

ICTR-98-44D-T
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Mparany Rajohnson
Bakhtiyar Tuzmukhamedov

Registrar: Adama Dieng

Date: 26 March 2010

THE PROSECUTOR

v.

Callixte NZABONIMANA
Case No. ICTR-98-44D-T

JUDICIAL RECORDS ARCHIVES
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**CONSOLIDATED DECISION ON PROSECUTOR'S SECOND AND THIRD
MOTIONS TO COMPEL DEFENCE TO COMPLY WITH TRIAL CHAMBER
DECISION OF 3 FEBRUARY 2010**

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

Office of the Prosecutor

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INTRODUCTION

1. On 3 February 2010, this Chamber ordered the Defence to file by close of business on 22 February 2010:

...(c) A list of witnesses the Defence intends to call with:

- (i) The name or pseudonym of each witness;
- (ii) A summary of the facts on which each witness will testify;
- (iii) The points in the indictment as to which each witness will testify;
- (iv) The estimated length of time required for each witness; and,
- (v) A list of exhibits the Defence intends to offer in its case, stating where possible whether or not the Prosecutor has any objection to authenticity.

This Chamber further ordered the Defence to provide the Trial Chamber and the Prosecutor with copies of the written statements and identifying information of each witness whom the Defence intended to call to testify.¹

2. On 1 March 2010, the Prosecution filed a Motion ("First Motion"), claiming inadequate disclosure by the Defence and asking this Chamber to compel adherence with its Order of 3 February 2010.²
3. On 4 March 2010, the Defence filed a Response to the First Motion.³
4. On 5 March 2010, a Pre-Defence Conference was held before this Chamber, in which, *inter alia*, various issues concerning the Defence's alleged lack of compliance with its disclosure obligations were addressed. During the Conference, the Defence acknowledged its Pre-Defence Brief and accompanying materials contained certain errors and omissions, and pursuant to an undertaking by the Defence,⁴ this Chamber issued an oral order for the Defence to file an amended Pre-Defence Brief and accompanying materials addressing such concerns by 12 March 2010,⁵ thereby

¹ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Order on Defence Disclosure, 3 February 2010 ("Order").

² *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Motion to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010 (Pursuant to Rules 73 and 73 *ter* (B)), 1 March 2010.

³ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Confidential Response to Prosecutor's Motion to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010 (Rules 73 AND 73 *ter* (B) of the Rules of Procedure and Evidence), 4 March 2010.

⁴ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Pre-Defence Conference Transcript, 5 March 2010 ("Transcript"), p. 10, l. 7-p. 11, l. 1.

⁵ Transcript, p. 16, ll. 13-19.

extending the original deadline which the Defence failed to meet. This Chamber further ordered the Defence to reduce the number of witnesses it intended to call and to make that number realistic and proportionate to the number in the list that had been filed by the Prosecution, and to provide a proofing chart with a refined estimate of the amount of time required for each witness's testimony, as well as an order of appearance for each witness.⁶ In light of these undertakings and orders, the Chamber declared the Prosecution's First Motion moot.⁷

5. On 12 March 2010, the Defence filed an Amended Pre-Defence Brief.
6. On 16 March 2010, the Prosecution filed another motion ("Second Motion"), raising further concerns regarding the Defence's compliance with its disclosure obligations as imposed by this Chamber in its Order of 3 February 2010 and during the Pre-Defence Conference of 5 March 2010.⁸ Appended to this Motion was an "Annexure", which contained a table that purported to itemize the precise extent of the Defence's failure to provide Personal Identification Sheets ("PISs") and witness statements for all of its witnesses.⁹
7. On 18 March 2010, the Prosecution again filed a motion ("Third Motion") alleging inadequate disclosure by the Defence.¹⁰ Once again, an "Annexure" was appended to the Motion, this time containing a table outlining what the Prosecution submitted were deficiencies in the content of those PISs that have been disclosed by the Defence.¹¹
8. On 22 March 2010, the Defence filed a consolidated Response to the Second and Third Motions ("Consolidated Response").¹² Appended to the Consolidated Response was an

⁶ Transcript, p. 15, l. 30 - p. 17, l. 25.

⁷ Transcript, p. 18, ll. 19-22.

⁸ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Second Motion to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010 (Pursuant to Rules 73 and 73 *ter* (B)), 16 March 2010.

⁹ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Annexure "A" to Prosecutor's Second Motion to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010 (Pursuant to Rules 73 and 73 *ter* (B)), 16 March 2010.

¹⁰ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Third Motion to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010 (Pursuant to Rules (C), 73, 73 *ter* (B) and 46).

¹¹ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Annexure "A" to Prosecutor's Third Motion to Compel Defence to Comply with Trial Chamber Decisions of 3 February 2010 (Pursuant to Rules 69 (C), 73, 73 *ter* (B) and 46, 18 March 2010).

¹² *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Confidential Consolidated Response to Prosecutor's Second and Third Motion to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010 (Rules 73 AND 73 *ter* (B) of the Rules of Procedure and Evidence).

"Annexe", in which the Defence provided identifying information concerning several of its prospective witnesses.¹³

SUBMISSIONS OF THE PARTIES

Second Motion

9. The Second Motion filed by the Prosecution argues that the Defence has breached the principle of equality of arms through four violations of its disclosure obligations: 1) The witness summaries disclosed by the Defence are so vague as to deprive the Prosecution of an adequate opportunity to prepare for the Defence case;¹⁴ 2) several witnesses on the list of 65 provided by the Defence in its Amended Pre-Defence Brief have not been identified, making it impossible for the Prosecution to conduct any meaningful investigation on them;¹⁵ 3) the Defence has failed to furnish witness statements for approximately half the witnesses it intends to call at trial, which has placed undue hurdles on the Prosecution's efforts to conduct meaningful examination of Defence witnesses;¹⁶ and 4) the Defence intends to call a disproportionate number of witnesses to rebut the same facts adduced by Prosecution witnesses.¹⁷

Third Motion

10. The Third Motion filed by the Prosecution asserts that the Defence has further violated its disclosure obligations and thus prejudiced the Prosecution in its ability to investigate and cross-examine Defence witnesses by withholding essential information in two ways: 1) it has failed to provide PISs for eleven of its proposed witnesses;¹⁸ and 2) there are "numerous instances" wherein inadequate identifying information regarding the prospective witnesses has been included in the PISs provided by the Defence.¹⁹

Consolidated Response

11. The Defence, in its Consolidated Response to the two Prosecution Motions, addresses the Prosecution's allegations in a number of ways: 1) it asserts that it has no obligation to disclose information or documents (including witness statements) that are not within

¹³ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Annexe A to "Nzabonimana's Confidential Consolidated Response to Prosecutor's Second and Third Motion to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010", 22 March 2010.

¹⁴ Second Motion, para. 19.

¹⁵ Second Motion, para. 20.

¹⁶ Second Motion, paras. 22-23.

¹⁷ Second Motion, para. 24.

¹⁸ Third Motion, paras. 17-18.

¹⁹ Third Motion, para. 18.

its possession, and that it has disclosed all information within its possession;²⁰ 2) it argues that the Prosecution is requesting more information (such as the precise current addresses of factual witnesses, or identifying information regarding an expert witnesses or a Defence investigator) than it either needs or is entitled to by law;²¹ 3) it provides several missing PISs in the "Annexe" to its Consolidated Response;²² 4) it offers undertakings to provide information that it claims is not yet within its possession immediately upon obtaining such information;²³ 5) it claims that the Prosecution is already in possession of some of the information it seeks;²⁴ and 6) it asserts that the information contained in the Defence witness summaries provides "ample notice" of the facts on which Defence witnesses will testify, and, in any event, is "identical" to the content of witness summaries provided in the Prosecution's Pre-Trial Brief.²⁵

DELIBERATIONS

Preliminary Matter

12. As a preliminary matter, the Trial Chamber determines that given the similarity of the issues raised by the Prosecution in its Second and Third Motions, as well as the Defence's Consolidated Response, it considers it appropriate in accordance with the principles of expediency and judicial economy, to dispose of all the issues raised by the Prosecution in its two Motions in a single Decision.

Applicable Law

13. Rule 69 (C) of the Rules of Procedure and Evidence stipulates that:

Subject to Rule 75 [allowing for protective measures for victims and witnesses], the identity of the victim or witness shall be disclosed within such time as determined by the Trial Chamber to allow adequate time for preparation of the Prosecution and the Defence.

Rule 73 *ter* (B) states, *inter alia*, that at a Pre-Defence Conference a Trial Chamber may order the Defence to file:

- ... (iii) A list of witnesses the Defence 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 as to which each witness will testify;
 - (d) The estimated length of time required for each witness;

²⁰ Consolidated Response, paras. 7-8, 10-14, 16, 28-33.

²¹ Consolidated Response, paras. 16, 18, 25-27.

²² Consolidated Response, para. 20.

²³ Consolidated Response, paras. 17, 21-24.

²⁴ Consolidated Response, paras. 18, 22, 27.

²⁵ Consolidated Response, paras. 36-43.

... The Trial Chamber or the Judge may order the Defence to provide the Trial Chamber and the Prosecutor with copies of the written statements of each witness whom the Defence intends to testify.

Rule 90 (F) states:

The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to:

- (i) Make the interrogation and presentation effective for the ascertainment of the truth; and
- (ii) Avoid needless consumption of time.

Analysis

14. A reading of the Prosecution's two Motions leads the Trial Chamber to the conclusion that the Prosecution is seeking redress for five alleged disclosure violations by the Defence: 1) a disproportionate number of witnesses testifying to the same set of facts; 2) failure to provide PISs; 3) inadequate identifying information contained in the PISs disclosed by the Defence; 4) failure to provide statements for all prospective Defence witnesses; 5) inadequate content of witness summaries provided by the Defence. The Trial Chamber will address each of these issues in turn.

Disproportionate Number of Witnesses

15. Although the Defence has reduced its witness list to 65, the Trial Chamber remains of the opinion, as expressed at the Pre-Defence Conference on 5 March 2010, that the list of witnesses the Defence intends to call remains excessive and that much of the prospective testimony outlined in the witness summaries is repetitious with respect to the allegations in the Indictment the Defence seeks to rebut, and may be redundant. The Trial Chamber is mindful of the fact that while the witness list filed by the Prosecution prior to the opening of its case contained 26 witnesses, that number had eventually been reduced to 20.

16. Therefore, the Trial Chamber, pursuant to its power under Rule 90 (F) (ii), requires the Defence, within five days of the issuance of this Decision, to further reduce its witness list to a number that is proportionate and commensurate with the number of witnesses contained in the list of witnesses filed by the Prosecution in this trial. That number shall not exceed 30 witnesses.

Missing PISs

17. On 3 February 2010, the Trial Chamber ordered the Defence to produce a list of witnesses containing identifying information by 22 February 2010. This Order was reiterated orally at the Pre-Defence Conference of 5 March 2010, with an extended deadline of 12 March 2010. Upon the issuance of this second Order, the Defence was explicitly warned that the Trial Chamber would strike from the list of witnesses any witnesses for whom no identifying information was provided.²⁶ At the time the Prosecution filed its two Motions, eleven PISs were still outstanding. However, the Trial Chamber notes that in the "Annexe" to its Consolidated Response, the Defence has provided PISs for five witnesses.²⁷ Although a Response is not the appropriate manner in which such information ought to be disclosed to the Prosecution and such belated disclosure constitutes a violation of two deadlines imposed by this Trial Chamber, the Trial Chamber believes that it is nevertheless in the interests of justice to allow these PISs to be included as part of the Defence disclosure.
18. However, the Trial Chamber is not satisfied by the justifications provided by the Defence for the omission of PISs for the four witnesses that the Defence has not yet interviewed.²⁸ Because the Defence has violated two deadlines imposed by this Chamber, these witnesses shall be struck from the Defence list.
19. Moreover, with respect to the expert witness it intends to call, the Defence's reliance on the *lex specialis* of Rule 94 bis (A) is misplaced. As that Rule clearly states, a Defence expert witness is only exempt from the disclosure obligations stipulated under Rule 73 ter (B) (iii) (b), i.e. "[a] summary of the facts on which each witness will testify". This exemption is very narrowly circumscribed, and because the Defence has failed to provide a PIS containing any information regarding its expert witness, the witness shall be struck from the list.
20. Likewise, the Trial Chamber is equally unconvinced by the arguments advanced by the Defence regarding the failure to provide a PIS for its investigator. The fact that the

²⁶ Transcript, p. 10, ll. 20-23.

²⁷ See Consolidated Response, para. 20, and Annexe, regarding witnesses T175, T174, T172, T65, and T55.

²⁸ T75, T152, T130, T23.

Prosecution may have failed to disclose information regarding its own investigator in its Pre-Trial Brief is of no consequence. If the Defence felt aggrieved by such an omission at that time, the appropriate course of action was to move this Chamber for a proper remedy. Equally unconvincing is the Defence argument that the Prosecution is "fully aware" of the nature of the investigator's prospective testimony. Even if this assertion were so, this Chamber's Orders are mandatory, and therefore the Defence is not relieved of its disclosure obligations based on the presumed knowledge of the opposing party, and the Defence investigator is hence struck from the Defence witness list.

21. For the foregoing reasons, the Trial Chamber will strike witnesses T75, T152, T130, T23, Susan Thompson, and Fernand Batard from the list of prospective Defence witnesses. The Trial Chamber notes, as it did during the Pre-Defence Conference,²⁹ that the Defence remains capable of filing a motion to vary its witness list at a later date, provided that good cause for inclusion of a particular witness is shown.

22. Moreover, for the reasons explained above, witnesses T175, T174, T172, T65 and T55, who were included in the "Annexe" to the Consolidated Response, will temporarily remain on the list, pending an assessment of the sufficiency of their PIS content, below.

Inadequate Identifying Information of Witnesses contained in Disclosed PISs

23. In addition to the 11 PISs that were never disclosed by the Defence, the Prosecution argues that numerous remaining PISs do not contain identifying information that would allow the Prosecution to conduct a proper investigation and cross-examination.

24. In determining the level of detail the Prosecution requires in order to adequately prepare an investigation and cross-examination, this Chamber finds guidance from Trial Chamber I in *Bagosora*, where it was determined that for the identification of prospective Defence witnesses, "[t]he information of particular importance is the witness's activities in 1994, parentage and birthplace, and country of present residence."³⁰ To this helpful list, this Chamber would add the witness's date of birth as being of significant importance in assisting the Prosecution to prepare for the Defence

²⁹ Transcript, 5 March 2010, p. 20, ll. 17-19.

³⁰ *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Sufficiency of Defence Witness Summaries, 5 July 2005, para. 8.

case. Thus, this Chamber will evaluate the sufficiency of the content of the PISs disclosed by the Defence based on the following identifiers: 1) place of birth (including *cellule, secteur, commune* and *préfecture*); 2) date of birth; 3) place of residence in 1994 (including, *cellule, secteur, commune* and *préfecture*); 4) occupation in 1994; and 5) country of current residence.

25. In applying the foregoing criteria to the PISs the Defence has disclosed as of its Consolidated Response, the Trial Chamber finds that only one³¹ of the 65 prospective Defence witnesses has been sufficiently identified. With respect to the witnesses with incomplete PISs, this Chamber shall grant the Defence five days in which to file amended PISs adhering to the guidelines enunciated above for those witnesses it still intends to call at trial, bearing in mind the Trial Chamber's earlier directive that the Defence witness list be reduced to no more than 30 witnesses. Failure to submit this necessary information in a timely manner will result in these witnesses being struck from the list.

Failure to Disclose Witness Statements for all Prospective Defence Witnesses

26. The Prosecution contends that the Defence is in breach of its disclosure obligations because it has not furnished witness statements for all of its 65 prospective witnesses. However, the jurisprudence is clear that the Defence is not obliged to provide witness statements that it has yet to obtain,³² and the Prosecution has offered no authority to counter this point. The Trial Chamber notes that Defence counsel, as an officer of this court, "certifies having disclosed all the statements in its possession for the witnesses it intends to call".³³ For these reasons, the Prosecution's request to order the Defence to produce statements for all its witnesses must be dismissed. However, the Trial Chamber reminds the Defence that its duty of disclosure is ongoing, and that should it continue to receive statements for its prospective witnesses it must disclose such statements to the Prosecution forthwith.

³¹ T133.

³² *Prosecutor v. Rwamakuba*, ICTR-98-44C, Decision on Prosecution Motion for Disclosure of Witness List and Witness Statements, 4 October 2005, para. 7; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Edouard Karemera's Motion for Postponement of the Commencement of his Case as well as on the Prosecutor's Cross Motion for Enforcement of Rule 73 ter and Remedial and Punitive Measures and the Prosecutor's Request for Temporary Transfer of Witness AXA, 27 February 2008, para. 27.

³³ Consolidated Response, para. 29 (emphasis in original).

Insufficient Content of Defence Witness Summaries

27. The Prosecution argues that the summaries of the prospective testimony to be proffered by Defence witnesses is lacking in sufficient content to allow the Prosecution to prepare for the Defence case. On this issue, the Trial Chamber recalls the Decision in *Bagosora*, where the Trial Chamber noted that

...no general formulation can determine whether the Defence summaries are adequately detailed. Even if the Chamber were inclined to closely review each of the summaries challenged by the Prosecution, no determination on their sufficiency would be possible until the witness's actual testimony was known. Their summaries cannot be evaluated in the abstract: their sufficiency can only be known in relation to actual testimony. Accordingly, ordering the Defence to provide fuller details of the testimony of witnesses is not the appropriate remedy.³⁴

As the Trial Chamber further noted, “[o]nce testimony is elicited which the Prosecution does not believe has been mentioned in the summaries in sufficient detail, a motion can be made for adjournment of the testimony or exclusion.”³⁵ Moreover, as the Trial Chamber noted in that case, the amount of detail provided by the Prosecution regarding prospective testimony of its witness does not necessarily provide useful guidance as to the standard of detail required in Defence witness summaries, because “[t]estimony of Defence witnesses, unlike the Prosecution witnesses, can be understood as a response to evidence that has already been presented”.³⁶

28. For the foregoing reasons, the Trial Chamber finds that the issue of the sufficiency of the Defence witness summaries is not yet ripe for examination, and therefore dismisses this aspect of the Prosecution's Motions.

FOR THESE REASONS, THE CHAMBER

GRANTS the Prosecution Motions in part;

ORDERS that witnesses for whom no PISs have been provided by the time of the filing of the Consolidated Response be struck from the list of prospective Defence witnesses;

³⁴ *Bagosora*, para. 5.

³⁵ *Bagosora*, para. 6.

³⁶ *Bagosora*, para. 6.

ORDERS the Defence to file, within five days, a revised and significantly reduced witness list that is proportionate and commensurate to that of the Prosecution and does not exceed 30 witnesses;

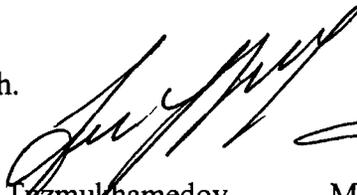
GRANTS the Defence five days to file PISs in conformity with the criteria outlined in this Decision, for each witness the Defence intends to call at trial;

DISMISSES the remainder of the Second and Third Prosecution Motions.

Arusha, 26 March 2010, done in English.



Solomy Balungi Bossa
Presiding Judge



Bakhtiyar Iuzmukhamedov
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

