



UNITED NATIONS
NATIONS UNIES

ICTR-98-44D-T
04-04-2012
(9347-9342)

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OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 4 April 2012

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THE PROSECUTOR

v.

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

**ORDER TO THE PARTIES CONCERNING SUBMISSIONS ON POTENTIALLY
EXCULPATORY MATERIAL CONTAINED ON THE CD-ROM DISCLOSED BY
THE PROSECUTION ON 17 FEBRUARY 2012**

Rule 68(A) of the Rules of Procedure and Evidence

Office of the Prosecutor

Paul Ng'arua
Memory Maposa
Simba Mawere
Mary Diana Karanja

Defence Counsel

Vincent Courcelle-Labrousse
Philippe Larochelle

[Handwritten initials]

1. On 14 February 2012, the Defence sent a letter to the Prosecution requesting, *inter alia*, transcripts of testimony from three previous ICTR trials.¹ On 17 February 2012 the Prosecution responded and sent to the Defence a CD-ROM containing the requested material ("CD-ROM").² On 12 March 2012, the Defence filed "Nzabonimana's Motion for Appropriate Relief in Light of the Prosecution's Delayed Disclosure to the Accused of Exculpatory Evidence" ("Motion I").³ The Prosecution filed a Response on 14 March 2012, submitting that the materials disclosed are not exculpatory and that the Defence has not proven *prima facie* how the materials are exculpatory ("Response I").⁴
2. On 15 March 2012, the Trial Chamber issued a *Proprio Motu* Order, ordering the Defence to file specific and comprehensive submissions regarding potentially exculpatory material contained on the CD-ROM by 19 March 2012, and the Prosecution to respond by 23 March 2012.⁵
3. In lieu of complying with this Order, on 19 March 2012, the Defence filed "Nzabonimana's Motion in Light of the Trial Chamber's *Proprio Motu* Order of 15 March 2012" ("Motion II").⁶ The Defence asserted that it lacked the "time and resources" to comprehensively address the disclosures contained on the CD-ROM.⁷
4. The Prosecution filed its Response on 21 March 2012, reiterating that the materials in the CD-ROM were not exculpatory ("Response II").⁸
5. On 22 March 2012, the Chamber invited the Registrar to make submissions on the human and material resources available to the Defence in 2012 ("Order to Registry").⁹
6. On 26 March 2012, the Registrar filed its submission ("Registrar's Submission").¹⁰ The Registrar informed the Chamber that Defence Counsel and Detention Management Section ("DCDMS") received a request from Lead Counsel on 8 February 2012 for additional

¹ Letter from Defence Counsel to Prosecution Counsel, dated 14 February 2012.

² *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecution Response to Defence Request Dated 14 February 2012, 17 February 2012.

³ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Motion for Appropriate Relief in Light of the Prosecution's Delayed Disclosure to the Accused of Exculpatory Evidence, 12 March 2012.

⁴ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Motion for Appropriate Relief in Light of the Prosecution's Delayed Disclosure to the Accused of Exculpatory Evidence ("Response I"), 14 March 2012, para. 11.

⁵ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, *Proprio Motu* Order to the Parties Concerning Nzabonimana's Motion for Appropriate Relief in Light of the Prosecution's Delayed Disclosure to the Accused of Exculpatory Evidence, dated 15 March 2012.

⁶ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Motion in Light of the Trial Chamber's *Proprio Motu* Order of 15 March 2012, 19 March 2012.

⁷ Motion II, paras. 6-7.

⁸ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Motion in Light of the Trial Chamber's *Proprio Motu* Order of 15 March 2012, 21 March 2012, para. 1.

⁹ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Order to the Registry for Submissions Concerning Resources Available to the Defence in 2012, 22 March 2012.

¹⁰ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Registrar's Submission in Respect of the Order to the Registry for Submissions Concerning Resources Available to the Defence in 2012, 26 March 2012.

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resources to comprehensively address the disclosures contained on the CD-ROM.¹¹ On 10 February 2012, Defence Lead Counsel recommended to DCDMS an allocation of 150 hours for one Legal Assistant or alternatively 75 hours for each of two Legal Assistants and 30 hours for Lead Counsel or Co-Counsel.¹² On 13 February 2012 DCDMS accepted the Defence request as it was considered reasonable in terms of material and human resources.¹³ On 14 and 16 February 2012, the contracts of two Legal Assistants were renewed for a period ending on 31 March 2012, and for a total allocation of 150 hours.¹⁴

7. The Registrar also submitted that Lead Counsel is assigned for all stages of the case and that Co-Counsel is assigned for the whole trial stage and should remain available until judgement delivery.¹⁵ Neither Lead Counsel nor Co-Counsel need be reassigned.¹⁶
8. On 30 March 2012 the Defence filed a request for leave to respond to the Registrar's submissions ("Defence Request").¹⁷ That same day, the Chamber issued an Order allowing the Defence to respond to the Registrar's submissions, also granting the Prosecution an opportunity to make submissions and inviting the Registry to reply ("Order on Registry's Submissions").¹⁸
9. On 2 April 2012, the Defence filed a document entitled, "Motion in Response to the Registrar's Submissions dated 26 March 2012" ("Defence Submission").¹⁹ The Defence asserts that the Registrar's Submissions of 26 March 2012 were deficient, inaccurate and incomplete because they do not take into account the activities carried out by the Defence on behalf of Nzabonimana.²⁰ The Defence lists the tasks undertaken by the Defence in 2012.²¹ The Defence further submits that the structure in place for the allocation of resources for the Defence is insufficient and may risk Nzabonimana's fair trial rights.²² The Defence thus claims that it is not possible to make in-depth and meaningful submissions on the CD-ROM material.²³

¹¹ Registrar's Submission, para. 4. The Chamber notes that this date precedes the date the CD-ROM was delivered, on 17 February 2012.

¹² Registrar's Submission, para. 6.

¹³ Registrar's Submission, para. 7.

¹⁴ Registrar's Submission, para. 10.

¹⁵ Registrar's Submission, para. 8.

¹⁶ Registrar's Submission, para. 8.

¹⁷ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Defence Request for Leave to Respond to the Registrar's Submissions dated 26 March 2012 ("Defence Request"), 30 March 2012.

¹⁸ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Order of Defence Request for Leave to Respond to the Registrar's Submissions dated 26 March 2012, 30 March 2012.

¹⁹ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Motion in Response to the Registrar's Submissions dated 26 March 2012 ("Defence Submission"), 2 April 2012.

²⁰ Defence Submission, paras. 6-8.

²¹ Defence Submission, para. 7-8.

²² Defence Submission, paras. 12-17.

²³ Defence Submission, paras. 18-21.

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10. The Prosecution filed submissions that same day (“Prosecution Submission”).²⁴ The Prosecution asserts that no resource related prejudice exists for the Defence. Further, any complaint about a lack of resources on the part of the Defence requires a showing that the Defence requested such resources from the Registry. Any resulting disputes are governed by Article 30 of the Directive on the Assignment of Counsel, which provides that the Defence must “first exhaust the avenues of redress open to him under the Directive before seeking redress from the Trial Chamber”.²⁵
11. The Registrar filed further submissions on 3 April 2012 (“Registrar’s Further Submissions”).²⁶ The Registrar denies the Defence assertion that he misled the Chamber in his 26 March 2012 Submission.²⁷ The Registrar reiterates that Lead Counsel and Co-Counsel remain assigned to the case.²⁸ Furthermore, the Registrar approved in its entirety the 8 February 2012 Defence request for additional resources.²⁹ The Defence never requested additional resources after the disclosure of the CD-ROM, and did not request that the contracts of support staff be renewed after their contracts expired on 31 March 2012.³⁰ The Registrar notes that “[i]t is not the practice of the Registry to volunteer resources to Defence teams” and that the Registry relies on the Defence to detail any exceptional circumstances which warrant allocation of additional resources. If the Defence makes a request for additional resources, the Registry will consider the submission.³¹ Lastly, the Registrar submits that Defence Counsel has not shown that he has exhausted the remedies available under the Directive on the Assignment of Defence Counsel, and did not challenge the lump-sum payment system during the proceedings.³²

ANALYSIS

12. As a preliminary matter, the Chamber notes that the Defence entitled its response to the Registrar’s 26 March 2012 Submission as a “Motion”. In the first paragraph of the Defence filing, the Defence states that “[t]he Defence hereby submits its response to the Registrar’s submission”. The Chamber will therefore treat the Defence filing as its Response to the Registrar’s Submission, made in compliance with this Chamber’s Order of 30 March 2012, and not as a separate motion.

²⁴ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor’s Submissions Pursuant to Order on Defence Request for Leave to Respond to the Registrar’s Submissions dated 26 March 2012, 2 April 2012.

²⁵ Prosecution Submission, paras. 1-4.

²⁶ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Registrar’s Further Submissions on Resources Available to the Defence in 2012 (“Registrar’s Further Submissions”), 3 April 2012.

²⁷ Registrar’s Further Submissions, para. 3.

²⁸ Registrar’s Further Submissions, para. 2.

²⁹ Registrar’s Further Submissions, para. 3.

³⁰ Registrar’s Further Submissions, paras. 2-3.

³¹ Registrar’s Further Submissions, para. 3.

³² Registrar’s Further Submissions, paras. 6-7.

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13. Having considered the submissions of the parties and the Registrar, the Chamber considers that necessary and sufficient resources have been in place for the Defence team since the disclosure of the CD-ROM on 17 February 2012.
14. In reaching this conclusion, the Chamber notes that as set out by the Registry, Lead Counsel and Co-Counsel remain assigned to the case.³³ Furthermore, support staff, consisting of two legal assistants, was in place before the disclosure of these documents by virtue of Defence Counsel's 8 February 2012 request, which the Registrar approved in its entirety. The Chamber recalls that the Registry renewed the contracts of the two legal assistants on 14 and 16 February 2012, for a period ending on 31 March 2012. The Defence therefore had the two legal assistants on staff for approximately five weeks after it came into actual possession of the CD-ROM.³⁴ Internal decision-making as to how best to utilise the allocated resources fell to Defence Counsel.
15. The Chamber notes that the Defence requests that the Chamber direct the Registrar to grant additional resources to the Defence.³⁵ The Chamber recalls the Registrar's submission that the Defence has made no further requests for resources after the disclosure of the CD-ROM. The Chamber further recalls the Registrar's submission that the Registry relies on the Defence to initiate the request for additional resources. The Chamber considers that the Defence should act in accordance with established procedures if it believes additional resources are necessary.
16. Nevertheless, the Chamber considers that given the volume of the materials on the CD-ROM, it is in the interests of justice to allow the Defence additional time to make specific and comprehensive submissions on the potentially exculpatory material contained on the CD-ROM. Therefore, the Chamber orders the Defence to make these submissions by 13 April 2012. This time frame takes into account that as of 13 April 2012, the Defence will have been in actual possession of the CD-ROM for seven weeks, since 23 February 2012.³⁶
17. The Chamber emphasises that the content of the Defence submissions is to be strictly limited to the material contained on the CD-ROM and its potentially exculpatory value, if any. Any

³³ See Directive on the Assignment of Defence Counsel, 31 January 2010, Article 15(A) and (F) (Article 15(A) provides that Counsel "shall deal with all stages of procedure and all matters arising out of the representation of the suspect of accused or of the conduct of his Defence."; Article 15(F) provides that any reference to Counsel applies to both the lead Counsel and co-Counsel); Code of Professional Conduct for Defence Counsel, 31 January 2010, Article 4 (1) ("Counsel must advise and represent their client until the client duly terminates Counsel's position, or Counsel is otherwise withdrawn with the consent of the Tribunal).

³⁴ See Defence Request, para. 3 (stating that because the Defence "no longer has an office at the seat of the Tribunal" so the CD-ROM "was not received until 23 February 2012").

³⁵ See Defence Submission.

³⁶ See Defence Request, para. 3 (stating that because the Defence "no longer has an office at the seat of the Tribunal" so the CD-ROM "was not received until 23 February 2012").

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submissions as to potentially exculpatory materials contained on the CD-ROM which are not made by 13 April 2012 will be deemed waived by the Chamber.

18. The Chamber orders the Prosecution to file a response, if any, by 16 April 2012.

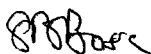
19. The Chamber orders the Defence to file a reply, if any, by 18 April 2012.

20. The Chamber considers that after receiving the parties' comprehensive submissions, it will be better placed to make a ruling regarding alleged violations of Rule 68 disclosure obligations, taking into account the current stage of the proceedings.

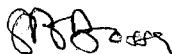
FOR THE ABOVE REASONS, THE CHAMBER

- I. **ORDERS** that the Defence file specific and comprehensive submissions on the potentially exculpatory material contained on the CD-ROM on or before 13 April 2012;
- II. **ORDERS** the Defence to strictly limit its submissions to the potentially exculpatory material contained on the CD-ROM;
- III. **ORDERS** that any submissions as to the potentially exculpatory material contained on the CD-ROM not received by 13 April 2012 will be deemed waived; and
- IV. **ORDERS** the Prosecution to file its response on the matter, if any, by 16 April 2012;
- V. **ORDERS** the Defence to file its reply on the matter, if any, by 18 April 2012; and
- VI. **DEFERS** its Decision on the pending Defence Motions until the receipt and consideration of these submissions.

Arusha, 4 April 2012, done in English.



Solomy Balungi Bossa
Presiding Judge



Bakhtiyar Tuzmukhamedov
Judge
(absent at the time of
signature)



Mparany Rajohnson
Judge

[Seal of the Tribunal]

