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13-12-2005
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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 13 December 2005

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THE PROSECUTOR

v.

**Edouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-T

DECISION ON VARIANCE OF THE PROSECUTION WITNESS LIST

Rules 73bis (D) and (E) of the Rules of Procedure and Evidence

Office of the Prosecutor:

Don Webster
Gregory Lombardi
Iain Morley
Gilles Lahaie
Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Mathieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera
Peter Robinson and Patrick Nimy Mayidika Ngimbi

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”),

SITTING as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding Judge, Judges Emile Francis Short and Gberdao Gustave Kam (“Chamber”);

BEING SEIZED of “Joseph Nzirorera’s Motion for Order Reducing the Number of Prosecution Witnesses” (“Nzirorera’s Motion”), filed on 19 September 2005;

CONSIDERING the Prosecutor’s Response thereto, filed on 3 October 2005;

BEING ALSO SEIZED of the “Prosecutor’s Motion to Vary the Witness List for the Trial Pursuant to Rule 73bis(E)” (“Prosecution Motion”), filed on 3 October 2005;

CONSIDERING Joseph Nzirorera’s Response thereto, filed on 10 October 2005 ;

CONSIDERING the submission entitled “Mémoire de M. Ngirumpatse sur la *Prosecutor’s Supplemental Filing re: Witness List for Trial* et sur la Requête de Joseph Nzirorera for Order Reducing the Number of Prosecution Witnesses” (“Joinder”), filed on 10 October 2005; the “Prosecution’s Confidential Reply to Nzirorera and Ngirumpatse Concerning Motion to Vary Witness List for Trial”, filed on 17 October 2005; and the “Prosecutor’s Supplemental Filing to Amend Motion to Vary Witness List for Trial Pursuant to Rule 73bis(E)” (“Supplemental Prosecution Filing”), filed on 24 October 2005;

NOTING that the Defence for Edouard Karemera did not respond to any of these submissions;

HEREBY DECIDES the Motion, pursuant to Rule 73 of the Rules of Procedure and Evidence (“Rules”).

INTRODUCTION

1. The trial in this case started on 19 September 2005, with the Prosecution calling its first witnesses. On 4 July 2005, the Prosecution disclosed 143 witness statements of witnesses to testify on the issue of rape and sexual assault as presented in Count 5 of the Indictment. Nzirorera’s Motion opposes this large amount of witnesses to be called on the same issue.

2. On 29 August 2005, the Prosecution disclosed the redacted statement of Witness ADE, a witness that was not on its final list of witnesses submitted with the Pre-Trial Brief of 27 June 2005. On 20 September 2005, after indications from the Prosecution regarding the witness list, the Chamber modified a prior scheduling Order and required the Prosecution to file all of its submissions regarding the witness list at the same time, by 3 October 2005.¹ At that time, the Prosecution opposed Nzirorera’s Motion and submitted a separate Motion to vary the witness list. This Decision addresses all of these issues as presented in the above-mentioned submissions.

¹ T., 20 September 2005, Oral Decision, p. 1-2.

DELIBERATIONS

Prosecution Motion to Vary its Witness List pursuant to Rule 73bis (E) of the Rules

3. Rule 73bis (E) states that “[a]fter the commencement of Trial, the Prosecutor, if he 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 his decision as to which witnesses are to be called”.

4. Pursuant to established jurisprudence, a list of witnesses may be varied, pursuant to Rule 73bis (E) of the Rules, if the Chamber considers it to be in the interests of justice.²

5. In its Motion and Supplemental Filing, the Prosecution seeks to remove some witnesses from its list, to notify the Chamber of a future motion pursuant to Rule 98 for the Chamber to call an expert witness, and to add Witness ADE to the witness list.

Request to Remove Witnesses from the Witness List

6. The Prosecution requests to withdraw 41 of 143 rape and sexual violence witnesses, because they cannot be located, have refused to testify willingly or are deceased. In addition, it wishes to remove factual Witness UAE from the list, who is now deceased. In its Supplemental Filing, the Prosecution requests to remove an additional 9 of the original 143 rape and sexual violence witnesses from the list for logistical difficulties. The Defence for Joseph Nzirorera and Defence for Mathieu Ngirumpatse do not oppose these requests.

7. The Chamber is of the view that the removal of 50 rape and sexual violence witnesses and Witness UAE from the Prosecution witness list is in the interests of justice and should be therefore granted.

Request Regarding an Expert Witness to be called

8. The Prosecution claims that it became recently aware that a previously listed Expert Witness, Professor Reyntjens, would be available to testify if summoned by the Chamber. It moves the Chamber to take note of the Prosecution’s intention to file a motion pursuant to Rule 98 of the Rules to compel the appearance of Professor Reyntjens as a witness for the Chamber.

9. The Chamber is of the view that such a request does not fall within the ambit of a variation of the witness list under Rule 73bis of the Rules. The Chamber will rule on this request when it is properly seized of the matter. The Prosecution’s request to take note of its intention to file a motion under Rule 98 is irrelevant at this stage and falls to be rejected.

Request to Add Witness ADE to the Witness List

10. The Prosecution seeks to add Witness ADE to its list claiming that it is in the interests of justice. The Defence for both Joseph Nzirorera and Mathieu Ngirumpatse oppose this application. It also contends that the Prosecution has not shown “good cause” for non-compliance with Rule 66(A)(ii) of the Rules and for the late disclosure of Witness ADE’s statement.

11. When assessing whether a proposed variation of a witness list is in the interests of justice, Chambers have taken into account such elements as the materiality of the testimony, the probative value of the proposed testimony in relation to that of existing witnesses and allegations in the indictment, the complexity of the case, any prejudice to the Defence –

² *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, par. 4 and 13; *Prosecutor v. Bagosora, Kabiligi, Ntabakuze, Nsengiyumva*, Case No. ICTR-98-41-T, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis(E) (TC), 26 June 2003, par. 13.

including elements of surprise – , the need for the Defence to have adequate time to make an effective cross-examination, sufficiency and time of disclosure of witness information to the Defence, on-going investigations – including whether the late discovery of the witnesses arose from fresh investigations –, replacements and corroboration of evidence, the reasons for adding witnesses, the date on which the proposed witnesses would be called, and the stage of the trial proceedings.³

12. Ultimately, the Chamber is vested with discretion to make a decision on an application pursuant to Rule 73bis(E). The jurisprudence of this Tribunal requires that the Chamber adopts a flexible approach in exercising its discretion relating to the matter of adding witnesses to a witness list.⁴ The Prosecution’s duty under the Statute to present the best available evidence to prove its case has to be balanced against the right of the Accused to have adequate time and facilities to prepare his Defence and his right to be tried without undue delay.⁵

13. In the instant case, the Chamber finds that Witness ADE’s proposed testimony is material to the case since he knows all three of the Accused personally and is relevant to their alleged involvement with the *Interahamwe*, as well as other members of the alleged joint criminal enterprise. The Chamber notes that Witness ADE will not introduce new evidence against the Accused, excluding any element of surprise.

14. The Chamber also observes that Witness ADE only became available to testify in mid-August. His statements were disclosed immediately thereafter, on 29 August 2005, as soon as practicable prior to the commencement of the trial, due to sensitive extenuating circumstances. The Chamber is satisfied that the Prosecution has shown good cause for the disclosure of the Witness statements less than 60 days before the date set for trial. Further, it is noted that the Prosecution does not plan to call Witness ADE to testify until the second quarter of 2006. Finally, the Prosecution indicates that the addition of Witness ADE will result in the removal of other witnesses from the list who will testify to the same issue, decreasing the number of witnesses at trial.

15. In its submission, the Defence for Ngirumpatse raises the issue of the duration of the examination of the Prosecution witnesses. The Chamber is highly concerned to guarantee the rights of the Accused to be tried without undue delay, but observes that the parties have agreed to file proposed guidelines to solve, among other things, time management in court.⁶ As a result of these submissions, the Chamber will issue practice directions that will certainly contribute to better focus the time spent in court and enhance the right to a fair and expeditious trial of the Accused.

³ See *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, par. 4 and 13; *Prosecutor v. Bagosora, Kobiligi, Ntabakuze, Nsengiyumva*, Case No. ICTR-98-41-T, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis(E) (TC), 26 June 2003, par. 13; *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T (“*Casimir Bizimungu et al.* Case”), Decision on Prosecutor’s Very Urgent Motion Pursuant to Rule 73bis (E) to Vary the Prosecutor’s List of Witnesses Filed on 25 May 2004 (TC), 3 September 2004, par. 16; *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, Decision on Prosecutor’s Very Urgent Motion Pursuant to Rule 73bis (E) For Leave to Vary the Prosecutor’s List of Witnesses filed on 19 January 2005 (TC), 24 March 2005 (“*Muvunyi* Decision”), par. 22.

⁴ *Prosecutor v. Ntagerura, Bagombiki and Imanishimwe*, 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, par. 10.

⁵ *Muvunyi* Decision, par. 21; *Prosecutor v. Bizimungu, Nindiliyamana, Nzuwonemeya, Saguhutu*, Case No. ICTR-2000-56-T, Decision on the Prosecution’s Motion dated 9 August 2005 to Vary its List of Witnesses Pursuant to Rule 73bis(E)(TC), 21 September 2005, par. 32.

⁶ Status Conference, T. 28 October 2005.

16. In light of the above-mentioned circumstances, the Chamber is of the view that the rights of the Accused will not be prejudiced by the addition of this Witness and that it is in the interests of justice to add Witness ADE to the witness list. The Chamber however considers that on the day Witness ADE completes his testimony, the Prosecution must submit its request to remove witnesses from the list as indicated in its Motion. In addition, the Prosecution should notify the Chamber and the Defence which Prosecution witnesses could be removed as a result of Witness ADE's testimony. Finally, to avoid the Defence wasting time in its preparation, these witnesses who could be removed should not be called during the same session Witness ADE will testify.

17. Finally, the Chamber notes that the Defence for Nzirorera requests disclosure of the plea agreement with Witness ADE and any other promises made to the Witness as exculpatory material pursuant to Rule 68 of the Rules. In its Reply, the Prosecution attaches the plea agreement with Witness ADE and other exculpatory material, rendering the Defence request moot.

Defence Request to Reduce the Number of Prosecution Witnesses pursuant to Rule 73bis(D) of the Rules

18. The Defence requests the Chamber for an Order pursuant to Rule 73bis(D) reducing the number of Prosecution witnesses to 10 for testimony on Count 5 of the Indictment. The Defence also contends it is unable to commence its investigations without knowing precisely which witnesses will be called. The Prosecution replies that it intends to offer witness statements of many of the listed witnesses pursuant to Rule 92bis in lieu of oral testimony, and that 86 statements have already been certified by the Registry in preparation for this submission. It will however make its Rule 92bis motion only once it has established key elements of proof through oral testimony from other witnesses.

19. Rule 92bis (A) of the Rules provide that "[a] Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment". Pursuant to jurisprudence of this Tribunal, this Rule implies that for a statement to be admitted, its author must first be a witness and therefore his/her name should be entered in the Prosecution witness list.⁷

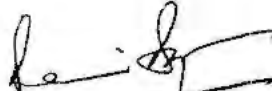
20. As a result of the Chamber's decision to grant leave to remove 50 rape and sexual violence witnesses (see above at par. 7), there remains 93 such witnesses. If the Prosecution submits 86 of those witnesses pursuant to Rule 92bis of the Rules, there will remain 7 witnesses to give oral testimony on Count 5 of the Indictment. In these particular circumstances, it is premature for the Chamber to order the Prosecution to reduce the number witnesses it intends to call pursuant to Rule 73bis (D). The Chamber however considers that the Prosecution should file its motions under Rule 92bis as soon as possible within a reasonable time-limit.



⁷ *Casimir Bizimungu et al. Case*, Decision on the Prosecutor's Motion and Notice pursuant to Rule 92bis(E) (TC), 17 November 2004, par. 5; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T (joint case), Decision on Prosecutor's Motion for Leave to Be Authorised to Have Admitted the Affidavits Regarding the Chain of Custody of the Diary of Pauline Nyiramasuhuko under Rule 92bis (TC), 14 October 2004, par. 12.


FOR THE ABOVE MENTIONED REASONS, THE CHAMBER

- I. **GRANTS** the Prosecution Motion in part, and accordingly
- II. **GRANTS** leave to remove 51 witnesses from the Prosecution witness list in accordance with paragraph 7 above and to add Witness ADE to the Prosecution witness list;
- III. **ORDERS** the Prosecution to file its witness list as amended by 20 December 2005;
- IV. **ORDERS** the Prosecution to notify, no later than 10 January 2006, the Chamber and the Defence of all of the Accused which Prosecution witnesses could be removed as a result of Witness ADE's testimony;
- V. **DECIDES** that these witnesses who could be removed should not be called during the same session during which Witness ADE will testify;
- VI. **ORDERS** the Prosecution to submit its request to remove witnesses on the day that Witness ADE completes his testimony;
- VII. **DENIES** remainder of the Prosecution Motion;
- VIII. **ORDERS** the Prosecution to file its submissions under Rule 92bis of the Rules no later than 10 January 2006;
- IX. **DENIES** the Defence Requests in their entirety.

Arusha, 13 December 2005, done in English.


Dennis C. M. Byron
Presiding Judge


Emile Francis Short
Judge

[Seal of the Tribunal]


Gberdao Gustave Kam
Judge