



UNITED NATIONS
NATIONS UNIES

ICTR-98-44D-T
02-12-2011
8901-8896

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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AM

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 02 December 2011

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

**DECISION ON DEFENCE MOTION TO STRIKE OUT OFFENDING SECTIONS OF
THE PROSECUTOR'S CLOSING BRIEF**

Pursuant to Rule 73 of the Rules of Procedure and Evidence

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INTRODUCTION

1. The Prosecution commenced its case on 9 November 2009 and closed on 13 April 2010 after calling a total of 19 witnesses, in a total of 25 Trial Days. The Trial Chamber allowed the Prosecution to call one rebuttal witness.¹
2. The Defence case commenced on 15 April 2010 and closed on 5 May 2011 after calling a total of 40 witnesses, in a total of 61 Trial Days.
3. The Parties filed their respective closing briefs on 5 July 2011. Following a directive from the Trial Chamber, the Defence filed an abridged brief on 13 July 2011.
4. On 13 September 2011, the Defence filed a corrigendum to the abridged brief.
5. On 21 October 2011, the Defence filed a motion requesting the Trial Chamber to strike out certain sections of the Prosecution closing brief pursuant to Rule 73 of the Rules of Procedure and Evidence (“Rules”).²
6. On 26 October 2011, the Prosecution filed its response.³
7. On 3 November 2011, the Defence filed its reply.⁴
8. On 20 and 21 October 2011, the parties presented their closing arguments before the Trial Chamber.

SUBMISSIONS OF THE PARTIES

Defence Motion

9. The Defence requests the Trial Chamber to strike out sections of the Prosecution Closing Brief (“PCB”) which it contends are “erroneous, misleading and [...] amounting to misrepresentation of the evidence.”⁵ It notes that the Prosecution has failed to exercise due diligence by filing a corrigendum to amend these errors.⁶ It argues that if not corrected, these errors will cause “gross injustice” to Callixte Nzabonimana.⁷
10. Specifically, the Defence challenges the Prosecutor’s assertion that the majority of its witnesses were survivors of the genocide, noting that only 6 of the 20 witnesses called

¹ Rebuttal witness testified on 5-6 May 2011.

² *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Callixte Nzabonimana’s Motion to Strike Out Offending Sections of the Prosecution Closing Brief (“Motion”), 21 October 2011.

³ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor’s Response to Callixte Nzabonimana’s Motion to Strike Out Offending Sections of the Prosecution Closing Brief and Annex A (“Response”), 21 October 2011.

⁴ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Callixte Nzabonimana’s Reply to the Prosecutor’s Response to Callixte Nzabonimana’s Motion to Strike Out Offending Sections of the Prosecution Closing Brief (“Reply”), 3 November 2011.

⁵ Motion, para. 6.

⁶ Motion, paras. 7-10.

⁷ Motion, para. 8.

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were survivors.⁸ It notes that the Prosecution misrepresents the Accused's influence in Gitarama by citing incorrect footnotes which do not support the Prosecution's evidence,⁹ that certain paragraphs¹⁰, footnotes¹¹ and assertions by the Prosecution¹² are misleading while certain dates are misrepresented.¹³ The Defence further contends that the Prosecution's reference to portions of a document entitled *Le Chateau* is improper and an attempt to "sneak" into evidence the entire document since it was not admitted in evidence.¹⁴

11. The gist of the Defence submission is that the Prosecution presents distorted arguments in its brief, cites wrong footnotes and refers to incomplete paragraphs to support its allegations against the Accused. It points out what it considers are inconsistencies in the PCB. The Defence further asserts that the Prosecution misquotes certain witnesses, presents half-truths and contorts the evidence as it deems fit. The Defence argues that the evidence presented by the Prosecution is bound to mislead the Trial Chamber and should be disregarded.¹⁵

Prosecution Response

12. The Prosecution objects to the Defence motion, noting that it falls outside the scope of Rule 86 (B) and paragraph 1.6 of the Practice Direction on Length and Timing of Closing Briefs and Closing Arguments ("Practice Direction").¹⁶ It submits that the Rules and Practice Directions do not provide for the right of reply to the opposing parties' brief.¹⁷ The Prosecution argues that the Defence motion amounts to a reply to the PCB. It further notes that the parties had ample opportunity to respond to each other's briefs during the hearing of the oral arguments held on 20 and 21 October 2011. The Prosecution therefore asserts that the Defence has suffered no prejudice and that there is no basis for the filing of the instant motion.¹⁸

⁸ Motion, para. 11, citing to paragraph 3 of the PCB.

⁹ Motion, paras. 12-14.

¹⁰ Motion, paras. 15-19 referring to paras 22, 27, 28, 35, 37 and footnotes 39, 53 and 77.

¹¹ Footnotes 39, 53 and 77.

¹² Motion, paras. 91-96, also See paragraph 338 and footnote 545, 563, and 566.

¹³ Motion, paras. 15-19.

¹⁴ Motion, para. 20.

¹⁵ Motion, paras. 25-90. The Defence disputes the contents of the following paragraphs and footnotes of the PCB i.e. paragraphs; 80, 83, 85, 86, 92, 98, 105, 108, 113, 137, 138, 141, 145, 148, 152, 155, 161, 163, 176, 178, 182, 186, 189, 208, 209, 217, 226, 228, 237, 263, 272, 273, 296, 300, 303, 309, 319, 323, 324, 326, 329, 330 and 331 and footnotes 147, 157, 153, 167, 168, 173, 188, 189, 185, 187, 200, 204, 219, 477, 488, 490, 498, 499, 503.

¹⁶ Practice Direction on Length and Timing of Closing Briefs and Closing Arguments.

¹⁷ Response, paras. 5-6, 17-18.

¹⁸ Response, para. 7-8

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13. To its Response, the Prosecution appends Annex A to demonstrate that the majority of the alleged errors are minor oversights that do not mislead the Defence or the Trial Chamber.¹⁹ It notes that there are no material errors in its PCB and that the minor inaccuracies are neither misleading nor cause any misrepresentations of facts or prejudice the Defence.²⁰
14. The Prosecution therefore contends that the Defence motion be disallowed as it has not demonstrated any basis for striking out any paragraphs of the PCB.²¹

Defence Reply

15. The Defence denies the Prosecution assertion that its motion is a reply to the PCB,²² stating that even if it is a reply, “there is no express rule prohibiting the filing of one.”²³ It contends that “the fact that Rule 113 allows for a reply brief in appellate proceedings shows that a reply brief in the trial phase can fall under Rule 73.”²⁴ It argues that as “officers of the court” the Defence is obliged “to bring to the Chamber’s attention any misleading statements made by opposing counsel.”²⁵ It further asserts that the “offending paragraphs” highlighted stand to prejudice the Accused’s right to a fair trial.²⁶ It recalls that during the presentation of its oral arguments it stated that there were fundamental errors in the PCB which it intended to address in a separate motion.²⁷ Regarding Annex A to the Prosecution Response, the Defence submits that where the Prosecution attempts to minimise the errors in the PCB, the Defence leaves the matter to the Chamber’s discretion and requests that its motion be granted.²⁸

DELIBERATIONS

Applicable Law

16. Rule 73 provides:

Subject to Rule 72, either party may move before a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused. The Trial Chamber, or a Judge designated by the Chamber from among its members, may rule on such motions

¹⁹ Response, para. 21.

²⁰ Response, paras. 22-24.

²¹ Response, paras. 25.

²² Reply, para. 9.

²³ Reply, para. 12.

²⁴ Reply, para. 12.

²⁵ Reply, para. 10.

²⁶ Reply, para. 11.

²⁷ Reply, para. 13.

²⁸ Reply, para. 14.

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based solely on the briefs of the parties, unless it is decided to hear the motion in open Court.

Analysis

17. At the outset, the Trial chamber expresses its concern regarding the unnecessary confidential filing of the instant motion. It is the Trial Chamber's considered view that the transparency of the proceedings is ensured by the public filing of documents and confidential filings should be reserved for exceptional circumstances, such as where the protection of a witness is at stake.²⁹ The Chamber finds that the Defence has provided no reason to support such a filing and directs that the confidential filing be lifted and the motion be filed publicly.
18. As regards the merits of the Defence request, the Trial Chamber observes that in its motion the Defence extensively provides counterarguments to several paragraphs and footnotes referenced by the Prosecution in its PCB. The Trial Chamber notes that the Defence argues that several of the footnote references are either wrong or do not support the assertions of the Prosecution in its PCB. It suggests that as a result, the Prosecution evidence is misrepresented, distorted or contains half-truths which will inevitably confuse the Trial Chamber and more so cause prejudice to the Accused.
19. The Trial Chamber notes that the filing of closing briefs by the parties is governed by Rule 86 (B) and paragraph 1.6 of the Practice Direction on Length and Timing of Closing Briefs and Closing Arguments which provides that "a single time limit for filing briefs shall be set, requiring the parties to file their briefs simultaneously." The relevant provisions do not envisage the filing of a response or reply by either party to the opposing party's briefs. Contrary to those provisions, the Defence motion amounts to an improper attempt to file a *de facto* response to the Prosecution Closing Brief. The Trial Chamber recalls that it is composed of professional Judges capable of assessing the parties' submissions pertaining to the evidence adduced by the parties and the Indictment.
20. Furthermore, the Chamber recalls that the parties had the opportunity to present any counter arguments, in rebuttal and/or rejoinder during hearing of the oral arguments on 20 and 21 October 2011. The Chamber observes that the Defence opted not to address

²⁹ See for example *The Prosecutor v. Dominique Ntawukilyayo*, Case No. ICTR-05-82, Decision on Defence Extremely Urgent Application for an Extension of Time for Filing Response to Prosecution Motion for Protective Measures (TC), 17 February 2009, para. 3; *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T, Order for Transfer of Detained Witnesses (TC), 1 March 2007, para. 5.

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what it considers as “errors or misrepresentations” during the closing arguments and now requests the Chamber to allow it to address these matters in its instant motion.

21. The Trial Chamber therefore considers that the Defence motion lacks merit, is frivolous and an abuse of process. Accordingly, it is denied.

FOR THESE REASONS, THE TRIAL CHAMBER

DENIES the Defence Motion;

DIRECTS the Registrar to;

- (i) lift the confidential filing of the Defence Motion;
- (ii) file the Motion publicly.

Arusha, 02 December 2011, done in English.



Solomy Balungi Bossa

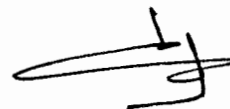
Presiding Judge



Bakhtiyar Tuzmukhamedov

Judge

(absent at time of signature)



Mparany Rajohnson

Judge

[Seal of the Tribunal]

