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

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

ICTR-99-54-T
25-01-2012

(106662-106656)

Registrar: Mr. Adama Dieng

Date: 25 January 2012

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL RECORDS ARCHIVES
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**DECISION ON DEFENCE MOTION FOR LEAVE TO VARY
THE WITNESS LIST BY ADDING WITNESS DWAN-74**

Office of the Prosecutor

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa, and Mparany Rajohnson (the "Chamber");

BEING SEIZED of the "Confidential and Extremely Urgent Motion for Leave to Vary the Witness List and to Replace Defence Witness DWAN-134 with Witness DWAN-74", filed confidentially on 30 December 2011 (the "Defence Motion");

CONSIDERING:

- (a) The "Prosecution's Reply to Defence Confidential and Extremely Urgent Motion for Leave to Vary the Witness List and to Replace Defence Witness DWAN-134 with Witness DWAN-74", filed on 3 January 2011 (the "Prosecution Response"); and
- (b) The "Defence Reply to Prosecution's 'Reply' to Confidential and Extremely Urgent Defence Motion for Leave to Vary the Witness List and to Replace Defence Witness DWAN-134 with Witness DWAN-74", filed on 9 January 2012 (the "Defence Reply");

CONSIDERING also the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion pursuant to Rules 66 (B), *73ter* and 75 of the Rules.

INTRODUCTION

1. On 9 February 2010, the Chamber ordered that "protective measures shall apply to potential Defence witnesses, as well as to other witnesses the Defence may call to testify".¹
2. On 26 August 2011, the Chamber ordered the Defence "to file its final list of witnesses, which is not to exceed 19 remaining witnesses", by 5 September 2011.²
3. On 5 September 2011, the Defence filed an Order of Appearance listing 19 remaining witnesses.³

¹ Decision on Defence Urgent Motion for Witness Protective Measures (TC), 9 February 2010 ("Decision of 9 February 2010"), p. 8.

² Decision on the Defence Motion for Reconsideration or Certification to Appeal the Oral Decision of 13 July 2011, and on the Reduction of the Defence Witness List (TC), 26 August 2011, para. 60, p. 12. This Decision is currently the subject of an interlocutory appeal. See Decision on the Defence Motion for Reconsideration and/or Certification to Appeal the Decision of 26 August 2011 (TC), 15 September 2011, p. 10.



4. On 27 September 2011, the Chamber ordered the Prosecution to immediately make available for inspection by the Defence the immigration files, statements to ICTR authorities, and specified *Gacaca* material of certain Defence witnesses.⁴

5. On 17 October 2011, the Chamber granted the Defence motion to vary its witness list by dropping three witnesses and adding three witnesses, including DWAN-134.⁵

6. On 24 October 2011, the Defence requested that the Prosecution disclose material pertaining to DWAN-134 and another witness.⁶ That same day, the Prosecution disclosed such material.⁷ Both the Defence request and the Prosecution disclosure were circulated on 25 October 2011.

7. On 26 October 2011, the Chamber granted the Defence request for leave to drop Witness DWAN-134 from its witness list. The Chamber also adjourned the proceedings until 30 January 2012.⁸

SUBMISSIONS OF THE PARTIES

Defence Motion

8. The Defence moves the Chamber to order that Defence Witness DWAN-74 be added to the witness list, which the Defence considers to be a “replacement of DWAN-134”.⁹ The Defence also asks that DWAN-74 be covered by the protective measures for Defence witnesses, and that the Prosecution be ordered to disclose without delay any statement to the ICTR authorities or any *Gacaca* testimony made by him between 1994 and 2011.¹⁰

9. The Defence submits that good cause exists for adding DWAN-74, whose anticipated evidence falls within the scope of former witness DWAN-134’s expected

³ Order of Appearance of the Defence Witnesses Pursuant to the Trial Chamber’s Order of 2 September 2011, 5 September 2011. The Chamber notes that the Defence listed two possible witnesses as the seventeenth witness, and affirmed that the official position concerning this witness would be known in two days’ time. See *id.* The following day, the Defence indicated the selection of this witness. See Corrigendum – Order of Appearance of the Defence Witnesses, 6 September 2011.

⁴ Decision on Defence Motion for Reconsideration or Certification to Appeal the Chamber’s Decision of 29 August 2011, or Alternatively, a Defence Second Motion for Inspection of Materials in the Prosecution’s Custody (TC), 27 September 2011 (“Decision of 27 September 2011”), para. 47, p. 11.

⁵ T. 17 October 2011, pp. 9-12.

⁶ Extremely Urgent Disclosure of material related to Defence witnesses DWAN-53 and DWAN-134. The Chamber notes that although this correspondence is dated 22 October 2011, it was stamped at 5.32 p.m. on 24 October 2011. This correspondence was not circulated until 25 October 2011.

⁷ Defence Request for Disclosure of Material related to Defence Witness DWAN-53 and DWAN-134. The Chamber observes that this disclosure was stamped at 5.33 p.m. on 24 October 2011, and was circulated on 25 October 2011.

⁸ T. 26 October 2011, pp. 83-84, 90.

⁹ See, for example, Defence Motion, para. 52(iii).

¹⁰ *Id.*, para. 52.

testimony. Moreover, DWAN-74 will be the only witness to testify about allegations made by Prosecution Witness ANAR, and thus his testimony will be extremely relevant and probative.¹¹

10. The Defence has made timely disclosure regarding DWAN-74's identifying information and anticipated testimony, and thus the Prosecution will not be prejudiced by his addition to the list. Nor will the proceedings be delayed, as DWAN-74 is available during the upcoming trial session and his expected examination-in-chief will not exceed one hour and a half in length.¹²

11. As an alternative prayer for relief, and in the event that DWAN-74 is unable to testify due to security concerns, the Defence requests leave to add DWAN-76 instead to its witness list, and for the relevant orders to apply to DWAN-76. In support of this prayer, the Defence contends that all of its submissions concerning DWAN-74 apply equally to DWAN-76.¹³

Prosecution Response

12. The Prosecution does not oppose the variation of the witness list by adding DWAN-74, but requests the Chamber to disregard the Defence submissions for alternative relief, as they are premature and speculative.¹⁴

Defence Reply

13. The Defence repeats its prayer for relief, and reiterates that the purpose of the Defence Motion is to vary the witness list so that DWAN-74 can testify.¹⁵

14. As for its alternative submissions, the Defence presented them only as a precaution and in the spirit of judicial efficiency, cooperation and transparency.¹⁶

DELIBERATIONS

Variation of the Defence Witness List

15. As a preliminary observation, the Chamber notes that the Defence wishes to consider Defence Witness DWAN-74 as a "replacement" for DWAN-134, who the Defence dropped from its witness list on 26 October 2011. The Defence does not appear to cite any jurisprudence substantiating its position that the dropping of a witness should necessarily entail the addition of another witness. In the Chamber's view, each individual motion to vary the witness list should be decided on its own merits.

¹¹ *Id.*, pp. 7-11. The Defence also makes various submissions concerning its motion to drop DWAN-134 from its witness list, which the Chamber granted on 26 October 2011. See *id.*, pp. 7-9. The Chamber cites the relevant pages here because certain paragraph numbers have been repeated in the Defence Motion.

¹² *Id.*, paras. 40-46. See also *id.*, Annex A (Will-Say Statement of DWAN-74).

¹³ *Id.*, paras. 47-52. See also *id.*, Annex B (Will-Say Statement of DWAN-76).

¹⁴ Prosecution Response, paras. 3-8.

¹⁵ Defence Reply, paras. 8, 12. See also *id.*, para. 5.

¹⁶ *Id.*, paras. 6-7, 9-11.

16. Rule 73ter (E) permits the Defence to “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” after the commencement of the Defence case, if the Defence believes it to be in the interests of justice. Whether to grant such a motion is a matter for the Chamber’s discretion.¹⁷

17. Variations to a witness list must be supported by good cause and be in the interests of justice.¹⁸ The jurisprudence of this Tribunal has consistently held that the following factors are relevant to the Chamber’s analysis of these issues:¹⁹

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 justification 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.

18. The Chamber notes the Defence submissions that DWAN-74’s testimony will be neither cumulative nor repetitive, that it has relevance and probative value to the case, that the Prosecution will not be prejudiced by his addition, and that no delay will occur in the proceedings. The Prosecution does not oppose the Defence Motion in this regard.

¹⁷ See Decision on Prosecution Motion of 24 June 2010 for Leave to Vary Its Witness List (TC), 15 July 2010 (“Decision of 15 July 2010”), para. 29; Decision on Prosecution Motion for Leave to Vary Its Witness List (TC), 28 January 2010, para. 48, citing *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-T, Decision on Defence for Ntagerura’s Motion to Amend Its Witness List Pursuant to Rule 73ter (E) (TC), 4 June 2002, para. 10.

¹⁸ Decision of 15 July 2010, para. 30, citing *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Nzabonimana’s Motion for the Variation of Its List of Witnesses (TC), 4 June 2010 (“*Nzabonimana Decision*”), para. 32, citing *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu’s Motion to Vary Witness List; and to Admit Evidence of Witness in Written Form in Lieu of Oral Testimony (TC), 1 May 2008 (“*Bizimungu et al. Decision of 1 May 2008*”), para. 12; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T (“*Bagosora et al.*”), Decision on Bagosora Motion to Present Additional Witnesses and Vary Its Witness List (TC), 17 November 2006, para. 2.

¹⁹ Decision of 15 July 2010, para. 30, citing *Nzabonimana Decision*, para. 32, citing *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-T, Consolidated Decision on Prosecution Oral Motion to Reduce Defence Witness List and Defence Motion to Vary Witness List (TC), 16 January 2009, para. 7; *Bizimungu et al. Decision of 1 May 2008*, para. 13; *The Prosecutor v. Augustin Ndindituyimana et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye’s Request to Vary His Witness List (TC), 31 January 2008, para. 3; *The Prosecutor v. Emmanuel Rukundo*, Case No. 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 (TC), 11 September 2007, para. 10; *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Defence Motion to Vary the Defence Witness List (TC), 28 March 2007, para. 3; *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, Decision on Accused’s Motion to Expand and Vary the Witness List (TC), 28 March 2006, para. 11. See also *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-I, Decision on Prosecutor’s Motion to Vary His Witness List (TC), 11 August 2009, paras. 11-12, citing *Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis (E) (TC), 26 June 2003, para. 14; *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses (TC), 26 June 2001, para. 20.

19. Having taken these submissions and the circumstances of the case into account, the Chamber considers that there is good cause for the addition of DWAN-74 to the witness list, and that this addition would be in the interests of justice. Accordingly, the Chamber grants the Defence Motion in this regard.

Protective Measures

20. As for the Defence prayer that DWAN-74 be covered by protective measures,²⁰ the Chamber recalls that its Decision of 9 February 2010 concerning protective measures for Defence witnesses applies to “potential Defence witnesses, as well as to other witnesses the Defence may call to testify”.²¹ Accordingly, the Chamber orders that these protective measures also apply to DWAN-74.

Statements to ICTR Authorities and Gacaca Testimony

21. The Defence also seeks immediate Prosecution disclosure of any statements given to ICTR authorities and of any *Gacaca* testimony by DWAN-74 between 1994 and 2011, a request which the Prosecution does not appear to oppose.

22. The Defence did not provide any legal basis to support its request, but merely places it in the prayer for relief.²² As such, the Chamber considers this request to be unsubstantiated, and will not address it here.²³

23. The Chamber also notes that the Defence appears to misinterpret the Decision of 27 September 2011. Although the Defence submits that the Chamber ordered inspection “concerning all Defence witnesses that would testify”,²⁴ the Chamber recalls that its Decision concerned only the witnesses identified by the Defence.²⁵ The Chamber declines to speculate, without any pertinent submissions from the Defence, whether the requested documents concerning DWAN-74 should also be subject to inspection.

Alternative Prayer for Relief

24. As for the Defence prayer that these measures be applied to potential witness DWAN-76 in the event that DWAN-74 is unable to testify due to security concerns,²⁶ the Chamber considers this request to be premature, and dismisses it accordingly.

²⁰ Defence Motion, para. 52(iv).

²¹ Decision of 9 February 2010, p. 9. See also Decision on Defence Motion for Reconsideration and/or Certification to Appeal the Trial Chamber’s Decision of 14 November 2011 on Rebuttal Evidence (TC), 13 December 2011, para. 59.

²² Defence Motion, para. 52(v).

²³ See generally Decision on Three Prosecution Motions to Compel Immediate Disclosure by the Defence (TC), 1 February 2011, para. 7; Decision on Defence Motion for Reconsideration, or, in the alternative, Certification to Appeal the Oral Decision of 18 March 2010 (TC), 15 April 2010, para. 5.

²⁴ Defence Motion, para. 9.

²⁵ See, for example, Decision of 27 September 2011, para. 47. See also T. 26 October 2011, p. 83.

²⁶ Defence Motion, paras. 47-52.

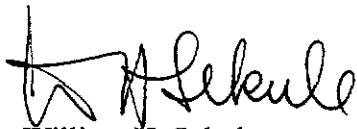
FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Defence Motion in part;

ORDERS that Witness DWAN-74 be added to the Defence witness list; and

ORDERS that the protective measures set out in the Chamber's Decision of 9 February 2010 be applied to Witness DWAN-74.

Arusha, 25 January 2012



William H. Sekule
Presiding Judge



Solomy Bahungi Bossa
Judge



[Seal of the Tribunal]



Mparany Rajohnson
Judge