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TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Bakhtiyor Tuzmukhamedov
Mparany Rajohnson

Registrar: Adama Dieng

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THE PROSECUTOR

v.

Callixte NZABONIMANA
Case No. ICTR-98-44D-T

**DECISION ON NZABONIMANA'S MOTION FOR THE VARIATION OF ITS LIST OF
WITNESSES**

(Rule 73 ter (E) of the Rules of Procedure and Evidence)

Office of the Prosecutor

Paul Ng'arua
Memory Maposa
Simba Mawere
Ndeye Marie Ka
Mary Diana Karanja

Defence Counsel

Vincent Courcelle-Labrousse
Philippe Larochelle

88

INTRODUCTION

1. The Prosecution case against the Accused Callixte Nzabonimana in the instant proceedings commenced on 9 November 2009.¹ From 17 December 2009 to 12 April 2010 the Trial Chamber observed a recess from trial proceedings ("Recess"). The Prosecution resumed its case on 12 April 2010² and rested its case on 13 April 2010.³ In total, the Prosecution case lasted 22 days,⁴ during which it called 19 witnesses.
2. During the Recess, a series of events unfolded regarding the number of witnesses the Defence is expected to call in support of its case.
3. On 3 February 2010, the Trial Chamber ordered the Defence to file by close of business on 22 February 2010 a list of witnesses it intended to call, with identifying information for each witness and information concerning the facts and points in the indictment to which each witness would testify.⁵
4. On 22 February 2010, the Defence provided the Prosecution and the Chamber with a list containing 153 witnesses.⁶
5. On 5 March 2010, a Pre-Defence Conference was held before this Chamber, during which the Defence was issued an oral Order to significantly reduce the number of witnesses it intended to call and to make that number realistic and proportionate to the number of witnesses called by the Prosecution, and to provide a proofing chart by 12 March 2010 ("5 March Order").⁷
6. On 12 March 2010, and notwithstanding the 5 March Order to significantly reduce its witness list, the Defence filed an Amended Pre-Defence Brief, containing, among other

¹ While the Prosecution made an opening statement on 9 November 2009 (see English Transcript of Trial Proceedings, 9 November 2009, pp. 10-17 ("Trial Transcript")), it did not call its first witness until 10 November 2009 (see Trial Transcript, 10 November 2009, pp. 1-6).

² Trial Transcript, 12 April 2010, pp. 1-5.

³ Trial Transcript, 13 April 2010, pp. 73-74.

⁴ Although the Prosecution phase of the present trial lasted 24 days, this includes 9 and 10 December 2009, when a deposition of Defence Witness Stratton Sibomana was conducted pursuant to Rule 71 of the Rules of Procedure and Evidence. No prosecution witnesses were heard on those dates.

⁵ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Order on Defence Disclosure, 3 February 2010.

⁶ Confidential letter from Philippe Larochelle dated 22 February 2010. See also 6 April Motion, *infra* fn 13, para. 5; Instant Motion, *infra* fn 19, para. 2.

⁷ English Transcript of Pre-Defence Conference, 5 March 2010, p. 15, l. 30 - p. 17, l. 25.

- items, a proofing chart for the first 65 witnesses it intended to call and an increased list of 179 prospective witnesses.⁸
7. On 26 March 2010, pursuant to two motions filed by the Prosecution,⁹ the Trial Chamber issued a Decision in which it ordered the Defence to file, no later than 31 March 2010, a list of 30 Defence witnesses ("26 March Order").¹⁰
 8. On 31 March 2010, the Defence, notwithstanding the 5 March and 26 March Orders, filed another increased witness list of 184 witnesses, a proofing chart for most of those witnesses, as well as Personal Information Sheets ("PIS") for 154 witnesses.¹¹ The Defence also filed a separate list of 30 witnesses, which purported to comply with the 26 March Order.¹²
 9. On 6 April 2010, the Defence filed a Motion for Reconsideration or Certification for Interlocutory Appeal of the 26 March Order ("6 April Motion").¹³ In an Annex to that Motion, the Defence indicated the names of 14 additional witnesses it would like to call should its request for Reconsideration be granted, as well as a "tentative schedule" for their proposed order of appearance.¹⁴
 10. On 14 April 2010, the Defence commenced its case.¹⁵
 11. On 7 May 2010, the Trial Chamber issued a Decision on the 6 April Motion, in which the Chamber denied Certification but granted Reconsideration in part ("Reconsideration

⁸ Confidential letter from Philippe Larochelle dated 12 March 2010. See also 6 April Motion, *infra* fn 13, para. 9; Instant Motion, *infra* fn 19, para. 4.

⁹ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Second Motion to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010, 16 March 2010; *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Third Motion to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010, 18 March 2010.

¹⁰ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Consolidated Decision on Prosecutor's Second and Third Motions to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010, 26 March 2010.

¹¹ Confidential e-mail from Philippe Larochelle dated 31 March 2010. See also, Instant Motion, *infra* fn 19, para. 14, where "[t]he Defence emphasizes that it still wishes for these 184 persons to appear for the Defence of Nzabonimana".

¹² *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Filing in Compliance with the 26 March 2010 Trial Chamber Decision, 31 March 2010.

¹³ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Extremely Urgent Motion for Reconsideration or Certification of the "Consolidated Decision on Prosecutor's Second and Third Motions to Compel the Defence to Comply with the Trial Chamber's Decision of 3 February 2010", Rendered on 26 March 2010, 6 April 2010.

¹⁴ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Annex "A" Nzabonimana's Suggested Names of 44 Witnesses and Proofing Chart in Support of Motion for Reconsideration, 6 April 2010.

¹⁵ Trial Transcript, 14 April 2010, pp. 2-9.

Decision").¹⁶ Specifically, the Trial Chamber allowed the Defence to add to its witness list, from the additional 14 witnesses proposed in the 6 April Motion, those witnesses who would testify to paragraphs of the Indictment that the Defence had identified as requiring rebuttal and where less than 4 witnesses were scheduled to testify.¹⁷ The Trial Chamber further ordered that the Defence could not present more than 4 witnesses with respect to any such paragraph.¹⁸

12. On 19 May 2010, the Defence filed a Motion ("Instant Motion"), wherein it sought to add witnesses to its list pursuant to the Reconsideration Decision, as well as drop and add other witnesses pursuant to Rule 73 *ter* (E) of the Rules of Procedure and Evidence ("Rules").¹⁹
13. On 24 May 2010, the Prosecution filed a Response to the Instant Motion ("Response").²⁰
14. On 31 May 2010, the Defence filed a Reply to the Prosecution's Response ("Reply").²¹
15. On 3 June 2010, the Trial Chamber observed another recess from trial proceedings. At that juncture, the Defence had called 19 witnesses in the span of 29 days.²² Trial proceedings are presently scheduled to resume for three subsequent sessions, spanning from 5–15 July 2010, 11–22 October 2010,²³ and 28 February – 25 March 2011. The Trial Chamber expects all trial proceedings, including the Defence case and the testimony of any potential Prosecution rebuttal witnesses, to be completed by 25 March 2011. Also on 3 June 2010, the Defence disclosed PIS for five²⁴ of the witnesses it hopes to add to its list by way of the Instant Motion.²⁵

¹⁶ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana's Extremely Urgent Motion for Reconsideration or Certification of the "Consolidated Decision on Prosecutor's Second and Third Motions to Compel Defence to Comply with the Trial Chamber's Decision of 3 February 2010", Rendered on 26 March 2010, 7 May 2010.

¹⁷ Reconsideration Decision, para. 44.

¹⁸ Reconsideration Decision, disposition.

¹⁹ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Motion for the Variation of its List of Witnesses, 19 May 2010.

²⁰ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Motion for the Variation of its List of Witnesses, 24 May 2010.

²¹ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Reply to Prosecutor's Response to "Nzabonimana's Motion for the Variation of its List of if [sic] Witnesses", 31 May 2010.

²² This figure does not include the deposition of Defence witness Straton Sibomana that was conducted in Kigali on 9 and 10 December 2009, making the current duration of the Defence case effectively 31 days, in which it has called 20 witnesses.

²³ See "JUDICIAL CALENDAR June 2010 to December 2010", issued by the Office of the President of the Tribunal, dated 31 May 2010 and circulated to all parties via e-mail on 1 June 2010.

²⁴ T76, T95, T110, T129, T161.

²⁵ Confidential letter from Philippe Larochelle dated 3 June 2010.

SUBMISSIONS OF THE PARTIES

Motion

16. In the Instant Motion, the Defence seeks three principal modifications to its witness list.

First, it wishes to add 9 witnesses from its proposed list of 14 contained in the April 6 Motion and allowed by this Chamber subject to the terms imposed by the Reconsideration Decision.²⁶ Second, pursuant to Rule 73 *ter* (E), the Defence seeks to vary its witness list by dropping 4 witnesses, including 2 witnesses from the original list of 30 and 2 witnesses from the 9 it seeks to add in the same Motion.²⁷ Third, and again pursuant to Rule 73 *ter* (E), the Defence seeks to add 5 new witnesses to its list, who were neither part of its original list of 30 witnesses nor the 14 proposed in the 6 April Motion.²⁸

Addition of 9 witnesses from list of 14 pursuant to Reconsideration Decision

17. In the Instant Motion, the Defence proposes to add to its witness list the following 9 witnesses from its supplemental list of 14 that this Chamber allowed to be added when it rendered the Reconsideration Decision: T56, T60, T98, T116, T129, T134, T138, T150 and T161. While the addition of these witnesses *per se* is a relatively straightforward and uncontroversial matter since their inclusion was approved by the Trial Chamber in advance, the Defence also seeks leave to make certain modifications to its witness list that were not permitted or envisaged by the Reconsideration Decision. These proposals are outlined below.

Request to allow Witnesses T56 and T161 to testify to paragraph 41 of the Indictment

18. Among the 9 witnesses the Defence seeks to add to its list pursuant to the Reconsideration Decision, the Defence proposes to allow Witnesses T56 and T161 to testify in relation to paragraph 41 of the Indictment, which was not one of the paragraphs identified by the Trial Chamber as requiring further corroboration, since that paragraph is already supported by more than 10 Defence witnesses.²⁹ The Defence argues that these additions are necessary because although that paragraph alleges that the Accused circulated in Nyabikenke *commune* with a megaphone, encouraging Hutu civilians and *Interahamwe* to kill Tutsi before taking their property, the Prosecution, in the presentation of its case, limited its evidence to alleged

²⁶ Instant Motion, paras. 12-15.

²⁷ Instant Motion, para. 22.

²⁸ Instant Motion, paras. 23-25.

²⁹ See Reconsideration Decision, para. 41, Table.

activity in Ngoma *secteur* (one of Nyabikenke's constituent *secteurs*). Moreover, avers the Defence, only two Defence witnesses (T5 and T57) from its original list of 30 can provide testimony with respect to the specific "allegation" pertaining to Ngoma *secteur*, and thus it would be "in the interest of justice" to allow T56 and T161 to provide further corroboration regarding Ngoma, and "bring the total amount of Defence witnesses on that allegation to 4, as permitted by the [Reconsideration Decision]."³⁰

Request to add Witnesses T116, T129 and T150

19. The Defence further seeks to add Witnesses T116, T129 and T150 to its list, pursuant to the Reconsideration Decision. Such additions would, at first blush, appear to violate the Reconsideration Decision in that they would provide the Defence with more than four witnesses in relation to paragraphs 53 and 54 of the Indictment. However, the Defence asserts that, contrary to what is indicated in its proofing chart,³¹ Witness T150 is in fact not capable of testifying to paragraph 54 of the Indictment, and likewise Witnesses T116 and T129 are not capable of testifying to paragraph 53 of the Indictment.³² Therefore, the Trial Chamber understands the Defence argument to be that despite its prior representations to the contrary—i.e. that T116, T129 and T150 are each capable of testifying with respect to both paragraphs 53 and 54 of the Indictment—this is in fact not the case, and thus the addition of these three witnesses would not cause paragraphs 53 and 54 to be supported by more than four witnesses each, in keeping with the dictate of the Reconsideration Decision.

Request to vary witness list pursuant to Rule 73 ter (E)

20. If the alterations to the Defence witness list outlined above were to be granted, the Defence calculates that it would be left with a total list of 39 witnesses.³³ However, the Defence then proceeds to propose additional variations to its list pursuant to Rule 73 ter (E), in light of the fact that four of its witnesses (T60, T93, T138 and T139) have expressed "their reluctance to testify" in the instant proceedings.³⁴ For this reason, the Defence proposes to drop those witnesses—two of whom are on the original list of 30 (T93, T139) and two of whom the Defence presently seeks to add from the supplemental list of 14 (T60, T138)—so that they

³⁰ Instant Motion, para. 17.

³¹ See Annexe I (strictement confidentielle) – Au 31 mars 2010, "TÉMOINS DE LA DÉFENSE", pp. 9, 21, 24; which was contained in the confidential e-mail from Philippe Laroche dated 31 March 2010 ("31 March Proofing Chart").

³² Instant Motion, para. 22.

³³ Instant Motion, para. 19.

³⁴ Instant Motion, paras. 19, 22.

may be replaced with 5 new witnesses (T61, T76, T95, T97, and T110), none of whom were on either the original list of 30 witnesses or the supplemental list of 14 witnesses.³⁵

Request to replace Witness T60 with Witnesses T61 and T95

21. The first proposal by the Defence to vary its witness list pursuant to Rule 73 *ter* (E) is that it seeks to replace uncooperative Witness T60, whose testimony, the Defence submits, would address paragraphs 23, 44, 49 and 58 of the Indictment.³⁶ The Defence proposes to replace T60's testimony regarding paragraph 23 with that of T61, and further seeks to replace the testimony of Witness T60 pertaining to paragraph 44 with that of T95.³⁷ The Defence does not propose to replace the testimony of T60 regarding paragraphs 49 and 58 with any new witnesses.

Request to replace Witnesses T138 and T139 with Witness T76

22. The Defence then proposes to replace Witnesses T138 and T139 with Witness T76, so that T76 may testify in respect of paragraph 48 of the Indictment.³⁸ While the Defence concedes that T76's proofing chart of 31 March 2010 did not give notice that the witness was capable of testifying with respect to paragraph 48, it asserts that "after careful review of the evidence of witnesses CNAA and CNAC", it now concludes that that T76 is in fact in position to testify to these allegations.³⁹ The Defence does not propose to allow T76 to testify to any other paragraph of the Indictment.

Request to replace Witness T93 with Witnesses T97 and T110

23. Finally, the Defence requests to replace Witness T93, who it submits was expected to testify to paragraphs 40, 44, 49 and 58 of the Indictment, with Witnesses T97 (who would offer testimony regarding paragraphs 44, 49 and 58 of the Indictment) and T110 (who would offer testimony regarding paragraph 40 of the Indictment).⁴⁰

24. If all of the variations the Defence proposes to make to its list pursuant to Rule 73 *ter* (E) were granted, the Defence calculates that its witness list would total 40.⁴¹ The Defence concludes by arguing that these variations involve "a straight substitution of witnesses

³⁵ See Instant Motion, paras. 23-25 and prayer for relief.

³⁶ Instant Motion, para. 23.

³⁷ Instant Motion, para. 23.

³⁸ Instant Motion, para. 24.

³⁹ Instant Motion, para. 24.

⁴⁰ Instant Motion, para. 25.

⁴¹ Instant Motion, para. 27.

testifying about identical matters”, which would raise “no delays in the expected duration of the case”,⁴² and that such variations are “relevant and justified in view of the charges faced by the accused”.⁴³

Response

25. With respect to the alterations proposed by the Defence pursuant to the Reconsideration Decision, the Prosecution responds that the proposed additions to paragraphs 41, 53 and 54 of the Indictment clearly exceed the numerical cap of 4 witnesses per paragraph of the Indictment that was imposed by this Chamber in that Decision.⁴⁴ With respect to paragraph 41 of the Indictment, the Prosecution “strenuously contests” the addition of Witnesses T56 and T161. Noting that this paragraph is already supported by more than ten witnesses, the Prosecution rejects the Defence’s justification for adding T56 and T161 on the following grounds: 1) the Defence had ample notice of the Prosecution evidence with respect to paragraph 41 prior to framing and presenting its case; 2) the Defence has had ample opportunity to “ventilate” its evidence through the testimony of its current witnesses, particularly T40 and T57, who speak about the megaphone incident at issue; and 3) “it is clearly apparent this paragraph has been overrepresented by the current defence witnesses”.⁴⁵ The Prosecution then advances “the same arguments in opposing the inclusion” of Witnesses T116, T129 and T150 “to paragraphs 53 and 54 which are presently covered by 2 witnesses each”.⁴⁶
26. The Prosecution does not oppose the Defence proposal pursuant to Rule 73 *ter* (E) to vary its witness list by replacing uncooperative witnesses with new witnesses that were neither on the original Defence witness list of 30 nor its supplemental list of 14, so that these new witnesses may testify to the paragraphs identified by the Defence in its Motion.⁴⁷ The Prosecution raised no issue with respect to missing or incomplete PIS for any of the witnesses the Defence proposes to add to its list.

⁴² Instant Motion, para. 26.

⁴³ Instant Motion, para. 28.

⁴⁴ Response, paras. 7-12.

⁴⁵ Response, paras. 8-10.

⁴⁶ Response, para. 11.

⁴⁷ Response, paras. 13-14.

DELIBERATIONS

Preliminary Matters

27. Prior to conducting the foregoing analysis, the Trial Chamber deems it necessary to address several preliminary matters.
28. First, the Trial Chamber notes that the Defence filed a Reply to the Prosecutor's Response on 31 May 2010. The Chamber recalls that the time frame for filing replies in this Chamber is three days. The Defence has not provided good cause for the late filing and thus the Chamber will not consider any submissions contained therein.
29. Second, the Trial Chamber recalls that the Defence filed the Instant Motion as strictly confidential. The Chamber will refer to Defence witnesses by pseudonym and will not address particulars of their anticipated testimony that might reveal their identity. Thus, the present Decision will be rendered publicly.
30. Third, the Trial Chamber notes that in the Instant Motion, the Defence frequently proposes to add witnesses to its list for the stated purpose of testifying with respect to fewer paragraphs in the Indictment than its proofing charts would indicate those witnesses are capable of testifying about.⁴⁸ The Chamber further notes, in relation to witnesses the Defence proposes to drop, that the Defence does not purport to replace all the testimony they could possibly offer regarding the Indictment, as indicated by its proofing charts, but only those paragraphs expressly identified in the Motion.⁴⁹ Therefore, for the purposes of the forthcoming analysis, the Trial Chamber understands the Defence submission to be that if its requests are granted, it would only call its additional witnesses to testify regarding paragraphs explicitly enumerated in its Motion, and that any prospective testimony lost by dropped witnesses that is not explicitly covered by replacement witnesses constitutes a tacit concession by the Defence that such paragraphs are suitably addressed by the remainder of the witnesses on its list.
31. Finally, the Trial Chamber observes with concern the rather convoluted manner in which the Defence has advanced its arguments in the Instant Motion, which risks causing needless confusion as to the crux of the matter to be addressed and obligates the Chamber to partake in undue and time-consuming efforts to untangle the Defence's web of submissions, so that a

⁴⁸ Compare generally, Instant Motion with 31 March and 16 April Proofing Charts.

⁴⁹ Compare generally, Instant Motion with 31 March and 16 April Proofing Charts.

just result on the merits may be reached. The Chamber cautions the Defence that it expects its future pleadings to be presented in a more clear and structured manner that will facilitate the smooth and expeditious resolution of the pressing issues the Chamber is asked to adjudicate.

Applicable Law

32. Rule 73 *ter* (E) (ii) provides that

[a]fter 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.

Variations to a witnesses list must be supported by “good cause” and be in “the interests of justice”.⁵⁰ The jurisprudence of this Tribunal has consistently held that the following factors are relevant to this analysis:

- 1) the materiality and probative value of the testimony in relation to existing witnesses and allegations in the indictment; 2) the complexity of the case; 3) any potential prejudice to the opposing party; 4) the justifications offered for the late variation of the witness list; 5) the timing of the late disclosure; and 6) any delays in the proceedings occasioned by the proposed variation.⁵¹

Analysis

Variations requested pursuant to Reconsideration Decision

Request to allow Witnesses T56 and T161 to testify to paragraph 41 of the Indictment

33. At the outset of this analysis, the Trial Chamber wishes to stress that the Defence mischaracterised the Chamber’s Reconsideration Decision when it stated in the Instant Motion that adding Witnesses T56 and T161 “would bring the total amount of Defence witnesses on that allegation [i.e. pertaining to Ngoma secteur] to 4, as permitted by the Decision of 7 May 2010”.⁵² This is simply untrue. The Trial Chamber lacked no clarity in that Decision when it stated that the Chamber would allow “the Defence to add to its

⁵⁰ See e.g., *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Bagosora Motion to Present Additional Witnesses and Vary its Witness List, 17 November 2006, para. 2; *Prosecutor v. Bizimungu et al.*, 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, 1 May 2008, para. 12.

⁵¹ See e.g., *Prosecutor v. Rukundo*, 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, 11 September 2007, para. 10; *Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-T, Decision on Nzuwonemeye’s Request to Vary his Witness List, 31 January 2008, para. 31; *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, Decision on Accused’s Motion to Expand and Vary the Witness List, 28 March 2006, para. 11; *Bizimungu*, para. 13; *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-T, Decision on the Defence Motion to Vary the Defence Witness List, 28 March 2007, para. 3; *Prosecutor v. Kalimanzira*, ICTR-05-88-T, Consolidated Decision on Prosecution Oral Motion to Reduce Defence Witness List and Defence Motion to Vary Witness List, 16 January 2009, para. 7.

⁵² Instant Motion, para. 17. (emphasis added)

existing list... those [witnesses] who would testify to paragraphs in the Indictment that are presently supported by less than 4 witnesses".⁵³ Moreover, the Trial Chamber's directive that the numerical cap of 4 witnesses pertained to paragraphs of the Indictment, rather than each "allegation" contained within in each paragraph, was explicitly repeated in the disposition of the Decision.⁵⁴

34. Moreover, the Trial Chamber recalls that when the Chamber recessed on 17 December 2009, all but one Prosecution witness (CNAJ) had been examined-in-chief.⁵⁵ Therefore, with the Prosecution case virtually complete as of mid-December, the Defence had several months in which to assess the strength of the case vis-à-vis paragraph 41 of the Indictment. Given this ample time, the Chamber does not consider that the Defence's failure to economically allot its resources should excuse it from the express edict of the Reconsideration Decision and thus allow it to add two witnesses to a paragraph for which more than 10 witnesses already exist. For these reasons, the Trial Chamber rejects the Defence request to allow Witnesses T56 and T161 to testify in relation to paragraph 41 of the Indictment.

Request to add Witnesses T116, T129 and T150

35. With respect to the Defence request to add Witnesses T116, T129 and T150, while the Trial Chamber finds it somewhat curious that the Defence would, at such an advanced stage of these proceedings, disclose that Witnesses T116 and T129 are incapable of testifying regarding paragraph 53 of the Indictment and that Witness T150 is likewise incapable of testifying with respect to paragraph 54, the Chamber accepts the Defence submission to constitute a binding undertaking that it will not lead evidence regarding paragraphs that it claims these witnesses have no knowledge about.⁵⁶ Therefore, on this condition, the Trial Chamber allows the Defence to add Witness T150 to its list in order to testify with respect to paragraph 53.

⁵³ Reconsideration Decision, para. 44. (emphasis added)

⁵⁴ Reconsideration Decision, disposition: "**FOR THESE REASONS, THE CHAMBER... ALLOWS** the Defence to add to its existing list of 30 Defence witnesses only those witnesses from its proposed list of 14 who would testify to paragraphs of the Indictment identified in paragraph 21 of the Instant Motion where less than 4 witnesses are currently scheduled to testify; **ORDERS** that the total number of Defence witnesses supporting a paragraph of the Indictment where the Defence has been allowed to add witnesses from its list of 14 not exceed 4 witnesses, after any additions have been made...". (bold in original, underscore added)

⁵⁵ While Prosecution Witness CNAC testified on 12 and 13 April 2010, the examination-in-chief of that witness had been completed prior to the Recess that began in December 2009.

⁵⁶ The Defence also proposes to add Witnesses T116 and T129 so that they may testify regarding paragraph 32 of the Indictment. The Trial Chamber takes no issue with this proposal, as that paragraph is currently supported by 2 Prosecution witnesses, meaning that the addition of T116 and T129 to that paragraph would not violate the parameters established by the Reconsideration Decision.



36. However, after having carefully reviewed the Defence proofing chart,⁵⁷ the Trial Chamber notes that in the Reconsideration Decision, it erroneously did not include Witness T19 among those witnesses capable of testifying to paragraph 41 of the Indictment, even though the Defence had clearly disclosed that T19 would testify regarding that paragraph.⁵⁸ Therefore, because the actual number of witnesses the Defence submitted to testify in relation to paragraph 54 is in fact three and not two, the Trial Chamber cannot allow the Defence to add more than one additional witness to that paragraph. For these reasons, the Defence must elect whether it wishes to add Witness T116 or T129 in relation to paragraph 54.

Variations requested pursuant to Rule 73 ter (E)

37. The Trial Chamber recalls that the Defence seeks to replace four reluctant witnesses with five new witnesses who would testify exclusively to paragraphs of the Indictment that would have been addressed by the witnesses who no longer wish to testify. Considering Rule 73 ter (E) and the jurisprudence of this Tribunal, the Trial Chamber observes that requests to substitute unavailable or uncooperative witnesses with new witnesses who would testify to the same aspects of an indictment is an accepted justification for proposals to vary witness lists,⁵⁹ especially where the proposed substitutions are on a witness-for-witness basis.⁶⁰

38. Bearing these factors in mind, the Chamber finds that the Defence proposal to substitute 5 witnesses in exchange for 4 witnesses who would testify only to specific paragraphs of the Indictment left wanting by the loss of the witnesses who are no longer willing to testify substantially comports with these criteria. Furthermore, because each of the proposed substitutions relates to a paragraph of the Indictment where less than 4 Defence witnesses are currently scheduled to testify, the Trial Chamber considers that the proposed testimony of the substitute witnesses may be material and probative in relation to existing witnesses and allegations in the Indictment.

⁵⁷ See *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Annexe I au Mémoire Préalable à la Défense Liste des Témoins Conformément à l'Ordonnance du 14 avril 2010, 16 April 2010, p. 2 ("16 April Proofing Chart").

⁵⁸ Indeed, the Prosecution Response noted in "Figure 1", a Table included at p. 6 of its Response, that according to its records, 3 Defence witnesses were scheduled to testify to paragraph 54 of the Indictment.

⁵⁹ *Rukundo*, paras. 9, 12-14; *Kalimanzira*, paras. 2, 8; *Prosecutor v. Ndindiliyimana*, ICTR-2000-56-T, Decision on Augustin Bizimungu's Request to Vary his Witness List (Augustin Bizimungu Variation Decision), paras. 4, 13-14, 19.

⁶⁰ *Rukundo*, paras. 9, 11-14; *Kalimanzira*, paras. 2, 8.

39. The Trial Chamber recalls that the Prosecution does not object to any of the variations at issue, which the Chamber interprets as a tacit concession that such variations would not pose the Prosecution any prejudice. Finally, given the recent development that trial proceedings in this matter are expected to continue for an additional 8 weeks over the course of the ensuing 10 months, the Trial Chamber finds that the proposed variations have been made in a timely manner and that they will not engender any delay to the instant proceedings. For these reasons the Trial Chamber allows the Defence to vary its witness list pursuant to Rule 73 *ter* (E), in accordance with the terms it has proposed in the Instant Motion.
40. The Trial Chamber observes that after all variations allowed by the Instant Decision have been made, the Defence witness list will stand at 38 witnesses. The Trial Chamber reminds the Defence that these variations have been granted with the explicit proviso that the witnesses added to the Defence list may only testify only with respect to paragraphs of the Indictment that have been enumerated in the Instant Decision, in keeping with this Chamber's power to control the scope of any testimony proffered by witnesses added pursuant to a Rule 73 *ter* (E) motion, in accordance with the jurisprudence of this Tribunal⁶¹ and in view of the Chamber's powers under Rule 90 (F).
41. For ease of reference, the following table illustrates exactly which witnesses the Chamber has permitted the Defence to add and drop and the corresponding paragraphs of the Indictment to which each witness added is allowed to testify:

Paragraphs of the Indictment where Defence had less than 4 witnesses prior to Instant Decision	Witnesses supporting paragraph prior to Instant Decision (number of witnesses)	Witnesses added to paragraph by Instant Decision (number added)	Witnesses dropped from paragraph by Instant Decision (number subtracted)	Total Witnesses who may be called in respect of paragraph after additions and deletions (witnesses)
21	T24 (1)	None (0)	None (0)	1 (T24)
23	T59 (1)	T60, T61 (+2)	T60 (-1)	2 (T59, T61)
24	CNAO, T109 (2)	None (0)	None (0)	2 (CNAO, T109)
28	T64, T65	None	None	2

⁶¹ See e.g., Augustin Bizimungu Variation Decision, paras. 12, 19-20

	(2)	(0)	(0)	(T64, T65)
32	T19, T117 (2)	T116, T129 (+2)	None (0)	4 (T19, T116, T117, T129)
40	CNAO, T93, T109 (3)	T110 (+1)	T93 (-1)	3 (CNAO, T109, T110)
44	T92, T93 (2)	T60, T95, T97, T98 (+4)	T60, T93 (-2)	4 (T92, T95, T97, T98)
46	T71 (1)	None (0)	None (0)	1 (T71)
47	T133 (1)	T134 (+1)	None (0)	2 (T133, T134)
48	T139 (1)	T76, T138 (+2)	T138, T139 (-2)	1 (T76)
49	T92, T93 (2)	T60, T97, T98, (+3)	T60, T93 (-2)	3 (T92, T97, T98)
53	T36, T117 (2)	T150 (+1)	None (0)	3 (T36, T117, T150)
54	T19, T36, T117 (3)	T116 <u>OR</u> T129 (+1)	None (0)	4 (T19, T36, T117, plus T116 <u>OR</u> T129)
58	T92, T93 (2)	T60, T97, T98 (+3)	T60, T93 (-2)	3 (T92, T97, T98)

FOR THESE REASONS, THE CHAMBER

GRANTS the Defence Motion in part;

ALLOWS the Defence, pursuant to the Reconsideration Decision of 7 May 2010, to add the following witnesses to its list, so that they may testify exclusively with respect to the following paragraphs of the Indictment: T60 (paragraphs 23, 44, 49 and 58), T98 (paragraphs 44, 49 and 58), T116 (paragraph 32), T129 (paragraph 32), T134 (paragraph 47), T138 (paragraph 48), and T150 (paragraph 53);

GRANTS the Defence five (5) days to decide whether it intends to have

Witness T116 or T129 testify in respect of paragraph 54 of the Indictment (in addition to paragraph 32, as permitted above);

ALLOWS the Defence, pursuant to Rule 73 *ter* (E), to drop the following witnesses from its list: T60, T93, T138 and T139;

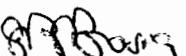
ALLOWS the Defence, pursuant to Rule 73 *ter* (E), to replace the witnesses it has dropped with the following witnesses, so that they may testify exclusively with respect to the following paragraphs of the Indictment: T61 (paragraph 23), T76 (paragraph 48), T95 (paragraph 44), T97 (paragraphs 44, 49 and 58), and T110 (paragraph 40);

ORDERS the Defence to file, within five (5) days, a revised witness list incorporating the alterations that have been allowed by this Decision and indicating its election as to whether it wishes to add Witness T116 or T129 to paragraph 54, as well as a revised proofing chart for those witnesses who have not yet testified, which reflects the permissible scope of testimony for new witnesses as dictated by this Decision;

ENJOINS the Defence to strictly confine its examination of any witnesses added to its list by the Instant Motion to the paragraphs of the Indictment indicated above; and

DENIES the Defence request to add Witnesses T56 and T161 to its list.

Arusha, 04 June 2010, done in English.


Solomy Balungi Bossa
Presiding Judge


Bakhtiyor Tuzmukhamedov
Judge


Mparany Rajohnson
Judge

[Seal of the Tribunal]

