12:32pm. The identifying information provided for Witness FG2 in the Defence Response at p. 2 is insufficient and the deficiency has not since been rectified.

7. Rule 73ter (E) of the Rules provides that after the commencement of the Defence case, the Chamber may grant leave to vary its decision as to which witnesses are to be called if it is in the interests of justice. Factors taken into account may include the potential importance of the testimony in relation to existing witnesses and allegations in the indictment, any prejudice to the opposing party, the legitimacy of the reasons and the timing of the variation of the list.<sup>12</sup>

8. The Prosecution submits that the reasons advanced by the Defence for the additions and substitutions are unconvincing. The Chamber does not agree. Witnesses FAG and FAV were supposed to testify on the killings at Kabuye hill, one of the most important allegations against the Accused.<sup>13</sup> The Defence has explained that FAG and FAV are no longer available to testify, and has identified two other witnesses, FAR and FAT, to testify in their place.

9. With respect to MVE and MVT, the Defence seeks to bolster FJS' testimony on the allegations at Sakindi roadblock with direct evidence.<sup>14</sup> The Defence indicates that while FJS lived near the roadblock and was acquainted with those who manned it, MVE and MVT actually manned the roadblock.

10. The Defence request included each new witness' full identifying information and summaries of their anticipated testimonies. The request was made 45 days before the commencement of the second trial session, affording the Parties ample preparation time. The Chamber accepts the potential importance of these witnesses' testimonies in relation to other witnesses and allegations in the indictment, finds the reasons for requesting variance of the list to be legitimate, and considers the timing of the request to have minimized any possible prejudice to the opposing party.

#### **FOR THESE REASONS, THE CHAMBER**

**DENIES** the Prosecution Oral Motion in respect of Witnesses CA1, FJS, AK11, FCS, FG1, FG3, FVC, BB06, BB08 and MZ20;

**GRANTS** the Prosecution Oral Motion in respect of Witness FG2, excluding him from the Defence witness list;

<sup>12</sup> See e.g. *The Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye, Innocent Sagahutu*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Request to Vary his Witness List, 31 January 2008, para. 3; Decision on Augustin Bizimungu's Request to Vary His Witness List, 24 October 2007, para. 3.

<sup>13</sup> See Indictment, paras. 9 and 10.


<sup>14</sup> See Indictment, paras. 13 and 25.

**DECLARES** the Prosecution Oral Motion in respect of Witness FAG moot;

**DECLARES** the Defence Motion in respect of Witnesses MDE and RTE moot; and

**GRANTS** the Defence Motion in respect of Witnesses FAR, FAT, MVE and MVT.


Arusha, 16 January 2009, done in English.

  
Dennis C. M. Byron

Presiding Judge

  
Vagn Joensen

Judge

 (With the consent and on  
behalf of)

Gberdao Gustave Kam  
Judge

(Absent during signature)

[Seal of the Tribunal]

