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ICTR-98-44D-T  
19-10-2011  
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UNITED NATIONS  
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OR: ENG

**TRIAL CHAMBER III**

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

**Registrar:** Adama Dieng

**Date:** 19 October 2011

**THE PROSECUTOR**

v.

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

JUDICIAL RECORDS/ARCHIVES  
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**DECISION ON THIRD DEFENCE MOTION FOR THE ADMISSION OF A WRITTEN  
STATEMENT AND ACCOMPANYING DOCUMENTS**  
*(Rules 73ter, 89 (C) and 92 bis of the Rules of Procedure and Evidence)*

**Office of the Prosecutor**  
Paul Ng'arua  
Simba Mawere  
Mary Diana Karanja

**Defence Counsel**  
Vincent Courcelle-Labrousse  
Philippe Larochelle

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## INTRODUCTION

1. On 2 September 2011, the Defence filed a motion seeking to admit a statement provided by Eugene Mwitirehe (“Mr. Mwitirehe”), and six photographs (“the documents”) taken by Mr. Mwitirehe pursuant to Rule 92 *bis* and 89(C) of the Rules of Procedure and Evidence (“Rules”) (“Third 92 *bis* Motion”).<sup>1</sup>
2. On 8 September 2011, the Prosecution filed its response (“Response”).<sup>2</sup>
3. On 12 September 2011, the Defence filed its reply (“Reply”).<sup>3</sup>

## SUBMISSIONS OF THE PARTIES

### *Motion*

4. The statement of Mr. Mwitirehe contains technical information regarding Mr. Mwitirehe’s participation in the construction of the Cyakabili – Nyabikenke road in 2010/2011 and the six photographs depict the purported road during the construction phases.
5. In seeking to have the material admitted into evidence pursuant to Rules 92 *bis* and 89 (C),<sup>4</sup> the Defence submits that the material satisfies the requirements of Rule 92 *bis* (A) as it does not go to proof of acts and conduct of the Accused.<sup>5</sup> It proposes that should the Trial Chamber find that the formal requirements of Rule 92 *bis* (B) are not met, the Trial Chamber should order the Registry to verify the documents pursuant to Rule 92 *bis* (B).<sup>6</sup> The Defence notes that the documents are accompanied by a sworn statement by the author, and the

<sup>1</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana’s Third Motion for the Admission of A Written Witness Statement and Accompanying Documents (“Third 92 *bis* Motion”), 2 September 2011.

<sup>2</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor’s Response to Nzabonimana’s Third Motion for the Admission of A Written Witness Statement and Accompanying Documents (“Response”), 8 September 2011.

<sup>3</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana’s Reply to the Prosecutor’s Response to Nzabonimana’s Third Motion for the Admission of A Written Witness Statement and Accompanying Documents (“Reply”), 12 September 2011.

<sup>4</sup> Third 92 *bis* Motion, para. 1.

<sup>5</sup> Third 92 *bis* Motion, para. 4.

<sup>6</sup> Third 92 *bis* Motion, paras. 6-8.

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photographs are signed by the author, with annotations about the locations where they were taken.<sup>7</sup>

6. The Defence further submits that the documents are relevant and have probative value in accordance with the provisions of Rule 89 (C).<sup>8</sup> The document contains information pertaining to the condition of the road between Cyakabili and Nyabikenke which the Prosecution alleges was used by the Accused in April 1994.<sup>9</sup> The Defence contends that “the driving time from the French Embassy in Kigali and Nyabikenke” is a vital issue in assessing the Prosecutor’s allegation that the Accused went to Nyabikenke between 6 and 12 April 1994.<sup>10</sup> It asserts that the photographs show significant improvement of the Cyakabili – Nyabikenke road between 2010 and 2011, which has consequently reduced the travelling time on that road.<sup>11</sup> It adds that the photographs provide an optical view of the improved road conditions which the Chamber must take into consideration when making a determination on the issue.<sup>12</sup>

#### Response

7. The Prosecution objects to the admission of the documents. It contends that the untimely filing of the Defence Motion is not only an abuse of process but demonstrates lack of due diligence by the Defence, since the documents relate to an issue which has been present since the start of this case.<sup>13</sup> It contends that the Defence had ample notice through the Indictment, Prosecution Pre-Trial Brief, and disclosure of Prosecution Witness Statements of the Prosecution’s allegation that the Accused travelled from Kigali to Gitarama *Préfecture* where crimes were committed between 6 and 12 April 1994.<sup>14</sup> According to the Prosecution, the Defence has been aware of this issue, since it raised an alibi defence alleging that on these dates the Accused was in fact at the French Embassy and did not travel to Gitarama.<sup>15</sup> The

<sup>7</sup> Third 92 *bis* Motion, para. 11.

<sup>8</sup> Third 92 *bis* Motion, paras. 5-6, 9-10.

<sup>9</sup> Third 92 *bis* Motion, para. 5.

<sup>10</sup> Third 92 *bis* Motion, para. 5.

<sup>11</sup> Third 92 *bis* Motion, paras. 5 & 10.

<sup>12</sup> Third 92 *bis* Motion, para. 5.

<sup>13</sup> Response, paras. 4.i, 7-10. The Prosecution refers to the Oral Decision of 7 April 2011 in which the Trial Chamber declared the Defence case closed. *See* Transcript of 7 April 2011, [Status Conference], p. 3.

<sup>14</sup> Response, paras. 5-6.

<sup>15</sup> Response, para. 6.

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Prosecution adds that the documents do not prove that “Nzabonimana did not travel to Gitarama or Nyabikenke between 6 and 12 April 1994”.<sup>16</sup>

8. The Prosecution notes that the documents are unreliable and have no probative value, pursuant to Rule 89 (C), since they will not assist the Chamber in “assessing whether Nzabonimana went to Nyabikenke between 6 and 12 April 1994 [...]”,<sup>17</sup> as they do not show the road’s condition in 1994.<sup>18</sup>
9. The Prosecution is also of the view that the documents should be excluded pursuant to Rule 92 *bis* (A)(ii)(c) as they relate to a central issue in this case which is subject to cross-examination by a party.<sup>19</sup> It further submits that the documents do not comply with the requirements of Rule 92 *bis* (B)(i)(a) or (b). It notes that the documents were witnessed by an “interested party” and not an authorised person.<sup>20</sup>
10. In conclusion, the Prosecution submits that the Defence Motion be denied but, should the Motion succeed, it alternatively requests to cross-examine the witness.<sup>21</sup>

### Reply

11. The Defence submits that the documents could not have been procured earlier as they relate to the construction of the Cyakabili – Nyabikenke road in 2010/2011.<sup>22</sup> It reasserts its position that in making a finding on the “driving time from the French Embassy in Kigali to Gitarama,” an assessment of the road’s condition must be made by the Chamber.<sup>23</sup>
12. The Defence adds that the site visit that took place between 5 and 9 September 2011 included a trip from the French Embassy to Nyabikenke *commune*. This is a new circumstance which occurred after the close of the Defence case, thus warranting admission of the documents,<sup>24</sup>

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<sup>16</sup> Response, para. 39.

<sup>17</sup> Response, paras. 4, 11-13

<sup>18</sup> Response, para. 40.

<sup>19</sup> Response, paras. 4, 14 -23.

<sup>20</sup> Response, paras. 4, 24-28

<sup>21</sup> Response, para 14-23.

<sup>22</sup> Reply, para. 7.

<sup>23</sup> Reply, para. 8.

<sup>24</sup> Reply, para. 9.

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and the 7 April 2011 Decision declaring that its case is closed does not preclude it from seeking admission of documentary evidence.<sup>25</sup>

13. In addition, the Defence recalls that it is permitted to submit addenda to its closing brief dealing exclusively with matters arising from the site visit. It observes that the “distance from the French Embassy to Nyabikenke is an issue that i[t] intends to file submissions on and will rely on the documents whose admission it seeks in making these submissions.”<sup>26</sup>
14. The Defence challenges the Prosecution’s stance with respect to the reliability and probative value of the photographs in question.<sup>27</sup> It concedes that the photographs do not show the condition of the road in 1994 but notes that t[hey] demonstrate the repairs embarked on the Cyakabili – Nyabikenke road. These repairs show that the road “was in much worse condition in 1994 than it was in 2011.” It thus notes that the travelling time observed by the Chamber during the site visit was shorter than the travelling time in 1994.<sup>28</sup>
15. The Defence objects to the Prosecution’s request for cross-examination of Mr. Mwitirehe, noting that the Prosecution fails to state which credibility issues require cross-examination and that fails to show any prejudice that it would suffer for lack of cross-examination.<sup>29</sup>
16. Finally, it notes that the documents were duly attested to by Mr. Philippe Larochelle, a qualified attorney in Quebec, who is authorised to attest documents in conformity with the requirements of Rule 92 *bis*.<sup>30</sup>

## DELIBERATIONS

### *Applicable Law*

17. Rule 92 *bis* (A) gives a Trial Chamber the discretion to admit, in whole or in part, the evidence of a witness in the form of a written statement, *in lieu* of oral testimony, on the condition that it goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment. Further, the written statement shall adhere to certain formal requirements as mandated by Rule 92 *bis* (B). In the exercise of its discretion, a Chamber is

<sup>25</sup> Reply, para. 9.

<sup>26</sup> Reply, para. 10.

<sup>27</sup> Response, paras. 12-15.

<sup>28</sup> Reply, paras. 13 & 15.

<sup>29</sup> Reply, paras. 16-17.

<sup>30</sup> Reply, para. 18.

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guided by the criteria for and against admission, set out in Rule 92 *bis* (A) (i) and (ii), respectively, which include whether it is appropriate for the witness to attend cross-examination. The lists are non-exhaustive.

18. After making a determination that a written statement is admissible in written form, sub-Rule 92 *bis* (E) bestows a further discretionary power upon the Chamber to require the witness to appear for cross-examination. Cross-examination shall be granted if the statement touches upon a critical element of the case, or goes to a live and important issue between the parties, as opposed to a peripheral or marginally relevant issue.<sup>31</sup>
19. In order for a statement to be admissible under Rule 92 *bis*, the general requirements of relevance and probative value, applicable to all types of evidence under Rule 89 (C), must also be satisfied.<sup>32</sup> Under Rule 89(C), the Chamber has broad discretion to admit any evidence which it deems to be of relevant and probative value.<sup>33</sup> Evidence will be considered relevant, for the purposes of Rule 89(C), if it can be shown that a connection exists between the evidence and proof of an allegation sufficiently pled in the indictment.<sup>34</sup> Evidence tendered before the Chamber has probative value if it tends to prove or disprove an issue and has sufficient *indicia* of reliability.<sup>35</sup>

<sup>31</sup> *Prosecutor v. Limaj et al.*, Public Version of Case No. IT-03-66-T, Decision on Prosecution's Motion for Provisional Admission of Witness Statements under Rule 92*bis*. Dated 13 October 2004 (TC), 15 December 2004, para. 7; *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on Rebuttal Evidence (TC), 2 April 2003, para. 8; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to have Written Statements Admitted Under Rule 92 *bis* (TC), 21 March 2002, para. 24.

<sup>32</sup> *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecution's Motion for the Admission of Written Witness Statements Under Rule 92 *bis* (TC), 9 March 2004, para. 12.

<sup>33</sup> *Karemera et al.*, Decision on the Prosecution Motion for Admission Into Evidence of UNAMIR Documents (TC), 20 October 2007, paras. 5-7; *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, Decision on Appeal Regarding Statement of a Deceased Witness (AC), 21 July 2000, para. 20; *Prosecutor v. Jeun De Dieu Kumuhanda*, Case No. ICTR-99-54A-T, Decision on Kamuhanda's Motion to Admit Evidence Pursuant to Rule 89 of the Rules of Procedure and Evidence (TC), 10 February 2003, para 10.

<sup>34</sup> *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Admit Documents Authored by Enoch Ruhigira (TC), Decision, 26 March 2008, para. 3 ("Karemera Decision 26 March 2008"), citing *Nyiramasuhuko et al.*, Decision on the Appeals by Pauline Nyiramasuhuko and Arsene Shalom Ntahohali on the "Decision on Defence urgent Motion to Declare Part of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), July 2004.

<sup>35</sup> *Karemera* Decision 26 March 2008, para. 3. A possible criteria for determining reliability was outlined in *Bagosora et al.*, Decision on Request to Admit United Nations Documents into Evidence Under Rule 89(C) (TC), 25 May 2006, para. 4. Indicia of reliability include: the authorship of the document; whether it is an original or a copy; the place from which the document was obtained in conjunction with its chain of custody; whether its contents are supported by other evidence; and the nature of the document itself, such as signatures, stamps, or the form of the handwriting. See *Bagosora et al.*, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole (TC), 13 September 2004, para. 9; and *Bagosora et al.*, Decision on request

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20. The discretion exercised by a Chamber under Rules 92 *bis* and 89 (C) must be governed by the Accused's right to a fair trial.<sup>36</sup>
21. While a Chamber may always request verification of the authenticity of evidence obtained out of court, pursuant to Rule 89 (D), "to require absolute proof of a document's authenticity before it could be admitted would be to require a far more stringent test than the standard envisioned by sub-rule 89 (C)."<sup>37</sup>

### **Analysis**

#### *Preliminary Issue*

22. At the outset, the Trial Chamber wishes to recall that it is well established that for a statement to be admitted pursuant to Rule 92 *bis*, the witness must appear on the moving party's witness list.<sup>38</sup> The Trial Chamber observes that the statement sought to be admitted by the Defence is made by a certain Mr. Mwitirehe, a person who has never appeared on the Defence Witness List in this case. The Trial Chamber hence considers that the Defence has not properly established a basis for its application under Rule 92 *bis*. Further, the Trial Chamber recalls that Rule 92 *bis* provides specific procedure for the admission of such statements.<sup>39</sup> A party cannot circumvent these requirements by seeking to admit statements

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to Admit United Nations Documents into Evidence Under Rule 89(C) (TC), 25 May 2006, para. 4 (and sources cited therein).

<sup>36</sup> *Prosecutor v. Bizimungu et al.*, Case No. 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 (TC), 1 May 2008, para. 20. Article 19 (1) and 20 (2) of the Statute of the International Criminal Tribunal for Rwanda read as follows: 19 (1) The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses; 20 (2) In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute.

<sup>37</sup> *Delalic et al.*, Decision on Admissibility, para. 20.

<sup>38</sup> *Bizimungu et al.*, Decision on the Prosecutor's Motion and Notice Pursuant to Rule 92 *bis* (E) (TC), 17 November 2004, paras. 4-8. See also *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Admit Statement of Gratien Kabiligi (TC), 4 February 2010, para. 4, citing *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Prosecutor's Motion for Leave to Be Authorised to Have the Affidavits Regarding the Chain of Custody of the Diary of Pauline Nyiramasuhuko Under Rule 92 *bis* (TC), 14 October 2004, para. 12; *Karemera et al.*, Decision on Variance of the Prosecution Witness List, 13 December 2005, para. 19; *The Prosecutor v. Rukundo*, Case No. ICTR-2001-70-T, Decision on Defence Motion to Present Additional Witnesses and to File Documentary Evidence Prior to the Close of its Case (TC), 30 November 2007, para. 12.

<sup>39</sup> *The Prosecutor v. Bagosora et al.*, Decision on Admission of Statement of Kabiligi Witness under Rule 89 (C), 14 February 2007, para. 3, citing *Bagosora et al.*, Decision on Admission of Statements of Deceased Witnesses, 19

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pursuant to the general requirements of Rule 89 (C).<sup>40</sup> Accordingly, the Rules do not allow the Trial Chamber to admit witness statements in lieu of oral testimony unless the requirements of Rule 92 *bis* are satisfied. The Chamber therefore turns to consider whether these requirements are met.

*Whether the documents go to proof of a matter other than the acts and conduct of the accused?*

23. The Trial Chamber notes that on a plain reading of Mr. Mwitirehe's statement, it contains a technical description of Mr. Mwitirehe's participation in the construction of the Cyakabili – Nyabikenke road in 2010/2011, whereas the photographs show the progress of the road construction.

24. The Trial Chamber notes that the Defence alleges that the “the driving time from French Embassy in Kigali to Nyabikenke, is an important issue to consider in assessing whether Nzabonimana indeed went to Nyabikenke between 6 and 12 April 1994 [...]”<sup>41</sup> The Trial Chamber, however, believes that the Defence seeks to use the documents to establish whether or not the Accused was able to drive from Kigali to Nyabikenke and back, in April 1994. The Trial Chamber observes that this is an issue which goes to the conduct of the Accused since it is centred around the Prosecution allegation that the Accused travelled from Kigali to Gitarama *Préfecture* where crimes were committed between 6 and 12 April 1994,<sup>42</sup> a period for which the Defence has raised an alibi that the Accused was at the French Embassy in Kigali.

25. In the Trial Chamber's view, it is highly probable that the Defence is seeking to use the documents to buttress its alibi defence for the Accused, which is a pivotal issue in the present case. The Trial Chamber recalls that in *Simba*, it was held that evidence of alibi “goes

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January 2005, para. 15; *Bagosora et al.*, Decision on Defence Motion for Admission of Statement of Witness LG-1/U-03 Under Rule 92 *bis* (TC), 11 December 2006, para. 3. See also *The Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-2001-69-I, Oral Decision on the Defence Request to Use a Document During the Testimony of Defence Witness Marie Goretti Uwingabire, 2 July 2008, p. 3.

<sup>40</sup>*Bagosora et al.*, Decision on Admission of Statement of Kabiligi Witness under Rule 89 (C), 14 February 2007, para. 4.

<sup>41</sup> Motion, para. 5.

<sup>42</sup> Response, paras. 5-6.



*Decision on Third Defence Motion for the Admission of a Written Statement and Accompanying Documents*

directly to proof of the acts or conduct of the Accused”.<sup>43</sup> Indeed, material tending to contradict evidence that the accused carried out certain acts has been held to relate to ‘proof of the acts and conduct of the accused’ for the purposes of Rule 92 *bis*.<sup>44</sup> The Trial Chamber therefore finds that the documents authored by Mr. Mwitirehe do not satisfy the threshold requirement of Rule 92 *bis* (A).

*Formal Requirements of Rule 92 bis (B)*

26. With respect to Rule 92 *bis* (B), the Trial Chamber notes that the Defence has submitted a statement authored by Mr. Mwitirehe and attested by Mr. Philippe Larochelle, Co-Counsel for the Accused Nzabonimana. The Trial Chamber notes that under general principles of law, an Advocate should not certify documents in a case in which he appears as Counsel. The Trial Chamber is concerned that Defence Counsel in the instant proceedings elected to certify the declaration in question, thereby attesting to a fact and in essence providing testimony. The Trial Chamber considers this to be improper. In light of these observations, the Trial Chamber finds that the documents were not attested in accordance with the provisions of Rule 92 *bis* (B). Accordingly, the Trial Chamber considers that the requirements of Rule 92 *bis* (B) are not met.

*Relevance and Probative Value*

27. While the statement and photographs proposed for admission into evidence show that there was construction along the Cyakabili – Nyabikenke road in 2010/2011 before the Trial Chamber conducted its site visit between 5 and 9 September 2011, they do not assist the Chamber in assessing the condition of the road in April 1994. The Trial Chamber therefore considers that the proposed statement and photographs have no relevance or probative value.

28. In addition, the Trial Chamber recalls that witnesses, including the Defence Investigator, have testified at length about the road conditions in Rwanda in 1994. The Defence had the opportunity to present the documents in the course of the presentation of its evidence but

<sup>43</sup> *Prosecutor v. Simba*, ICTR-01-76-T, Decision on the Admission of a Written Statement, 25 January 2005, para. 5.

<sup>44</sup> *Nshogoza*, para. 7; citing *Bizimungu*, Decision on Justin Mugenzi’s Motion to Admit Transcript Extracts of General Romeo Dallaire’s Evidence in the *Ndindiliyama* Proceedings, 4 November 2008, para. 24; *Bizimungu*, Decision on Jerome-Clement Bicamumpaka’s Motion for the Statement of the Deceased Witnesses, Faustin Nyagahima, to be Accepted as Evidence, 30 May 2007, para. 14; *Bagosora*, 92 *bis* Decision, para. 16.

chose not to do so. Instead it opted to submit the present documents through the instant Motion, after the closure of the evidentiary phase of the trial. The Trial Chamber recalls that the admission of documents at this late stage of the trial can only be allowed in exceptional circumstances,<sup>45</sup> none of which became apparent to the Trial Chamber as it was considering the Motion. Accordingly, the Trial Chamber opts to exercise its discretion in accordance with Rule 89 (C) and thereby does not allow their admission into evidence at this late stage of the proceedings.


*Cross-examination by the Prosecution*

29. Since the Trial Chamber has denied the admission of the documents in question into the evidentiary record of this trial via Rule 92 *bis* and Rule 89 (C), consequently the issue of whether or not to permit cross-examination by the Prosecution becomes moot.

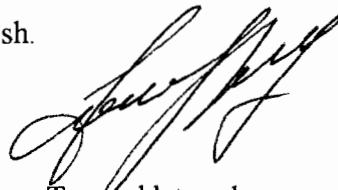
**FOR THESE REASONS, THE TRIAL CHAMBER**

**DENIES** the Defence Motion in its entirety.

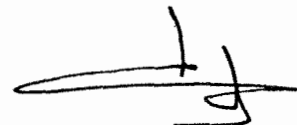
Arusha, 19 October 2011, done in English.



Solomy Balungi Bossa  
Presiding Judge



Bakhtiyar Tuzmukhamedov  
Judge



Mparany Rajohnson  
Judge

[Seal of the Tribunal]



<sup>45</sup> *Bagosora et al.*, Decision on Bagosora motion to tender statement of Witness B-06 (TC), 3 April 2007, para. 4; Decision on Bagosora motion for disclosure of agenda (TC), 11 April 2007, para. 5.