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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:** Khalida Rachid Khan, presiding  
Lee Gacuiga Muthoga  
Aydin Sefa Akay

**Registrar:** Mr. Adama Dieng

**Date:** 30 September 2009

**THE PROSECUTOR**  
v.  
**DOMINIQUE NTAWUKULILYAYO**

Case No. ICTR-05-82-T

2009 SEP 30 1 P 2: 38  
JUDICIAL RECORDS ARCHIVE  
RECEIVED  
*Dieng*

**DECISION ON DEFENCE MOTION FOR LEAVE TO VARY ITS WITNESS LIST  
TO ADD THREE WITNESSES AND EXTEND PROTECTIVE MEASURES;  
AND THE CHAMBER'S FURTHER ORDER TO  
REDUCE THE DEFENCE WITNESS LIST**

*Rules 73ter and 75 of the Rules of Procedure and Evidence*

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## INTRODUCTION

1. The Trial Chamber is currently hearing the Defence case which commenced on 23 September 2009.
2. By Motion filed on 25 September 2009, the Defence seeks leave to vary its Witness List filed on 14 August 2009, and add three witnesses to the List. The Defence further requests that protective measures, granted by the Chamber on 11 May 2009, be extended to the three proposed additional witnesses.<sup>1</sup>
3. The Prosecution did not respond to the Motion.

## BACKGROUND

4. On 26 May 2009, the Trial Chamber ordered the Defence to file, by 7 August 2009, a list of witnesses it intends to call to testify ("Witness List").<sup>2</sup> On 14 August 2009, the Defence filed its Witness List which consisted of 30 witnesses and included summaries of the facts and points in the Indictment upon which each witness would testify, as well as the estimated length of time required for each witness.<sup>3</sup>
5. On 21 August 2009, the Chamber, recalling that the Prosecution called 12 witnesses over 12 trial days; that the Accused is charged with three counts, of which one is in the alternative;<sup>4</sup> and considering that the Witness List and summaries showed there to be an excessive number of witnesses being called to prove the same facts,<sup>5</sup> ordered the Defence to reduce its Witness List pursuant to Rule 73ter (D) of the Rules.<sup>6</sup>
6. On 25 August 2009, the Defence filed a response to the Chamber's Order to reduce the Witness List in which it indicated that it was removing four witnesses from the List.<sup>7</sup>
7. On 15 September 2009, the Defence filed correspondence indicating that three witnesses were being added to the Witness List, and provided summaries of the facts and points in the Indictment upon which each witness will testify. The correspondence and witness summaries were circulated on 16 September 2009, and on 18 September 2009, the Chamber informed the Defence that due to the imminent commencement of the Defence case

<sup>1</sup> *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Requête de la Défense aux fins d'être autorisée à revoir la composition de sa liste de témoins à décharge et à ajouter 3 témoins supplémentaires (Articles 73 ter E) du Règlement de Procédure et de Preuve) et aux fins d'extension des mesures de protection accordées aux témoins de la Défense par décision de la Chambre du 11 mai 2009 aux 3 témoins supplémentaires de la Défense ("Motion").

<sup>2</sup> The Pre-Defence Conference was held pursuant to Rule 73ter of the Rules of Procedure and Evidence ("Rules"). See, T. 26 May 2009, pp. 1-4.

<sup>3</sup> *Ntawukulilyayo*, Confidential Filing of Annex A and Annex B to the Defence Pre-Trial Brief, 14 August 2009.

<sup>4</sup> The Accused is charged with Genocide (Count 1), or in the alternative, Complicity in Genocide (Count 2), and Direct and Public Incitement to Commit Genocide (Count 3).

<sup>5</sup> In particular, witnesses who will testify on the Accused's good character and the assistance he provided to Tutsi in 1994, many of whom are not testifying on any other specific events alleged in the Indictment.

<sup>6</sup> *Ntawukulilyayo*, Order for the Defence to Reduce its List of Witnesses ("Order to Reduce the Defence Witness List"). Rule 73ter (D) of the Rules provides that the Trial Chamber or the designated Judge may order the Defence to reduce the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts.

<sup>7</sup> *Ntawukulilyayo*, Confidential Response to 'Order for the Defence to Reduce its List of Witnesses', 25 August 2009 ("Defence Response").



on 23 September 2009, the Defence should seek leave of the Chamber to add witnesses to its Witness List.<sup>8</sup>

## DISCUSSION

### *Law Relating to Variation of Defence Witness List*

8. Rule 73ter (E) of the Rules of Procedure and Evidence (“Rules”) permits the Defence to move the Trial Chamber for leave to vary its witness list, after the commencement of its case, if it considers it to be in the interests of justice.<sup>9</sup>

9. 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>10</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>11</sup>

10. As a preliminary point, the Chamber notes that the Defence filed its correspondence, indicating the addition of three witnesses to its Witness List, before commencement of the Defence case. The Chamber however considers that as commencement of the Defence case was imminent, and that the addition of witnesses at such a late stage may impair the Prosecution’s ability to prepare for cross-examination, thereby resulting in possible delay, it is in the interests of justice, for the Defence to justify such late additions to its Witness List in accordance with Rule 73ter (E).

11. The Chamber will now turn to consider each of the proposed witnesses in light of the relevant factors set out above.

### *Witness KAD*

12. The summary of Witness KAD’s proposed testimony shows that she spent three days at Gisagara Market and describes the conditions there, as well as relations between traders at the Market and those who had sought refuge there. She saw the Accused arrive at the Market one evening in the company of the *bourgmestre* and a priest named Thomas. She went to Kabuye with her family because of the squalid conditions of the Market and the pressure exerted on them by the traders to leave the premises. According to Witness KAD, no figure of authority asked them to leave, no one prompted them to go to Kabuye, and she saw no policemen, gendarmes or soldiers on her way to Kabuye. On her first evening in Kabuye, and

<sup>8</sup> Email communication from the Chamber addressed to Defence Counsel and copied to Prosecution Counsel dated 18 September 2009.

<sup>9</sup> Rule 73ter (E) of the Rules: “After commencement of the Defence case, the Defence, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called.”

<sup>10</sup> *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu’s Motion to Vary Witness List; and to Admit Evidence of Witness in Written Form in Lieu of Oral Testimony (TC), 1 May 2009 (“*Bizimungu Decision*”), para. 13; *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>11</sup> *Bizimungu Decision*, para. 13; *Prosecutor v. Bagosora et al.*, Decision On Bagosora Motion To Present Additional Witnesses And Vary Its Witness List, 17 November 2006, para. 2; *Prosecutor v. Mpambara*, Decision on the Prosecution’s Request to Add Witness AHY (TC), 27 September 2005, para. 4.



on the following day, soldiers, together with members of the population, attacked them. People were killed, including several members of her family. She spent slightly more than three days on Kabuye Hill and hid herself under the dead. Witness KAD will state that the Accused was not among the killers, and that he cannot be held responsible for the aforementioned events. According to Witness KAD, the Accused was unable to prevent what happened because people no longer listened to him. The estimated time for Witness KAD's testimony is three hours.

13. The Defence submits that Witness KAD is crucial to the Defence case as she is a Tutsi survivor of the events which occurred on Kabuye Hill from 21 to 25 April 1994 as alleged in the Indictment.<sup>12</sup> The Defence submits that no other witness on the Witness List will testify regarding these allegations.<sup>13</sup>

14. The Defence further submits that the importance of the issues on which Witness KAD will testify justify adding her to the Witness List. In addition, the Defence states that it was not aware of this Witness when filing its initial Witness List on 14 August 2009. One of the members of the Defence investigation team first had contact with the Witness at the end of August 2009, and it was not until the beginning of September 2009 that a member of the Defence team could meet with the Witness in Kenya to obtain a statement.

15. The Chamber notes that there has been approximately three and a half months between close of the Prosecution case and commencement of the Defence case. The Chamber therefore considers that the Defence explanation for the late availability of Witness KAD's testimony is rather unsatisfactory. The Chamber, however, observes that while there have been, and will be other Defence witnesses who testify that the refugees at Gisagara Market did not leave due to instructions from the Accused, and that the Accused was not present at Kabuye Hill, Witness KAD's proposed testimony is unique because she was one of the refugees who left Gisagara Market to go to Kabuye Hill, and is a survivor of the events which occurred there.<sup>14</sup> In addition, her proposed testimony is material and of probative value, as it relates directly to key charges against the Accused which form the basis of the Counts of Genocide, and in the alternative, Complicity to Commit Genocide, as contained in the Indictment.<sup>15</sup>

16. In addition, the Chamber notes that the Defence case is currently underway and scheduled to continue until on or about 9 October 2009 and resume from approximately 16 November 2009.<sup>16</sup> The Chamber therefore considers that Witness KAD should be called

<sup>12</sup> Indictment (which is the fifth Amended Indictment filed on 19 May 2009), paragraphs 7, 10, 11, 13, 19, 20, 21, and 22.

<sup>13</sup> Motion, para. 10.

<sup>14</sup> See T. 24 September 2009: Witness MAI testified that the Accused was not at Gisagara Market when the refugees were pressured by traders to leave the market. Witness MAI was not, however, a Tutsi refugee but a trader at Gisagara Market; Witness MAD testified that she never saw the Accused at Gisagara Market and that Radio Muhaburu told refugees to go to Kabuye but she was not a Tutsi survivor. Further, see Defence Witness List for the following witnesses: Witness TAG, Witness MAE, Witness UAB, Witness UAF.

<sup>15</sup> See *supra* fn. 12.

<sup>16</sup> *Ntawukulilyayo*, Scheduling Order Regarding Commencement of the Defence Case, 11 September 2009. The Defence case was originally scheduled to commence on 14 September 2009 and to run until 9 October 2009, but was rescheduled to commence on 23 September 2009. In the Order of 11 September 2009, the Chamber ordered that the Defence case would run if necessary until 9 October 2009, and the Chamber would, if necessary, schedule the continuation of the Defence case after 9 October 2009. The Chamber has since informed the Parties that the current first session will continue, if possible, into the week commencing 12 October 2009, and the second session for the Defence case will commence after 16 November 2009.



during the second session of the Defence case. Accordingly, any prejudice to the Prosecution caused by the late addition of Witness KAD will be minimal, since the Prosecution will have more than one month to prepare for the Witness. Furthermore, considering that the estimated time for Witness KAD's testimony is three hours, her addition to the Witness List will not cause any significant delay to the proceedings.

17. The Chamber therefore considers, in accordance with Rule 73*ter* (E) of the Rules, that it is in the interests of justice to permit the Defence to add Witness KAD to its Witness List.

*Witness KAA*

18. The summary of Witness KAA's proposed testimony states that during the events of 1994, the population suspected the *sous-préfet* [the Accused] of being a Tutsi and a supporter of the Rwandan Patriotic Front ("RPF"). Between April and July 1994, Witness KAA attended only one meeting in Gisagara *sous-préfecture*, which was held at Kirarambogo, in Nyabitare *secteur*, toward the end of May 1994. According to Witness KAA, this was the only meeting which took place at Nyabitare. At that time, killings had already occurred and ceased. The meeting lasted approximately two hours and the Accused did not attend. Witness KAA will testify that the killing of Tutsis was not ordered at that meeting and that it was a civic duty to man roadblocks to prevent RPF infiltration. The estimated time for Witness KAA's testimony is three hours.

19. The Defence submits that Witness KAA is the only witness who will testify on the meeting which the Accused is alleged to have attended in May 1994 in Kirarambogo in Nyabitare *secteur*, as alleged in paragraph 27 of the Indictment. The Indictment alleges that at this meeting, clear instructions were given to flush out and kill all remaining Tutsis who were hiding and that the Accused's attendance and subsequent silence at the meeting was intended as being seen by the population as his agreement with those speeches. The Defence further submits that it was not aware of Witness KAA at the time it filed its Witness List.

20. While the Defence explanation for the late addition of Witness KAA to the Witness List is not sufficiently detailed, the Chamber observes that there are no other witnesses on the Witness List who will testify regarding the allegations contained in paragraph 27 of the Indictment, which is relevant to the Count of Direct and Public Incitement to Commit Genocide. The Chamber therefore considers that Witness KAA's anticipated testimony is material and of probative value. Furthermore, for the same reasons as stated above in relation to Witness KAD, the Chamber considers that the addition of Witness KAA to the Witness List, if heard during the second session of the Defence case, will cause minimal, if any, prejudice to the Prosecution and will not significantly delay the proceedings.

21. The Chamber therefore considers, in accordance with Rule 73*ter* (E) of the Rules, that it is in the interests of justice to permit the Defence to add Witness KAA to its Witness List.

*Witness KAB*

22. The summary of Witness KAB's anticipated testimony states that he is a native of Nyaruhengeri *commune*. He attended a meeting which lasted approximately two or three hours, around the end of May 1994, at Gikore Centre. It was a security meeting that sought to defuse mounting tension between the people of Kibilizi and Gikore, and the Accused was not present. Witness KAB will further testify that he knows Prosecution Witness BAW who is



known as having testified in Arusha against “former authorities.” Witness KAB will say that Witness BAW belongs to a group of persons coached by the State and Tutsi associations to falsely accuse former officials. Witness KAB will also say that Witness BAW impersonated a lawyer. The time estimate for Witness KAB’s anticipated testimony is three hours.

23. The Defence submits that Witness KAB is a key witness as he will corroborate the testimony of Witness MTA, who has yet to testify. According to the Defence, Witness KAB will also provide additional evidence on the allegation contained in paragraph 28 of the Indictment, namely, that the Accused attended a meeting held on or about 28 April 1994 in Gikoro, Nyaruhengeri *secteur*, where he is alleged to have rewarded persons who would kill the greatest number of Tutsis. The Defence further states that it was not aware of Witness KAB at the time of filing its Witness List and has only recently become aware of him.

24. The Chamber notes that while paragraph 28 of the Indictment refers to a meeting in Gikore on or about 28 April 1994, at which the Accused is alleged to have promised a reward to those persons who would kill the greatest number of Tutsis, the Prosecution led evidence of a similar meeting in Gikore in May 1994.<sup>17</sup> Since Witness KAB will testify on the Gikore meeting, and his proposed testimony responds to the Prosecution evidence, the Chamber finds it to be material and of probative value.

25. In addition, the Chamber notes that there is only one other Defence witness, namely, Witness MTA, who will testify that he attended a meeting held in Gikore in May 1994 and that the Accused was not present. While proposed Defence Witness Laurien Uwizeyiman will also testify in relation to an alleged meeting in Gikore, the Chamber observes that Uwizeyiman did not himself attend that meeting. Rather, his mother attended the meeting and informed him that the Accused was not present. The Chamber does not therefore consider the Defence to be calling an excessive number of witnesses to testify on those facts which Witness KAB will testify on.

26. Furthermore, though the Defence explanation for the late addition is not sufficiently detailed, the Chamber finds, for the same reasons as set out in relation to Witnesses KAD and KAA, that the addition of Witness KAB to the Defence Witness List, if heard during the second session of the Defence case, will cause minimal, if any, prejudice to the Prosecution and that it will not significantly delay the proceedings.

#### *Further Reduction of the Defence Witness List*

27. In view of the above additions, the Defence Witness List contains 30 witnesses. The Chamber recalls that the Prosecution called just 12 witnesses over 12 trial days and the Accused is charged with only three counts, of which one is in the alternative.<sup>18</sup> The Chamber further notes that notwithstanding the Order to Reduce the Defence Witness List, there are still an excessive number of Defence witnesses being called to testify on: (i) why the refugees

<sup>17</sup> Paragraph 28 of the Indictment alleges that on or about 24 April 1994, the Accused addressed the local population in Gikore, Mudabori, Nyaruhengeri *secteur* and promised to reward those persons who would kill the greatest numbers of Tutsis with houses, land and money. With regard to the Prosecution evidence, *see for example*, Prosecution Witness BAW who testified that at a meeting in Mudabori [sic], Nyaruhengeri *commune* [sic] on 15 May 1994, the Accused addressed the people and said that those who would “distinguish themselves in killings would be given rewards.” *See* T. 14 May 2009, pp. 25, 26.

<sup>18</sup> *See supra* para. 5.



at Gisagara Market left for Kabuye Hill; and (ii) the Accused's good character and the assistance he provided to Tutsis in 1994.<sup>19</sup>

28. The Chamber recalls that Rule 73ter (D) provides that a Trial Chamber may order the Defence to reduce the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts, and Rule 54 of the Rules provides that a Chamber may issue such orders as may be necessary for the conduct of the trial.

29. In view of the above, and recalling that the Defence was allocated approximately four weeks within which to conclude its case,<sup>20</sup> the Chamber considers that a further order to reduce the Defence Witness List is warranted. In addition, the Defence should manage its evidence to ensure that its witnesses will complete their evidence within the time frame allocated.

*Protective Measures pursuant to Rule 75*

30. On 11 May 2009, the Chamber ordered protective measures to safeguard the security of Defence witnesses in this case.<sup>21</sup> The Chamber therefore extends the existing witness protection measures to apply to the three new witnesses.

**FOR THE ABOVE REASONS, THE CHAMBER**


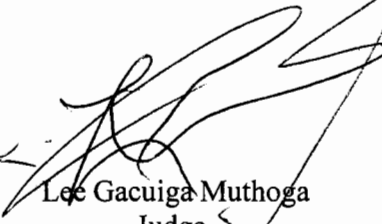

**GRANTS** the Defence Motion;

**ORDERS** that Witnesses KAD, KAA and KAB be called to testify during the second session of the Defence case;

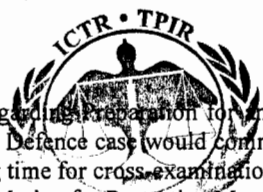
**ORDERS** that the protective measures ordered on 11 May 2009 extend to Witnesses KAD, KAA and KAB; and that the Defence immediately disclose the identifying information for these witnesses to the Prosecution if it has not already done so; and

**ORDERS**, pursuant to Rules 54 and 73ter (D) of the Rules, that the Defence review its Witness List and file, by close of business on 2 October 2009, a revised and reduced Witness List.

Arusha, 30 September 2009

 Khalida Rachid Khan Presiding Judge	 Lee Gacuiya Muthoga Judge	 Aydin Sefa Akay Judge
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[Seal of the Tribunal]



<sup>19</sup> See supra fn. 5.

<sup>20</sup> Ntawukulilyayo, Scheduling Order Regarding Preparation for and Commencement of the Defence Case, 12 May 2009. The Chamber ordered that the Defence case would commence on 14 September 2009 and continue if necessary until 9 October 2009, including time for cross-examination by the Prosecution.

<sup>21</sup> Ntawukulilyayo, Decision on Defence Motion for Protective Measures, 11 May 2009.