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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 7 May 2010

THE PROSECUTOR

v.

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

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**DECISION ON NZABONIMANA'S EXTREMELY URGENT MOTION FOR
RECONSIDERATION AND/OR CERTIFICATION TO APPEAL THE
"CONSOLIDATED DECISION ON PROSECUTOR'S SECOND AND THIRD
MOTIONS TO COMPEL DEFENCE TO COMPLY WITH THE TRIAL CHAMBER'S
DECISION OF 3 FEBRUARY 2010", RENDERED ON 26 MARCH 2010
(Rule 73 (B) of the Rules of Procedure and Evidence)**

Office of the Prosecutor
Paul Ng'arua
Memory Maposa
Simba Mawere
Ndeye Marie Ka
Mary Diana Karanja

Defence Counsel
Vincent Courcelle-Labrousse
Philippe Larochelle

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INTRODUCTION

1. On 3 February 2010, the Trial Chamber ordered the Defence to file by close of business on 22 February 2010 a list of witnesses it intended to call, with identifying information for each witness and information concerning the facts and points in the indictment to which each witness would testify.¹
2. On 22 February 2010, the Defence provided the Prosecutor and the Chamber with a list containing 153 witnesses.²
3. On 5 March 2010, a Pre-Defence Conference was held before this Chamber, during which the Defence was issued an oral Order to significantly reduce the number of witnesses it intended to call and to make that number realistic and proportionate to the number of witnesses called by the Prosecution, and to provide a proofing chart by 12 March 2010.³
4. On 12 March 2010, and notwithstanding this Chamber's oral Order on 5 March 2010 to significantly reduce its witness list, the Defence filed an Amended Pre-Defence Brief, containing, among other items, a proofing chart for the first 65 witnesses it intended to call and an increased list of 179 prospective witnesses.⁴
5. On 16 and 18 March 2010, the Prosecution filed two motions⁵ requiring the Defence to comply with, among other things, the Chamber's Order of 5 March 2010 to significantly

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

² Confidential letter from Philippe Larochelle dated 22 February 2010. See also *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Extremely Urgent Motion for Reconsideration or Certification of the "Consolidated Decision on Prosecutor's Second and Third Motions to Compel the Defence to Comply with the Trial Chamber's Decision of 3 February 2010", Rendered on 26 March 2010, 6 April 2010, para. 5. ("Instant Motion")

³ Transcript of Pre-Defence Conference, 5 March 2010, p. 15, l. 30 - p. 17, l. 25.

⁴ Confidential letter from Philippe Larochelle dated 12 March 2010. See also Instant Motion, para. 9.

⁵ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Second Motion to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010, 16 March 2010; *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Third Motion to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010, 18 March 2010.

reduce its witness list and to provide complete identifying information for all of its prospective witnesses.

- 6. On 22 March 2010, the Defence filed a consolidated Response to the two Prosecution Motions.⁶
- 7. On 26 March 2010, the Trial Chamber issued a Decision for which the Defence presently seeks Reconsideration or Certification ("Impugned Decision"), in which it ordered the Defence to file, no later than 31 March 2010, a list of 30 Defence witnesses, and struck from the list certain witnesses for whom no identifying information had been provided by the 12 March 2010 deadline.⁷
- 8. On 31 March 2010, the Defence, again notwithstanding the Orders of the Trial Chamber on 5 March and 26 March 2010 that it reduce its witness list, filed another increased witness list of 184 witnesses, a proofing chart for most of those witnesses, as well as Personal Information Sheets ("PISs") for 154 witnesses.⁸ The Defence also filed a separate list of 30 witnesses, which purported to comply with the Impugned Decision, which also contained two witnesses that had been expressly struck from the Defence list by that Decision.⁹
- 9. On 6 April 2010, the Defence filed a Motion for Reconsideration or Certification of the Impugned Decision ("Instant Motion").¹⁰ Attached to the Instant Motion was Annex "A",¹¹ which contained "a tentative schedule" for the testimony of 44 witnesses the Defence intended to call at trial. The document noted that the Defence had filed the Instant Motion, and that the list of 44 witnesses distinguished between the 30 that were permitted pursuant to Impugned Decision, as well as an additional 14 witnesses the

⁶ *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, 22 March 2010.

⁷ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Consolidated Decision Prosecutor's Second and Third Motions to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010, 26 March 2010.

⁸ Confidential e-mail from Philippe Larochelle dated 31 March 2010. See also, Instant Motion, para. 14. As the Instant Motion notes therein, "[t]he Defence emphasizes that it still wishes for these 184 persons to appear for the Defence of Nzabonimana".

⁹ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Filing in Compliance with the 26 March 2010 Trial Chamber Decision, 31 March 2010.

¹⁰ See Instant Motion, *supra* fn 2.

¹¹ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Annex "A" Nzabonimana's Suggested Names of 44 Witnesses and Proofing Chart in Support of Motion for Reconsideration, 6 April 2010 ("Annex A to Instant Motion").

Defence intended to call should the Instant Motion be successful. The list of 30 witnesses again included the same 2 witnesses that had been expressly struck from the Defence witness list by the Impugned Decision.

10. On 9 April 2010, the Defence filed a Revised Order of Appearance of Witnesses which again included 44 prospective witnesses, in excess of the limit of 30 imposed by the Impugned Decision. As with Annex "A" to the Instant Motion, the Revised Order of Appearance made a distinction between the 30 witnesses it was entitled to call as per this Chamber's Order of 26 March 2010, and "14 supplementary witnesses which the Defence would like to present during the session".¹² Once again, this document listed the same two witnesses who had been explicitly struck from the Defence list by the Impugned Decision among its list of 30 witnesses allowed by this Chamber.¹³
11. On 12 April 2010, the Prosecution filed a Response to the Instant Motion ("Response").¹⁴
12. On 14 April 2010, the Defence filed a Motion under Rule 73 *ter* (E) to re-admit the two witnesses that were struck from its list by the Impugned Decision ("Rule 73 *ter* (E) Motion").
13. On 15 April 2010, the Prosecution filed a Response to the Rule 73 *ter* (E) Motion in which it did not oppose the Defence request to re-admit two witnesses to the list of 30.
14. On 15 April 2010, the Defence filed a Reply to the Prosecution's Response in the Instant Motion ("Reply").¹⁵

¹² *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Revised Order of Appearance of Witnesses as per Trial Chamber Order of 8 April 2010, 9 April 2010 ("Revised Order of Appearance").

¹³ See Revised Order of Appearance and *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Corrigendum to "Revised Order of Appearance of Witnesses as per Trial Chamber Order of 8 April 2010", 12 April 2010.

¹⁴ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Extremely Urgent Motion for Reconsideration or Certification of the "Consolidated Decision on Prosecutor's Second and Third Motions to Compel the Defence to Comply with the Trial Chamber's Decision of 3 February 2010", Rendered on 26 March 2010, 12 April 2010.

¹⁵ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Defence's Reply to Prosecutor's Response to its Motion "Nzabonimana's Extremely Urgent Motion for Reconsideration and/or Certification of the "Consolidated Decision on Prosecutor's Second and Third Motions to Compel the Defence to Comply with the Trial Chamber's Decision of 3 February 2010", Rendered on 26 March 2010, 15 April 2010.

15. On 16 April 2010, in response to an oral Order by this Chamber on 14 April 2010, the Defence filed a revised proofing chart for 30 witnesses, including the two witnesses (shaded in grey) that were the subject of the pending Rule 73 *ter* (E) Motion ("Revised Proofing Chart").¹⁶

16. On 19 April 2010, the Trial Chamber delivered an oral Decision on the Rule 73 *ter* (E) Motion, in which it re-instated the two witnesses who had been struck from the Defence witness list by the Impugned Decision, thus restoring the number of Defence witnesses permitted by the Chamber to the maximum of 30 allowed by the Impugned Decision.¹⁷

SUBMISSIONS OF THE PARTIES

Instant Motion

Reconsideration

17. With respect to Reconsideration, the Defence argues that the Trial Chamber committed an error of law and abused its discretion when it decided to limit the number of witnesses the Defence is entitled to call to 30.¹⁸ The Defence argues that this Chamber violated Rule 73 *ter* (D) of the Rules of Procedure and Evidence ("Rules"), which, the Defence submits, permits this Chamber to reduce its list of witnesses only "if it considers that an excessive number of witnesses are being called to prove the same facts".¹⁹ It further argues that the numerical limit of 30 witnesses imposed by this Chamber "would not even allow the Defence to refute all the allegations that were made by the Prosecution witnesses",²⁰ and that the Rule 73 *ter* (D) "does not mention the possibility of restricting the right of the Defence to call a witness for the reason that personal information at a certain time is not yet available to the Defence".²¹

18. The Defence then proposes that a "fairer" solution would be for this Chamber to allow the Defence to call a minimum of 44 witnesses,²² though it protests that even if its own

¹⁶ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Annexe I au Mémoire Préalable à la Défense: Liste des Témoins Conformément à L'Ordonnance du 14 Avril 2010, 16 April 2010.

¹⁷ Transcript of Trial Proceedings, p. 26, ll. 12-30. The Trial Chamber further observes that these 30 witnesses do not include the testimony of Defence witness RW-42, which was taken by deposition pursuant to Rule 71 of the Rules of Procedure and Evidence, in Kigali before Judge Rajohnson on 9 December 2009.

¹⁸ Instant Motion, paras. 16-17.

¹⁹ Instant Motion, para. 17.

²⁰ Instant Motion, para. 17.

²¹ Instant Motion, para. 17.

²² Instant Motion, paras. 18-24.

proposal were granted, the Defence would be precluded from presenting "a full and complete defence" under Article 20 of the Statute of the Tribunal ("Article 20"), and that allowing the Defence to call the 44 witnesses it proposes would only "partially reduce the prejudice suffered by the fact that it cannot call all the witnesses on its list".²³ The Defence further purports to illustrate, through a "proofing chart"²⁴ attached as Annex "A" to the Instant Motion,²⁵ how "it would be perfectly possible to present 44 witnesses in the time frame which the Trial Chamber... has granted to the Defence to present its case".²⁶

Certification

19. In the alternative, the Defence seeks Certification for Interlocutory Appeal of the Impugned Decision under Rule 73 (B), claiming that the numerical limit of 30 witnesses imposed by this Chamber "unduly compromises the right of Callixte Nzabonimana to present a full Defence and to obtain the attendance of witnesses on his behalf" in violation of the Statute of this Tribunal and international human rights conventions.²⁷ This violation, argues the Defence, stems from the fact that the Accused: 1) will be deprived of the opportunity to "prove not only the falsity of each and every one of the allegations made against him, but further that they are part of a pattern of fabricated evidence generated in Rwanda which generally undermine the whole case";²⁸ 2) will not be afforded the opportunity to "prove" his alibi;²⁹ 3) is "literally prohibit[ed]" from adducing any evidence of mitigating circumstances in the event of a conviction;³⁰ and 4) is diminished in his ability to offer corroborating evidence.³¹ The Defence further submits that Certification is warranted because "it is crucial for the issue [of its witness list to] be resolved before the end of the trial".³²

²³ Instant Motion, paras. 26-30. (emphasis added) The Defence appears to apply the terms "full and complete defence" (para. 26), "full and effective Defence" (para. 29), and "full defence" (para. 35, 37) interchangeably.

²⁴ While the Defence formally labelled this document a "proofing chart", the Chamber observes that in actuality it appears to be an order of appearance.

²⁵ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Annex "A" Nzabonimana's Suggested Names of 44 Witnesses and Proofing Chart in Support of Motion for Reconsideration, 6 April 2010.

²⁶ Instant Motion, paras. 31-42.

²⁷ Instant Motion, paras. 35, 37.

²⁸ Instant Motion, paras. 36, 41-42. (emphasis added)

²⁹ Instant motion, paras. 46-52.

³⁰ Instant Motion, paras. 53-57.

³¹ Instant Motion, paras. 58-63.

³² Instant Motion, para. 11.

20. In conclusion, the Instant Motion devotes nearly 23 pages to outlining the "importance and relevance"³³ of "each of the witnesses which it wants to be included on its witness list". The Defence then presents "very brief justification[s]" for a total of 170 witnesses, including the 30 witnesses it submitted on 31 March 2010 pursuant to this Chamber's Order of 26 March 2010, as well as the additional 14 witnesses it requests to be added in the Instant Motion.

Response

21. The Prosecution responds that the respective tests for Reconsideration and Certification have not been met by the Instant Motion, as both remedies are "exceptional" and must be granted "sparingly".³⁴

Reconsideration

22. The Prosecution argues that the Defence has failed to demonstrate that this Chamber abused its discretion or that any injustice was occasioned by the Impugned Decision.³⁵ It argues that because the Impugned Decision left the selection of 30 witnesses "at the complete discretion of the Defence",³⁶ the Defence was expected to exercise "due diligence in ensuring that those 30 witnesses selected would adequately present their case",³⁷ especially bearing in mind that the Prosecution used "far less witnesses (19) to achieve the same purpose in formulating the charges,"³⁸ and "having due regard to the Principle of Proportionality" as well as the fact that the burden to prove its case beyond a reasonable doubt lies with the Prosecution, not the Defence.³⁹

23. Therefore, contends the Prosecution, because the Impugned Decision provided the Defence with "ample opportunity to ensure that each of the charges were satisfactorily rebutted",⁴⁰ any prejudice suffered by the Defence results from the fact that it failed to diligently exercise its discretion by selecting redundant and superfluous witnesses, and thus "squandered the opportunity" to ensure that issues such as corroboration and

³³ Instant Motion, para. 69.

³⁴ Response, para. 13.

³⁵ Response, paras. 14, 43.

³⁶ Response, para. 44.

³⁷ Response, para. 44.

³⁸ Response, para. 44.

³⁹ Response, para. 46.

⁴⁰ Response, para. 46.

mitigating factors be adequately addressed.⁴¹ The Prosecution concludes by proposing a more "equitable", "alternative remedy" whereby repetitious witnesses be expunged from the Defence list and replaced with witnesses "who can mitigate the purported prejudice suffered by the Accused".⁴²

Certification

24. The Prosecution contends that the Defence has not satisfied the test for the "exceptional" remedy of Certification. It claims that the relevant factors that should be taken into account in granting Certification are: 1) the importance of the issue; 2) whether the Appeals Chamber has provided guidance on the issue; and 3) whether there are conflicting approaches among Trial Chambers.⁴³ The Prosecution further argues that the Defence has failed to demonstrate that there are conflicting approaches among the Trial Chambers or that the Appeals Chamber has failed to provide adequate guidance on the issue of whether a Trial Chamber has the discretion to reduce a Defence witness list.⁴⁴

Reply

25. The Defence replies that the issue of "constraining" witness lists and testimony length is "not a straightforward matter" that can be "reduced to a simple mathematical equation", and that the complexity of the issues confronting the Accused must be taken into account.⁴⁵ It further asserts that the Prosecution's Response amounted to precisely such an impermissible "mathematical" approach.⁴⁶ The Defence then further re-affirms its right to "rebut" or "disprove" the allegations against the Accused, a right which it submits has been satisfied when: 1) it has exhausted the means and methods by which it may counter the allegations made against the Accused; 2) it has countered every relevant factual element which composes such an allegation; 3) it has the opportunity to corroborate evidence as needed; 4) it has the opportunity to demonstrate mitigating factors.⁴⁷ The Defence maintains that because most of its witnesses are expected to testify "negatively" (i.e. state that an alleged fact did not occur) rather than "positively" (i.e. assert that a given fact did occur), such evidence is inherently weaker and more

⁴¹ Response, paras. 47-53.

⁴² Response, paras. 55-58.

⁴³ Response, paras. 23, 63.

⁴⁴ Response, paras. 64-75.

⁴⁵ Reply, paras. 18-19.

⁴⁶ Reply, para. 20.

⁴⁷ Reply, para. 39.

indirect and thus requires more corroboration than Prosecution witnesses, who typically testify "positively".⁴⁸ Finally, the Defence contends that the Indictment contains a number of paragraphs consisting of several factual elements, thus necessitating several witnesses to adequately refute the full content of such paragraphs.⁴⁹

DELIBERATIONS

Applicable Law

Reconsideration

26. As this Tribunal has acknowledged in *Karemera*, it is the established jurisprudence of the Tribunal that Trial Chambers have the "inherent power" to reconsider their own decisions, under the following "exceptional" circumstances:

- i. when a new fact has been discovered that was not known by the Trial Chamber;
- ii. where new circumstances arise after the original decision;
- iii. where there was an error of law or an abuse of discretion by the Trial Chamber resulting in an injustice.⁵⁰

Certification

27. Rule 73 (B) states:

Decisions rendered on [Trial Chamber] motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

The jurisprudence of this Tribunal further establishes that Certification is an "exceptional" remedy that remains within the absolute discretion of the Trial Chamber. As was noted in *Ntahobali*, "Rule 73(B) of the Rules provides... that in exceptional circumstances, the Trial Chamber may—not must—allow interlocutory appeals of [its] decisions".⁵¹

⁴⁸ Reply, paras. 40-41.

⁴⁹ Reply, paras. 42-44.

⁵⁰ See e.g., *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera*, Decision on Reconsideration of Protective Measures for Prosecution Witnesses, 30 October 2006, para. 2; *Karemera*, Decision on Reconsideration of Admission of Written Statements in lieu of Oral Testimony and Admission of the Testimony of Prosecution Witness GAY, 28 September 2007, paras. 10-11.

⁵¹ *Prosecutor v. Ntahobali et al.*, ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motions Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 18 March 2004, paras. 13-15.

Witness List Reduction

28. In *Kanyabashi*, the Appeals Chamber of this Tribunal affirmed that "it is well-established in the jurisprudence of this Tribunal... that Trial Chambers exercise discretion in relation to the conduct of proceedings before them" and that a decision "to reduce the number of witnesses who may testify on behalf of the [Defence is] a decision taken with the discretion of the Trial Chamber" that is entitled to "deference".⁵²

Analysis

Reconsideration

29. The Trial Chamber will now consider the Defence arguments that the Chamber committed an error of law or an abuse of its discretion resulting in an injustice toward the Defence when it issued the Impugned Decision capping the Defence witness list at 30 witnesses.

Error of Law

30. The Defence alleges a number of legal errors throughout the Instant Motion, none of which are persuasive. As was noted above, the Appeals Chamber stated in *Kanyabashi* that "it is well-established... that Trial Chambers exercise discretion in relation to the conduct of proceedings before them", which includes the prerogative "to reduce the number of witnesses who may testify on behalf of the [Defence]".⁵³

31. One error of law alleged by the Defence is that Rule 73 *ter* (D) "does not mention the possibility of restricting the right of the Defence to call a witness for the reason that personal identification at a certain time is not yet available to the Defence".⁵⁴ However, this argument cannot hold, because if one were to accept its logic, it would completely nullify the effect of Rule 69 (C), which explicitly states that "the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the Prosecution and the Defence".

⁵² *Prosecutor v. Kanyabashi et al.*, ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007.

⁵³ *Kanyabashi*, para. 10.

⁵⁴ Instant Motion, para. 17.

32. On the allegation that the Chamber breached Article 20 of the Statute because it has not allowed the Accused the opportunity to present a "full defence", the entire premise of this argument fundamentally miscasts one of the most elementary principles of criminal law – i.e. that the onus lies on the Prosecution to prove the Accused's guilt beyond a reasonable doubt, not on the Defence to prove his innocence. Likewise, it is well-established law that the Prosecution bears the burden to refute beyond a reasonable doubt any defence of alibi properly raised by the Defence, rather than the Defence having to "prove" its alibi.⁵⁵
33. While the Trial Chamber passes no judgement on the merits of the Defence allegations concerning the entire Prosecution case at this stage, it notes that the sheer volume of such evidence that the Defence proposed to tender exceeds what is appropriate for the fair and expeditious conduct of these proceedings.
34. For the foregoing reasons, the Trial Chamber rejects the Defence argument that this Chamber committed an error of law in the Impugned Decision.

Abuse of Discretion

35. In compiling witness lists, it is the standard practice of this Tribunal that at the outset, the Defence, and indeed any party, has complete discretion in choosing its number of witnesses. This premise is in keeping with the fundamental principle that a party is in the best situation to know and conduct its own case. Indeed, this Chamber's Order of 3 February 2010 was completely faithful to that principle, and did not impose any limit on the Defence witness list.
36. However, it is also well-established jurisprudence at this Tribunal that the right of the Defence to conduct its case as it sees fit is not absolute, and that a Trial Chamber is empowered to order the reduction of a witness list, in the interests of fair and expeditious proceedings as well as economy of judicial resources, if it is of the opinion that the prerogative of the Defence is being abused. Moreover, in circumstances where the Court observes that the Defence has taken an intractable stance on the issue of witness list reduction, which threatens to disrupt the time-frame in which the Defence is expected to

⁵⁵ See e.g., *Zigiranyirazo v. Prosecutor*, ICTR-01-73-A, Judgement, 16 November 2009, paras. 17-19.

complete its case, it is the settled jurisprudence of this Tribunal that it is within the discretion of a Trial Chamber, in the interests of justice, to impose a numerical cap on the number of witnesses the Defence may call.⁵⁶

37. The Trial Chamber recalls that the Defence, rather than conforming with this Chamber's orders, actually increased its witness list. Having considered all relevant factors, and in keeping with the principles established in *Kanyabashi*, the Chamber exercised its discretion to impose a numerical limit of 30 on the amount of witnesses the Defence was entitled to call.

38. In light of the above, the Trial Chamber is not persuaded by the Defence argument that this Chamber abused its discretion when it issued the Impugned Decision.

Material change of circumstances

39. While the Trial Chamber rejects the Defence contention that it has committed an error of law or an abuse of its discretion resulting in an injustice against the Accused, new circumstances have arisen that affect the premise of the Impugned Decision. Specifically, the Trial Chamber considers that the Defence's reversal of its stance on the issue of reducing its witness list in favour of a more reasonable suggestion to increase its witness list to 44 witnesses constitutes a material change in circumstances that affected the entire basis upon which the Impugned Decision was premised. In light of these new circumstances, the Trial Chamber believes it is in the interests of justice to reconsider the Impugned Decision in an attempt to ascertain whether the Defence's request for an increased number of witnesses is warranted.

40. In conducting this analysis, the Trial Chamber will not consider the merits of including the 126 proposed witnesses in the Instant Motion that are neither part of the existing list of 30 witnesses nor the Defence's proposal of adding 14 witnesses to that list. Given that the Chamber has already expressed its opinion that such a number of witnesses is excessive and disproportionate, the Chamber finds the Defence's request to consider these 126 witnesses irrelevant, a waste of this Chamber's time and resources, a violation

⁵⁶ *Kanyabashi*, paras. 22-23 (noting that the Appellant's failure to comply with its previous orders to significantly reduce the number of his witnesses resulted in the Trial Chamber ordering a reduction of the witness list to 30, a decision that was upheld by the Appeals Chamber as within the discretion of the Trial Chamber and in keeping with the time-frame established for the completion of trial).

of this Chamber's prior orders, and an abdication of the Defence's role in vetting its own proposed witness list. Moreover, this Chamber sees no need to consider the merits for including those witnesses that are already contained in the list of 30 prescribed by the Impugned Decision, as it is settled that these witnesses may testify (and indeed, some already have testified).

41. The Trial Chamber understands the Defence position regarding the paragraphs of the Indictment it must rebut to be reflected in its table contained in paragraph 21 of the Instant Motion.⁵⁷ Specifically, the Chamber understands the Defence contention to be that Prosecution witnesses have testified (and thus must be rebutted by Defence witnesses) regarding the following paragraphs of the Indictment: 16-17, 19-21, 23-24, 26, 28, 30, 32-33, 35, 37, 40-41, 44-49, 51-54 and 58. The Defence also purports to demonstrate in that same table how it would allocate its witnesses if this Chamber granted its request to add 14 witnesses to its current list, for a total of 44.⁵⁸ However, the Chamber notes that there is a significant discrepancy between what the Defence has represented in its table⁵⁹ (which indicates that no paragraph would be supported by more than 4 Defence witnesses) and what is represented in the proofing charts⁶⁰ it has disclosed with respect to the capacity of its witnesses to testify to the relevant paragraphs of the Indictment. This disparity can be displayed in the following table:

Paragraphs of the Indictment Defence must rebut according to Table	Number of witnesses Defence claims will testify to that paragraph according to Table	Witnesses Defence has identified will testify to that paragraph according to its proofing charts (Witnesses that would testify to paragraph if additional 14 granted)	Number of witnesses that will testify to that paragraph according to proofing charts (number that would testify if additional 14 were granted)
16	2	T24, T25, T27, T28, T31, T33, T34, T36, T39, T40,	10 (14)

⁵⁷ The Defence Table is reproduced as Annex "A" to the Instant Decision.
⁵⁸ See Annex A to Instant Motion, *supra* fn 11; Revised Order of Appearance, *supra* fn 12.
⁵⁹ The first column of the Defence table indicates "Paragraphs of the Indictment for which evidence was adduced". The third column of the table indicates "Requested number of Defence witnesses". See Annex "A" to the Instant Decision.
⁶⁰ See Revised Proofing Chart, *supra* fn 16; as well as Annexe I (strictement confidentielle) – Au 31 mars 2010, "TÉMOINS DE LA DÉFENSE", pp. 3549, 3554-55, 3558-59, 3562, 3569-73, 3576, which was contained in the Confidential e-mail from Philippe Larochelle dated 31 March 2010, *supra* fn 8.

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		(T41, T150, T49, T37)	
17	1	T24, T25, T27, T28, T31, T33, T34, T36, T39, T40, (T41, T150, T49, T37, T179)	10 (15)
19	2	T24, T25, T27, T28, T31, T33, T34, T36, T39, T40, (T41, T150, T49, T37)	10 (14)
20	4	T19, T24, T25, T27, T28, T31, T33, T34, T36, T39, T40, (T41, T150, T49, T37)	11 (15)
21	1	T24, T25	2 (2)
23	1	T59, (T60)	1 (2)
24	2	CNAO, T109, (T138)	2 (3)
26	2	T24, T25, T27, T28, T31, T33, T34, T36, T39, T40, T72, CNAO, (T138, T41, T150, T49, T37)	12 (17)
28	1	T64, T65	2 (2)
30	2	T24, T25, T27, T28, T31, T33, T34, T36, T39, T40, (T41, T150, T49, T37, T179)	10 (15)
32	1	T19, T117, (T129, T115)	2 (4)
33	1	T24, T25, T27, T28, T31, T33, T34, T36, T39, T40, (T41, T150, T49)	10 (13)
35	2	T5, T6, T7, T9, T24, T25, T27, T28, T31, T33, T34, T36, T39, T40, (T41, T150, T49, T10, T37)	14 (19)
37	1	T5, T6, T7, T9, T24, T25, T27, T28, T31, T33, T34, T36, T39, T40, (T41, T150, T49, T10, T37)	14 (19)
40	3	CNAO, T93, T109, (T138)	3 (4)
41	2	T5, T6, T7, T24, T25, T27, T28, T31, T33, T34, T36, T39, T40, T57, T161, T41, T56, T150,	14 (20)

Decision on Nzabonimana's Extremely Urgent Motion for Reconsideration and/or Certification to Appeal the "Consolidated Decision on Prosecutor's Second and Third Motions to Compel Defence to Comply with Trial Chamber's Decision of 3 February 2010"

		T49, T37	
44	2	T92, T93, T60, T98	2 (4)
45	1	T24, T25, T27, T28, T31, T33, T34, T36, T39, T40, (T41, T150, T49, T37, T179)	10 (15)
46	1	T71	1 (1)
47	1	T133, (T134)	1 (2)
48	2	T139	1 (1)
49	1	T92, T93, (T60, T98)	2 (4)
51	4	T19, T24, T25, T27, T28, T31, T34, T36, T39, T40, T57, T59, T64, T65, T71, T72, CNAO, T92, T93, T109, T117, T133, T139, (T60, T161, T138, T41, T134, T56, T129, T150, T98, T115, T49, T37, T179)	23 (36)
52	1	T5, T6, T7, T9, T19, T24, T25, T27, T28, T31, T33, T34, T36, T39, T40, (T41, T150, T49, T10, T37, T179)	15 (21)
53	1	T36, T117, (T129, T150, T115, T179)	2 (6)
54	1	T36, T117, (T129, T150, T115, T179)	2 (6)
58	1	T92, T93, (T60, T98)	2 (4)

42. Because the Trial Chamber is incapable of reconciling these two sources of information, it will resort to the more detailed and consistent information contained in the proofing charts proffered by the Defence in ascertaining the capacity of the Defence's proposed witnesses to testify to the paragraphs of the Indictment it has indicated it must rebut.

43. The Chamber recalls the Defence argument that the Impugned Decision prevented the Defence from adducing sufficient corroboratory testimony regarding the alleged crimes of the Accused. Yet this argument rings hollow when the Defence, in seeking to augment its witness list, appears to have chosen much of the extra testimony it seeks to

adduce with respect to paragraphs where there already exists demonstrably ample evidence. While the Trial Chamber notes the Defence argument that a sufficient witness list cannot be reduced to a simple "mathematical calculation" of the total number of Prosecution versus Defence witnesses, it appears that many of the proposed witnesses will offer redundant and repetitive testimony.

44. Having considered the above, the Trial Chamber finds that it is in the interests of justice to reconsider the Impugned Decision and allow the Defence to add to its existing list of 30 witnesses, from the 14 Witnesses requested by the Defence,⁶¹ those who would testify to paragraphs in the Indictment that are presently supported by less than 4 witnesses. Specifically, the Chamber observes those paragraphs to be the following: 21, 23, 24, 28, 32, 40, 44, 46, 47, 48, 49, 53, 54 and 58. As for the remaining paragraphs of the Indictment the Defence seeks to rebut, the Trial Chamber observes that such paragraphs are already addressed by sufficient, and in many cases ample, Defence evidence. Therefore, the addition of any witnesses who will testify to those paragraphs is denied.

Certification

45. The Trial Chamber noted at the outset of the Instant Decision that Certification is a remedy that lies within the absolute prerogative of the Trial Chamber. Having fully considered the merits of the Defence's request for Reconsideration and having granted part of the relief sought, the Trial Chamber sees no basis upon which to grant Certification in the Instant Motion.

FOR THESE REASONS, THE CHAMBER

GRANTS the Defence request for Reconsideration of the Impugned Decision in part;

ALLOWS the Defence to add to its existing list of 30 Defence witnesses only those witnesses from its proposed additional list of 14 who would testify to paragraphs of the Indictment identified in paragraph 21 of the Instant Motion where less than 4 witnesses are currently scheduled to testify;

⁶¹ See Annex A to Instant Motion, *supra* fn 11; Revised Order of Appearance, *supra* fn 12.

ORDERS that the total number of Defence witnesses supporting a paragraph of the Indictment where the Defence has been allowed to add witnesses from its list of 14 not exceed 4 witnesses, after any additions have been made;

DENIES the Defence request to add the remaining witnesses mentioned in the Instant Motion to the list of Defence witnesses; and

REJECTS the Defence request for Certification in its entirety.

Arusha, 7 May 2010, done in English.



Solomy Balungi Bossa
Presiding Judge



Bakhtiyar Tuzmukhamedov
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

