



**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

UNITED
NATIONS
NATIONS
UNIES

OR: ENG

TRIAL CHAMBER III

Before Judges: Florence Rita Arrey, Presiding
Bakhtiyar Tuzmukhamedov
Aydin Sefa Akay

Registrar: Adama Dieng

Date: 31 March 2011

THE PROSECUTOR

v.

GREGOIRE NDAHIMANA

Case No. ICTR-2001-68-T

**DECISION ON DEFENCE MOTION TO VARY ITS WITNESS LIST
AND
REQUEST FOR PROTECTIVE MEASURES FOR NEW WITNESSES**

Office of the Prosecutor:

Holo Makwaia, Senior Appeals Counsel
Althea Alexis-Windsor, Appeals Counsel
Segun Jegede, Trial Attorney
Lansana Dumbuya, Case Manager

Counsel for the Defence

Bharat B. Chadha, Lead Counsel
Wilfred Ngunjiri Nderitu, Co Counsel
Tharcisse Gatarama, Legal Assistant
Marie-Pier Barbeau, Legal Assistant

INTRODUCTION

1. The Accused in this case is charged with three counts, one of which is pleaded in the alternative. The Indictment charges the Accused with having participated in a series of events that took place over a period of approximately one week in relation to crimes committed at one location.¹
2. On 7 December 2010, the Defence filed its Pre-Defence Brief (“Pre-Defence Brief”). The Brief indicated that the Defence proposed to call 42 witnesses.²
3. On 14 December 2010, the Trial Chamber ordered the Defence to reduce its witness list.³
4. On 11 January 2011, the Defence filed a revised witness list reducing its list of witnesses from 42 to 33.⁴
5. On 17 January 2011, the Defence commenced its case calling ten witnesses during the first session which ended on 28 January 2011. Fourteen witnesses were called during the second session which was held from 7 February 2011 to 28 February 2011, thereby leaving 9 witnesses to be heard by the Chamber in the remaining sessions.
6. On 16 March 2011, the Defence filed a motion requesting leave to vary its witness list and seeking protective measures for some of the witnesses it would like to add to its witness list (“Motion”).⁵

¹ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Indictment, 18 August 2010. The Accused is charged with Genocide (Count 1), or in the alternative, Complicity in Genocide (Count 2), and Extermination (Count 3).

² *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Gregoire Ndahimana’s Pre-Trial Brief, Pursuant to Rule 73ter of the Rules of Procedure and Evidence, 07 December 2010.

³ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Order for the Defence to reduce its list of witnesses, 14 December 2010

⁴ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Revised list of Defence witnesses(Annex 1) and the list containing the revised order of appearance (Annex 2) filed pursuant to the Trial Chamber III’s decision of 15 December 2010 together with the identifying information of protected witnesses with pseudonyms ND20 and ND21,11 January 2011.

⁵ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Extremely Urgent Defence motion to vary its witness list and request for protective (Pursuant to Rule 73ter (E) of the Rules of Procedure and Evidence), and Request for the grant of

7. On 21 March 2011, the Prosecution filed a response objecting to the Defence Motion (“Response”).⁶
8. On 25 March 2011, the Defence filed a reply to the Prosecution’s response (“Reply”).⁷
9. On 28 March the Prosecution filed a response to the Defence reply, reiterating its objections to the Motion.⁸

DELIBERATIONS

Applicable Law

10. Rule 73 *ter* (E) of the Rules of Procedure and Evidence allows the Defence to move the Trial Chamber to vary its witness list “if it considers it to be in the interests of justice.” 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.⁹ Relevant factors include the materiality and probative value of the testimony in relation to existing witnesses and

protective measures to witnesses ND36, AM1, AM2, FM1, FM2 and ND37 (Pursuant to Rule 69 and 75 of the Rules of Procedure and Evidence), 16 March 2011.

Prosecutor v. Ndahimana, ICTR-2001-68-T, Corrigendum to the Extremely Urgent Defence motion to vary its witness list and request for protective (Pursuant to Rule 73*ter* (E) of the Rules of Procedure and Evidence), and Request for the grant of protective measures to witnesses ND36, AM1, AM2, FM1, FM2 and ND37 (Pursuant to Rule 69 and 75 of the Rules of Procedure and Evidence), 18 March 2011.

⁶ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Prosecutor’s response to the Extremely Urgent Defence motion to vary its witness list and request for protective (Pursuant to Rule 73*ter* (E) of the Rules of Procedure and Evidence), and Request for the grant of protective measures to witnesses ND36, AM1, AM2, FM1, FM2 and ND37 (Pursuant to Rule 69 and 75 of the Rules of Procedure and Evidence), 16 March 2011

⁷ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Defence’s reply to the Prosecutor’s response to the Extremely Urgent Defence motion to vary its witness list and request for protective (Pursuant to Rule 73*ter* (E) of the Rules of Procedure and Evidence), and Request for the grant of protective measures to witnesses ND36, AM1, AM2, FM1, FM2 and ND37 (Pursuant to Rule 69 and 75 of the Rules of Procedure and Evidence), 25 March 2011

⁸ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Prosecution’s response to Defence’s reply to the Prosecutor’s response to the Extremely Urgent Defence motion to vary its witness list and request for protective (Pursuant to Rule 73*ter* (E) of the Rules of Procedure and Evidence), and Request for the grant of protective measures to witnesses ND36, AM1, AM2, FM1, FM2 and ND37 (Pursuant to Rule 69 and 75 of the Rules of Procedure and Evidence), 28 March 2011

⁹ Decision on the Defence Motion to Vary the Defence Witness List to Add M. Gaspard Musabyimana, 13 April 2007 (TC), para. 2; Decision on the Defence Motion to Vary the Defence Witness List (TC), 28 March 2007, para. 3 (citing *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).

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.¹⁰

11. Rule 75 (A) provides that “A Judge or a Chamber may, *proprio motu*, or at the request of either party, or of the victim or witness concerned, or the Victims and Witnesses Support Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused.”

Introduction to discussion

12. In its Motion the Defence seeks to add thirteen witnesses to the list of witnesses it submitted on 11 January 2011, namely Witnesses ND35, ND23, ND36, ND27, FM1, FM2, AM1, AM2, FB11, ND37, ND33, ND26 and ND38,¹¹ of whom ND26, ND27 and FB 11 were listed in Annex II to the Pre-Defence Brief.¹² The Defence submits that these witnesses are crucial to the defence of the Accused,¹³ and explains that the investigators were “able to locate these witnesses recently.”¹⁴

13. The Prosecution submits that if the Defence is granted leave to call these additional witnesses, the Prosecution will require additional time to investigate the witnesses.¹⁵ Thus, permitting the Defence to add 13 witnesses will delay the proceedings significantly.¹⁶ Moreover, that the Defence has not demonstrated good cause for its request to vary its witness list.¹⁷

¹⁰ Decision on the Defence Motion to Vary the Defence Witness List to Add M. Gaspard Musabyimana, 13 April 2007 (TC), para. 2; Decision on the Defence Motion to Vary the Defence Witness List (TC), 28 March 2007, para. 3 (citing *Prosecutor v. Bagosora et al.*, Decision on Bagosora Motion to Present Additional Witnesses and Vary its Witness List (TC), 17 November 2006, para. 2; *Prosecutor v. Mpambara*, Decision on the Prosecution’s Request to Add Witness AHY (TC), 27 September 2005, para. 4).

¹¹ Motion para. 15

¹² Motion para. 19

¹³ Motion para. 22

¹⁴ Motion, para. 33

¹⁵ Response para. 12

¹⁶ Response para. 10

¹⁷ Response para. 9

14. In its Reply, the Defence amends its position, stating that it wishes to add 7 witnesses, namely ND35, ND23, ND33, ND26, ND27, ND38 and FB11.¹⁸ Of these 7 witnesses, 4 will be substituted for witnesses who have been dropped by the Defence or who are untraceable.¹⁹ The “newly found” witnesses will only be called if the Chamber grants the Defence permission to do so.²⁰

Justification for late filing of Motion

15. At the outset, the Chamber wishes to express its disapproval of the Defence’s inability to provide justification for its late request to add the witnesses at issue. Specifically, it has not explained why it failed to contact these witnesses earlier, being fully aware of the Trial schedule which, it should be recalled, was adjusted to meet the presumably urgent needs of the Defence. The Defence merely states that “[t]he investigators were able to contact the witnesses recently...during the first week of March 2010”²¹ and “[a]s a matter of fact, the intended testimony [of ten proposed witnesses] belatedly came to the attention of the Defence.”²² Moreover, the Trial Chamber disapproves of the frivolous statement in the Defence’s Response that their request for the inclusion of several “newly found” witnesses is “purely theoretical for the purposes of the coming session.”²³ It is only in pursuit of the interests of justice that the Trial Chamber will consider the Motion.

Witnesses ND35, FM1, FM2, FB11 and ND37

16. The Defence submits that Witnesses ND35, FM1, FM2, FB11 and ND37 will support the alibi of the Accused on 16 April 1994, and corroborate the evidence of Defence witness ND17.²⁴

17. The Prosecution argues that the proposed testimonies of ND35, FM1, FM2, FB11 and ND37 are not necessary because similar evidence was given on this point by Witnesses BX3,

¹⁸ Reply, para. 15.

¹⁹ Reply para. 10.

²⁰ Reply para. 14.

²¹ Motion, paras. 33.

²² Motion, paras. 35.

²³ Response, para. 14.

²⁴ Motion paras. 23-24.

ND24, ND7, and ND1. Moreover, Witness FB1 is scheduled to testify on related issues in the next session.²⁵

18. The Chamber observes that Witness BX3 provided hearsay evidence that Ndahimana was at the “Sister’s Convent” on 16 April 1994, while Witnesses ND24, ND7 and ND1 testified that they did not see Ndahimana at Nyange Parish on 16 April 1994. According to the Defence Proofing Chart, Witness ND17, who is scheduled to testify during the next session, will support the alibi of the Accused for 16 April 1994.²⁶

19. The Chamber recalls that paragraphs 29-33 of the Indictment contain extremely grave allegations regarding the activities of the Accused on 16 April 1994, and that the Defence filed a Notice of Alibi on 3 September 2010 in which it indicated that on 16 April 1994 the Accused was hiding from the *Interahamwe* in the “Sister’s Convent”. The Chamber considers that the evidence of witnesses who testified that they did not see the Accused at Nyange Parish on 16 April is less conclusive than evidence supporting the Defence’s claim that the Accused was elsewhere. Thus, the Trial Chamber concludes that permitting the Defence to reinstate Witness FB11 who will testify to the Accused’s alibi is in the interests of justice.

Witness ND33

20. According to the Defence, Witness ND33 will corroborate the evidence of Defence witness ND2 regarding the events of Rubaya and the circumstances surrounding the departure of the Accused from Rubaya to Kivumu.²⁷

21. The Prosecution argues that the defence has led sufficient evidence on the circumstances surrounding Ndahimana’s flight from Rubaya and that this evidence does not relate to any count in the Indictment.²⁸

²⁵ Response, para. 26.

²⁶ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Gregoire Ndahimana’s Pre-Trial Brief, Pursuant to Rule 73ter of the Rules of Procedure and Evidence, 07 December 2010. Annex 1. Summary of facts and points in the indictment on which witnesses will testify. page 33.

²⁷ Motion, para. 25.

²⁸ Response, para. 29.

22. The Trial Chamber finds that the Defence has already led sufficient evidence concerning Ndahimana's flight from the Rubaya to Kivumu in 1993.²⁹ Thus, there is no need to hear further evidence on this subject from Witness ND33.

Witnesses ND23, ND36 and ND38

23. According to the Defence, Witnesses ND23, ND36 and ND38 will testify about a meeting they attended at the Kivumu Communal Office on 11 April 1994.³⁰ The Defence further proposes that these witnesses replace Witness ND20, who was scheduled to testify about that meeting but cannot be located.³¹

24. The Prosecution argues that Defence Witness KR3 testified extensively on the decisions made at the meeting on 11 April 1994 and the role of the Accused during that meeting, thus making the evidence of Witness ND23 superfluous.³² Further, the Prosecution opposes the admission by deposition of Witness ND38's evidence, stating that Defence did not refer to the relevant Rule and did not demonstrate exceptional circumstances requiring a deposition of the witness.³³

25. In its Reply, the Defence affirms that it intends to file a motion pursuant to Rule 92 *bis* rather than Rule 71(A), if the Trial Chamber allows the Defence to add ND38 to its witness list.³⁴ The Defence further states that Witness ND36 will no longer testify.³⁵

26. The Chamber observes that paragraph 16 of the Indictment alleges that "[o]n or about 10 April 1994", the Accused and others "attended a meeting at the Kivumu Communal Office in order to plan the extermination of the Tutsis..." Paragraph 17 of the Indictment charges the Accused with making preliminary plans to kill Tutsi civilians during a meeting held at the

²⁹ See For Example, Defence Witnesses Léonille Murekeyisoni, Witness ND2, Melane Nkiriyehe.

³⁰ Motion, para. 26.

³¹ Motion, para. 38.

³² Response, para. 28.

³³ Response, paras. 31-36.

³⁴ Reply, paras. 12-13.

³⁵ Reply, para. 11.

Kivumu Communal Office on 11 April 1994. Paragraphs 19 and 20 of the Indictment refer to meetings held at the Communal office “[o]n or about” 10-13 April 1994.

27. The Trial Chamber notes that only one Defence witness thus far has given evidence on the meeting held at the Kivumu Communal Office on 11 April 1994, although the meeting is explicitly referred to in paragraph 17 of the Indictment, and may also be relevant to paragraphs 16 and 18-20 of the Indictment.³⁶ Although Defence Witness KR3 gave detailed evidence about this meeting, the Chamber is of the view that further evidence on this could assist the Chamber in its assessment of the facts in this case and would be in the interests of justice. Considering that none of the Prosecution witnesses was present at that meeting, while three Prosecution witnesses were able to provide only hearsay evidence about the meeting, the Trial Chamber will grant leave to the Defence to vary its witness list in order to allow the Defence to call one additional witness who attended the meeting that took place at the Kivumu Communal office on 11 April 1994.

Witnesses ND26 and ND27

28. The Defence submits that Witnesses ND26 and ND27 will testify about the attacks launched on Nyange Church on 14, 15 and 16 April 1994, with particular emphasis on 16 April 1994. Witness ND26 will also testify about Ndahimana’s conflict with the staff working at the Communal Office, and his dispute with the Civil Defence Forces in May 1994.³⁷

29. The Prosecution argues that the Chamber has already heard evidence from Defence witnesses, including Witnesses ND11, ND12, KR3, ND6, ND14, Therese Mukabideri, Beatrice Mukankusi and ND13, that Ndahimana was not present at the Nyange church on 14, 15 and 16 April 1994. Many of these witnesses also provided information regarding his whereabouts on 14 and 16 April 1994, and a number of them also testified concerning the relationship between the Accused and the communal workers.³⁸ In addition, the Prosecution

³⁶ Three Prosecution witnesses (witnesses CBR, CDJ and CNJ) gave evidence on the meeting at the Kivumu Communal office on 11 April 1994.

³⁷ Motion, paras. 28-30.

³⁸ Response, paras. 18-24.

submits that no allegations have been made against Ndahimana with respect to May/June 1994, nor does the Indictment refer to Civil Defence Forces.³⁹

30. The Chamber observes that the allegations of criminal behaviour cited in the Indictment all took place between 10 and 16 April 1994. Thus, it considers that any evidence on events that took place later is of little assistance to the Chamber. Furthermore, the Trial Chamber has heard extensive evidence from the Defence witness about events at Nyange Parish on 14, 15 and 16 April.⁴⁰ The Defence has failed to specify how the evidence it wishes to add differs from, or strengthens, the substantial evidence the Chamber has already heard on this issue. In conclusion, the Chamber considers that it is not in the interests of justice to permit the Defence to add these witnesses at this late stage in the proceedings.

Witnesses still to be contacted by Defence Counsel

31. The Defence submits that witnesses AM1, AM2, FM1, FM2 and ND37 have only been contacted by its investigator by phone, and requests permission from the Chamber to meet with these witnesses. The Defence notes that the Defence Counsel and Defence Management Section (DCDMS) will only approve financing for this mission if the Chamber grants this section of the Motion.⁴¹ These are the very witnesses (see para. 15 above) that are described by the Defence as “purely theoretical” in the Reply.⁴²

32. The Chamber finds that the Defence has failed to justify its inability to contact these witnesses before the start of the Defence case. More generally, it has not shown good cause for this request. Granting it at this juncture may result in delay of proceedings and wastage of the Tribunal’s resources.

³⁹ Response, para. 25.

⁴⁰ Defence witnesses ND11, ND12, KR3, ND6, ND14, Therese Mukabideri, Beatrice Mukankusi and ND13.

⁴¹ Motion, para. 34.

⁴² Reply, para. 14.

Substitution of witnesses

33. The Defence requests permission to drop Witnesses GK1 and KR5 from its current list of witnesses.⁴³ The Chamber grants the Defence request to substitute two new witnesses for Witnesses GK1 and KR5 who have been dropped.

34. In addition, the Defence states that Witness ND20 is untraceable and that it is “very doubtful” that Witness FB1 will testify.⁴⁴ Although the formulation regarding these two witnesses is exceedingly vague, the Chamber directs the Defence to clearly indicate by 11 April 2011, if they are dropping Witnesses ND20 and FB1 from their witness list. If the Defence drops these two witnesses the Chamber would be inclined to grant them leave to replace them with two other witnesses.

Conclusion on variation of the Witness List

35. In conclusion, the Trial Chamber will permit the Defence to vary its witness list to allow it to provide further evidence on the meeting of 11 April 1994 at the Kivumu Communal Office and the alibi of the Accused on 16 April 1994. To its current list of five remaining witnesses,⁴⁵ the Trial Chamber will allow the Defence to add two new witnesses to replace the two they have dropped. Should the Defence decide to drop witnesses ND20 and FBI by 11 April 2011, the Chamber will, subject to the Defence fulfilling its disclosure obligations in a manner that will not result in any delays, permit the Defence to replace witnesses ND20 and FBI with two other witnesses to address 11 and 16 April 1994 only.

Protective Measures pursuant to Rule 75

36. On 30 September 2010, the Chamber ordered protective measures for Defence witnesses in this case.⁴⁶ The Chamber therefore extends the existing witness protection measures apply to Witnesses ND38 and FB11.

⁴³ Reply, para 10

⁴⁴ Reply, para. 10.

⁴⁵ Reply, para. 8

⁴⁶ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Decision on protective measures for Defence witnesses, 30 September 2010

THE ABOVE REASONS, THE CHAMBER

GRANTS the Defence Motion in part;

ALLOWS the Defence to drop witnesses GK1 and KR5 from the witness list and replace them with witnesses FB11 and ND23;

ORDERS that Witnesses FB11 and ND23 be called to testify during the next sessions of the Defence case in addition to witnesses MB1, ND31, ND17, BX7 and ND22;

ALLOWS the Defence to also call witnesses ND38 and ND35, if by 11 April 2011, they drop witnesses ND20 and FB1 from their witness list.

ORDERS that the protective measures ordered on 30 September 2010 be extended to Witnesses ND38 and FB11;

ORDERS the Defence to disclose by 1 April 2011, the identifying information of witnesses MB1, ND31, ND17, BX7, ND22, FB11, ND23, ND38 and ND35 to the Prosecution; and

ORDERS the Defence to file by 11 April 2011, the Order of Appearance of its 9 remaining witnesses.

Arusha, 31 March 2011, done in English.

Florence Rita Arrey

Bakhtiyar Tuzmukhamedov

Aydin Sefa Akay

Presiding Judge

Judge

Judge

[Seal of the Tribunal]