



UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

19417  
Mwanja

OR: ENG

**TRIAL CHAMBER II**

**Before Judges:** Khalida Rachid Khan, Presiding  
Lee Gacuiga Muthoga,  
Emile Francis Short

**Registrar:** Mr. Adama Dieng

**Date:** 24 November 2004

ICTR-99-50-T  
24-11-2004  
(19417 - 19409)

**THE PROSECUTOR**

v.

**CASIMIR BIZIMUNGU  
JUSTIN MUGENZI  
JÉRÔME-CLÉMENT BICAMUMPAKA  
PROSPER MUGIRANEZA**

Case No. ICTR-99-50-T

JUDICIAL RECORDS/ARCHIVES  
ICTR  
1 2004 NOV 24 P 5:11

**DECISION ON BICAMUMPAKA AND MUGENZI'S MOTION FOR SPECIFICITY  
IN THE PRE-TRIAL BRIEF**

**Office of the Prosecutor:**

Paul Ng'arua  
Ibukunolu Babajide  
Justus Bwonwonga  
Elvis Bazawule  
George William Mugwanya  
Shyamlal Rajapaksa

**Counsel for the Defence:**

Michelyne C. St. Laurent and Alexandra Marcil for Casimir Bizimungu  
Howard Morrison and Ben Gumpert for Justin Mugenzi  
Pierre Gaudreau and Michel Croteau for Jérôme-Clément Bicamumpaka  
Tom Moran and Christian Gauthier for Prosper Mugiraneza

19416

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

**SITTING** as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short, (the "Trial Chamber");

**BEING SEIZED** of "Bicamumpaka and Mugenzi's Motion for Specificity in the Pre-Trial Brief," filed on 22 September 2004 (the "Motion");

**CONSIDERING**

- i) the "Prosecutor's Response to Bicamumpaka and Mugenzi's Motion for Specificity in the Pre-Trial Brief," filed on 29 September 2004 (the "Response"), and;
- ii) the Defence "Reply to Prosecutor's Response to Bicamumpaka and Mugenzi's Motion for Specificity in the Pre-Trial Brief," dated 6 October 2004 (the "Reply");

**RECALLING** the Chamber's Order of 7 October 2003 (the "Initial Order"),

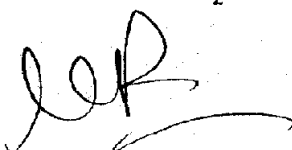
**CONSIDERING** the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Article 20(4)(a) and Rule 73 *bis*;

**NOW DECIDES** the matter solely on the basis of the briefs of the parties pursuant to Rule 73(A) of the Rules.

**SUBMISSIONS OF THE PARTIES**

*The Defence Motion*

1. The Defence moves the Chamber to Order the Prosecutor to file a document listing the Prosecution Witnesses and the paragraphs of the Indictment to which *all* such witnesses will testify. This Motion is in furtherance of the Initial Order, which required the Prosecutor to file a Pre-Trial Brief in conformity with Rule 73 *bis*. The Defence argues that the Prosecutor's filing was defective. If not remedied, this defect stands to violate the Accused persons' right to be informed in detail of the nature and cause of the charges against them as provided for in Article 20(4)(a) of the Statute.
2. The Defence submits that pursuant to that Initial Order, the Prosecutor served the Defence with a 94-page document setting out the law and the facts as alleged at the time. Attached to this document was a list of 95 witnesses, with their relevant pseudonyms and a 52-page schedule with a summary of the anticipated testimony of each of those witnesses as well as the offence which the testimony purports to substantiate and naming the relevant accused to be incriminated. Although this schedule provided the offences to which each witness was to testify, it did not specify the paragraphs of the Indictment which each of those witnesses was to speak to so that it is impossible for the evidence to be properly assessed.
3. It is further argued, that the deletion and addition of witnesses from the Prosecutor's original list makes it imperative, in the interest of efficiency, for the Chamber and the Defence to be provided with a document which relates the evidence of each witness to



19415

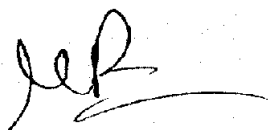
the specific paragraph of the Indictment which the Prosecutor contends that it goes to prove.

4. The Defence recalls that the Indictment in the instant case runs into 81 pages and comprises 179 paragraphs. Bicomumpaka and Mugenzi are both charged with Counts 1, 2, 3, 6, 7, 8, 9, 10 and Counts 4 and 5 respectively. With the exception of these latter two Counts, the Indictment recites the same 51 paragraphs as the factual basis for both the acts and/or omissions relating to direct criminal responsibility and command responsibility for all four Accused persons. Seventeen paragraphs of the Indictment are cited in support of Count 4, against Bicomumpaka and the other 2 Accused persons. Twenty paragraphs of the Indictment are cited as supporting Count 5 against Mugenzi.
5. In addition to the powers which Rule 73 *bis* affords the Chamber, and the fact that an Order pursuant to that Rule has already been entered in the instant case, the Defence contends that the jurisprudence is also unambiguous on the issue of specificity of Pre-Trial Briefs. Merely indicating the offences or counts of the Indictment to which witnesses will testify is insufficient, and a violation of Article 20(4). The Defence cites the case of *Bagosora* in support of this contention where it was held that:

[...] pursuant to Rule 73 *bis* (B)(iv)(c) the Prosecution should indicate the points of the Indictment on which each witness will testify. This rule implements the rights of the Accused to be informed in detail of the nature and cause of the charges against him, which is guaranteed in Article 20(4)(a) of the Statute. However, the summary of witness statements indicates only the names of the Accused and the crime on which each witness will testify. The Chamber agrees with the Defence that that the reference in the Rule to the "points of the indictment" does not mean the "counts of the indictment", which only recite or rephrase the legal text of the Statute relating to the crimes within the jurisdiction of the Tribunal and to the mode of criminal responsibility of the accused. Witnesses do not testify on such abstract legal matters, but rather to the factual circumstances underlying such charges as alleged in the indictment's concise statement of facts or the crimes and of the cases filed in accordance with Article 17(4) of the Statute and Rule 47(C). Furthermore, citing only the counts of the indictments, which relate to a number of events, does not properly inform the Accused of the anticipated evidence relating to specific allegations. Consequently, the Chamber is of the view that the Prosecution should indicate to which events, circumstances or paragraphs in the concise statement of facts in the Indictments each of the witnesses will testify.<sup>1</sup>

6. As an example of how the current Pre-Trial Brief is defective for lack of specificity, the Defence cites the example of Witness GMC. This witness is listed to testify in relation to the crimes of complicity in genocide, genocide, conspiracy to commit genocide and crimes against humanity (extermination), i.e., Counts 3, 2, 1 and 7 respectively. The Defence argues that using the current Pre-Trial Brief, the Chamber and the Defence are "simply left to guess how it can be that this witness incriminates the Accused in respect of these counts but [not] in respect of counts 6, 8, 9 and 10, for which the relevant paragraphs of the indictment are said to be identical."

<sup>1</sup> *Prosecutor v. Bagosora*, ICTR-96-7-T, "Decision on Defence Motions of Nsengiyumva, Kabiligi and Ntabakuze Challenging the Prosecutor's Pre-Trial Brief and on the Prosecutor's Counter Motion," 23 May 2002, para.12.



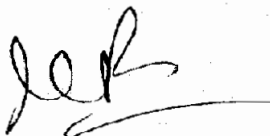
19414

7. The Defence argues that this lack of specificity causes delays, during both examination-in-chief and cross-examination, as neither the Chamber nor the Defence is able to focus or limit a witness' testimony to the pertinent part of the charges against the accused. It is submitted that the Chamber should exercise its powers to avoid needless consumption of time with regard to the presentation of evidence as provided for in Rule 90(F).<sup>2</sup>
8. The Defence maintains that the Pre-Trial Brief and list of witnesses are of considerable significance at all stages of the litigation. It gives the Accused notice of the evidential case against him vis-à-vis the Indictment, and it enables the Chamber and the Defence to ascertain whether a witness' testimony is pertinent to any part of the Indictment. Perhaps most significantly, at the close of the Prosecutor's case, a sufficiently specific Pre-Trial Brief would enable the Chamber and the Defence to assess whether the evidence which, according to the Prosecutor, proves the various counts of the Indictment, does in fact do so; or whether there are elements which are not supported by the evidence. In the absence of such a "road map", the drafting and decision-making on Rule 98 *bis* motions for acquittal will be immensely complicated, and the Defence, in particular, will essentially be left in the unfair position of having to guess at the Prosecutor's approach to the case.
9. For ease of reference and by way of example of a document which would adequately inform the Chamber and the Defence, the latter has annexed to this Motion the Prosecutor's filing in the *Bagosora* case in compliance with the Decision cited in paragraph 5 above.
10. It is submitted that in granting the present Motion, the Chamber and the Defence will be able to particularly relate the new witnesses to the Indictment. It is argued that while the Prosecutor was granted leave to vary its witness list by adding those new witnesses, this was done on the basis that no prejudice would accrue to the Accused. The Defence submits that the Chamber could not have intended to subject the Prosecutor to different requirements in respect of the new witnesses, such that it leaves the Defence with less notice than it had with the original list of witnesses.

### *The Prosecutor's Response*

11. The Prosecutor contends that he has complied with the requirements of Rule 73 *bis*. According to the Prosecutor, paragraphs 124-127, 129, 131-133, 136-137 of the Pre-Trial Brief does specify the relevant paragraphs of the Indictment and the witnesses testifying in support of the same. Likewise, pages 98-150 of the Brief sets out the pre-trial summary of anticipated testimony of prosecution witnesses and the counts of the Indictment and the "substance that proves the points in the Indictment on which each witness will testify." The Prosecutor also lists numerous paragraphs of the Pre-Trial Brief in which the anticipated evidence of the witnesses are set out without specifying the points in the Indictment to which that evidence relates. It is argued that Rule 73 *bis* (B)(iv) has therefore been complied with.

<sup>2</sup> Rule 90(F) states, *inter alia*: "The Trial Chamber shall exercise control over the mode of interrogating witnesses and presenting evidence so as to: ... (ii) avoid needless consumption of time."

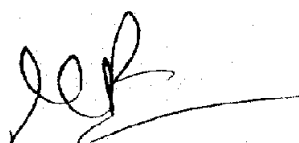


19413

12. The Prosecutor submits that the Pre-Trial Brief is a document of “lesser magnitude and is not subject to challenge in terms of specificity [...], is a road-map for the Trial Chamber to manage the case [and] is not designed to inure to the benefit of the Defence.” It is the Indictment, the Prosecutor submits, as the primary accusatory instrument, which may be subject to challenge in terms of its specificity.
13. The Prosecutor contends that, in any event, the Defence was obliged to raise any objection with regard to the Pre-Trial Brief in a timely manner. The Prosecutor argues that if at all a Pre-Trial Brief could be challenged for want of specificity, the principle of timely objections as applied to cases where the specificity of an Indictment is challenged, must equally apply to situations in which a Pre-Trial Brief is being challenged for lack of specificity. In support of this argument, the Prosecutor cites the Appeals Chamber’s Judgement in the case of *Niyitigeka* on the timeliness of objections with regard to material facts not pleaded in the Indictment.
14. It is argued that, any challenge to the Pre-Trial Brief “should happen ‘before the date set for trial’” as stated in Rule 73 *bis* (B). The case of *Bagosora*, as cited by the Defence in support of its Motion, is distinguishable from the instant situation in that the Defence in the former case filed its Motion challenging the Prosecutor’s Pre-Trial Brief four months prior to the testimony of the first prosecution witness.
15. The Prosecutor submits that the delay in the filing of the instant application is inordinate, and is tantamount to the Defence “seeking a review of the composite rule 73 *bis* (B) Order of the Chamber by seeking new orders directing the Prosecutor” to file the document relating the testimony of all Prosecution witnesses to the specific paragraphs of the Indictment.
16. The Prosecutor submits that there has been, and will be, no prejudice to the Defence and prays that the Motion be dismissed in its entirety as it is superfluous, excessive, unfounded in law, frivolous, vexatious and an abuse of the judicial process.

#### *The Defence Reply*

17. The Defence states that the law regarding the content of the Pre-Trial Brief is unambiguous. The only decision interpreting Rule 73 *bis* (B)(iv) clearly holds that the Pre-Trial Brief, in implementing the accused’s right to be informed of the charges against him, must indicate the specific paragraphs of the Indictment on which each witness will testify.
18. It is submitted that the rationale behind that Rule is plain in that it serves to provide accused persons with a better understanding of the case that the Prosecutor intends to present against them, and how it will be presented. This, the Defence contends, is of particular significance where the accused persons are “facing trials lasting for years on an Indictment that could easily qualify as novels and endless and continuous variations of witness lists.” In this case, the Indictment runs into 80 pages and at the close of the Prosecution case, in the event that the Prosecutor does not seek to further vary its witness list, 63 witnesses will have been heard.



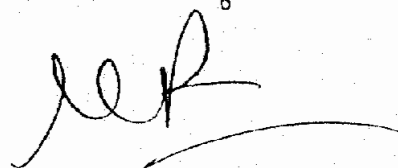
19412

19. The Defence notes that the Prosecutor has himself shown the Chamber that of the 492 paragraphs in the Pre-Trial Brief, only 10 paragraphs give an indication of the paragraphs of the Indictment to which the witnesses will testify. Based on these paragraphs of the Pre-Trial Brief, the Defence has a clear idea of which witnesses will testify in support of paragraphs 6.20, 6.22, 6.25, 6.43, 6.45, 6.46, 6.54-6.56 of the Indictment. The Defence simply requests that the Prosecutor be required to carry out the same exercise in respect of the remainder of the Indictment.
20. The Defence further notes that the Prosecutor acknowledges that for the vast majority of the witnesses he intends to call, the points in the Indictment to which their evidence will relate were not specified. Moreover, some paragraphs of the Pre-Trial Brief refer only to witnesses, thus placing the Defence in a position where it has to guess which paragraphs of the Indictment these witnesses are testifying to. Other paragraphs of the Pre-Trial Brief refer only to paragraphs of the Indictment, and therefore conversely require the Defence to guess which witnesses are being called to testify to those paragraphs.
21. As regards the Prosecutor's suggestion that he has met his obligations under the Rule in pages 98-150 of the Pre-Trial Brief, the Defence points out that nowhere in those 52 pages is a single paragraph of the Indictment linked to the anticipated testimony of the potential witnesses. The Defence reiterates that such document does not satisfy Rule 73 bis (B) (iv).
22. The Defence argues that the Prosecutor's exposition of the applicable law on this issue is wrong. In so arguing, the Defence recalls its citation of the *Bagosora* Decision which plainly shows that the Prosecutor's submission is not the law. It is submitted that Rule 73 bis (B) (iv) does in fact mean that the Prosecutor has to indicate the paragraphs of the Indictment to which each witness will testify.
23. With respect to the timing of the Motion, the Defence submits that the multiple changes to the witness list of the Prosecutor warrant that the Chamber order the Prosecutor to file a document that conforms with Rule 73 bis (B)(iv). The Defence contends that it has "never waived its right to obtain a Pre-Trial Brief that complies with Rule 73 bis (B) (iv), and that it needs one in order to adequately prepare not only the defence itself but the eventual motion for acquittal and the Defence Pre-Trial Brief."
24. Finally, the Defence also takes issue with the fact that the Prosecutor systematically asks the Court to order the non-payment of fees associated with the Defence Motions. The Defence prays that the Chamber consider issuing a warning to the Prosecutor under Rule 46(A) so that it desists from making these "demands in such an arbitrary fashion."

## DELIBERATIONS

25. Rule 73 bis, in the relevant part, provides that:

(B) At the Pre-Trial Conference the Trial Chamber or a Judge, designated from among its members, may order the Prosecutor, within a time limit set by the Trial Chamber or the said Judge, and before the date set for trial, to file the following:

6  


(i) A Pre-Trial Brief addressing the factual and legal issues;

[...]

(iv) A list of witnesses the Prosecutor intends to call with:

(a) The name or pseudonym of each witness;

(b) A summary of the facts on which each witness will testify;

(c) The points in the indictment on which each witness will testify; and

(d) The estimated length of time required for each witness;

26. The Chamber recalls that at the Pre-Trial Conference of 7 October 2003, the Prosecutor undertook to file a list of witnesses which was to include "pseudonyms, and a summary of facts with which witnesses will testify, and all the matters contained in 73 bis (B)(iv)..." Upon this undertaking, the Chamber sought clarification on whether the document would also contain "the points in the indictment on which each witnesses will testify".<sup>3</sup> The Prosecutor answered in the affirmative, and an Order was so entered.
27. As regards the interpretation of sub-paragraph (c) above, the Chamber concurs with the position stated in the *Bagosora* Decision. The Chamber holds the view that "points in the indictment" must mean more than just a recitation of the relevant counts. The issues and events to which each witness will testify must be stated in relation to the concise statements of facts alleged in the Indictment.
28. Based on the submission of the Parties and of the Chamber's own reading of the Pre-Trial Brief, the Chamber finds that the Prosecutor has not fully complied with the Initial Order of 7 October 2003, and the brief filed in compliance with that Order is deficient in that it does not cite the points in the Indictment that each witness will address.
29. The Chamber agrees with the view expressed by the Prosecutor that a Pre-Trial Brief is a road-map of the Prosecutor's case. The Chamber recalls that the Prosecutor has himself previously argued that the Pre-Trial Brief has adequately notified the Accused of the case against him, when the Defence have moved for the exclusion of certain evidence.<sup>4</sup>
30. The analysis of the case in the Pre-Trial Brief by the Prosecutor serves as a tool for the Defence to properly anticipate the evidence, adequately prepare for the cross-examination of witnesses, and for effective preparation to meet the case against the Accused person. It also serves to guide the Chamber through the case, although it is not bound by the information contained in the Pre-Trial Brief in its eventual evaluation of the evidence against the Accused.
31. Be that as it may, the Chamber does question the timeliness of the present application, particularly with the regard to witnesses who have already testified. The evidence of these witnesses is already on the record, and the time for objections with regard to

<sup>3</sup> T, 7 October 2003, p. 6.

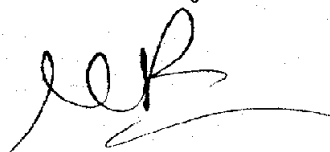
<sup>4</sup> See, *inter alia*, *Bizimungu et al.*, ICTR-99-50-T, Decision on Motion of Defendant Bicamumpaka Opposing the Admissibility of Witnesses GFA, GKB and GAP, 6 October 2004, at para. 10.

their evidence has passed. In this regard, the Chamber draws the attention of the Parties to the recent Decision in the *Bagosora* case which held that:<sup>5</sup>

With regard to evidence that was actually presented, *the closing brief will serve the purpose for which the Defence seeks the update*. The Rules provide for this type of summation at the close of all the evidence, not the close of the Prosecution's case. It would not promote the interests of judicial economy to require the Prosecution to amend the Pre-Trial Brief at this late date. [Emphasis added]

32. The Chamber notes that the Prosecutor's Pre-Trial Brief was filed and served on the Defence in October 2003, and that the present Motion was not filed until 22 September 2004.
33. It follows, therefore, that up until that time, the Defence was satisfied with the rather inadequate brief that was provided. The Chamber notes that the Defence has not, until the filing of the instant Motion, objected to the Prosecution's inadequate Pre-Trial Brief. The Chamber observes that the Defence has not expressed inability to respond fully and effectively to the Prosecutor's case or to understand the testimony of the witnesses who have so far testified. The Chamber also expects that the Defence, having already heard the testimony and cross-examined the witnesses, is now in a position to relate the evidence to the points in the Indictment. Indeed, with regard to the witnesses who have already testified, it is expected that the Prosecutor's closing brief will address the issue and remedy the deficiency referred to above.
34. The Chamber, however, finds it necessary to re-emphasise, for the benefit of the Prosecutor, that a Pre-Trial Brief ordered to comply with Rule 73bis of the Rules should, to be complete, indicate the specific points of the Indictment that the evidence of each witness shall relate to.
35. The Chamber, therefore, considers that in respect of the 12 Prosecution witnesses that are yet to be called, the Defence would benefit from an exemplification of the Pre-Trial Brief by indication of the points in the Indictment that the evidence of each remaining witness, other than the expert witnesses, would address. The Chamber takes the view that the Prosecution should comply with its undertaking to file a Pre-Trial Brief which includes the points of the Indictment on which each witness would testify. The Prosecution should not be permitted to resile from its undertaking, even at this stage. Moreover, compliance with the Initial Order would also assist the Trial Chamber in following the evidence of the remaining witnesses
36. Finally, the Chamber notes with concern the objection raised by the Defence with regard to the conduct of the Prosecutor in response to Defence motions in general. The Chamber here wishes to remind the Parties of their obligation to conduct themselves in a manner befitting their respective roles, and to exercise their discretion in calling for sanctions against the opposing Party.

<sup>5</sup> *Bagosora et. al.*, ICTR-98-41-T, Decision on the Joint Defence Motion for an Update of the Prosecution's Pre-Trial Brief, 2 November 2004, para. 5.





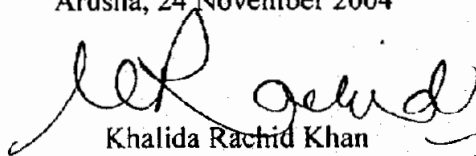
19409

**FOR THE FOREGOING REASONS, THE CHAMBER**

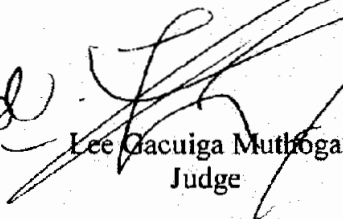
**GRANTS** the Defence Motion in part; and

**ORDERS** the Prosecutor to file, by **15 December 2004**, a document containing a list of **all remaining witnesses** to be called, specifying the paragraphs of the Indictment to which each of these witnesses will testify.

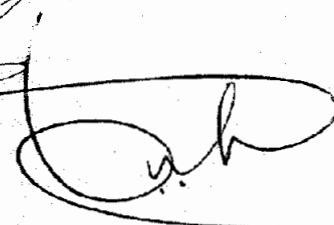
Arusha, 24 November 2004



Khalida Rachid Khan  
Presiding Judge



Lee Gacuiga Muthoga  
Judge



Emile Francis Short  
Judge

