



UNITED NATIONS  
NATIONS UNIES

ICTR-98-44D-T  
10-02-2011  
(5665-5659)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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OR: ENG

**TRIAL CHAMBER III**

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

**Registrar:** Adama Dieng

**Date:** 10 February 2011

**THE PROSECUTOR**

v.

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

JUDICIAL RECORDS ARCHIVES  
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**DECISION ON PROSECUTOR'S MOTION FOR DISCLOSURE OF DEFENCE  
WITNESS INFORMATION**

*(Rules 69 (C), 73 ter (B) and 54 of the Rules of Procedure and Evidence)*

**Office of the Prosecutor**  
Paul Ng'arua  
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**Defence Counsel**  
Vincent Courcelle-Labrousse  
Philippe Larochelle

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## INTRODUCTION

1. In its decision of 26 March 2010, the Trial Chamber established certain guidelines by which the Defence must be governed in discharging its disclosure obligations ("Disclosure Decision").<sup>1</sup>
2. On 19 January 2011, the Trial Chamber issued a decision granting a Defence motion for variation of its witness list that was filed on 20 December 2010.<sup>2</sup>
3. On 24 January 2011, the Defence filed their latest order of appearance for the last trial session of this case ("Order of Appearance").<sup>3</sup>
4. On 24 January 2011, the Prosecution filed a Motion claiming inadequate disclosure by the Defence and requesting the Trial Chamber to compel disclosure in accordance with the standards set out by this Chamber in its Disclosure Decision ("Motion").<sup>4</sup>
5. On 31 January 2011, the Defence filed a response to the Prosecution Motion ("Response").<sup>5</sup>
6. On 4 February 2011, the Prosecution filed a reply to the Defence response ("Reply").<sup>6</sup>
7. On 7 February 2011, the Defence made an additional filing to which it attached documentary evidence refuting a claim made in the Prosecution Reply ("Attachment").<sup>7</sup>

<sup>1</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, paras. 24-26.

<sup>2</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on "Nzabonimana's Motion for the Variation of Its Lists of Witnesses", 19 January 2011.

<sup>3</sup> Confidential Letter from Philippe Larochelle to Paul Ng'arua filed 24 January 2011.

<sup>4</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Motion for Disclosure of Defence Witness Information, 24 January 2011.

<sup>5</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Callixte Nzabonimana's Response to the Prosecutor's Motion for Disclosure of Defence Witness Information, 31 January 2011.

<sup>6</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Reply to Defence Response to the Prosecutor's Motion for Disclosure of Defence Witness, 4 February 2011.

<sup>7</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Callixte Nzabonimana's Filed Attachment of T200's PIS pursuant to the Prosecutor's Motion for Disclosure of Defence Witness Information, 7 January 2011.

## SUBMISSIONS OF THE PARTIES

### *Motion*

8. The Prosecution Motion argues that the Defence has failed to provide Personal Information Sheets ("PIS") for witnesses T300, T200 and T303, in accordance with its disclosure obligations as imposed by the Trial Chamber in its Disclosure Decision.<sup>8</sup>
9. The Prosecution Motion further alleges that the Defence has failed to provide statements or adequate notice of the prospective testimony of witnesses T72, T300, T193 and T54.<sup>9</sup>
10. The Prosecution Motion requests that the Defence be required to file "before the end of January 2011" the outstanding PIS' in accordance with its disclosure obligations set out in the Disclosure Decision.<sup>10</sup>

### *Response*

11. In its Response, the Defence asserts that the PIS' of witnesses T300, T200 and T303 and the statements of witnesses T300 and T193 have been previously disclosed.<sup>11</sup>
12. The Defence Response affirms that there are no statements for witnesses T54 and T72.<sup>12</sup>
13. The Defence argues in its Response that the scope of the prospective testimony of witnesses T54 and T72 is described in various lists of witnesses filed by the Defence.<sup>13</sup> The Defence asserts further that its motion for variation, dated 20 December 2010, provides detailed summaries for each of the witnesses' testimonies.<sup>14</sup>

### *Reply*

14. In its Reply, the Prosecution confirms that it is in receipt of PIS' for witnesses T300 and T303 and statements for witnesses T300, T303 and T193.<sup>15</sup>

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<sup>8</sup> Motion, para. 9.

<sup>9</sup> Motion, para. 7.

<sup>10</sup> Motion, para. 9.

<sup>11</sup> Response, paras. 4, 8.

<sup>12</sup> Response, para. 9.

<sup>13</sup> Response, para. 9.

<sup>14</sup> Response, para. 11.

<sup>15</sup> Reply, paras. 5-6.

15. The Prosecution submits in its Reply that it was unable to locate the PIS for witness T200 in the Defence's disclosure of witness statements. The Prosecution Reply therefore maintains its request for the disclosure of the PIS for witness T200.<sup>16</sup>
16. The Prosecution Reply does not address the Defence's assertion in its Response that it has provided adequate notice of prospective testimony for witnesses T54 and T72.

*Attachment*

17. In its Attachment, the Defence filed the PIS and statement for witness T200, enclosing correspondence demonstrating that the statement and the PIS were disclosed to the Senior Trial Attorney of the Nzabonimana Prosecution team on 8 October 2010.<sup>17</sup>

**DELIBERATIONS**

*Applicable Law*

18. Rule 69 (C) of the Rules of Procedure and Evidence ("Rules") 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;

... 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 46 (A) states that:

A Chamber may, after a warning, impose sanctions against a counsel if, in its opinion, his conduct remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice. This provision is applicable *mutatis mutandis* to Counsel for the prosecution.

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<sup>16</sup> Reply, paras. 7-8.

<sup>17</sup> Attachment, paras. 1-2.

*Preliminary Matters*

19. At the outset, the Trial Chamber notes that the Prosecution Reply was filed after the applicable deadline, with no explanation for the belated filing. While normally this would be grounds to ignore the pleading, the Trial Chamber observes that the Reply contains concessions by the Prosecution that help elucidate the factual record and thus simplify the matters to be adjudicated. Therefore, the Trial Chamber considers it to be in the interests of justice to consider the Reply on this occasion. Similarly, the Defence has elected to file a further attachment in response to the Prosecution Reply, despite there being no Rule providing for this and no established practice of such filings before this Chamber. However, because the Attachment also contains valuable information that further clarifies the factual record, the Trial Chamber likewise deems it to be in the interests of justice to accept it.

*Analysis*

20. The Prosecution Motion seeks redress for the alleged failure by the Defence to provide PIS' and witness statements or adequate notice of the prospective testimony of certain witnesses to be called during the forthcoming trial session.

Missing PIS'

21. The Trial Chamber is satisfied, in accordance with the available record, that PIS' for witnesses T300, T200 and T303 have already been disclosed by the Defence. The Prosecution Reply conceded that PIS' for witnesses T300 and T303 have previously been disclosed.

22. Moreover, the Trial Chamber finds that the Defence has conclusively demonstrated, in its Attachment, that the PIS for witness T200 was disclosed on 7 October 2010.

23. In light of these developments, the Trial Chamber finds that all of the Prosecution's requests for PIS' are moot.

Failure to Disclose Witness Statements

24. In its Reply the Prosecution acknowledged that it is in receipt of statements for witnesses T300 and T193, which were included in Annex 2 of Nzabonimana's Motion for the

Variation of Witnesses of 20 December 2010.<sup>18</sup> The Reply thus renders moot the Prosecution's original request for those statements.

25. With respect to the witness statements for witnesses T54 and T72, the Trial Chamber notes that Defence Counsel, as officers of this court, have affirmed in their response that there are no statements for these witnesses.<sup>19</sup> As previously recognised by this Trial Chamber, the relevant jurisprudence is clear that the Defence is not required to furnish witness statements that it has yet to obtain.<sup>20</sup> Absent any indication to the contrary, the Trial Chamber therefore accepts the Defence's representation on this issue. 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.

#### Adequate Notice of Testimony

26. The Trial Chamber observes that the Prosecution, in its Reply, did not maintain the accusation contained in its Motion that the Defence had failed to provide adequate notice of prospective testimony for witnesses T54 and T72, and the prayer for relief contained in the Reply did not seek redress in this regard. Therefore, the Trial Chamber considers that the Prosecution has implicitly abandoned this claim.

#### Misconduct of Counsel

27. The Prosecution has wasted the valuable time and resources of this Trial Chamber by filing a clearly frivolous motion. The record reveals that every item sought by the Prosecution in its Motion had been duly disclosed by the Defence. Moreover, even when the Defence clearly identified the impugned disclosure, the Prosecution erroneously maintained that the Defence had failed to divulge a document that it demonstrably had. The lamentable inability of the Prosecution to organise its case file is in itself a cause for concern. This concern is aggravated by the fact that when it believed the Defence disclosure to be incomplete, instead of directly communicating with the

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<sup>18</sup> Reply, paras. 6-7.

<sup>19</sup> Response, para. 9.

<sup>20</sup> *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.

*The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T

Defence as a matter of first recourse, it wasted the valuable time and resources of this Chamber by proceeding directly to litigation.

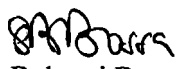
28. Recalling that the Prosecution has already recently been cautioned in relation to its very belated filing of a motion,<sup>21</sup> the Trial Chamber finds that the Prosecution has again obstructed the present proceedings. For these reasons, the Trial Chamber believes that the Prosecution's recent conduct warrants an escalated sanction by way of a formal warning under Rule 46 (A). Should this type of conduct persist in the future, the Prosecution will be liable to the imposition of more serious sanctions.

**FOR THESE REASONS, THE CHAMBER**

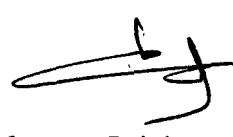
**DENIES** the Prosecution Motion; and

**WARNS** the Prosecution, in accordance with Rule 46(A), to desist from filing such frivolous Motions.

Arusha, 10 February 2011, done in English.

  
Solomy Balungi Bossa  
Presiding Judge

  
Bakhtiyar Tyumukhamedov  
Judge

  
Mparany Rajohnson  
Judge

[Seal of the Tribunal]



<sup>21</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Prosecutor's Motion for Prohibition of Conduct Contrary to Rule 77 (A) (II) of the Rules of Procedure and Evidence, 10 February 2011, para. 27.