



UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

**Before Judges:** Lee Gacuga Muthoga, *Presiding*  
Seon Ki Park  
Robert Fremr

**Registrar:** Adama Dieng

**Date:** 12 April 2011

THE PROSECUTOR

v.

Ildéphonse NIZEYIMANA

CASE NO. ICTR-00-55C-T

DECISION ON PROSECUTOR'S URGENT MOTION CONCERNING  
DEFICIENCIES OF THE PRE-TRIAL DEFENCE BRIEF

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## INTRODUCTION

1. The trial commenced on 17 January 2011 with the opening statements of both the Prosecution and the Defence. The Prosecution closed its case-in-chief on Friday, 25 February 2011, after having called 38 witnesses. The Defence case is scheduled to commence on 9 May 2011.

2. On 15 March 2011, the Chamber ordered the Defence team of the Accused, Ildéphonse Nizeyimana ("the Defence" and "the Accused" respectively) to provide the Prosecution with "the relevant list of witnesses".<sup>1</sup> On 16 March 2011, the Defence filed a "preliminary" witness list, sequence and a collection of information sheets for the Defence witnesses ("16 March List").<sup>2</sup> On 28 March 2011, the Defence filed its Pre Defence Brief ("PDB").<sup>3</sup>

3. On 31 March 2011, the Office of the Prosecutor ("Prosecution") filed a motion requesting the Chamber to order the Defence to comply with Rule 73ter of the Rules of Procedure and Evidence ("Rules").<sup>4</sup> The Prosecution submits that the PDB on 28 March 2011 does not provide proper notice to the Prosecution of the Defence case.<sup>5</sup>

4. More in particular, the Prosecution submits that the PDB is deficient with respect to the following matters: (1) the Defence impermissibly altered the number of witnesses contained in its initial, 16 March List, by 10 additional witnesses in its PDB,<sup>6</sup> (2) the witness list does not include a time estimate, identifying information and functional witness summaries for various witnesses,<sup>7</sup> (3) witness KEN01 contained in the 16 March List is missing from the PDB,<sup>8</sup> (4) there are problems with regards to the pseudonyms of two witnesses,<sup>9</sup> (5) the PDB does not contain a statement of admissions and other matters not in dispute,<sup>10</sup> and (6) the PDB does not contain a statement of contested matters of fact or law.<sup>11</sup>

<sup>1</sup> Order Regarding Urgent Nizeyimana Defence Motion for Clarification (15 March 2011 Order), 15 March 2011.

<sup>2</sup> "Preliminary List of Witnesses and Sequence of Appearance", 16 March 2011.

<sup>3</sup> Nizeyimana Pre Defence Brief, 28 March 2011.

<sup>4</sup> Prosecutor's Urgent Motion Concerning Deficiencies of the Pre-Defence Brief Pursuant to Rules 54, 73, 73bis and 73ter ("Prosecution Motion"), 31 March 2011.

<sup>5</sup> Prosecution Motion, para. 8.

<sup>6</sup> Prosecution Motion, para. 12.

<sup>7</sup> Prosecution Motion, para. 13.

<sup>8</sup> Prosecution Motion, para. 14(i).

<sup>9</sup> Prosecution Motion, para. 14(ii) and (iii).

<sup>10</sup> Prosecution Motion, paras. 15-19.

<sup>11</sup> Prosecution Motion, paras. 20-28.



5. The Prosecution further submitted the following matters: (1) the two members of the Prosecution team listed in the PDB witness summaries will not be testifying at trial,<sup>12</sup> (2) the Prosecution takes the absence of the Accused from the testimony sequence and list of witnesses in both the 16 March List and the PDB as notice that the Accused has decided against testifying,<sup>13</sup> (3) the time estimate provide by the Defence with respect to the testimonies of its witnesses is not "a realistic projection of the time that will be consumed",<sup>14</sup> and (4) the Prosecution does not accede to the Defence submission that it provided the Prosecution with sufficient notice of alibi, or the Defence's position that the systematic fabrication of evidence in Rwanda is relevant to this trial,<sup>15</sup> and finally (5) the Prosecution requests that the Defence provide the Chamber and the Prosecution with copies of the written statements of the witnesses the Defence intends to call.<sup>16</sup>

6. On 2 April 2011, the Defence responded to the Prosecution Motion by submitting that its investigations are still under way, and the Defence is therefore unable to provide a finalized witness list and witness summaries at this time, unless the trial is delayed.<sup>17</sup> The Defence further reiterates: (1) the need for having the two members of the Prosecution testify,<sup>18</sup> (2) that it has no admissions,<sup>19</sup> and (3) that it cannot provide submissions on matters of facts and law, as the Prosecution's theory of the case is unclear and contradictory to what is contained in the Indictment.<sup>20</sup>

7. The Defence further argues that the Accused is under no obligation at this point in time to inform the Prosecution of his intent to testify at trial and has thus not waived the right to do so.<sup>21</sup> The Defence submits that its time projections for the testimony of its witnesses are reasonable<sup>22</sup> and that it has provided the Prosecution with sufficient notice of its intent to present alibi evidence.<sup>23</sup>

8. On 8 April 2011, the Prosecutor filed its Reply to the Defence Response, in which it submits, *inter alia*, that the ongoing nature of the Defence investigations cannot form a

<sup>12</sup> Prosecution Motion, para. 10.

<sup>13</sup> Prosecution Motion, para. 11.

<sup>14</sup> Prosecution Motion, para. 37.

<sup>15</sup> Prosecution Motion, paras. 33-36.

<sup>16</sup> Prosecution Motion, para. 40.

<sup>17</sup> Response to Prosecutor's Urgent Motion Concerning Deficiencies in the Pre-Defence Brief Pursuant to Rules 54, 73, 73bis, and 73ter ("Defence Response"), 2 April 2011, paras. 2, 6.

<sup>18</sup> Defence Response, para. 4.

<sup>19</sup> Defence Response, para. 8.

<sup>20</sup> Defence Response, paras. 9-11.

<sup>21</sup> Defence Response, para. 5.

<sup>22</sup> Defence Response, para. 12.

<sup>23</sup> Defence Response, para. 13.



justification for the failure to comply with the Rules and the Chamber's directions.<sup>24</sup> According to the Prosecution, the Defence has provided scant information with respect to both the background and intended testimony of various witnesses and an expected time-line for disclosure thereof.<sup>25</sup>

## DELIBERATIONS

### *Compliance with Rule 73ter*

9. The Prosecution submits that the PDB contained a series of deficiencies and anomalies that require correction by the Defence, including, *inter alia*, the absence of a statement of matters not in dispute and a statement of contested matters of law and fact.<sup>26</sup> The Defence submits that it has no admissions and cannot provide a statement of law and fact, as it "does not know the case he has to meet on many issues."<sup>27</sup>

10. Rule 73ter (A) and (B) provide the Chamber with the discretion to hold "a Conference prior to the commencement by the Defence of its case." During the Conference, the Chamber may order the Defence, before the start of its case, to file:

- (i) Admissions by the parties and a statement of other matters which are not in dispute;
- (ii) A statement of uncontested matters of fact and law;
- (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; and
  - d) The estimated length of time required for each witness;
- (iv) A list of exhibits the Defence intends to offer in its case, stating where possible whether or not the Prosecution has any objection as to authenticity.

11. The Chamber notes that the elements set out in Rule 73ter are provided for the purpose of streamlining the trial proceedings by delineating the boundaries of the trial prior to the commencement of the Defence case, and by identifying potential areas of agreement between the parties. Without a concerted effort by the Defence at filing a substantive

<sup>24</sup> Prosecutor's Reply to Defence Response to Prosecutor's Urgent Motion Concerning Deficiencies of the Pre-Defence Brief Pursuant to Rules 54, 73, 73bis, and 73ter ("Prosecution Reply"), 8 April 2011, paras. 5-7.

<sup>25</sup> Prosecution Response, paras. 10-13; Prosecutor Reply, paras. 14-15.

<sup>26</sup> Prosecution Motion, paras. 15-32.

<sup>27</sup> Defence Response, paras. 8-11.



submission on the elements above, there can be no proper preparation or focus at the start of the Defence case. The Chamber finds that the Defence has received sufficient notice of the Prosecution's case by means of the Indictment, the Pre-Trial Brief and, most importantly, the case-in-chief. The justification by the Defence that it "does not know the case he has to meet on many issues" is therefore without merit.

12. *In lieu* of an explicit Conference held prior to the start of the Defence case, the Chamber, pursuant to Rule 73ter, orders the Defence to re-submit its Pre Defence Brief, which is to include (1) admissions by the parties and a statement of matters which are not in dispute, (2) a statement of uncontested matters of facts and law, (3) identifying information and summaries of all of the witnesses the Defence intends to call during its case.

13. The Chamber notes that there exists no general formulation which can determine whether the Defence witness summaries are sufficiently detailed; their sufficiency can only be determined in relation to the actual testimony.<sup>28</sup> The Chamber notes that a more detailed witness summary enables the Prosecution to conduct a more targeted investigation. While the Chamber recognizes the ongoing nature of the Defence investigations, it expects the Defence to provide the Prosecution with informative witness summaries as soon as practically possible, and in any case no later than 21 days before the scheduled testimony of the particular witness.

#### *Variance of Witness List*

14. The Prosecution submits that the Defence impermissibly increased the number of witnesses it intends to call by 10 witnesses in its PDB, following the filing of the 16 March List.<sup>29</sup> The Defence responded that the witness list and summaries "are not complete" as the investigations are ongoing.<sup>30</sup>

15. Rule 73ter (E) permits the Defence to move the Trial Chamber for leave to vary its witness list, after the commencement of its case, if considered to be in the interest of justice. As a preliminary point, the Chamber notes that the Defence filed its increased witness list prior to the commencement of its case. The Chamber notes that while it is important for the Prosecution to have sufficient notice of the list of witnesses in order to effectively prepare for

<sup>28</sup> *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Sufficiency of Defence Witness Summaries, 5 July 2005, para. 5; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Prosecutor's Submissions Concerning Edouard Karemera's Compliance with Rule 73ter and Chamber's Orders, 2 April 2008, para. 4.

<sup>29</sup> Prosecution Motion, para. 12.

<sup>30</sup> Defence Response, para. 2.

cross-examination, the Defence filed its PDB, including the altered witness list, six weeks before the start of its case.

16. The Chamber considers the variance to have been communicated with sufficient time for the Prosecution to prepare for cross-examination. The Chamber notes, however, that any change to the Defence witness list following the commencement of the Defence case should proceed via a request made to the Chamber, accompanied by a reasoned justification, in accordance with Rule 73*ter* (E).

17. The Chamber further notes the absence of any identifying information regarding witnesses 50, 54, 55, 56 and 57. As the Chamber clearly indicated in its 15 March 2011 Order, the Defence is to provide the Prosecution with the "same information as was disclosed to the Defence by the Prosecution at the equivalent stage of the proceedings."<sup>31</sup> The Chamber accordingly orders the Defence to comply immediately with its 15 March 2011 Order.

18. Lastly, the Chamber takes notice of the 57 witnesses contained in the PDB witness list and reminds the Defence that they have an allocated amount of time within which the testimony of the witnesses is to be completed, namely six weeks. The Defence has to operate within the confines of this schedule and should thus be mindful of the time frame when selecting and calling their witnesses to testify.

*Members of the Prosecution on the Defence Witness List*

19. The Defence included two members of the trial team of the Prosecution, Ms. Yasmine Chubin and Mr. Jean Baptiste Nsanzimfura, on its PDB witness list.<sup>32</sup> The Defence intends to call both members of the Prosecution in order to question them about alleged discrepancies between Witness ZAV's recorded statement of November 2009 and his testimony provided during trial.<sup>33</sup> The Prosecution opposes this.<sup>34</sup>

20. The Chamber notes that the existence of discrepancies between a recorded statement and the witness's testimony does not, in and of itself, provide grounds for allowing the challenging party to call as a witness the recorder of the interview.<sup>35</sup> The Trial Chamber notes that a *prima facie* showing of misfeasance must be made before the recorder of a witness

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<sup>31</sup> 15 March 2011 Order.

<sup>32</sup> PDB, p. 50.

<sup>33</sup> Defence Response, para. 4.

<sup>34</sup> Prosecution Motion, para. 10.

<sup>35</sup> *Ibid.*



statement may be called and questioned about alleged contradictions.<sup>36</sup> The Defence has made no showing of misfeasance on the part of the Prosecution.

21. Moreover, while there may exist discrepancies in the instant case between Witness ZAV's prior written statement and his testimony, any such discrepancy goes to the determination of the credibility of a witness, which assessment is to be made by the Chamber at the end of the case. Under these circumstances, the Chamber finds that there is no basis for the Defence to call the two members of the Prosecution to testify and orders the names of Ms. Chubin and Mr. Nsanzimfura be removed from the witness list.

#### *Testimony by the Accused*

22. The Prosecution submits that it regards the absence of the Accused on the PDB witness list as notice that "the Accused has made his election not to testify."<sup>37</sup> The Defence responded that the Accused has not decided whether he intends to testify and has waived no right to do so.<sup>38</sup>

23. Rule 85(C) provides that an accused may appear as a witness in his own defence. The Chamber notes that the Accused is not included on the witness list contained in the PDB. The Chamber further notes that the absence of such an indication on the PDB witness list does not constitute a waiver of the Accused's right to testify. The Chamber, however, invites the Defence to indicate whether the Accused intends to testify or not within the six weeks allotted, as soon as practically possible.

#### *Notice of Alibi*

24. The Prosecution "[w]ithout responding in any detailed substance", submits that it does not accede to the Defence position that the Defence provided sufficient notice of alibi.<sup>39</sup> The Defence responded that it has been "more than diligent in its alibi disclosure."<sup>40</sup>

25. The Chamber recalls that Rule 67(A) requires the Defence "[a]s early as reasonably practicable and in any event prior to the commencement of trial," to notify the Prosecution of any "defence of alibi" or "special defence". The Chamber further recalls that "[i]f any party discovers additional evidence or information or materials which should have been produced

<sup>36</sup> *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-T, Decision on the Defence Motion for Disclosure of Exculpatory Information with respect to Prior Statements of Prosecution Witnesses ("Zigiranyirazo Decision"), 6 July 2006, para. 15.

<sup>37</sup> Prosecution Motion, para. 11.

<sup>38</sup> Defence Response, para. 5.

<sup>39</sup> Prosecution Motion, para. 40.

<sup>40</sup> Defence Response, para. 13.



earlier pursuant to the Rules, it shall promptly notify the other party and the Trial Chamber of the existence of the additional information or materials.”<sup>41</sup> The failure to provide notice prior to the commencement of trial does not limit the right of the accused to rely on the alibi defence.<sup>42</sup> The Chamber may, however, take this failure into account when weighing the credibility of the alibi.<sup>43</sup>

26. The Chamber notes that the Defence gave notice of its intent to present an alibi defence on 12 January 2011, before the commencement of trial. The Chamber also notes the various disclosures were made by the Defence subsequently.<sup>44</sup> The Chamber does take note, however, of the changes and additions to the amount of Defence witnesses listed in the PDB as alibi witnesses, a number of which without further identifying information. As the Chamber stated in its Decision on 7 February 2011, “when and if the Defence obtains additional relevant, including full geographical particulars for alibi witnesses, it is required to disclose this information.”<sup>45</sup> The Chamber thus orders the Defence to comply with Rule 67(A) and promptly disclose to the Prosecution any relevant information pertaining to the alibi witnesses, and in any case no later than two days after this Order.

#### *List of Defence Exhibits*

27. The Prosecution submits that it is not likely to object to the exhibits contained within the Defence exhibit list annexed to the PDB, provided it receives copies of various items listed therein.<sup>46</sup> The Prosecution further submits that it “relies on the 28 March list of exhibits as the final list.”<sup>47</sup> The Defence does not address this issue in its Response.

28. Rule 73ter (B) (iv) allows the Chamber to order the Defence to file, before the commencement of the case, “[a] list of exhibits the Defence intends to offer in its case.” The Chamber notes that the Defence filed a list of exhibits to its PDB.<sup>48</sup> While Rule 73ter (B) (iv) does not provide for the receipt of copies of the exhibits, the Chamber does recognize how the copies can be useful to the Prosecution in the preparation of its case. The Chamber

<sup>41</sup> Rule 67(D).

<sup>42</sup> *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Judgement (TC), 16 May 2003, para. 20, citing *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Decision on Motion for an Order Requesting Compliance by the Defence with Rules 67(A)(ii) and 67 (C)(TC), 15 June 1998, paras. 237-239.

<sup>43</sup> *Ibid.*

<sup>44</sup> See e.g., Response to Prosecutor's Urgent Motion for the Disclosure of Particulars of a Defence of Alibi Pursuant to Rules 54 and 67(A)(ii), 31 January 2011, paras. 9, 11.

<sup>45</sup> Decision on Prosecutor's Urgent Second Motion for Disclosure of the Particulars of a Defence of Alibi Pursuant to Rules 54 and 67(A)(ii), 7 February 2011, para. 7 (citations omitted).

<sup>46</sup> Prosecution Motion, paras. 29-32.

<sup>47</sup> Prosecution Motion, para. 32.

<sup>48</sup> PDB, p. 54.



therefore invites the Defence to provide the Prosecution with copies of the exhibits listed in its PDB. The Chamber finally notes that the Defence, pursuant to Rule 73*ter* (B) has until the commencement of its case to file a final exhibit list.

*Disclosure of Witness Statements*

29. The Prosecution submits that the Defence, where in possession thereof, should provide it with copies of the witness statements.<sup>49</sup>

30. Rule 73*ter* (B) provides the Trial Chamber with the discretion to "order the Defence to provide the Prosecutor with copies of the written statements of each witness whom the Defence intends to call." Although the Defence is under no obligation to take statements from its witnesses, it must disclose any statements which have been taken.<sup>50</sup> To the extent that any statements given by the witnesses identified by the Defence exist, the Defence must disclose the statements forthwith.

**FOR THESE REASONS, THE CHAMBER**

**GRANTS** the Motion in part.

**ORDERS** the Defence to:

1. Re-submit a Pre Defence Brief, including (a) admissions by the parties and a statement of matters which are not in dispute, (b) a statement of uncontested matters of facts and law, (c) identifying information by 20 April 2011;
2. Provide the summaries of all the witnesses the Defence intends to call during its case as soon as practically possible, and in any case no later than 21 days before their intended testimony;
3. Comply with the Chambers Order of 15 March 2011 and provide the Prosecution with the identifying information of all the witnesses the Defence intends to call during its case;
4. Remove the members of the Prosecution team in this case, Ms. Chubin and Mr. Nsanzimfura, from the Defence witness list;
5. Disclose to the Prosecution any additional information obtained regarding the alibi defence within two days of this Order;

<sup>49</sup> Prosecution Motion, paras. 33-36.

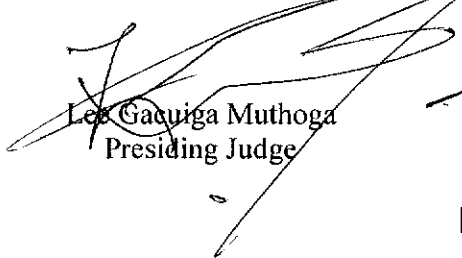
<sup>50</sup> *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Alleged Deficiencies in the Kabiligi, 30 October 2006, para. 5 (citation omitted).



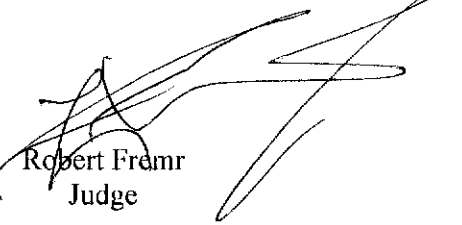
6. Provide the Prosecution with copies of the Exhibits listed in the PDB;
7. Provide the Prosecution with copies of witness statements it has in its possession; and
8. As soon as practically possible, advise the Chamber whether or not the Accused intends to testify within the six weeks allotted to the Defence case.

**DENIES** the remainder of the Motion.

Arusha, 12 April 2011, done in English.

  
Leoluca Muthoga  
Presiding Judge

  
Seon-Ki Park  
Judge

  
Robert Fremr  
Judge

