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Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 19 January 2011

JUDICIAL RECORDS SECTION
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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 LISTS OF WITNESSES"

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

Office of the Prosecutor
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INTRODUCTION

1. On 3 February 2010, the Trial Chamber ordered the Defence to produce a list of witnesses it intended to call at trial, as well as information concerning the facts and points in the Indictment to which each witness would testify ("Proofing Chart").¹
2. On 22 February 2010, the Defence disclosed a list containing 153 witnesses.²
3. On 5 March 2010, during a Pre-Defence Conference, the Trial Chamber issued an oral order for the Defence 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").³
4. On 12 March 2010, notwithstanding the 5 March Order, the Defence filed an increased list of 179 witnesses and a Proofing Chart for the first 65 witnesses it intended to call.⁴
5. On 26 March 2010, the Trial Chamber issued a decision ordering the Defence to file, by 31 March 2010, a list of 30 witnesses ("26 March Decision").⁵
6. On 31 March 2010, the Defence filed a list of 184 witnesses and another Proofing Chart.⁶ It also filed a separate list of 30 witnesses, purporting to comply with the 26 March Decision.⁷
7. On 6 April 2010, the Defence filed a Motion for Reconsideration or Certification of the 26 March Order ("6 April Motion").⁸ In an Annex to that Motion, the Defence indicated 14 additional witnesses it wished to call should its request for Reconsideration be granted.⁹

¹ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Order on Defence Disclosure, 3 February 2010.

² Confidential letter from Philippe Larochelle dated 22 February 2010.

³ English Transcript of Pre-Defence Conference, 5 March 2010, p. 15, l. 30 - p. 17, l. 25.

⁴ Confidential letter from Philippe Larochelle dated 12 March 2010.

⁵ *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.

⁶ Confidential e-mail from Philippe Larochelle dated 31 March 2010.

⁷ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Filing in Compliance with the 26 March 2010 Trial Chamber Decision, 31 March 2010.

⁸ *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.

⁹ *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.

8. On 14 April 2010, the Defence commenced its case.¹⁰
9. On 7 May 2010, the Trial Chamber issued a decision on the 6 April Motion ("7 May Decision"),¹¹ denying Certification but granting partial Reconsideration and allowing the Defence to add to its witness list, from its proposed additional 14 witnesses, those who would testify to paragraphs of the Indictment the Defence had identified as requiring rebuttal and where less than four witnesses were slated to testify.¹² The Chamber further ordered that no more than four witnesses could testify to any such paragraph.¹³ Consequently, the Defence filed a motion to vary its witness list on 19 May 2010 ("First Variation Motion").¹⁴
10. On 4 June 2010, the Trial Chamber issued a decision on the First Variation Motion, allowing the Defence to increase its witness list from 30 to 38, while restricting the paragraphs of the Indictment to which the new witnesses could testify ("First Variation Decision").¹⁵ A subsequent Defence Motion requesting Reconsideration or Certification of these restrictions was denied in substantial part by the Chamber on 14 July 2010 ("14 July Decision").¹⁶
11. On 5 August 2010, the Defence filed a motion for the variation of its witness list to replace a reluctant witness with a proposed substitute ("Second Variation Motion").¹⁷ On 20 September 2010, the Trial Chamber denied this motion ("Second Variation Decision").¹⁸

¹⁰ English Transcript of Trial Proceedings, 14 April 2010, p. 2 *et seq.* The commencement of the Defence case does not include the testimony of Defence Witness Straton Sibomana, who provided evidence during the Prosecution phase of the trial by way of Deposition conducted pursuant to Rule 71 of the Rules of Procedure and Evidence, on 9-10 December 2009.

¹¹ *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.

¹² 7 May Decision, para. 44.

¹³ 7 May Decision, disposition.

¹⁴ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Motion for the Variation of its List of Witnesses, 19 May 2010.

¹⁵ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana's Motion for the Variation of its List of Witnesses, 4 June 2010, para. 40.

¹⁶ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana's Motion for Reconsideration/and or Certification of the "Decision on Nzabonimana's Motion for the Variation of its List of Witnesses", Rendered on 4 June 2010, 14 July 2010.

¹⁷ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Second Motion to Vary his List of Witnesses, 5 August 2010.

¹⁸ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Consolidated Decision on Nzabonimana's Second Motion to Vary His List of Witnesses and Nzabonimana's Motion to Suspend "Second Motion to Vary his List of Witnesses", 20 September 2010.

- 12. On 7 October 2010, the Defence moved the Trial Chamber to, *inter alia*, add new witnesses to its list and reconsider limitations placed on the testimony of an existing witness ("Third Variation Motion").¹⁹ On 30 November 2010, the Chamber granted the motion in part, raising the Defence witness list from 38 to 40 while confining the testimony of the newly added witnesses to specific paragraphs of the Indictment ("Third Variation Decision").²⁰
- 13. On 20 December 2010, the Defence filed the instant motion ("Motion"), again seeking to vary its lists of witnesses.²¹
- 14. On 23 December 2010, the Prosecution filed a response to the Motion ("Response").²²
- 15. On 28 December 2010, the Defence filed a reply to the Prosecution Response ("Reply").²³
- 16. Trial proceedings are presently scheduled to resume from 28 February – 8 April 2011, with a one week adjournment from 14 – 18 March 2011. The Trial Chamber expects the Defence case and any Prosecution rebuttal case to be completed during this session.

SUBMISSIONS OF THE PARTIES

Motion

Addition of new Witness T300 to Defence witness list

17. In the Defence Motion, the Defence seeks to add to its list a new witness, T300, who it has only "very recently" managed to identify and locate, and who was therefore not interviewed by the Defence for the first time until November 2010.²⁴ Providing a synopsis of T300's prospective testimony and his connection to the events depicted in paragraph 28 of the Indictment,²⁵ the Defence avers that T300's "evidence will be key in rebutting the

¹⁹ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Motion for the Variation of its Global List of Witnesses and for Reconsideration of Certain Decisions Pertaining to the Scope of Defence Witnesses Testimony under Rule 73ter (E) of the Rules of Procedure and Evidence ("RPE"), 7 October 2010.

²⁰ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana's Motion for the Variation of its Global List of Witnesses and for Reconsideration of Certain Decisions Pertaining to the Scope of Defence Witnesses Testimony under Rule 73ter(E) of the Rules of Procedure and Evidence, 30 November 2010.

²¹ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Motion for the Variation of its Lists of Witnesses under Rule 73ter(E) of the Rules of Procedure and Evidence ("RPE"), 20 December 2010.

²² *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Motion for the Variation of its Lists of Witnesses under Rule 73ter(E) of the Rules of Procedure and Evidence, 23 December 2010.

²³ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Reply to Prosecutor's Response on "Nzabonimana's Motion for the Variation of its Lists of Witnesses under Rule 73ter (E) of the Rules of Procedure and Evidence ("RPE"), 28 December 2010.

²⁴ Motion, paras. 23, 25-26.

²⁵ Motion, paras. 25, 27.



allegations contained [in that paragraph]".²⁶ The Defence further submits that T300 "will... provide general information as to the alleged presence of Callixte Nzabonimana at various roadblocks, pursuant to paragraph 55 of the Indictment",²⁷ and thus requests that T300 be allowed to testify on that paragraph as well.²⁸ Citing an Annex to the Motion that purports to illustrate the strength of its rebuttal case ("Annex"), the Defence contends that paragraphs 28 and 55 will only be rebutted by one witness each (T64 and T65, respectively), meaning that the addition of T300 would not breach the limit of four witnesses per paragraph imposed by the 7 May Decision, thus allowing the Defence to proffer valuable corroboration testimony.²⁹ Finally, the Defence postulates that this addition would not cause prejudice to the Prosecution nor would it engender any delays to the present proceedings.³⁰

Expansion of Witness T72's testimony to replace that of Witness T76

18. The Defence then announces that it wishes to drop Witness T76 from its list, who was expected to testify regarding paragraph 48 of the Indictment. To compensate for this evidentiary attrition, the Defence proposes to expand the scope of Witness T72's testimony beyond paragraph 26 to include paragraph 48.³¹ The Defence contends that the expansion of T72's testimony is in the interests of justice because his testimony will be material and probative,³² the Prosecution will suffer no prejudice as there will be one less Defence witness to cross-examine,³³ and hence the proposed variation will simplify the case.³⁴

Substitution of Witnesses T114 and T303 for Witnesses T116 and T129

19. The Defence also seeks to drop Witnesses T116 and T129 from its list, as they "have expressed... reluctance to come and testify before this court",³⁵ and replace their testimony concerning paragraphs 32 and 54 of the Indictment with that of Witnesses T114 and T303.³⁶ Because the proposed variation would involve a straight witness-for-witness substitution regarding identical paragraphs of the Indictment, the Defence reasons that the maximum

²⁶ Motion, paras. 23-24.
²⁷ Motion, paras. 27, 30.
²⁸ Motion, paras. 28, 32.
²⁹ Motion, paras. 27, 30.
³⁰ Motion, para. 31.
³¹ Motion, paras 34, 37, 40.
³² Motion, paras 41-42.
³³ Motion paras 43-44.
³⁴ Motion, para 45.
³⁵ Motion, paras. 33, 47.
³⁶ Motion, paras. 47-49, 51-53, 55, 57.

witnesses allowed for those paragraphs will not be disturbed.³⁷ The Defence also stresses the need to "complete and corroborate" evidence already adduced by Defence Witnesses T117 and Straton Sibomana regarding the paragraphs at issue.³⁸ The Defence contends the Prosecution has received adequate notice of the particulars and prospective testimony of the two replacement witnesses,³⁹ and posits that it "can bring these witnesses during the February-April 2011 session" while causing "no further delays" to the trial.⁴⁰

Substitution of Witnesses T193 and T54 for Witness T36

20. Recalling the reluctance of Witness T36 to testify before the Tribunal, the Defence proposes to replace his evidence with Witnesses T193 and T54, who would address paragraphs 19, 20 and 43 of the Indictment.⁴¹ While the Defence concedes that this variation would cause paragraph 19 to be supported by five Defence witnesses in violation of the Trial Chamber's prior edict, the Defence seeks an exception because T36's anticipated evidence was more comprehensive in nature and thus requires the combined testimony of two witnesses to be recaptured.⁴² Moreover, the Defence announces that it is willing to drop T39 from its list, thus negating any net increase in the total number of witnesses on the Defence list.⁴³ The Defence stresses the need to corroborate evidence adduced by Witnesses T24 and T28 on the paragraphs at issue,⁴⁴ and posits that the Prosecution is already sufficiently apprised of the testimony, whereabouts and identity of T193 and T54.⁴⁵ Finally, the Defence repeats its assertion that all its remaining witnesses can be heard during the final session.⁴⁶

Response

Addition of T300 to Defence witness list

21. The Prosecution opposes the addition of T300 to the Defence witness list,⁴⁷ averring that "T300 was first mentioned by prosecution witness CNAV on 3 December 2009 in court", and that "[w]hen the Defence interviewed T64 [in November 2010], they already knew

³⁷ Motion, paras. 35-36, 50.
³⁸ Motion, para. 53.
³⁹ Motion, paras. 54-55.
⁴⁰ Motion, para. 56.
⁴¹ Motion, paras. 58-61.
⁴² Motion, paras. 61-62.
⁴³ Motion, para. 72.
⁴⁴ Motion, para. 66.
⁴⁵ Motion, paras. 67-69.
⁴⁶ Motion, para. 70.
⁴⁷ Response, para. 54.

about T300".⁴⁸ Consequently, the Prosecution submits that "[t]he Defence have not explained how they got information of him only recently when all along he was mentioned in the case",⁴⁹ and that the justification for the late addition of T300 "is vague and unconvincing".⁵⁰ Moreover, the Prosecution disputes the probative value of T300's proposed testimony, because "[h]is purported evidence does not bring any new area except the purported corroboration of T64's testimony", noting further that "[t]here are indeed some paragraphs where the Defence have called only one witness to testify and the number of four [witnesses per paragraph] stipulated by the court is not meant to be a minimum".⁵¹

Expansion of T72's testimony to replace that of T76

22. The Prosecution presents no objection to the expansion of T72's testimony in order to replace the evidence lost by Defence's election to drop T76 from its list.⁵²

Substitution of T114 and T303 for T116 and T129

23. While conceding that the Defence may substitute evidence lost by T116 and T129's refusal to testify, the Prosecution argues the Defence must "choose only one witness between T114 and T303 in respect of both paragraphs 32 and 54", implying that to add both witnesses would exceed the maximum of four witnesses per paragraph imposed by this Chamber.⁵³

Substitution of T193 and T54 for T36

24. The Prosecution objects to the proposed substitution of T193 and T54 in place of T36.⁵⁴ Citing the past refusal of the Trial Chamber to add further witnesses to paragraphs 19, 20 and 43 in view of apparently adequate existing rebuttal evidence (according to representations contained in the Defence Proofing Chart), the Prosecution argues that adding witnesses to these paragraphs would cause them to be "oversubscribed with witnesses".⁵⁵ Regarding paragraph 43, the Prosecution intimates that it is illogical to allow the Defence to call more witnesses on that paragraph, since it asserts in its Motion that no Prosecution

⁴⁸ Response para. 55.

⁴⁹ Response, para. 55.

⁵⁰ Response, para. 55.

⁵¹ Response, para. 56.

⁵² Response, para. 45.

⁵³ Response, paras. 51-53.

⁵⁴ Response, para. 46.

⁵⁵ Response, paras. 47-49.

evidence exists to support those allegations, and that in any event two Defence witnesses have already testified to rebut said allegations.⁵⁶

Reply

25. The Defence opens its Reply by "not[ing] the following admissions" made by the Prosecution in its Response:

- The Prosecutor does not oppose the expansion of T72's testimony to cover paragraph 48 of the Indictment in replacement of witness T76;
- The Prosecutor does not contest that paragraph 43 of the Indictment is supported by no prosecution evidence; and
- The Prosecutor does not contest the Revised Table of Defence Witnesses attached to the Motion under Annex A [sic].⁵⁷

The Defence then seeks, "[i]n light of the above... to rely solely on [its Annex] in regards to its witnesses. It is indeed agreed now by both parties that it is the most recent and relevant table as per the Defences [sic] witnesses that have and will testify in this trial".⁵⁸

Addition of T300 to Defence witness list

26. The Defence strenuously disputes the Prosecution's assertion that T300 was adequately identified by the testimony of Prosecution Witness CNAV as early as 3 December 2009, and counters that "[i]t is only when meeting T64 prior to his testimony in July 2010 that the Defence team became aware of T300's full identity and location".⁵⁹ It was "immediately following" this event that the Defence "diligently" followed the requisite bureaucracy involved "in meeting the witness, assessing its [sic] evidence and deciding whether or not to call him".⁶⁰ The Defence also dismisses the Prosecution contention that corroboration is not grounds for adducing evidence, and maintains that if T300's "very brief" testimony is allowed, only two Defence witnesses will testify to paragraph 28 of the Indictment.⁶¹

Substitution of T114 and T303 for T116 and T129

27. The Defence dismisses the Prosecution's arguments opposing the addition of both T114 and T303 in place of T116 and T129 as erroneously relying on outdated projections contained in

⁵⁶ Response, para. 50.

⁵⁷ Reply, para. 4.

⁵⁸ Reply, para. 5.

⁵⁹ Reply, paras. 6-8.

⁶⁰ Reply, para. 9.

⁶¹ Reply, para. 10.

"an obsolete proofing chart",⁶² as opposed to adhering to the practice prescribed by the Trial Chamber of considering which witnesses were actually called by the Defence for each paragraph.⁶³ Because the Prosecution has failed to contest the accuracy of the Defence's Annex, this "most recent and relevant" record ought to be the sole governing authority in determining the true strength of the Defence case,⁶⁴ and thus the Annex's averment that adding both T114 and T303 would not cause paragraphs 32 and 54 to exceed four witnesses must be accepted in the absence of any demonstration to the contrary.⁶⁵

Substitution of T193 and T54 for T36

28. The Defence concedes that the proposed substitution would cause paragraph 19 to have one more witness than the maximum allowed by the Trial Chamber, but reiterates the argument contained in its Motion that because the testimony of T193 and T54 less comprehensively covers the same events as the testimony of T36, an exception to the numerical cap is warranted under the circumstances.⁶⁶ Moreover, the Defence, relying on its Annex, negates the Prosecution charge that more than four witnesses will testify to paragraph 20.⁶⁷ Finally, citing what it characterises as "the Prosecution's admission that there is no Prosecution evidence... in support of [paragraph 43]", the Defence offers not to have T193 and T54 testify with regard to this paragraph, "to insure the smooth running of these proceedings".⁶⁸

29. Finally, as a general matter, the Defence notes that "[t]he Prosecutor raises no issue as to disclosure or delay caused during the February-April proceedings."⁶⁹

DELIBERATIONS

Applicable Law

30. Rule 73 *ter* (E) of the Rules of Procedure and Evidence ("Rules") 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.

⁶² Reply, para. 12. This reference was technically contained in the section advocating for the replacement of T36 by T193 and T54, but the Trial Chamber reads the Defence Reply as a whole to apply this line of argument to the proposed substitution of T114 and T303 for T116 and T119.

⁶³ Reply, paras. 26-28.

⁶⁴ Reply, para. 5.

⁶⁵ Reply paras. 26-30.

⁶⁶ Reply, paras. 13-21.

⁶⁷ Reply, paras. 22-23.

⁶⁸ Reply, paras. 24-25.

⁶⁹ Reply, para. 30.

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Variations to a witness list must be supported by "good cause" and be in "the interests of justice".⁷⁰ 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.⁷¹

31. As affirmed in *Karemera*, Trial Chambers have the "inherent power" to reconsider their own decisions, under the following "exceptional" circumstances:

- i. when a new fact has been discovered that was not known by the Trial Chamber;
- ii. where new circumstances arise after the original decision;
- iii. where there was an error of law or an abuse of discretion by the Trial Chamber resulting in an injustice.⁷²

Preliminary Matter

32. Prior to conducting the foregoing analysis, the Trial Chamber finds it appropriate to make certain preliminary remarks regarding the Defence's repeated assurances that it will complete its case during the next session.

33. First, the Trial Chamber observes that the Defence, in issuing its projections, has neglected to mention the cross-examination of T61, which has been held over from the October 2010 trial session.⁷³ Second, the Defence's avowals that it will complete its case in due course make no mention of this Chamber's stated position that during the impending trial session the Prosecution must complete any rebuttal case it elects to bring pursuant to Rule 85 (A) (iii).⁷⁴

⁷⁰ 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.

⁷¹ 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. Ndingiyimana et al.*, ICTR-00-56-T, Decision on Nzuwonemeye's Request to Vary his Witness List, 31 January 2008, para. 3; *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.

⁷² See e.g., *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera*, ICTR-99-44-T, Decision on Reconsideration of Protective Measures for Prosecution Witnesses, 30 October 2006, para. 2; *Karemera*, ICTR-99-44-T, Decision on Reconsideration of Admission of Written Statements in lieu of Oral Testimony and Admission of the Testimony of Prosecution Witness GAY, 28 September 2007, paras. 10-11.

⁷³ English Transcript of Trial Proceedings, 18 October 2010, p. 8, l. 7 – p. 9, l. 17.

⁷⁴ See e.g., First Variation Decision, para. 15.

Third, the Trial Chamber observes that while the Defence has managed to call approximately 2½ witnesses per week in the presentation of its case thus far, it would have to significantly exceed that pace, by calling over 3 witnesses per week, in order to achieve its stated target of calling its remaining 12 witnesses (plus T61) in four weeks of trial proceedings.⁷⁵ Thus, it would appear the Defence has set an ambitious target for itself, with little margin for error. The Chamber reminds the Defence of its obligation to maximize the precious resources of the Tribunal by conducting the examination of its witnesses diligently and in a manner of presentation that ensures the effective ascertainment of the truth while avoiding needless consumption of time.

Analysis

Addition of new witness T300 to Defence witness list

34. The Trial Chamber finds that the Defence has offered a detailed and plausible explanation as to why T300 is being introduced as a new witness at this late stage of the proceedings. Moreover, the Trial Chamber considers that the Defence has adequately explained how the proposed testimony of T300 is material and probative with respect to existing witnesses and allegations in the Indictment. It should also be noted that while T300 is not a substitution witness, due to other witnesses the Defence proposes to drop from its list, his addition will not increase the size of the Defence list but rather maintain the numerical status quo of Defence witnesses. Furthermore, the addition of T300 will not cause the number of Defence witnesses testifying with respect to paragraph 28 of the Indictment to exceed four.

35. Conversely, the Trial Chamber cannot accept the Prosecution argument that because T300 is expected to produce corroboratory evidence, he should be excluded from the Defence witness list. Moreover, the Trial Chamber finds that the Prosecution has not raised any argument that it has received inadequate disclosure vis-à-vis T300 or that it is otherwise prejudiced in its ability to cross-examine that witness. For these reasons, the Defence may call T300 to testify exclusively with respect to paragraphs 28 and 55.

Expansion of T72's testimony to replace that of T76

36. In view of the Prosecution's consent and in an effort to expedite proceedings, the Trial Chamber will allow T72 to testify on paragraph 48 of the Indictment in lieu of T76.

⁷⁵ Confidential e-mail from Philippe Larochelle to Paul Ng'arua dated 13 December 2010.

Substitution of T114 and T303 for T116 and T129

37. The Trial Chamber recalls that according to the jurisprudence pertaining to Rule 73 *ter* (E), as previously acknowledged by this Chamber,⁷⁶ 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, especially where the proposed substitutions are on a witness-for-witness basis.⁷⁷ The Chamber finds these criteria satisfied in the present request, and recalls its recent pronouncement in the Third Variation Decision that “[i]n the absence of any demonstration to the contrary, the Trial Chamber presumes the representations made by Defence Counsel, who are officers of this court, to have been made honestly and in good faith”.⁷⁸ Now, as then,⁷⁹ the Prosecution has not contested the veracity of the claim contained in the Defence Annex that it has suffered a diminution of its case. Consequently, the Trial Chamber finds that the testimony of T114 and T303 will not occasion more than four witnesses testifying in relation to paragraphs 32 and 54 of the Indictment, and therefore the substitution proposed by the Defence is allowed.

Substitution of T193 and T54 for T36

38. While this proposed variation is not, strictly speaking, on a witness-per-witness basis, this Trial Chamber has previously ruled that a “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 the... criteria [for substituting witnesses].”⁸⁰ In its Motion, the Defence has explained how the combined evidence of T193 and T54 is necessary to recapture what was lost from T36. Moreover, the Chamber notes that the Defence is dropping T39 from its witness list, thus causing no net increase in its number of witnesses. Finally, the Chamber reiterates that the Prosecution has not challenged the Defence’s Annex, and therefore rejects the suggestion that paragraphs 20 and 43 are “oversubscribed” with Defence witnesses.

39. This being noted, the issue remains as to whether the Trial Chamber should allow five Defence witnesses to testify on paragraph 19 of the Indictment, in excess of the numerical cap of four witnesses imposed by the 7 May Decision and repeatedly upheld by this

⁷⁶ First Variation Decision, para. 37.

⁷⁷ *Rukundo*, paras. 9, 11-14; *Kalimanzira*, paras. 2, 8; *Ndindiliyimana*, Decision on Augustin Bizimungu’s Request to Vary his Witness List, 24 October 2007, paras. 4, 13-14, 19.

⁷⁸ Third Variation Decision, para. 33.

⁷⁹ Third Variation Decision, para. 33.

⁸⁰ First Variation Decision, para. 38.

Chamber in its subsequent jurisprudence.⁸¹ The Chamber considers that given the difficulties the Defence has experienced in replacing T36's testimony, it would be in the interests of justice to exceptionally reconsider the application of the numerical cap to paragraph 19, in light of these new circumstances.

FOR THESE REASONS, THE CHAMBER

GRANTS the Defence Motion;

ALLOWS the Defence to add T300 to its witness list in order to testify exclusively with respect to paragraphs 28 and 55 of the Indictment;

ALLOWS the scope of T72's testimony to be expanded to encompass paragraph 48 of the Indictment;

ORDERS the Defence to remove T76 from its witness list;

ALLOWS the Defence to add T114 and T303 to its witness list, so that they may each testify exclusively with respect to paragraphs 32 and 54 of the Indictment;

ORDERS the Defence to remove T116 and T129 from its witness list;


ALLOWS the Defence to add T193 and T54 to its witness list, so that they may each testify exclusively with respect to paragraphs 19, 20 and 43 of the Indictment;

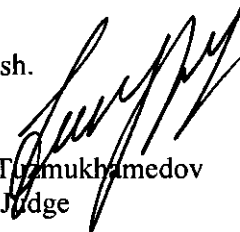
ORDERS the Defence to remove T36 and T39 from its witness list;

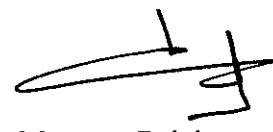
ORDERS the Defence to file, within five (5) days, a revised list of its remaining witnesses reflecting the alterations that have been allowed by this Decision and an Order of Appearance for the remaining Defence witnesses to be called during the upcoming trial session; and

ENJOINS the Defence to strictly confine its examination of any witnesses added to its list by this Decision to the paragraphs of the Indictment indicated above.

Arusha, 19 January 2011, done in English.


Solomy Balungi Bossa
Presiding Judge


Bakhtiyar Turmukhamedov
Judge


Mparany Rajohnson
Judge

[Seal of the Tribunal]

⁸¹ See, e.g., First Variation Decision; 14 July Decision; Third Variation Decision.