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UNITED NATIONS

International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law committed in the territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994

Case No.ICTR-98-41-I

Date : .....

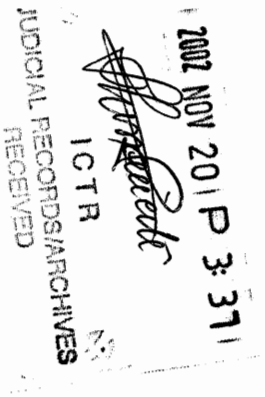
ENGLISH

Original: FRENCH

TRIAL CHAMBER III

Before: Judge Llyod George Williams, Q.C., presiding
Judge Pavel Dolenc
Judge Andrésia Vaz

Registry: Adama Dieng
Decision of: 4 November 2002



THE PROSECUTOR
v.
THÉONASTE BAGOSORA
GRATIEN KABILIGI
ALOYS NTABAKUZE
ANATOLE NSEMGIYUMVA

DECISION
(MOTION BY ALOYS NTABAKUZE'S DEFENCE FOR EXECUTION OF THE TRIAL CHAMBER'S DECISION OF 23 MAY 2002 ON THE PROSECUTOR'S PRE-TRIAL BRIEF, DATED 21 JANUARY 2002, AND ANOTHER MOTION ON A RELATED MATTER

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

Sitting as Trial Chamber III ("the Chamber") composed of Judges Lloyd George Williams, Q.C., presiding, Pavel Dolenc and Andrésia Vaz.

Being seized of the "Motion by Aloys Ntabakuze's Defence for execution of the Trial Chamber's 23 May 2002 decision on the Prosecutor's pre-trial brief, dated 21 January 2002, and another motion on a related matter," filed on 13 August 2002 and of an addendum to the said motion filed on 2 September 2002 ("the Motion").

Considering the Prosecutor's response to the Motion filed on 22 August 2002 ("the Response"),

Ruling on the motion solely on the basis of the parties' briefs, pursuant to Rule 73 (A) of the Tribunal's Rules of Procedure and Evidence ("the Rules").

Background

1. On 21 January 2002, the Prosecution filed a pre-trial brief pursuant to Rule 73 *bis* of the Rules.

2. On 2 April, 3 and 6 May 2002, Counsel for Nsengiyumva, Ntabakuze and Kabiligi objected to the said brief.[1] They submitted, *inter alia*, that the Prosecution, in breach of Rule 73*bis* (B)(iv)(c), did not specify the points in the Indictment on which each witness would testify.

3. On 23 May 2002, the Chamber granted the Defence's requests in this regard. In essence, it noted out that the summary of the witness statements indicated only the names of the Accused and the crime in respect of which each witness would testify, and that the fact of only citing the counts, each of which relates to a number of events, did not sufficiently inform the Accused of the factual evidence that each of them would provide during his testimony. The Chamber therefore ordered the Prosecution to specify the paragraphs of the concise statement of facts in the Indictment that relate to each testimony.[2]

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[1] "[Accused's Nsengiyumva's] Preliminary Objection to the Prosecutor's Pre-Trial Brief and Annexes, and Motion to Reject the Brief and Annexes," filed on 2 April 2002; "Motion by Aloy's Ntabakuze's Defence for the dismissal of the Prosecution's 21 January 2002 Brief because of non-compliance with the Statute and the Rules, and inconsistency with the Indictment," filed on 3 May 2002; "*Requête de la Défense de Gratien Kabiligi aux fins de rejet du mémoire préalable du Procureur en date du 21 Janvier 2002*," filed on 6 May 2002.

[2] "Decision on Defence Motions of Nsengiyumva, Kabiligi, Ntabakuze Challenging the Prosecutor's Pre-Trial Brief and on the Prosecutor's Counter-Motion," particularly paras. 12 to 19(a).

4. On 7 June 2002, the Prosecution filed a revision of the Pre-Trial Brief, purportedly done in compliance with the Order of 23 May 2002 ("the Revised Pre-Trial Brief").[3]

Submissions of the parties

5. The Defence submits that the revision was not done in compliance with the Order of 23 May 2002: instead of specifying, for each Prosecution witness, the paragraphs of the concise statement of facts on which the witness will testify, the Prosecution specified, for each paragraph of the concise statement of facts, the witnesses who will testify on the matter. The Prosecution does not dispute this fact.

6. The Defence contends that there is no correlation between the summaries of the prospective testimony of Prosecution witnesses appearing in the Pre-Trial Brief and the paragraph or paragraphs of the concise statement of facts in the Indictment on which the witnesses will testify as per the Revised Pre-Trial Brief. The Defence refers to most of the 43 witnesses mentioned in its motion.[4] It argues that the Prosecution's approach makes it difficult for the Defence to verify whether there is any correlation between each of the factual points in the Indictment, the names or pseudonyms of the witnesses concerned and their prior statements; the Defence adds that the revision must first be redone in the reverse order, witness by witness. It therefore prays the Chamber to order the Prosecution:

> (i) To comply with the order of 23 May 2002, by following a witness-by-witness approach and not that of paragraph-by-paragraph of the Indictment; or
>
> (ii) To exclude the said witnesses from the list of Prosecution witnesses against the Accused, Aloys Ntabakuze.

7. Wish respect to point 6(i) above, the Prosecution argues that it did not contravene the Chamber's Order since, thanks to the Revised Pre-trial Brief, the Defence knows the points in the Indictment on which the Prosecution witnesses will testify. The Prosecution submits that it adopted a paragraph-by-paragraph approach so as to be able to submit the Revised Pre-Trial Brief within the time-limits prescribed by the Chamber. The Prosecution further submits that if it had adopted a witness-by-witness approach, the exercise would not have been completed on time and, lastly, that the Defence is free to reorganise the said information as it deems fit and necessary.

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[3] "The Prosecutor's Pre-Trial Brief Revision in Compliance with the Decision on Prosecutor's Request for an Extension of the Time Limit in the Order of 23 May, 2002, and with the Decision on the Defence Motion Challenging the Pre-Trial Brief, dated 23 May, 2002."

[4] Namely: BG, BI, BJ, BV, BY, CW, DAS, DH, DO, EB, FS, GU, HV, KJ, KT, LMG, AOB, OAF, OAH, OAM, OAO, OB, OC, OD, OE, OF, OG, OM, ON, OO, OP, OQ, OW, OY, VJ; WD, XAM, XAS, XAV, XBC, XBD, XXM and XXY.

8. With respect to point 6(ii) above, the Prosecution submits: that it is not for the Defence to determine which witnesses the Prosecution should call or not call, since the burden of proof lies with the Prosecution; that the Prosecution must therefore remain master of its own case; that the Prosecution revised the Brief in the light of the prior statements of the witnesses concerned and drew certain conclusions as to the nature and quality of the evidence that they were to provide; that the Trial Chamber will ultimately be the sole judge to determine the correctness or incorrectness of the said conclusions; and lastly, that this is not the appropriate time to question the merits of the prosecution evidence.

9. The Defence further points out, in connection with the 43 afore-mentioned witnesses, that they were not supposed to testify against the Accused, Kabiligi and Ntabakuze, according to the Pre-Trial Brief. It requests that all the said witnesses be excluded with respect to the two Accused. The Prosecution does not respond specifically to this objection, to which it seemingly applies the arguments summarised in the preceding paragraph.

10. Lastly, the Defence requests the exclusion of a number of witnesses cited in the Revised Pre-Trial Brief on the ground that they are neither experts nor eyewitnesses or that it did not receive their respective statements or any expert reports. In response, the Prosecution submits generally that pursuant to Rule 94 *bis* of the Rules, it is only obliged to disclose the reports of expert witnesses 21 days before they testify, which it will do should it decide to call the said witnesses. The Prosecution further stresses that it did disclose to the Defence teams, the statements of Witnesses Olivier Bogaert alias Bogaoli, Réné Degni Segui alias Degnren, Bacre Waly N'diaye alias N'diaye, or some documents written by them on dates which it indicates; that it has no statements by Witnesses Jean Damascène Ndagihimana alias Ndagjea and Ntariba Kamanzi alias Kamanta; that, nevertheless, according to information in its possession, the said witnesses themselves may have information relevant to the Prosecution case; that that is why it deemed it appropriate to notify the Defence of its intention to call them to testify; and, lastly, that it intends to disclose to the Defence, as soon as possible, any newly obtained material concerning the witnesses in question, should such material be proper for disclosure.

DELIBERATION

11. The Defence's first objection relating to the approach adopted for the revision of the Pre-Trial Brief raises the question of the legal basis for the Tribunal's monitoring of the implementation of its decisions by the parties concerned. In the absence of any specific provision applicable to the present case,[5] the Chamber considers that the power expressly conferred upon it, under Article 18 of the Statute, to issue all the orders

[5] The only provision in the Rules is the case of failure by States and not by non-State entities such as parties, to co-operate with the Tribunal, in violation of Rule 28 of the Statute. See in this connection, Rules 7 *bis*, 59 and 61 of the Rules relating respectively to non compliance with obligations, failure to execute a warrant of arrest and the procedure applicable in such cases.

required for the conduct of the trial should be interpreted broadly. The said power is reaffirmed in Rule 54 of the Rules. Such an interpretation is prompted by the need to safeguard the Tribunal's functions, and hence, its judicial role. Thus, the Chambers considers that the question raised is properly covered by the above-mentioned provisions.

12. With respect to the first objection, the Chamber notes that although it ordered the Prosecution to indicate the exact paragraphs of the concise statement of facts in the Indictment on which each witness will testify, it did not order the Prosecution to adopt a particular approach in that respect. The Chamber's order was not strictly executed, so to speak, in purely technical terms. However, the fact remains that all the information that the Defence needed to adequately prepare the defence of their respective clients was provided. In fact, the Defence did not state that it did not receive all the information mentioned in the Order of 23 May 2002. Furthermore, the Defence must have obtained all the prior witness statements, indicating the nature of the evidence that the Prosecution intends to adduce. In the circumstances, the Accused suffered no prejudice. Accordingly, the first Defence objection is overruled.

13. The Defence further requests that 43 witnesses, whose prospective testimony does not, according to the Defence, correlate with the events referred to in the paragraphs of the Indictment indicated in the Revised Brief, should be removed from the Prosecution witness list. The Prosecution states that the revision was based on the statements of the said witnesses. If that is the case, which the Chamber has no reason to doubt, the Chamber is bound to overrule the Defence's objection.

14. Regarding the Defence's ancillary objection with respect to the fact that the 43 witnesses in question are mentioned in the Revised Pre-Trial Brief as witnesses who will testify against Kabiligi and Ntabakuze, whereas there is no such indication in the Brief itself, the Chamber noted that the Defence's allegation was founded in some respects. For example, while the Brief indicates that Witnesses BG, BJ, BV, BY and CW would only testify against Théonaste Bagosora, the Revised Pre-Trial Brief states that they would testify against all the Accused. However, the Chamber considers that the Prosecution has discharged its duty with respect to Rule 73 *bis* (B)(iv) of the Rules by providing its list of witness against all the Accused in its Pre-Trial Brief, before the revision. The 43 witnesses in question appear on the said list. Moreover, even if the box corresponding to the names of the other Accused was not ticked in the witness list, the summaries of prospective corresponding testimonies did, however, indicate to the Defence, prior to the revision, that the said witnesses could also testify against other Accused in the instant case, including Kabiligi and Ntabakuze. In this respect, the revision had the merit of clarifying the issue, which is in the interest of the Defence in terms of its preparation for the appearance of the said witnesses. Lastly, the Defence must have obtained all the prior witness statements indicating the nature of the evidence that the Prosecution intends to produce, and on which basis the Prosecution purportedly revised its Pre-Trial Brief. In any event, the Chamber will determine to what extent a witness can disregard or stick to his earlier statements during his testimony. In the circumstances, the Accused did not suffer any prejudice. This objection is therefore overruled.

15. Regarding the last objection concerning witnesses whose previous statements or expert reports the Defence claims it did not receive, the Chamber notes as follows:

(i) With respect to Witnesses Olivier Bogaert alias Bogaoli, Réné Degni Segui alias Degnren, Bacre Waly N'diaye alias Ndiaye, the Prosecution asserts that it disclosed some documents and/or statements concerning them, which, in its opinion, already give the Defence an indication of the contents of their prospective testimony at trial. The case-file does not show that the Prosecution failed to fulfil its disclosure obligations with respect to the said witnesses,

(ii) With regard to Witnesses Jean Damascène Ndagihimana alias Ndagjea and Ntariba Kamanzi alias Kamanta, the Prosecution claims that it does not have any prior statement to disclose to the Defence. Since the Prosecution states that it may call the said witnesses to testify, the Chamber orders it to make up its mind as soon as possible and, should it decide to call the witnesses, to disclose the summaries of their prospective testimonies and any prior statements,

(iii) The Prosecution did not respond to the Defence's objection regarding the alleged non-disclosure of the prior statements of the other prosecution witnesses cited in the motion. The Chamber reiterates that the Prosecution must comply with the provisions of Rule 66(A)(ii) of the Rules. The Chamber therefore directs the Prosecution to disclose the statements of all the witnesses it intends to call to testify, within ten days from the date of the present decision.

16. With respect to the same objection, the Chamber does not have information that would enable it to distinguish between expert witnesses and witnesses of fact, with the exception of Messrs. N'diaye and Degni-Segui. The Chamber stresses that under Rule 94 *bis* of the Rules, the Prosecution has the obligation to file with the Chamber the written statements of any expert witnesses no less than 21 days prior to date on which they are expected to testify. As far as its obligations *vis à vis* the Defence are concerned, the Prosecution is required, under the same provision, to disclose to the Defence the prior statements of any expert as early as possible. The Chamber is therefore of the view that the Prosecution must obtain the said reports from the respective witnesses as early as possible before the date on which they are expected to testify, so that they can be disclosed to the Defence before the deadline for the filing of the report with the Chamber. It is the Chamber's opinion that the 21-day period before the appearance of the witnesses, provided for in Rule 94 *bis* of the Rules is, indeed, a deadline. A similar interpretation of Rule 94 *bis* of the Rules was, incidentally, made by the Tribunal's Trial Chamber II.[6]

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[6] See *The Prosecutor v. Pauline Nyiramasuhuko et al.,* Case No. ICTR-97-21-T and *The Prosecutor v. Anatole Nsabimana and Alphonse Nteziryayo*, Case No. ICTR-97-29-T, Decision on the Defense Motions for an Extension of the Time Limit for Filing the Notice in Respect of Expert Witness Statements, 25 May 2001, para. 12: "(...) disclosure of the statements of expert witnesses to the opposing Party is to be made as early as possible. Indeed, by (...) distinguishing between filing (with the Trial Chamber) and disclosure [to

17. Lastly, the Chamber notes that the trial commenced on 2 April 2002 and that, according to the Pre-Trial Brief, the Prosecution intends to call more than two hundred witnesses to testify. The said list is far from final, as indicated by the Prosecution in its Response and during the proceedings so far.[7]

18. The Chamber recognises in that a commendable effort by the Prosecution to spare the Defence any surprises with respect to the prosecution evidence to be ultimately presented before the Chamber. However, it must be noted that that was not the only purpose of the Pre-Trial Brief, which should enable both the Defence and the Chamber to know, before the commencement of trial, in as much detail and with as much certainty as possible, the Prosecution's intended strategy, including the exact number of witnesses that it intends to call to testify in support of the specific allegations that it will put forward. In fact, the Prosecution cannot continue to keep the Chamber and particularly, the Defence in the dark regarding its strategy.

19. The Chamber notes that, in the case of *Nsabimana*, Trial Chamber II pointed out that the Accused's basic right to have adequate time and facilities for the preparation of his defence and the right to have his case heard within a reasonable time (Article 20(4) of the Statute) prevailed over the right not to be swamped "with ... the statements of witnesses whom [the Prosecution] does not actually intend to call and which might not be otherwise useful for a proper determination of the case".[8]

20. Furthermore, under Rule 73 *bis* (E) of the Rules, after the trial has commenced, the Prosecution can only amend its witness list in the interests of justice and with leave of the Chamber.

21. While appreciating the practical difficulties which the Prosecution says it would experience in compiling its final list of witnesses, the Chamber, nevertheless, orders the Prosecution to fulfil its obligations and file its revised witness list within ten days from the date of this decision.

FOR THE FOREGOING REASONS,

THE CHAMBER,

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the opposing party], Rule 94 *bis* (A) of the Rules emphasises the necessity of an early disclosure of the expert witness statements to the opposing party."

[7] The Prosecution stated that it intended to reduce the number of Prosecution witnesses. It also stated that it was uncertain about the availability of some of them. See, in particular, the Transcript of the Status Conference of 4 September 2002, pp. 13 and 14 (closed session).

[8] *The Prosecutor v. Sylvain Nsabimana*, Case No. ICTR-97-29-T, *Decision on the Defence motion to limit possible evidence to be disclosed to the Defence and to exclude certain material already disclosed by the Prosecutor,* 11 February 2000, p. 5.

PARTIALLY GRANTING THE MOTION,

I. **Orders** the Prosecution to comply with the provisions of Rule 66(A)(ii) of the Rules, by disclosing to the Defence within ten days from the date of this decision, copies of the statements of all the witnesses that it intends to call to testify;

II. **Orders** the Prosecution to file its revised list of witnesses within ten days from the date of this decision;

III. **Denies** all the other requests and submissions.

The foregoing is the Chamber's decision and order.

Judge Pavel Dolenc appends a dissenting opinion to this Decision.

Arusha, 4 November 2002.

(Signed)

Llyod George Williams, Q.C.
Presiding Judge

(Signed)

Andrésia Vaz
Judge

(Seal of the Tribunal)

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ICTR-98-41-T
5-11-2002
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SEPARATE AND DISSENTING OPINION OF JUDGE PAVEL DOLENC

(REQUÊTE DE LA DÉFENSE D'ALOYS NTABAKUZE EN VUE DE FAIRE EXÉCUTER LA DÉCISION DE LA CHAMBRE EN DATE DU 23 MAI 2002, RELATIVE AU MÉMOIRE PRÉALABLE DU PROCUREUR DU 21 JANVIER 2002, ET AUTRE DEMANDE POUR QUESTION CONNEXE)

1. In its Decision dated 23 May 2002 ("Decision") on the Motions of Nsengiyumva, Kabiligi, and Ntabakuze challenging the Prosecutor's Pre-Trial Brief of 21 January 2002 ("Brief"), the Chamber ordered the Prosecutor to amend the Brief by indicating the points in the concise statement of facts in each of the three indictments to which each witness will testify. The original Brief only indicated the name of the crime to which each witness would testify instead of referring to the points in each of the indictments as required by Rule 73*bis* (B)(iv)(c).

2. Following the Decision, the Prosecutor's Pre-Trial Brief Revision was filed on 7 June 2002 ("Revision"). In the Revision, the Prosecutor lists all the paragraphs of the three indictments and specifies for each which witnesses will be called to testify. The Prosecutor further indicates that all 205 witnesses are expected to testify on certain general paragraphs and that the testimonies of twelve witnesses are relevant to every paragraph in the three indictments.

3. The Defence for Ntabakuze has now brought a Motion and Addendum to the Motion (collectively "Motion") seeking a correction in the Prosecutor's execution of the Decision. The Defence objects to the Revision because it consists of a list of paragraphs of the three indictments with a corresponding indication of relevant witnesses, rather than of a list of witnesses with a corresponding indication of the relevant paragraphs, as ordered in the Decision.

4. The Defence contends, moreover, that this inverted methodology permits the Prosecutor to conceal the absence of correspondence between the witness statements and the points cited in the Revision. If the presentation had been made witness-by-witness, the Defence would have been better placed to compare the indicated points with the witness statements and with the Brief. The Defence submits that the Prosecutor used the Revision to systematically enlarge the scope of all witnesses' testimonies by indicating that the testimonies would cover more than what is included in their statements and that the summaries of the statements of certain witnesses listed in the Revision to testify about Ntabakuze and Kabiligi do not contain any relevant information. The Defence further challenges that forty-three witnesses, most of whom were not originally designated in the Brief as expected to testify against Ntabakuze, and whose summaries have no connection to the Ntabakuze and Kabiligi Indictment,

5. are now listed in the Revision as relevant to specific paragraphs in the Ntabakuze and Kabiligi Indictment. Finally, the Defence complains that it has not received any witness statements or expert reports from twenty-five Prosecution witnesses.

6. The Defence requests the Chamber to order the Prosecutor to comply with the Decision. In addition the Defence asks the Chamber to exclude from the witness list the forty-three witnesses who, according to the Defence, were not originally listed in the Brief as witnesses against Ntabakuze. The Defence also requests that the Chamber exclude from the list the twenty-five witnesses for whom the Defence has not received statements.

7. In its response, the Prosecutor submits that the Defence objection to the formulation of the Revision is "nonsensical". The Prosecutor posits that it does not matter whether a paragraph or a witness is used as a point of reference for the witness list, because both approaches give the Defence the same information as to which allegation in the indictments a given witness will be called to testify about. The Prosecutor explains that she devoted substantial resources to producing the Revision and that it was presented in the format that was the most useful, understandable, and efficient.

8. Regarding the Defence request to exclude forty-three witnesses from the list, the Prosecution states that only the Chamber, and not the Defence, is entitled to decide which witnesses will testify and for what purpose. Furthermore, the Prosecution explains that some of twenty-five witnesses, whose statements the Defence asserts were not disclosed, will be called as experts and their statements will be communicated according to the time limit set out in Rule 94 *bis*. The Prosecutor specifically notes that, of the witnesses challenged by the Defence, the witness statement of Oliver Bogaert was disclosed to Ntabakuze on 25 February 2000 and the Prosecutor is not in possession of any statement for either Ntariba Kamanza or Jean Damascene Ndagihimana. For the remaining witnesses challenged by the Defence, the Prosecutor has provided no response to the Defence's allegations. Nevertheless, the Prosecution proposes that the Chamber deny the Motion.

The Methodology of the Revision

9. I have had the advantage of reviewing the majority decision in the instant matter ("Majority") and agree with the finding in paragraph 11 that the Defence's objections to the modalities of the Revision concern the control of the execution of an interlocutory decision. I further agree that this matter is not specifically governed by the Statute or the Rules, except in relation to judgements and orders for external cooperation with the Tribunal. The Chamber's control over the execution of interlocutory decisions is derived from the general language of Article 19(1) of the Statute which provides that "[t]he Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence." Pursuant to Rules 54 and 73 a Chamber may, *proprio motu* or at the request of a party, issue such orders as may be necessary for the conduct of the trial or, at the request of a party, make appropriate ruling or relief.

10. I also agree with the Majority that, pursuant to these rules, the Chamber has wide discretion regarding the control of the execution of its decisions. However, in the absence of express guidance in the Statute or the Rules, I am convinced that the Chamber should provide guidelines concerning the exercise of this discretion. Such generalized guidelines are especially necessary when a Chamber is dealing with an issue that is not routine or where jurisprudence is scarce or contradictory. Articulated guidelines serve to give the parties and the public a notion of the generalized and abstract criteria that a chamber applies in exercise of its discretion and to ensure that a discretionary power is exercised in accordance with its purpose. By articulating the standards applied in a given case, a chamber can restrict and control the exercise of its otherwise unlimited discretionary power, which must not be exercised inconsistently, arbitrarily or discriminatorily. The absence of any such guidelines could result in conflicting decisions even when similarities in circumstances do not justify the difference. A clear articulation of the underlying standards for exercising judicial discretion makes judicial decisions more predictable, transparent, and consistent. Consequently, generalized guidelines would contribute to the persuasiveness of a decision.

11. The Majority dismisses the Defence objection concerning the modality of the Revision, finding that although the Decision was not strictly executed in purely technical terms, that the Defence received the necessary information and therefore did not suffer any prejudice. I respectfully disagree with this analysis. The criteria applied by the Majority in rejecting the Defence objections are: (i) that the Chamber did not order a specific method of presentation; (ii) that the Defence received the information required by the Decision; and (iii) that the Defence therefore suffered no prejudice. In my view, this approach conflates the determination of whether the Prosecution has complied with the order and the determination of an appropriate remedy, if any, to be granted. When a party brings a motion alleging non-compliance with a decision, the Chamber should first make a clear determination of whether there has been compliance with the decision. Only when the Chamber finds that the party has failed to comply, should the Chamber then consider the secondary question of whether a remedy is required.

12. While a dissenting opinion is not the place to make an exhaustive articulation of general guidelines, it cannot be controversial to indicate that a chamber should, as a matter of principle, insist that its decisions be executed in accordance with the wording of the order. If a party is unsure of its obligations because it believes that the order is ambiguous, it should seek advice on the correct interpretation from the trial chamber. When the execution of a decision has been rendered impossible for a party, or where strict compliance with the decision imposes an undue burden that is clearly excessive in relation to its aim and purpose, a party should apply to the Chamber for an order for substitute execution. However, a party may not, as the Prosecutor has done in the instant case, unilaterally alter the wording or meaning of a decision and may not choose to execute a decision in a manner that the party deems more suitable, without permission of the Chamber. Further, a party should generally not be excused

from complying with a decision to the detriment of the other party, especially where the problem in executing the decision derives from the conduct or strategy of the defaulting party.

13. In the instant case, I therefore take the position that the Prosecutor failed to comply with the Decision. Pursuant to the order in paragraph 19(a) of the Decision and Rule 73*bis* (B)(iv)(c), the Prosecution was required to indicate the points in the concise statement of facts in each of the three indictments relating to all four Accused to which each witness would testify. In my view the Decision is clear and unambiguous: it requires a list of witnesses and not a list of paragraphs. Accordingly, the Prosecution should have amended the Brief by indicating for each witness the events, circumstance or paragraphs in the indictments about which the witness was expected to testify. I stress that the Decision of the Chamber required the Prosecution to make these specific changes and nothing less and nothing more. In structuring the Revision paragraph-by-paragraph, the Prosecutor failed to comply with the Decision.

14. Having made a finding of non-compliance, I would then consider whether a remedy is required in this case. At this stage, it is appropriate to consider the criteria of prejudice which was introduced by the Majority analysis. In my view, whether or not a party has sustained prejudice as a result of non-compliance with a decision may, as a general guideline, be a relevant factor in determining whether a remedy should be afforded and, especially, in fashioning an appropriate remedy.

15. I do not agree, however, with the Majority's conclusion that the Defence has not suffered any prejudice. I agree that all of the information required by the decision is contained in the Revision. However, I believe that the methodology employed by the Prosecutor has made the information contained in the Revision extremely difficult to access. The Prosecutor admits that the amendment of the Brief in accordance with the Decision would take a long time. Proceeding as it did in the Revision, the Prosecution has shifted this burden, and the additional work required to compare and to analyze the Brief and the Revision, onto the Defence. It is clear that the magnitude of this task is exacerbated by the fact that the Prosecutor continues to list over 200 witnesses, a number far in excess of that which it will eventually call to testify.

16. The method of presenting the information in the Revision has also facilitated certain significant collateral outcomes to which the Defence objects. In the Brief, the Prosecution presented a consolidated list of witnesses against all four Accused, indicating for each witness the names of the Accused against whom the witness is expected to testify. The Prosecution does not oppose the Defence submission that a number of witnesses indicated in the Revision as witnesses against Ntabakuze were not listed in the Brief as witnesses against him. By making these unilateral additions to the witness lists, the Prosecution has failed to comply with the provisions of Rule 73*bis* (B)(iv) and Rule 82(A). Regardless of the form of the witness list, and regardless of whether a trial includes one or more accused, each accused is entitled, at the pre-trial stage, to information about which witnesses are to testify against him and about which points in the indictment they are expected to testify. Any variation of this

data after the commencement of trial is subject to the prior approval of a Chamber. In this case, the Prosecution did not seek the Chamber's approval with respect to the additions included within the Revision.

17. Moreover, the Majority appears to violate the procedural principle of *reformatio in peius*, which prohibits decisions which place the complainant in a worse position than it was in before the motion was made. The Decision granted the Defence motion objecting to the Brief and ordered amendments in favour of the Defence. However, the practical result of the Majority is that the Defence is now burdened with an additional time-consuming analysis imposed by the Prosecutor's unwarranted method of presenting its Revision. Moreover, in the Revision the Prosecutor added a number of witnesses to its list of witnesses against Ntabakuze without leave of the Chamber. Several other witnesses remain on the list despite the uncontested submission of the Defence that it has not received their statements.

18. I am, therefore, of the opinion that the failure of the Prosecutor to comply with the decision has resulted in prejudice to the Defence. For the reasons considered above, I would therefore grant the Motion and insist on strict execution of the Decision.

The Witness List

19. I further agree with the finding of the Majority that the Prosecution is in breach of Rule 66(A)(ii) when it has not disclosed the statements of non-expert witnesses. However, I do not agree with the remedy granted by the Majority, which gives the Prosecutor a further 10 days in which to disclose all witness statements to the Defence and to file a revised list of witnesses. This is not a remedy requested by the Defence, and in my view is not an appropriate cure for the Prosecutor's violations of Rules 66(A) (ii) and 73 bis (E) in this case.

20. The Prosecutor admits that does not possess statements from certain witnesses. The Rules require that the Prosecutor obtain statements from all non-expert witnesses, which it must then provide to the Defence prior to the commencement of the trial. If the Prosecutor does not have any statements from a prospective witness, then she has not completed the necessary preliminary steps that must taken before calling the witness to testify and consequently should not list this person as a witness. These persons without statements should therefore be expunged from the witness list. Similarly, all of the witnesses who were not originally listed in the Brief against certain Accused, but who were added without leave to the list of witnesses against that Accused by the Revision, should be returned to the position set out in the Brief. Pursuant to Rule 73 *bis* (E), modifications of the witness list after the commencement of trial can only be made with leave of the Chamber.

21. I do not believe that a further extension of the time limit for disclosure and for filing a final witness list should be afforded as a cure for these violations of the rules. Considering the long delays in bringing this matter to trial, I find no justification for the Prosecution's failure to comply with its disclosure requirements. I also see no

explanation for the Prosecutor's unauthorized additions to its witness list. In spite of repeated requests by the Chamber, the Prosecutor has still not filed a witness list of reasonable length. In my view, a further extension of the time limit for disclosure and for filing a final list of witnesses simply rewards the Prosecutor's failure to comply with the Rules and with the orders of the Chamber, since she will be given further time to comply and will be permitted to make unilateral variations to the lists after trial without adhering to Rule *73bis* (E). I would therefore strike out all witnesses for whom statements have not been disclosed pursuant to the rules from the Prosecutor's witness list. I would also order the Prosecutor to remove the additional witnesses that she added against certain accused in the Revision.

Arusha, 5 November 2002.

Judge Pavel Dolenc