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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:** 30 November 2010

**THE PROSECUTOR**

v.

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

2010 NOV 30 P 3:55  
JUDICIAL RESEARCH ARCHIVE  
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**DECISION ON NZABONIMANA'S MOTION FOR THE VARIATION OF ITS  
GLOBAL LIST OF WITNESSES AND FOR RECONSIDERATION OF CERTAIN  
DECISIONS PERTAINING TO THE SCOPE OF DEFENCE WITNESSES  
TESTIMONY UNDER RULE 73TER (E) OF THE RULES OF PROCEDURE AND  
EVIDENCE ("RPE")**

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## INTRODUCTION

1. On 3 February 2010, the Trial Chamber ordered the Defence to produce a list of witnesses it intended to call at trial, as well as information concerning the facts and points in the Indictment to which each witness would testify ("Proofing Chart").<sup>1</sup>
2. On 22 February 2010, the Defence disclosed a list containing 153 witnesses.<sup>2</sup>
3. On 5 March 2010, during a Pre-Defence Conference, the Trial Chamber issued an oral order for the Defence 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 ("5 March Order").<sup>3</sup>
4. On 12 March 2010, notwithstanding the 5 March Order, the Defence filed an increased list of 179 witnesses and a Proofing Chart for the first 65 witnesses it intended to call.<sup>4</sup>
5. On 26 March 2010, the Chamber issued a decision ordering the Defence to file, by 31 March 2010, a list of 30 witnesses ("26 March Decision").<sup>5</sup>
6. On 31 March 2010, the Defence filed a list of 184 witnesses and another Proofing Chart.<sup>6</sup> It also filed a separate list of 30 witnesses, purporting to comply with the 26 March Decision.<sup>7</sup>
7. On 6 April 2010, the Defence filed a motion for Reconsideration or Certification of the 26 March Decision ("6 April Motion").<sup>8</sup> In an Annex to that motion, the Defence indicated 14 additional witnesses it wished to call should its request for Reconsideration be granted.<sup>9</sup>

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

<sup>2</sup> Confidential letter from Philippe Larochelle dated 22 February 2010. See also 6 April Motion, *infra* fn 8, para. 5; 19 May Motion, *infra* fn 13, para. 2.

<sup>3</sup> English Transcript of Pre-Defence Conference, 5 March 2010, p. 15, l. 30 - p. 17, l. 25.

<sup>4</sup> Confidential letter from Philippe Larochelle dated 12 March 2010. See also 6 April Motion, *infra* fn 8, para. 9; 19 May Motion, *infra* fn 13, para. 4.

<sup>5</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Consolidated Decision on Prosecutor's Second and Third Motions to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010, 26 March 2010.

<sup>6</sup> Confidential e-mail from Philippe Larochelle dated 31 March 2010. See also 19 May Motion, *infra* fn 13, para. 14, where "[t]he Defence emphasizes that it still wishes for these 184 persons to appear for the Defence of Nzabonimana".

<sup>7</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Filing in Compliance with the 26 March 2010 Trial Chamber Decision, 31 March 2010.

8. On 7 May 2010, the Trial Chamber issued a decision on the 6 April Motion ("7 May Decision"),<sup>10</sup> allowing the Defence to add to its witness list, from its proposed additional 14 witnesses, those who would testify to paragraphs of the Indictment the Defence had identified as requiring rebuttal and where less than 4 witnesses were scheduled to testify.<sup>11</sup> The Chamber further ordered that the Defence could not present more than 4 witnesses with respect to any such paragraph.<sup>12</sup> The Defence filed a motion seeking to vary its witness list pursuant to this decision on 19 May 2010 ("19 May Motion").<sup>13</sup>
9. On 4 June 2010, the Trial Chamber issued a decision on the 19 May Motion, allowing the Defence to increase its witness list from 30 to 38, while restricting the paragraphs of the Indictment to which the newly added witnesses could testify ("4 June Decision").<sup>14</sup> A Defence motion requesting Reconsideration or Certification of these restrictions was denied in substantial part by the Chamber on 14 July 2010 ("14 July Decision").<sup>15</sup>
10. On 7 October 2010, the Defence filed the instant motion ("Motion").<sup>16</sup>
11. On 11 October 2010, the Prosecution filed a request for an extension of time to respond to the Motion.<sup>17</sup> On 13 October 2010, the Trial Chamber extended the deadline for the Prosecution to respond to the Motion until 15 October 2010.<sup>18</sup>

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<sup>8</sup> *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.

<sup>9</sup> *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.

<sup>10</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana's Extremely Urgent Motion for Reconsideration or Certification of 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, 7 May 2010.

<sup>11</sup> 7 May Decision, para. 44.

<sup>12</sup> 7 May Decision, disposition, p. 16.

<sup>13</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Motion for the Variation of its List of Witnesses, 19 May 2010.

<sup>14</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana's Motion for the Variation of its List of Witnesses, 4 June 2010, paras. 40-41 and disposition.

<sup>15</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana's Motion for Reconsideration/and or Certification of the "Decision on Nzabonimana's Motion for the Variation of its List of Witnesses", Rendered on 4 June 2010, 14 July 2010.

<sup>16</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Motion for the Variation of its Global List of Witnesses and for Reconsideration of Certain Decisions Pertaining to the Scope of Defence Witnesses [sic] Testimony under Rule 73ter (E) of the Rules of Procedure and Evidence ("RPE"), 7 October 2010.

<sup>17</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Request for Extension of Time to Respond to Nzabonimana's Motion for the Variation of its Global List of Witnesses and for Reconsideration of Certain

12. On 15 October 2010, the Prosecution filed a response to the Defence Motion ("Response").<sup>19</sup>
13. On 18 October 2010, the Defence filed a reply to the Prosecution Response ("Reply").<sup>20</sup>
14. On 19 October 2010, in response to a pressing need to address one aspect of the instant Motion prior to the testimony of Defence Witness T150, the Trial Chamber issued an in-court oral decision in which it disposed of that discrete issue ("19 October Decision").<sup>21</sup>

## SUBMISSIONS OF THE PARTIES

### *Motion*

15. The Defence moves this Chamber to grant it four remedies: 1) permission to "add new individuals to its global list of witnesses"; 2) permission to add a new witness, T200, "to the list of witnesses to be heard by the Chamber"; 3) reconsideration of the Trial Chamber's decisions not to allow witness T56 to testify; 4) "reconsideration of the decisions and orders issued by the Trial Chamber concerning the scope of testimony of witness T150".<sup>22</sup>

### Request to add to its "Global List of Witnesses"

16. The Defence seeks permission from the Trial Chamber "to add the names of certain individuals<sup>23</sup> to what will be referred to as the Global List of Witnesses, not for the purpose of having these people offer live testimony in court but simply to have them listed as Defence witnesses, which is one of the criteria for the admission of written statements under Rule 92bis of the RPE".<sup>24</sup> The Defence submits "that it is in the interest of Justice to have

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Decisions Pertaining to the Scope of Defence Witness Testimony under Rule 73 ter (E) of the Rules of Procedure and Evidence, 11 October 2010.

<sup>18</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Prosecutor's Request for Extension of Time to Respond to Nzabonimana's Motion for the Variation of its Global List of Witnesses and for Reconsideration of Certain Decisions Pertaining to the Scope of Defence Witness Testimony Under Rule 73 ter (E) of the Rules of Procedure and Evidence, 13 October 2010.

<sup>19</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Motion for the Variation of its Global List of Witnesses and for Reconsideration of Certain Decisions Pertaining to the Scope of Defence Witness Testimony Under Rule 73 ter (E) of the Rules Procedure and Evidence, 15 October 2010.

<sup>20</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Reply to Prosecutor's Response to Nzabonimana's Motion for the Variation of its Global List of Witnesses and for Reconsideration of Certain Decisions Pertaining to the Scope of Defence Witnesses Testimony under Rule 73ter (E) of the Rules of Procedure and Evidence ("RPE"), 18 October 2010.

<sup>21</sup> English Transcript of Trial Proceedings, 19 October 2010, p. 1, l. 27 – p. 2, l. 28.

<sup>22</sup> Motion, para. 14.

<sup>23</sup> The individuals that the Defence proposes to add to its "Global List of Witnesses" are identified by the pseudonyms T196, T197, T198, T199, T201, and T202.

<sup>24</sup> Motion, para. 18.

these persons included in the Global List of Witnesses<sup>25</sup> for the purpose of providing Rule 92bis evidence, and that "the addition of these individuals to the further [sic] creates absolutely no prejudice to the Prosecutor nor does it create delays in the proceedings."<sup>26</sup>

Request to add new witness T200 to the "list of witnesses to be heard by the Trial Chamber"

17. The Defence announces that it "has recently managed to locate witness T200",<sup>27</sup> who the Defence had difficulty locating because of initial confusion surrounding his identity. The Defence submits that it is in the interests of justice to allow T200 to testify because his evidence would directly contradict the testimony of Prosecution Witness CNAM with respect to paragraph 23,<sup>28</sup> and would "complete" and "corroborate" the evidence of T59 and T61, the only other two Defence witnesses for that paragraph.<sup>29</sup> The Defence further contends that the probity of T200's evidence is enhanced because T59 identified him as an eyewitness to the events in paragraph 23.<sup>30</sup> Finally, the Defence proposes the addition would cause "no prejudice to the Prosecutor and no further delays".<sup>31</sup>

Request to reconsider prior decisions of Trial Chamber refusing to allow T56 to testify

18. The Defence seeks Reconsideration of the Trial Chamber's prior decisions refusing to add Witness T56 "to its list of witnesses to be heard by the Trial Chamber".<sup>32</sup> The Defence notes the Trial Chamber's prior decisions on the issue,<sup>33</sup> but, citing a Revised Table of Defence Witnesses annexed to its Motion ("Table"), argues that "there are much less defence witnesses than anticipated that are testifying on various parts of the Indictment".<sup>34</sup> Specifically, the Defence propounds that by the time its case concludes, only three Defence witnesses<sup>35</sup> will have testified regarding paragraph 41 of the Indictment, and thus the addition of T56 would be in compliance with the cap of four witnesses imposed by this Chamber.<sup>36</sup> This attrition of the Defence case "constitutes a 'new fact' warranting

<sup>25</sup> Motion, para. 20.

<sup>26</sup> Motion, para. 22.

<sup>27</sup> Motion, para. 24.

<sup>28</sup> Motion, paras. 24, 27.

<sup>29</sup> Motion, para. 28.

<sup>30</sup> Motion, paras. 30-31.

<sup>31</sup> Motion, paras. 32-33.

<sup>32</sup> Motion, para. 49.

<sup>33</sup> Motion, paras. 35-36.

<sup>34</sup> Motion, para. 38.

<sup>35</sup> T5, T24, T57.

<sup>36</sup> Motion, paras. 37, 39, 41-44.

reconsideration of both the 4 June 2010 and 14 July Decisions",<sup>37</sup> since the premise for those Decisions—that that the number of Defence witnesses testifying to paragraph 41 greatly exceeds four—is “no longer the case”.<sup>38</sup> Finally, the Defence argues T56 would cause no prejudice to the Prosecution and would not occasion any delays in the instant proceedings.<sup>39</sup>

Request to reconsider prior decisions limiting scope of testimony of Witness T150

19. The Defence also seeks Reconsideration of the 4 June and 14 July Decisions insofar as they limited the permissible scope of Defence Witness T150's testimony to paragraph 53 of the Indictment.<sup>40</sup> In support of this relief, the Defence reveals that “the Trial Chamber's Decisions to narrow the scope of the testimony of witness T150 rested on the erroneous description by the Defence of the scope of testimony of some of its witnesses”.<sup>41</sup> Again with reference to its Table, the Defence submits “that there are much less defence witnesses than anticipated that are testifying on various parts of the Indictment”, including paragraphs 16-21 and 37, and that “allowing T150 to be heard on these paragraphs would not increase the number of witnesses on these paragraphs in excess of 4”.<sup>42</sup> Moreover, the Defence argues that “the fear and reluctance to come testify” recently expressed by Defence Witnesses T36 and T37 are “new facts” favouring an increased testimonial scope for T150.<sup>43</sup>

*Response*

Defence request to add to its “Global List of Witnesses”

20. The Prosecution commences “by debunking the myth that two separate witness lists exist, that is; a global list of witnesses and a list of witnesses to be heard as suggested by the Defence motion”.<sup>44</sup> In an effort to “bring closure” to this issue,<sup>45</sup> the Prosecution makes extensive reference to the procedural history to argue that “[n]ot only does this supposition have no basis in law, but the Chamber has also been unequivocal in all its relevant Decisions

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<sup>37</sup> Motion, para. 40.

<sup>38</sup> Motion, paras. 36-37.

<sup>39</sup> Motion, paras. 46-48.

<sup>40</sup> Motion, para. 50.

<sup>41</sup> Motion, para. 51.

<sup>42</sup> Motion, paras. 52-53.

<sup>43</sup> Motion, paras. 55-56.

<sup>44</sup> Response, para. 41.

<sup>45</sup> Response, para. 44.

about the legitimacy of one list of Defence witnesses, and has even cautioned the Defence on their practice of filing multiple lists of witnesses".<sup>46</sup>

21. Moreover, the Prosecution argues that "if the Defence were inclined to request for the submission of Rule 92bis statements, these witnesses would have to be drawn from the existing list of 38 witnesses"<sup>47</sup> the Chamber has already approved, and that "[w]here the witnesses are not already included within the approved list, the Defence would be expected to make an application for variation under Rule 73 ter (E)".<sup>48</sup> Finally, the Prosecution argues the Defence has not satisfied the test for variation in its present Motion.<sup>49</sup>

Defence request to reconsider prior decisions regarding T56 and T150

22. From the outset, the Prosecution contests that prior decisions of this Trial Chamber regarding the admissibility and scope of evidence from Defence Witnesses T56 and T150 "can validly be the subject of a Reconsideration Decision",<sup>50</sup> as these issues were fully and finally adjudicated by the Trial Chamber's 14 July 2010 Decision.<sup>51</sup> The Prosecution then asserts that the new representations of the Defence vis-à-vis the strength of its case allows for "the inference to be drawn... that the earlier proofing charts provided by the Defence were not reliable or were untrue".<sup>52</sup> Stressing the binding nature of the Defence Proofing Chart as a means of ensuring transparency and mutual disclosure, the Prosecution submits that it "would be highly prejudiced" if the Defence were permitted at this stage of the proceedings to abandon those disclosures, because "[t]he Prosecutor has in preparing his rebuttal and planning his case, been guided by the Defence proofing chart on the presumption of good faith and the exercise of due diligence".<sup>53</sup>

23. The Prosecution takes exception to the Defence argument that allowing T150 to expand the scope of his testimony would alleviate prejudice occasioned by the reluctance of T36 and T37 to testify in the instant proceedings, citing a lack of notice regarding the expanded content of T150's testimony and the fact that, according to the Defence Proofing Chart, even

<sup>46</sup> Response, paras. 42-57.

<sup>47</sup> Response, para. 64.

<sup>48</sup> Response, para. 65.

<sup>49</sup> Response, paras. 66-70.

<sup>50</sup> Response, para. 71.

<sup>51</sup> Response, paras. 73-74.

<sup>52</sup> Response, para. 75.

<sup>53</sup> Response, para. 78.

with "witnesses T36 [and T37] reluctant to testify... the Defence [still maintains] an extremely excessive number of witnesses testifying to the said paragraphs of the indictment compared to the prosecution".<sup>54</sup>

Defence request to include Witness T200 in its "list to be heard by the Trial Chamber"

24. The Prosecution concedes that only two Defence witnesses are scheduled to testify with respect to paragraph 23 of the Indictment, and believes that the Defence has sufficiently demonstrated that the inclusion of this additional witness to address paragraph 23 of the Indictment is warranted. Therefore, the Prosecution "does not contest the inclusion of the [sic] T200 as a witness and the admission of his testimony strictly within the scope of paragraph 23 of the Indictment".<sup>55</sup>

*Reply*

25. The Defence argues that limiting the admissible testimony under Rule 92 *bis* "to those witnesses who *actually* testified before the Trial Chamber... would in effect nullif[y] the scope of Rule 92*bis*, which allows the Trial Chamber to admit certain facts by way of written statements *in lieu* of oral testimony".<sup>56</sup> The Defence further contends that the criteria for admitting additional witnesses pursuant to Rule 73 *ter* (E) is to be applied differently when the sole purpose for seeking variation of the witness list is to adduce evidence under Rule 92*bis*, and argues that this modified standard has been met in the instant Motion.<sup>57</sup> Regarding the additional witnesses to be called to testify at trial, the Defence disputes that the Prosecution has demonstrated any prejudice resulting from the proposed additions.<sup>58</sup>

## DELIBERATIONS

*Applicable Law*

Witness Lists and Proofing Charts

26. Rule 73 *ter* (B) of the Rules of Procedure and Evidence ("Rules") states that

...the Trial Chamber... may order that the Defence... file the following:... (iii) A list of witnesses the Defence intends to call with:... (b) A summary of the facts on which

<sup>54</sup> Response, paras. 85-89.

<sup>55</sup> Response, paras. 90-92.

<sup>56</sup> Reply, para. 10. (emphasis in original)

<sup>57</sup> Reply, paras. 16-18.

<sup>58</sup> Reply, paras. 23-29.

each witness will testify; (c) The points in the indictment as to which each witness will testify...

27. Rule 73 <sup>ter</sup> (E) of the Rules further provides that

[a]fter commencement of the Defence case, the Defence, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called.

Variations to a witnesses list must be supported by "good cause" and be in "the interests of justice".<sup>59</sup> The jurisprudence of this Tribunal has consistently held that the following factors are relevant to this analysis:

1) the materiality and probative value of the testimony in relation to existing witnesses and allegations in the indictment; 2) the complexity of the case; 3) any potential prejudice to the opposing party; 4) the justifications offered for the late variation of the witness list; 5) the timing of the late disclosure; and 6) any delays in the proceedings occasioned by the proposed variation.<sup>60</sup>

#### Admissibility of Written Statements

28. Pursuant to Rule 92 *bis* (A):

A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to the proof of a matter other than the acts and conduct of the accused as charged in the indictment.

As documentary evidence, any written statement tendered for admission must be relevant and have probative value in accordance with Rule 89(C).<sup>61</sup>

#### Reconsideration

29. As affirmed in *Karemera*, 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;

<sup>59</sup> See e.g., *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Bagosora Motion to Present Additional Witnesses and Vary its Witness List, 17 November 2006, para. 2; *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on Casimir Bizimungu's Motion to Vary Witness List; and to Admit Evidence of Witness in Written Form in lieu of Oral Testimony, 1 May 2008, para. 12.

<sup>60</sup> See e.g., *Prosecutor v. Rukundo*, ICTR-2001-70-T, Decision on the Defence Motions for Additional Time to Disclose Witnesses' Identifying Information, to Vary its Witness List and for Video-Link Testimony, and on the Prosecution's Motion for Sanctions, 11 September 2007, para. 10; *Prosecutor v. Nindiliyimana et al.*, ICTR-00-56-T, Decision on Nzuwonemeye's Request to Vary his Witness List, 31 January 2008, para. 31; *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, Decision on Accused's Motion to Expand and Vary the Witness List, 28 March 2006, para. 11; *Bizimungu*, para. 13; *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-T, Decision on the Defence Motion to Vary the Defence Witness List, 28 March 2007, para. 3; *Prosecutor v. Kalimanzira*, ICTR-05-88-T, Consolidated Decision on Prosecution Oral Motion to Reduce Defence Witness List and Defence Motion to Vary Witness List, 16 January 2009, para. 7.

<sup>61</sup> *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Ntabakuze Motion to Deposit Certain United Nations Documents, 19 March 2007, para. 9; *Bagosora*, Decision on Defence Motion for the Admission of Written Statements under Rule 92 *bis*, 1 June 2006, para. 3.

- 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.<sup>62</sup>

### *Analysis*

#### Defence request to add to its "Global List of Witnesses"

30. In seeking to import the written statements of six new witnesses into the evidentiary record via Rule 92 *bis*, the Defence concocts a juridical neologism – "global list of witnesses" – that is alien to the relevant rules obtaining before this Tribunal. In adjudicating this point of procedure, the Trial Chamber is guided by the "well established" jurisprudence of this Tribunal that for the statement of a Defence witness to be admitted pursuant to Rule 92 *bis*, that "witness must appear on the moving party's witness list" as envisaged by Rule 73 *ter* (B) (iii).<sup>63</sup> Because the Defence seeks leave to amend a list that this Chamber has never accorded any juridical recognition, its request is bereft of legal merit and must be denied. If the Defence wishes to have certain witnesses from its "global" witness list immigrate to its actual witness list for the purpose of adducing 92 *bis* evidence, it must file a proper motion in accordance with Rule 73 *ter* (E).

#### Defence request to expand scope of Witness T150's testimony

31. The Trial Chamber recalls the 19 October Decision in which the Chamber accepted the Defence submission that the reluctance of Witnesses T36 and T37 to testify constituted new circumstances warranting reconsideration of the Chamber's earlier restriction of T150's testimony.<sup>64</sup> The Chamber further recalls an informal communication sent by the Defence

<sup>62</sup> 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*, ICTR-99-44-T, Decision on Reconsideration of Protective Measures for Prosecution Witnesses, 30 October 2006, para. 2; *Karemera*, ICTR-99-44-T, 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.

<sup>63</sup> See *Prosecutor v. Gatete*, ICTR-2000-61-T, Decision on Defence and Prosecution Motions for Admission of Written Statements and Defence Motion to Postpone Filing of Closing Briefs, 24 June 2010, para. 16; citing *Prosecutor v. Nyiramasuhuko et al.*, ICTR-97-21-T, Decision on Prosecutor's Motion for Leave to be Authorised to Have Admitted the Affidavits Regarding the Chain of Custody of the Diary of Pauline Nyiramasuhuko Under Rule 92 *Bis*, 14 October 2004, para. 12; *Bizimungu*, Decision on the Prosecutor's Motion and Notice Pursuant to Rule 92*bis*(E), 17 November 2004, para. 6; *Karemera*, ICTR-98-44-T, Decision on Variance of the Prosecution Witness List, 13 December 2005, para. 19; *Rukundo*, ICTR-2001-70-T, Decision on Defence Motion to Present Additional Witnesses and to File Documentary Evidence Prior to the Close of its Case, 30 November 2007, para. 12.

<sup>64</sup> English Transcript of Trial Proceedings, 19 October 2010, p. 1, l. 27 – p. 2, l. 28: "Before the witness is brought in, this is the ruling of the Trial Chamber with regard to permission to vary the list of witnesses to allow T150 to testify on certain paragraphs of the indictment. On 7th October 2010 the Defence filed a motion requesting permission to vary a list of witnesses and for reconsideration of earlier decisions pertaining to the scope of Defence witness testimony pursuant to Rule 73 *ter* (E). In particular, the Defence requested that the Trial Chamber reconsider its decision of 4th June 2010 limiting the scope of the testimony of Defence Witness T150, and on 14th

on 18 October 2010 in which it confined its request to expand T150's testimony to paragraphs 16, 19 and 21 of the Indictment. Having examined the Defence Proofing Chart, the Trial Chamber noted that Witnesses T36 and T37 were scheduled to testify to paragraphs 16 and 19 of the Indictment, but not paragraph 21. Therefore, the Chamber allowed the Defence to examine T150 only with respect to paragraphs 16, 19 and 53. In view of this prior Decision, the Chamber concludes that this aspect of the Defence Motion is now moot.

Defence request to reconsider admitting T56 to its witness list

32. On the issue of whether to allow T56 to testify to paragraph 41 of the Indictment, the Trial Chamber recalls its prior reasoning in its 14 July Decision, wherein it held that

Rule 73 *ter* (B) (iii) (c) unambiguously requires the Defence to provide a list of its prospective witnesses, including points of the indictment to which each witness will testify. The reason for this mandatory language is simple: it provides the Prosecution and the Trial Chamber with a clear preview of the case the Defence will present, in order to avoid the element of surprise and facilitate the smooth conduct of proceedings. To suggest that the Defence is not subject to this binding disclosure obligation, and that its Proofing Chart merely provides an overview of the sphere of knowledge of its witnesses, would nullify the very purpose of Rule 73 *ter* (B) (iii) (c).<sup>65</sup>

This being noted, the Chamber further recalls that in the same decision, it was observed that

while the Chamber categorically rejects the Defence contention that it can willfully ignore its own Proofing Chart and reaffirms the principle that the Defence is expected to know its own case, the Chamber understands that occasionally a witness will not ultimately provide the testimony that was anticipated, for reasons that are not imputable to any error by the Defence. In such rare circumstances, and where an allegation remains unrebutted by adequate Defence evidence, the Trial Chamber considers that it may be in the interests of justice to allow another witness to provide such rebuttal. However, the onus lies on the Defence to clearly demonstrate why good cause exists to allow the

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July denying reconsideration or leave to appeal the 4th June 2010 decision. In support for its request for reconsideration the Defence notes that Defence Witnesses T36 and T37 have opted not to testify in this trial and explains that T150 is in a position to testify on issues that these witnesses would have addressed. Following a decision granting an extension of time to respond, the Prosecution filed a response on 15th October 2010 objecting to the Defence motion. Pointing to Defence proofing charts, the Prosecution submits that the Defence already has sufficient witnesses scheduled to testify to all the allegations in the indictment. In this oral decision, the Trial Chamber will only consider the issues related to the scope of the testimony of Defence Witness T150. A written decision will follow in due course addressing these and other issues. The Trial Chamber accepts that the decision of Witness -- the decisions of Witnesses T36 and T37 not to testify in this trial constitutes a new circumstance warranting reconsideration of the Trial Chamber's earlier decisions on the scope of the testimony of Defence Witness T150. The Trial Chamber notes that in any informal communication sent after the close of yesterday's session, the Defence clarified that it would like to have Witness T150 testify on indictment paragraphs 16, 19, and 21, in addition to paragraph 53. The Trial Chamber notes that according to the Defence proofing charts available, Defence Witnesses T36 and T37 were scheduled to testify with respect to indictment paragraphs 16 and 19, but not indictment paragraph 21. Therefore, the Trial Chamber will allow the defence, Witness T150, to testify with respect to indictment paragraph 16 and 19 in addition to paragraph 53. The Defence has not demonstrated that a new circumstance has arisen warranting reconsideration of the Trial Chamber's earlier decisions with respect to paragraph 21. That is the ruling of the Trial Chamber".

<sup>65</sup> 14 July Decision, para. 29.

supplemental testimony and specifically identify the points of the Indictment that the testimony will address.<sup>66</sup>

Thus, the crux of the issue to be resolved is whether the fresh assertion by the Defence that it expects to have only three witnesses testify on paragraph 41 (whereas its Proofing Chart indicated that more than 10 witnesses would testify to this paragraph) constitutes a "new fact" warranting the "exceptional" remedy of Reconsideration and a departure from the general rule that the Defence is expected to know its case when preparing its Proofing Chart.

33. On this issue, the Trial Chamber notes that the Prosecution has not contested the veracity of the Defence claim that it has suffered a diminution of its case. Rather, the Prosecution merely submits that it "would be highly prejudiced" if the Defence were "permitted to effectively abandon the disclosures" contained in its "unreliable proofing charts".<sup>67</sup> In the absence of any demonstration to the contrary, the Trial Chamber presumes the representations made by Defence Counsel, who are officers of this court, to have been made honestly and in good faith. For these reasons, and recalling that the Defence only seeks to have T56 testify with respect to one paragraph of the Indictment, the Chamber believes that in this instance the fundamental right of the Accused to present an adequate defence trumps the need for strict adherence to the projections contained in the Defence Proofing Chart. This being noted, the exceptional exercise of the Trial Chamber's discretion in reconsidering its prior Decisions based on the advent of new circumstances should not be read as providing the Defence with *carte blanche* to whimsically disregard its Proofing Chart in the future.

#### Defence request to admit T200 to its witness list

34. The Trial Chamber observes that the Prosecution has assented to the inclusion of T200 on the Defence witness list for the purpose of testifying to paragraph 23 of the Indictment, which the Chamber construes as a concession that such an inclusion would not prejudice the Prosecution. The Chamber also considers the explanation proffered by the Defence for the late disclosure of this witness—which was not contested by the Prosecution—to be plausible. The Chamber further notes that the addition of T200 would not cause the Defence to exceed four witnesses with respect to paragraph 23 (which has never had more than 4 witnesses according to the Defence Proofing Chart), and finds that the Defence has

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<sup>66</sup> 14 July Decision, para. 36.

<sup>67</sup> Response, paras. 75-79.

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sufficiently demonstrated the probity of his prospective evidence in relation to that paragraph. Finally, the Chamber notes that this request has been made several months prior to the forthcoming trial session. For these reasons, the Chamber concludes that the Defence has demonstrated good cause that it is in the interests of justice to include T200 on its witness list, in order to testify exclusively with respect to paragraph 23 of the Indictment.

**FOR THESE REASONS, THE CHAMBER**

**GRANTS** the Defence Motion in part;

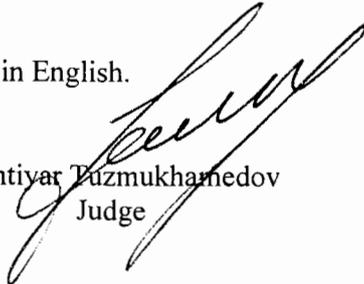
**ALLOWS** the Defence to add T56 and T200 to its witness list in order to testify exclusively with respect to paragraphs 41 and 23 of the Indictment, respectively;

**DENIES** the remainder of the Motion.

Arusha, 30 November 2010, done in English.



Solomy Balungi Bossa  
Residing Judge



Bakhtiyar Tuzmukhamedov  
Judge



Mparany Rajohnson  
Judge

[Seal of the Tribunal]

