

ICR-00-55C-T  
(28-7-2011)  
(7861-7858)

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

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Lee Gacuiga Muthoga, *Presiding*  
Seon Ki Park  
Robert Fremr

**Registrar:** Adama Dieng

**Date:** 28 July 2011

**THE PROSECUTOR**

v.

**Ildéphonse NIZEYIMANA**

**CASE NO. ICTR-00-55C-T**

JUDICIAL RECORDS ARCHIVES  
UNICTR  
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2011 JUL 28 P 4: 54  
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**DECISION ON PROSECUTOR'S CONFIDENTIAL MOTION FOR LEAVE TO  
VARY THE WITNESS LIST**

**Office of the Prosecution:**  
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John Philpot  
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Myriam Bouazdi  
Sébastien Chartrand

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## INTRODUCTION

1. The trial commenced on 17 January 2011 with the opening statements of both the Prosecution and the Defence. The Prosecution closed its case-in-chief on 25 February 2011, after having called 38 witnesses. The Defence closed its case on 16 June 2011, after having called 38 witnesses.

2. On 8 July 2011, the Office of the Prosecutor (“Prosecution”) filed a motion seeking to vary the rebuttal witness list to include Prosecution Witness D.<sup>1</sup> The Prosecution submits that Witness D will provide evidence that is relevant, non-cumulative and probative in nature.<sup>2</sup> The Prosecution notes that the admission of Witness D to the witness list would be in furtherance of the interest of justice and the “quest to ascertain the truth.”<sup>3</sup> The Prosecution lastly submits that the evidence contained in Witness D’s affidavit arose *ex improviso* from the Defence case and was not reasonably foreseeable.<sup>4</sup>

3. On 18 July 2011, the Defence team of the Accused, Ildéphonse Nizeyimana (“the Defence” and “the Accused” respectively) filed its response.<sup>5</sup> The Defence submits that the request for leave to amend the Prosecution witness list does not meet the criteria set out in Rule 73bis (E) of the Rules of Procedure and Evidence (“Rules”).<sup>6</sup> The Defence further submits that the evidence given by Witness D would impermissibly broaden the scope of the rebuttal evidence, and should, if anything, be the subject of further litigation concerning the admission of additional rebuttal evidence.<sup>7</sup> The Defence lastly notes that Witness D’s affidavit does not fulfil the criteria set out under Rule 92bis.<sup>8</sup>

4. On 25 July 2011, the Prosecution filed its reply.<sup>9</sup> The Prosecution submits that the Defence did not file its response in a timely manner and should thus be dismissed.<sup>10</sup> The Prosecution further submits that the testimony provided by Witness D falls within the scope of the rebuttal evidence, and would undermine the credibility of the Defence alibi

<sup>1</sup> Prosecutor’s Confidential Motion for Leave to Vary the Witness List (“Prosecution Motion”), 8 July 2011.

<sup>2</sup> Prosecution Motion, paras. 32-34.

<sup>3</sup> Prosecution Motion, para. 35.

<sup>4</sup> Prosecution Motion, paras. 36-37.

<sup>5</sup> Defence Response to Prosecutor’s Confidential Motion for Leave to Vary the Witness List (“Defence Response”), 18 July 2011.

<sup>6</sup> Defence Response, paras. 13-20.

<sup>7</sup> Defence Response, paras. 21-26.

<sup>8</sup> Defence Response, paras. 27-29.

<sup>9</sup> Prosecutor’s Confidential Reply to Defence Response to Prosecutor’s Confidential Motion for Leave to Vary the Witness List (“Prosecution Reply”), 25 July 2011.

<sup>10</sup> Prosecution Reply, para. 11.

witnesses.<sup>11</sup> The Prosecution notes that it seeks to include Witness D's evidence in the form of a Rule 92*bis* statement, so as to further "the interests of judicial economy", while allowing the Defence the opportunity to cross-examine the Witness.<sup>12</sup>

### DELIBERATIONS

5. The Chamber notes at the outset that the practice of this Tribunal has been to file responses and replies according to the registry's stamp on a filing. However, the Chamber will nonetheless take into consideration the Defence Response and the Prosecution Reply thereto, in furtherance of the interest of justice.

#### *Standard for the Variation of a Witness List*

6. Rule 73*bis* (E) permits the Prosecutor to "move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called" after the commencement of trial, if the Prosecutor believes 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.<sup>13</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>14</sup>

7. The Chamber recalls that the rebuttal evidence is strictly limited in scope, namely "in response to the alibi defence for the dates of the morning of 21 April 1994 to the late afternoon of 22 April 1994 and from 26 April 1994 to on or about 17 May 1994."<sup>15</sup> In other words, the rebuttal evidence is to focus solely on the presence or absence of the Accused from Butare on the specific dates alleged.

<sup>11</sup> Prosecution Reply, paras. 12-15.

<sup>12</sup> Prosecution Reply, paras. 18-19.

<sup>13</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) ("Bizimungu Decision"), 1 May 2008, para. 13; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecutor's Motion to Vary its Witness List (TC), 2 October 2006, para. 3; *Prosecutor v. Musema*, Case No. ICTR-96-13-T 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.*, Case No. ICTR-98-41-T, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73*bis* (E) (TC), 26 June 2003, para. 13.

<sup>14</sup> Bizimungu Decision, para. 13; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Bagosora Motion to Present Additional Witnesses and Vary its Witness List (TC), 17 November 2006, para. 2; *Prosecutor v. Mpambara*, Case No. ICTR-2001-65-T, Decision on the Prosecution's Request to add Witness AHY (TC), 27 September 2005, para. 4.

<sup>15</sup> Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, 7 June 2011, para. 26.

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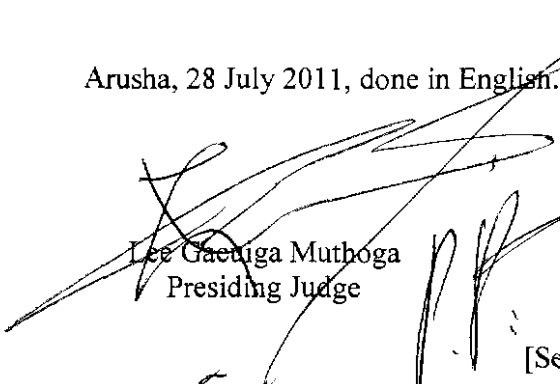
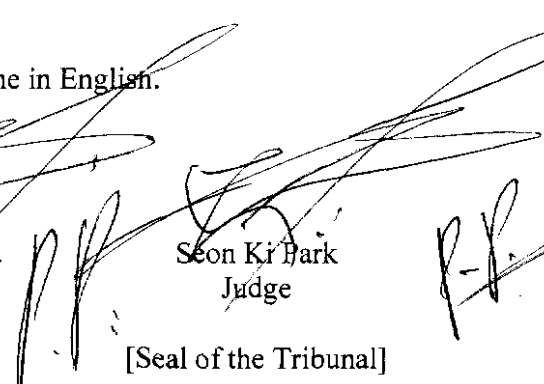
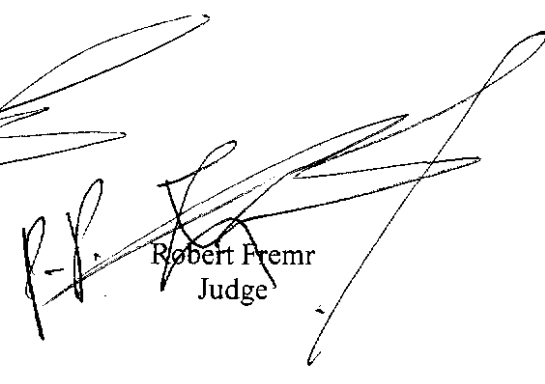
8. The Chamber notes that Witness D is to provide testimony on the fact that, contrary to what was alleged by a number of Defence alibi witness, Witness D did not go on mission to Mata on 20 or 21 April 1994.<sup>16</sup> While the testimony may be relevant and probative as it relates to the credibility of the Defence witnesses who allege that Witness D was present in Mata, it falls outside the scope of the rebuttal evidence as granted to the Prosecution. The Informal Affidavit attached by the Prosecution as Annex B does not include evidence which will place the Accused in either Mata or Butare on the dates alleged.

9. Moreover, the Chamber does not find that the Prosecution has provided sufficient justification for the late addition of Witness D to the rebuttal witness list, when the Defence witnesses had already mentioned his name during the proceedings. The Chamber therefore exercises its discretion to deny the Prosecution motion.

**FOR THESE REASONS, THE CHAMBER**

**DENIES** the Prosecution Motion.


Arusha, 28 July 2011, done in English.

Lee Gacuga Muthoga  
 Presiding Judge

Seon Ki Park  
 Judge

Robert Fremr  
 Judge

[Seal of the Tribunal]  
 [absent at the time of signing]  

 [absent at the time of signing]

<sup>16</sup> Confidential Annex B to Prosecutor’s Confidential Motion for Leave to Vary the Witness List, 11 July 2011, paras. 8-9.