

ICTR-00-56-T
24-10-2007
(64507-64501)

64507
PM



UNITED NATIONS
SAFARI/00/01

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before Judges: Asoka de Silva, Presiding
Taghrid Hikmet
Seon Ki Park

Registrar: Adama Dieng

Date: 24 October 2007

THE PROSECUTOR

v.

**AUGUSTIN NDINDILYIMANA
AUGUSTIN BIZUMUNGU
FRANÇOIS-XAVIER NZUWONEMEYE
INNOCENT SAGAHUTU**

2007 OCT 24 11 A 10 47
SECRETARY GENERAL

CASE NO. ICTR-2000-56-T

DECISION ON AUGUSTIN BIZUMUNGU'S REQUEST TO VARY HIS WITNESS LIST

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

Office of the Prosecutor:

Alphonse Van
Moussa Sefou
Segun Jegede
Abubacar Tambadou

Felistas Mushi
Faria Rekkas
Anne Bodley

Defence Counsel for A. Ndindilyimana

Christopher Black & Vincent Lurquin
Defence Counsel for A. Bizumungu
Gilles St. Laurent & Ronnie MacDonald

**Defence Counsel for François-Xavier
Nzuwonemeye**

Charles Taku & Beth Lyons

Defence Counsel for Innocent Sagahutu

Fabien Segatwa & Seydou Doumbia

INTRODUCTION

1. The trial in this case started on 20 September 2004. The Prosecution closed its case on 7 December 2006 after calling 72 witnesses. The Defence for Bizimungu ("Defence") called 24 witnesses in the last trial session which ended on 15 June 2007. The second trial session in the Defence case started on 16 October 2007, where the Defence is expected to complete the presentation of its evidence.

2. The Defence's Pre-Defence Brief contains the summaries of 79 witnesses, with one addition at a later time, making a total of 80 witnesses that it intended to call on its behalf. Following the Chamber's Order after the last trial session¹, the Defence submitted that it would withdraw 19 witnesses from its witness list.² In this Motion, the Defence requests the Chamber for permission to vary its witness list by adding 15 new witnesses and withdrawing 11 witnesses.³ Neither the Prosecution nor the other Defence teams responded to this Motion.

DELIBERATIONS

3. Rule 73ter(E) of the Rules of Procedure and Evidence empowers a Trial Chamber to authorize the variation of the witness list if it deems that it would serve the interests of justice. In making that determination, Trial Chambers have taken into account various factors such as the potential importance of the testimony, in relation to existing witnesses and allegations in the indictment, the complexity of the case, any prejudice to the opposing party, the legitimacy of the reasons and timing for variation of the witness list.⁴

4. The Defence submits that it wishes to vary its witness list after certain discoveries made during investigations that took place during the months of July, August and September 2007. The Defence asserts that these witnesses are essential for a full defence. The Defence further submits that it is necessary to replace some of the witnesses who revoked their promises to testify. The Defence claims that it could not submit this Motion prior to 20 September 2007 for reasons out of its control, but that no prejudice will result to the Prosecution.

5. The Motion also includes a request to withdraw 11 witnesses from the witness list. The Chamber accepts this request for withdrawal in the interests of judicial economy. The Chamber will now discuss the request for the addition of each witness in turn.

Witness DA9-12

6. Witness DA9-12 is proposed to testify of alleged pressures on certain Prosecution witnesses (GFU, GAP, GFD, GFV, GFC, GFA, AOE, AOF) to give false testimony in this case. The Defence submits that DA9-12 is the only witness to counter these Prosecution

¹ Scheduling Order Following the Status Conference Held on 18 June 2007, 19 June 2007, para. 1.

² Mise à jour de la liste des témoins du Mémoire préalable du Général Augustin Bizimungu, para. 12, filed on 25 June 2007.

³ Requête de la Défense D'Augustin Bizimungu en Variation de sa Liste de Témoins, filed on 24 September 2007.

⁴ See for example, *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. Emmanuel Rukundo*, Case No. ICTR-2001-70-T, Decision on the Defence Motions for Additional Time to Disclose Witness' 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 (citations omitted).

64505

witnesses. The Chamber notes that Witness DA9-12 is not expected to testify on any of the charges in the Indictment. The Prosecution witnesses are not on trial in this case. If the Defence has information to challenge the credibility of a witness, it should have used such information to impeach the witness when he/she took the stand. The Chamber cannot allow a witness to be called to testify solely on the veracity of another witness' testimony. Accordingly, the request to add Witness DA9-12 is denied.

Witness DE8-1

7. Witness DE8-1 is expected to refute Witness GFU and other Prosecution witnesses regarding the alleged training and distribution of arms, and the planning of the massacre at the Ruhengeri Court of Appeal. This witness' proposed testimony will refer to the Ruhengeri Operation, the relationship between the military authorities and the prefectural authorities in Ruhengeri, the military sector of Ruhengeri in relation to the Arusha Accords, and roadblocks in general. The testimony is expected to focus on the activities of Bizimungu, including that Bizimungu did not attend any meetings in Ruhengeri between July 1992 and June 1994, and the quality of his command during the period from July 1992-April 1994. The witness will talk of the war in February 1993. He will deny that there was any connection with the *Interahamwe* or the *Amahindure*.

8. The Chamber recognizes that the massacre alleged at the Court of Appeal may be important to the Defence and goes directly to the charges in the Indictment.⁵ However, the Chamber has already heard many witnesses on other issues proposed by this witness. The Defence shall contain this witness' testimony to issues relating to the direct charges against the Accused, and those not already covered by previous witnesses. The Chamber allows the addition of Witness DE8-1 to the witness list on that condition.

Witness DG5-2

9. The Defence submits that Witness DG5-2 will replace Witnesses DF1-1 and DF4-38 who were previously removed from the witness list. The witness will supposedly offer counter-evidence to the testimony of Alison des Forges, specifically on the negotiations conducted for the Arusha Accords and the role of the RPF and opposition parties, the position of President Habyarimana, issues of national unity and multipartism. The witness will also testify on the RPF's invasion of Rwanda in October 1990, its actions in 1993, and the consequences on the population of Rwanda that resulted. He is also expected to discuss the role of the OUA (former Organization for African Unity) and its actions of which the witness has personal knowledge. Lastly, the witness claims to have personal knowledge of the youth sectors of the political parties and of Radio Muhabura.

10. The Chamber notes that the Defence has listed four experts to testify on its behalf in the Amended Pre-Defence Brief: an expert to testify to all of the paragraphs in the Indictment, a legal expert, a military expert and a linguistics expert.⁶ Hearing this witness on the same issues would be unnecessarily duplicative. The Chamber therefore denies the addition of Witness DG5-2 to the witness list.

Witness DB15-8

11. Witness DB15-8 is expected to testify about the prevailing tension in his *commune* before and after the death of President Habyarimana. He will allegedly explain the evolving

⁵ Paras. 64-65 of the Amended Indictment of 23 August 2004.

⁶ Amended Pre-Defence Brief by General Augustin Bizimungu, filed on 16 April 2007.

meaning of *Interahamwe*. The Defence maintains that DB15-8 is the only available witness to testify on those issues. The witness will further testify to deny military training in his *commune*, deny the existence of killings at the Remera-Rukoma hospital, and deny that a dead body of a white man was transported by helicopter from the hospital, as alleged by Prosecution Witness GFD.

12. The Chamber finds that this witness's testimony, which purports to refute the testimony of Prosecution Witness GFD, may be important, as being directly relevant to paragraph 58 of the Indictment. The Chamber will, however, confine the testimony to this sole purpose and will not authorize the witness to venture on the general situation or observations in Rwanda. On that condition, the Chamber authorizes Witness DB15-8 to be added to the Defence witness list.

Witness DB15-9

13. Defence Witness DB15-9 proposes to directly contradict the testimony of Prosecution Witness GFD regarding the events alleged to have taken place in the Remera-Rukoma hospital. The Defence claims no other witness will be able to contradict the allegations in paragraph 58 of the Indictment, and that this witness is to replace Witness DE8-3 who was removed from the witness list.

14. The Chamber accepts that Witness DB15-9 is to substitute for a witness who was removed from the witness list, but notes that Witness DB15-8 is also set to refute the alleged killings perpetrated at Remera-Rukoma hospital, and is not the only witness to testify on this issue as alleged. The Chamber, however, finds that the proposed testimony is sufficiently relevant to the indictment to warrant his addition to the witness list.

Witness DB8-7

15. In its Motion, the Defence proffers that Witness DB8-7 will refute the allegations of Witness GAP and the other allegations regarding the authority and security in Ruhengeri *prefecture* before and during 1994, including the Ruhengeri Court of Appeal. The Chamber notes Witness DB8-7's employment before and during the events of 1994 and the proposed testimony in the summary indicating the witness' detailed knowledge of the happenings in Ruhengeri at that time. Although there have been many witnesses (including the proposed testimony of Witness DE8-1) refuting the allegations against the Accused in Ruhengeri, the Chamber finds his testimony may be useful given his particular employment at the time of the events. Witness DB8-7 is permitted to be added to the witness list.

Witness DB11-26

16. The witness is proposed to testify regarding events that allegedly occurred at the Nkuli *commune* office. It is submitted that the witness will refute the testimony of Prosecution Witnesses AOF and AOF regarding Bizimungu's or Kabuga's presence and participation in the meetings and the massacres in Nkuli *commune* as well as the military involvement in any such activities. The Chamber recognizes that testimony refuting Bizimungu's alleged involvement in the events that took place at Nkuli *commune* may be important and material to this case and may contradict evidence led by the Prosecution on this issue. The Chamber accepts the addition of DB11-26 to the witness list.

Witness DA9-10

17. Witness DA9-10 is expected to refute the allegations of Witness GAP regarding the alleged presence of Ephrem Setako in Ruhengeri on the night of 6 April and the days of 7-8



April 1994. This witness replaces DE4-35 and DE4-36 and will cover the same grounds. The Chamber notes that it was Prosecution Witness AOE who testified to the presence of Setako with Bizimungu on 7 April 1994, not Witness GAP. Witness AOE's testimony places Setako with Bizimungu in Ruhengeri where he allegedly incited many Hutu to kill Tutsi. The witness' position in April 1994 appears to give a direct alibi for Setako at the time. The Chamber finds that the addition of Witness DA9-10 to the witness list is warranted.

Witness DB11-35

18. The Defence submits Witness DB11-35's testimony to refute part of the testimony of Prosecution Witness GFU, particularly regarding the presence of Ephrem Setako, Marcel Ruvugabagabo, and Augustin Bizimungu at the Hotel Muhabura before the start of the massacre of the Ruhengeri Court of Appeal. The witness will give evidence, among others, on the alleged real identities of the attackers at the Hotel Muhabura. This incident is material to the charges in the Indictment. The Chamber finds that Witness DB11-35 should be added to the witness list to refute these allegations.

Witness DB11-12

19. The Defence submits that Witness DB11-12 will replace withdrawn Witness DE4-9. He will allegedly testify that he never heard of the military's involvement in the events at the Court of Appeal in Ruhengeri or that they trained the *Interahamwe* in Ruhengeri. Again, the incident at the Court of Appeal and the allegations concerning the training of *Interahamwe* are material charges against the Accused. The witness also purports to testify about Bizimungu's role in the creation of an organization, which helps the child victims of the war of February 1993. The Chamber has already heard Witness Greindl on this issue⁷ and finds that it is not necessary to hear more evidence in this regard. The Chamber therefore allows Witness DB11-12 to be added to the witness list but orders that his testimony be limited to his alleged knowledge regarding the events in Ruhengeri concerning the Court of Appeal and the *Interahamwe*.

Witness DB11-36

20. The Defence states that Witness DB11-36 is the only witness who can testify that the crimes committed in Ruhengeri were perpetrated by *Interahamwe* from outside the prefecture. When faced with a choice, the Chamber prefers to hear testimony which is first-hand, rather than hearsay. From the summary annexed to this Motion, the Chamber finds that this witness' proposed testimony would be hearsay concerning the activities that allegedly occurred at the Muhabura Hotel and the Court of Appeal. Since there are many other witnesses who have testified and will testify to these incidents with more direct knowledge, the Chamber denies the addition of Witness DB11-36 to the witness list.

Witness DB11-37

21. The Defence requests to add Witness DB11-37 to the witness list, to testify that there was no relationship between the military and the *Interahamwe* during the events in Musambira. The Chamber notes that paragraphs 69 and 114 of the Indictment allege acts of violence in Musambira by soldiers in the Rwandan army and militiamen. It is asserted that the witness will also offer testimony regarding the reputation of 3 Prosecution witnesses (DBA, DBB, and DBH) who testified and their association with IBUKA. The Chamber notes again that it is not the Prosecution witnesses who are on trial in this case and it is not appropriate to call witnesses to testify on the reputation of these witnesses. Finally, the

⁷ Witness Greindl testified in examination-in-chief on 18 October 2007.



witness purports to discuss LIPRODHOR (a Rwandan human rights organization) and what happened in Gacaca hearings. The submission is vague in this regard and the Chamber finds that it is not material to the issues charged in the Indictment. However, the Chamber finds that the proposed testimony regarding the relationship between the military and the *Interahamwe* in Musambira may be important as several Prosecution witnesses testified to incidents regarding one or both groups in that area.⁸ The Chamber therefore permits the addition of Witness DB11-37 to the witness list but limits the testimony to the issues in Musambira.

Witness DE11-4

22. Witness DE11-4 is expected to counter allegations contained in paragraphs 22, 25, 27, 29 and 57 of the Indictment. Due to the role that Witness DE11-4 played in Ruhengeri in 1992 to 1994, as indicated in the recent disclosure on 19 October 2007, the Chamber permits that he be added to the witness list.

Witness DB11-39

23. The Defence wishes to call Witness DB11-39 to oppose paragraph 81 of the Indictment as well as Prosecution Witness GFC's testimony. Specifically this witness is supposed to have information regarding the location of the Director of the Institute of Kigali which he alleges is in dispute and has extensive details regarding ISAE (Institut Supérieur d'Agriculture et d'Elevage). The Chamber finds that Witness DB11-39's purported testimony is material and relevant to the charges in the Indictment, and also notes that this witness will be the only one to testify on these issues. Witness DB11-39 is allowed to be added to the witness list.

Witness DA5-5

24. The Defence avers that Witness DA5-5 will refute the allegations of Prosecution Witness EZ regarding the participation of the military in the crimes alleged to have taken place in Gitarama prefecture. Witness EZ testified to several alleged incidents in Gitarama which are directly related to the Indictment at paragraphs 69 and 86-88. Since the proposed testimony is material to the charges in the Indictment and directly refuting a Prosecution witness, the Chamber finds that Witness DA5-5 should be added to the witness list.

25. The Chamber notes that the Defence filed this Motion three weeks before the start of the scheduled trial session, without appending the identifying information for the new witnesses.⁹ This violates the Chamber's Order of 19 June 2007 which required the Defence to carry out disclosure of the personal information of the witnesses it intends to call to testify, 21 days before the trial session.¹⁰ The Chamber cannot accept the reasons given by the Defence for the non-disclosure, which was that the witnesses did not want their identities disclosed. The paramount duty of the Defence is to the Chamber. The Defence has frustrated the purpose of the Order which is intended to give the Prosecution sufficient time to prepare its cross-examination, in a trial session when the Defence is expected to close its case. The last trial session ended almost four months before the start of this trial session, thus giving ample opportunity for timely disclosure. The Motion filed in this manner, is a clear violation of the Chamber's Order. The Chamber hereby issues a warning pursuant to Rule 46(A) of the

⁸ See for example the testimonies of Prosecution Witnesses DBA, DBB, EZ, DBE and DY.

⁹ Only following the Chamber's further Order on 17 October 2007, did the Defence disclose the necessary information on 17 and 19 October 2007.

¹⁰ Scheduling Order Following the Status Conference Held on 18 June 2007, 19 June 2007, para. IV.

64501

Rules to the Defence for Bizimungu for obstructing the proceedings.¹¹

26. Furthermore, the Chamber will not entertain any subsequent requests to add or substitute witnesses to the Defence witness list. Regardless, the Defence is expected to know its case at this stage of the proceedings.

27. Finally, the Chamber instructs the Defence to call the witnesses permitted to be added to the list as soon as possible, to avoid a break in the trial proceedings. If 21 days have not yet passed from the time of disclosure, and the Prosecution requires additional time before cross-examining the witness, the Chamber will address those requests at the appropriate moment to avoid any prejudice to the Prosecution.

FOR THE ABOVE REASONS, THE CHAMBER HEREBY

GRANTS the Defence Motion in part, and authorizes the Defence to:

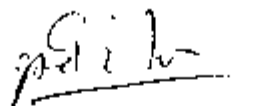
- 1) add Witnesses DE8-1, DB15-8, DB15-9, DB8-7, DB11-26, DA9-10, DB11-35, DB11-12, DB11-37, DE11-4, DB11-39, and DA5-5 to the witness list;
- 2) withdraw Witnesses DA7-2, DE8-12, DE4-5, DE4-11, DE4-15, DB11-18, DE14-1, DE4-9, DA10-1, DE4-40, and DC4-1 from the witness list; and

DENIES the remainder of the Motion;

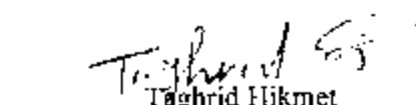
ORDERS that any remaining witness identifying information be disclosed to the Prosecution and WVSS within 24 hours of the filing of this Decision;

ISSUES A WARNING to the Defence for Bizimungu pursuant to Rule 46(A) of the Rules.

Arusha, 24 October 2007, done in English.


Asoka de Silva

Presiding Judge



Taghrid Hikmet

Judge


Seon Ki Park

Judge

[Seal of the Tribunal]



¹¹ Rule 46(A) of the Rules provides that following a warning, a Chamber may impose sanctions against a counsel if the offensive, abusive or obstructionist conduct continues. Warnings to this Defence team have been issued on two prior occasions: 24 November 2005 (Decision on Bizimungu's Motion in Opposition to the Admissibility of the Testimonies of Witnesses LMC, DX/ANM, BB, GS, CJ/ANL, and GFO and for Reconsideration of the Chamber's Decision of 13 May 2005) and 14 May 2007 (Proprio Motu Order Following the Registrar's Submission Regarding the Chamber's Scheduling Order of 16 February 2007).