

ICR-95-1-T
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UNITED NATIONS



NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR
CRIMINAL REGISTRY
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TRIAL CHAMBER II

OR: ENG

Before: Judge William H. Sekule, Presiding Judge
Judge Yakov A. Ostrovsky
Judge Tafazzal H. Khan

Registry: Mr. John Kiyeyeu

**THE PROSECUTOR
VERSUS
CLEMENT KAYISHEMA
OBED RUZINDANA
Case No. ICTR-95-1-T**

**DECISION ON THE JOINT DEFENCE MOTION REQUESTING THE
INTERPRETATION OF RULES 67 OF THE RULES**

The Office of the Prosecutor:

Mr. Jonah Rahetlah
Ms. Brenda- Sue Thornton
Ms. Holo Makwaia

The Counsel for the Accused:

Mr. Andre Ferran (Counsel For Clement Kayishema)
Mr. Pascal Besnier (Counsel for Obed Ruzindana)

A handwritten signature in black ink, appearing to be 'to me'.

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SITTING AS Trial Chamber II of the International Criminal Tribunal for Rwanda ("the Tribunal"), composed of Judge William H. Sekule, Presiding, Judge Yakov A. Ostrovsky and Judge Tafazzal H. Khan;

CONSIDERING that in the instant case, the initial appearance of the accused Clement Kayishema took place on 31 May 1996 and that of the accused Obed Ruzindana on 29 October 1996; and hearing on merits commenced on 11 April 1997;

NOTING THAT the Prosecutor closed her case on 13 March 1998;

CONSIDERING THAT the Tribunal is currently hearing the evidence for the Defence;

BEING SEIZED of the Prosecutor's motion of 12 March 1998 requesting the Trial Chamber to interpret the notion of 'defence of alibi' and 'special defence' as stipulated in Rule 67 of the Rules of Procedure and Evidence (the "Rules");

TAKING INTO CONSIDERATION THAT by virtue of a letter dated 21 April 1998, the Defence Counsel for Obed Ruzindana had complied with the requirements of rule 67 of the Rules and submitted to the Prosecutor a list of the witnesses who would be deposed on behalf of the accused for the defence of alibi;

MINDFUL OF the imperative need to adhere to the provisions of the Statute of the Tribunal ("the Statute") and the Rules made thereunder;

TAKING INTO ACCOUNT the provisions of rule 67 of the Rules;

HAVING HEARD both parties on 12 May 1998;

PLEADINGS BY THE PARTIES:

A. Counsel for Clement Kayishema

The Defence Counsel submitted that the Defence was already prepared as to what arguments to use to fight the claims made by the Prosecution witnesses but he went on to state:

(a) that until the Prosecution closed their case, the defence did not know what they would use to counter the claims made by the Prosecution hence they could not decide

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whether they would use the defence of alibi or other special defences;

(b) that if the literal interpretation of rule 67 of the Rules was considered, it would be violative of the rights of the accused;

(c) that Defence is not in a position to know whether to plead defence of alibi and given that lack of clarity of the phrase 'defence of alibi' and 'special defence', the Defence would not use either of the defences. However, there was still a need to interpret the phrases 'defence of alibi' and 'special defence';

(d) that the Defence was in disagreement with the Prosecutor's submission that the Defence could only use the defence of alibi or special defence and no other;

(e) that the Defence was caught up in problems of disturbances prevailing in Africa hence it would be difficult to find people who would testify under oath that they saw the accused somewhere different from what the Prosecutor alleged;

(f) that the Defence should, however, be permitted to plead the defence of alibi by induction, that is, just by implication;

(g) that the Defence was also not sure whether it would be possible to have a mixed defence for one site;

B. Counsel for Mr. Obed Ruzindana

The Defence Counsel submitted:

(a) that since the Defence of Dr. Kayishema was different from the Defence of Mr. Ruzindana, each party could use all evidence at disposal;

(b) that although in March 1997 the Defence of Mr. Ruzindana had stated that they would use the defence of alibi in its broadest terms and had also confirmed this fact in their written statement to the Prosecutor in April 1998, they were not sure what was meant by the phrases 'defence of alibi' and 'special defence';

(c) that according to their interpretation, the phrase 'defence of alibi' excludes insanity and superior orders;

(d) that since both the Prosecutor and the Defence had provided their definitions of phrase 'defence of alibi', it was necessary for the Trial Chamber also to provide its

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own definition;

Response by the Prosecutor

The Prosecutor commented on the Defence submission pertaining to the selection of defence and stated:

- (a) that rule 67 did not oblige the Defence to use the defence of alibi or a special defence as the only defences but they could use any evidence available to them. However, if the Defence intended to use the defence of alibi or special defence, they were obliged to disclose to the Prosecution;
- (b) that if one considered rule 67(A)(ii) of the Rules, it was clear that in any event, the phrases 'defence of alibi' and the 'special defence' are common criminal law terms which do not need any interpretation;
- (c) that the concomitant use of the defence of alibi and that of special defence was in order and the Defence could use any or both of those defences at one crime site or several sites but subject to disclosure to the Prosecutor as per rule 67 of the Rules;
- (d) that rule 67(A)(ii)(a) of the Rules provides the context and the particular situation that might arise so the Defence could not claim that the defence of the accused was frustrated;
- (e) that given that rules were unambiguous, the Defence Counsel for Dr. Kayishema should explain why they have not collected their evidence;
- (f) that each party should provide its own interpretation of the Rules the way they understood them and then, the Trial Chamber could only affirm or not affirm a given definition;
- (g) that even if rule 67 of the Rules was not clear, the Defence should have requested an interpretation prior to the commencement of the trial.

Reply by the Defence Counsel for Dr. Clement Kayishema

The Defence Counsel disagreed with the Prosecutor's contention that rule 67 of the Rules was clear and reiterated the difficulties the Defence was facing as well as the need to have

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rule 67 interpreted in order to assist in the search for truth. The Defence Counsel further submitted that the parties were operating in a legal and particular context and were all undergoing a learning process in respect to international law, particularly with regard to serious crimes;

There was no response by Counsel for Mr. Obed Ruzindana.

Deliberations

This Trial Chamber has noted the arguments of both parties and is of the view that it cannot define rule 67 of the Rules in an abstract form without a specific problem to address.

It is also the view of the Trial Chamber that the Rules pertaining to the defence of alibi and special defence as provided in rule 67 of the Rules contain in themselves the definition envisaged by the drafters of the Rules.

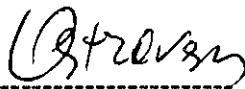
FOR ALL THE ABOVE REASONS

This Trial Chamber, therefore, DISMISSES the defence motion.

Signed at Arusha, 15 June 1998



William H. Sekule
Presiding Judge



Yakov A. Ostrovsky
Judge



Tafazzal H. Khan
Judge

SEAL OF THE TRIBUNAL




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