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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 12 May 2003

The PROSECUTOR

v.

Juvénal KAJELIJELI

Case No. ICTR-98-44A-T

DECISION ON THE PROSECUTION MOTION FOR LEAVE TO CALL REBUTTAL EVIDENCE (RULE 85)

Office of the Prosecutor
Ms. Ifeoma Ojemeni
Ms. Dorothée Marotine

Counsel for the Accused
Professor Lennox S. Hinds
Professor Nkeyi M. Bompaka

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Winston C. Matanzima Maqutu and Judge Arlette Ramaroson (the "Chamber");

BEING SEIZED of:

i. The "Prosecutor's Motion for Leave to Call Rebuttal Evidence Pursuant to Rule 85(A)(iii) of the Rules of Procedure and Evidence", filed on 11 April 2003;

ii. The "Corrigendum to the Prosecutor's Motion for Leave to Call Rebuttal Evidence Pursuant to Rule 85(A)(iii) of the Rules of Procedure and Evidence", filed on 15 April 2003 (the "Prosecution Motion");

iii. The "Defence Opposition to the Prosecutor's Motion for Leave to Call Rebuttal Evidence Pursuant to Rule 85(A)(iii) of the Rules of Procedure and Evidence", filed on 17 April 2003 (the "Defence Response");

iv. The "Prosecutor's Reply to Defence's Opposition to the Prosecutor's Motion for Leave to Call Rebuttal Evidence Pursuant to Rule 85(A)(iii) of the Rules of Procedure and Evidence", filed 28 April 2003 (The "Prosecution Reply");

v. The "Defence's Response to Prosecutor's Reply Re: Motion for Leave to Call Rebuttal Evidence Pursuant to Rule 85(A)(iii) of the Rules of Procedure and Evidence", filed on 1 May 2003 (The "Defence Additional Response");

vi. The letter containing an annex to the Defence Additional Response[1], filed on 5 May 2003 (The "Defence Additional Response Annex");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence,[2] particularly Rule 67(A)(ii)(a), Rule 85, and Rule 90(F) which are here set out for ease of reference:

> **Rule 67: Reciprocal Disclosure of Evidence**
> Subject to the provisions of Rules 53 and 69:
> (A)As early as reasonably practicable and in any event prior to the commencement of the trial:
> (ii)The defence shall notify the Prosecutor of its intent to enter:
> (a)The defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

[1] Letter from Professor Nkeyi Bompaka, Co-counsel for the Accused, addressed to Roger Kouambo, CMS Coordinator for Trial Chamber II, dated 2 May 2003.
[2] Unless otherwise stated, all references to Rules are to be construed as references to the Rules of Procedure and Evidence.

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Rule 85: Presentation of Evidence

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

(i) Evidence for the prosecution;
(ii) Evidence for the defence;
(iii) Prosecution evidence in rebuttal;
(iv) Defence evidence in rejoinder;
(v) Evidence ordered by the Trial Chamber pursuant to Rule 98.
(vi) Any relevant information that may assist the Trial Chamber in determining an appropriate sentence, if the accused is found guilty on one or more of the charges in the indictment.

(B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine him in chief, but a Judge may at any stage put any question to the witness.

(C) The accused may, if he so desires, appear as a witness in his own defence.

Rule 90: Testimony of Witnesses

(F) The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to:

(i) Make the interrogation and presentation effective for the ascertainment of the truth; and
(ii) Avoid needless consumption of time.

NOW CONSIDERS the matter solely on the basis of the written briefs of the Parties, pursuant to Rule 73(A) of the Rules;

PRELIMINARY MATTER

1. The Chamber notes that the Prosecution Reply was filed late without any justification. Such late filing upsets the work of the Chamber. On this occasion, and exceptionally, the Chamber will consider the late submission, however in future the Parties should be sure to file all submissions on time. Where no acceptable reason can be advanced for the late filing of a submission, that submission will be disregarded by the Chamber.

SUBMISSIONS OF THE PARTIES

The Prosecution Motion

2. The Prosecution seeks leave to present rebuttal evidence through six witnesses: GBW, GAR, GNL, GNK, GNJ and GNM. The justification it provides in support of its Motion can be summarised as follows:

(i) According to Rule 67(A)(ii)(a), the Defence should have given the Prosecution notice of its intention to enter the defence of alibi, but it failed to do so in a timely manner. The Prosecution was put on notice regarding the defence of alibi at a late stage, after it had already commenced its Case-in-chief;

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(ii) There was no full disclosure of "the particulars of the witnesses and any other evidence upon which the accused intends to rely to establish the alibi."[3]

(iii) The notice of alibi was placed under seal by the Defence, pursuant to the witness protection orders of the Chamber,[4] and the Prosecution only gained access to this information in January 2002;

(iv) Investigations in Ruhengeri Prefecture and neighbouring areas were hampered by the volcanic eruption in Goma,[5] and other security threats around Gisenyi;

(v) On 8 April 2002, two Prosecution witnesses, GBW and GAR, refused to travel to Arusha to testify, as a Rwandan organisation by the name of IBUKA withdrew its cooperation from the Tribunal. Two days later, the Prosecution notified the Chamber of its intention to call these witnesses as rebuttal witnesses and proceeded to close its case;

(vi) The particulars of around 60% of the 25 Defence Witnesses were only disclosed to the Prosecution in Court thus denying the Prosecution the opportunity to sufficiently prepare for the testimony of these witnesses.

3. Thus, the Prosecution submits that the Chamber should grant its request to call rebuttal evidence pursuant to Rule 85(A)(iii).

4. The Prosecution supplies a summary of the testimonies of the witnesses that it intends to call as rebuttal evidence.

The Defence Response

5. The Defence objects to the granting of the Prosecution Motion. In the Defence Response, the Chamber's attention is drawn to the following factual submissions:

(i) The Defence gave notice of its intent to enter the defence of alibi on 9 July 2001, one week after the Prosecution commenced its Case-in-chief and eighteen months before the first alibi witness was called.

(ii) The particulars of the alibi witnesses were placed under seal pursuant to the Chamber's Decision of 3 April 2001[6] regarding protective measure for witnesses.

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[3] The requirements of Rule 67(A)(ii)(a), as quoted by the Prosecution in its Motion.
[4] Prosecutor v. Kajelijeli, *Decision on the Prosecutor's Motion for Protective Measures for Witnesses*, 6 July 2000
[5] In January 2002 there was a massive volcanic eruption near Goma, in eastern DRC.
[6] Prosecutor v. Kajelijeli, *Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defence Witnesses*, 3 April 2001

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(iii) The particulars of the witnesses were unsealed on 21 December 2001. The Prosecution conducted interviews of the alibi witnesses located in Kenya and Rwanda between 9 March and 13 March 2002.

6. The Defence then sets out a detailed legal argument, supported by a list of authorities, which in summary amounts to the contention that in the first instance, the Prosecution has not justified the need for rebuttal evidence. In the second instance, even if the Chamber should find that the Prosecution was disadvantaged by the late filing of the notice of alibi and entitled to bring rebuttal evidence, the witnesses whom it has listed are not suitable for this purpose.

7. Based upon the chronology of facts that it has listed, the Defence contends that the instant case can be distinguished from the *Semanza* Decision[7] where Trial Chamber III allowed the Prosecution to call rebuttal evidence. In the present case, the Defence argues that the Prosecution had timely notice to conduct the necessary investigations to challenge the Defence alibi witnesses, and it was the Prosecution's "tardy" conduct in taking steps to obtain the identity and insure the confidentiality of the Defence Witnesses, which caused the difficulty.

8. The Defence contends that rebuttal evidence may properly be admitted as to matters which arise *ex improviso* in the course of the Defence case which no human ingenuity could have foreseen.

9. As regards the Prosecution claim in its Motion that it was denied the opportunity to sufficiently prepare for cross examination of the Defence alibi witnesses because the particulars and statements of 60% of the witnesses were only made known to the Prosecution when the witnesses reached court, the Defence draws the attention of the Chamber to the fact that the Prosecution has provided no legal authority for its contention that the Defence is required to provide witnesses statements for the Prosecution.

10. The Defence submits that there is a second hurdle which the Prosecution must clear before it can be allowed to present rebuttal evidence. It quotes with approval from the *Delalic* Decision of the ICTY,[8] "[t]he essence of the presentation of evidence in rebuttal is to call evidence to refute a particular piece of evidence which has been adduced by the defence. Such evidence is therefore limited to matters that arise directly and specifically out of defence evidence."[9]

11. It endorses the argument that rebuttal evidence is not evidence which is itself probative of the guilt of the Accused, or evidence which the Prosecution wishes to use to fill in

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[7] Prosecutor v. Semanza, *Decision on the Prosecutor's Motion for Leave to call Rebuttal Evidence*, 27 March 2002 (henceforth the "*Semanza* Decision").
[8] Prosecutor v. Delalic *et al.*, *Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case*, para.23; ICTY, 19 August 1998
[9] ibid. para. 23

gaps in their case.[10] Nor is rebuttal evidence permitted to merely confirm or reinforce the Prosecution case.[11]

12. The Defence, citing Rule 90(F), emphasises the need to bring finality to the proceedings, and that if Parties were to view rebuttal and rejoinder evidence as a matter of entitlement, it would result in a negation of the public policy that calls for an efficient end to litigation.

13. The Defence then examines the proposed testimony of the witnesses, which the Prosecution wishes to call. It submits that the evidence of Witnesses GAR and GBW would be similar in nature to that of Witnesses ACM and GBG. It concludes that this evidence would amount to similar fact evidence and should not be allowed by the Chamber. It also adds that, in its opinion, the Prosecution made a tactical decision to split its case and call Witnesses GAR and GBW as rebuttal witnesses. Further, the testimony was available to the Prosecution *ab initio*, and the Prosecution is trying to use this evidence to "shore up" its other witnesses.

14. The Defence examines the proposed testimony of Witnesses GNJ and GNK and concludes that a comparison with the evidence of GAO and GBV highlights essential similar fact evidence between them. The Defence suggests that the Prosecution may wish to use the testimony of Witnesses GNJ and GNK to fill the gaps in the evidence of its other witnesses.

15. The Defence examines the proposed testimony of Witness GNM and concludes that its testimony cannot be admitted by any construction, because it raises new issues, which if allowed, would require the Defence to call rejoinder witnesses to meet the new allegations.

16. It submits that the evidence of Witness GNL is intended to place the Defendant in the commune of Mukingo as a whole on 7 and 8 April 1994 and to buttress the Prosecution's case. It argues that such evidence is not admissible at this stage.

17. The Defence concludes by looking at the purpose of rebuttal evidence when it comes to challenging an alibi. It submits that a proper alibi rebuttal attacks the heart of the alibi evidence itself, and that nothing in any of the proposed testimonies meets this requirement.

The Prosecution Reply

18. The Prosecution reiterates that there was no effective notice of alibi given to them by the Defence as required by the Rules. It challenges the Defence rendition of the facts.

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[10] The Defence quote from the *Delalic* Decision, ibid. para.23, in support of its proposition

[11] The Defence quote from a Decision in the case of Prosecutor v. Semanza, *Decision on Defence Motion for Leave to Call Rejoinder Witnesses*, 30 April 2002

19. It agrees with the Defence that rebuttal evidence is limited to matters arising out of Defence evidence, but adds that where the Defence adduces evidence of a fresh matter, which the Prosecution could not have foreseen, such evidence may be called.[12]

20. It agrees with the Defence that rebuttal evidence should not merely be confirmatory of the Prosecution case. However, if uncalled prosecution evidence only took on significance during the Defence case because of an issue that the Prosecution could not have known about, and its precise nature was not known until the defence witness had testified, it might later be called as rebuttal evidence.

21. The Prosecution submits that it would not be reasonable to expect it to adduce evidence before hand in every criminal case to counter alibi defence.

22. It counters the Defence suggestion that it was tardy, and adds that the protection of the confidentiality of the particulars of Defence Witnesses is the responsibility of the Defence and not the Prosecution.

23. It adds additional information, not contained in the Prosecution Motion, and not arising out of the Defence Response, that Witnesses GAR and GBW would testify on additional areas affecting the testimony of other Defence Witnesses. The Chamber does not consider this information for the purpose of deciding this Motion, as it was not available in the original Motion for the Defence to answer to, and not acceptable content for a Reply to the Response to a Motion.

The Additional Defence Response

24. The Chamber when considering written submissions will not normally consider submissions filed out with the established procedure of the Tribunal. Where a Party files a Motion, there is a Response, and a Reply by moving Party, then that will normally conclude the submissions. As noted by the Chamber, the Prosecution Reply contained additional information that the Defence had no opportunity to respond to in its Response. The Chamber has decided to disregard this information. For this reason, the Chamber will also disregard the Additional Defence Response, which related to this additional Prosecution information.

DELIBERATIONS

25. There are two main conditions that the Prosecution must meet before the Chamber will exercise its discretion to allow rebuttal evidence. The first is that it must demonstrate that the circumstances of the case are such that rebuttal evidence is permissible. Trial Chamber III in *Semanza* set out the proper test:

> Where, however, a new issue is raised in the Defence case that the Prosecutor could not reasonably have anticipated, a common law judge has the discretion to permit the Prosecutor to bring rebuttal witnesses. Rebuttal is not permitted merely to confirm or

[12] The Prosecution cite the *Semanza* Decision as supporting their position.

> reinforce the Prosecutor's case, or to deal with collateral issues. Rebuttal is permitted when it is necessary to ensure that each party has an opportunity to address issues central to the case.[13]

The second condition is that the specific rebuttal evidence, which the Prosecution wishes to call, must be suitable for that purpose. Trial Chamber III in *Semanza* adopted the following statement of the law as laid down by a Trial Chamber of the ICTY in *Delalic*, which the Chamber now endorses:

> The essence of the presentation of evidence in rebuttal is to call evidence to refute a particular piece of evidence which has been adduced by the defence. Such evidence is therefore limited to matters that arise directly and specifically out of defence evidence. Where the evidence sought to be introduced in rebuttal is itself evidence probative of the guilt of the accused, and where it is reasonably foreseeable by the Prosecution that some gap in the proof of guilt needs to be filled by the evidence called by it, then generally speaking the Trial Chamber will be reluctant to exercise its discretion leave to adduce such evidence. The Prosecution thus, cannot call additional evidence merely because its case has been met by certain evidence to contradict it.[14]

26. Assuming that the Prosecution could fulfil the first condition, the Chamber would still have to determine whether the second condition has been met. In view of the materials and arguments submitted by the parties in the present case, the decision of the Chamber really turns on the second condition—that is, whether the Prosecution has demonstrated that the proposed testimony of the listed witnesses directly attacks the fabric of the Defence alibi evidence. Having examined the proposed testimony of the listed rebuttal witnesses, the Chamber finds that the Prosecution has not met this requirement.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Prosecution Motion

Arusha, 12 May 2003

William H. Sekule Presiding Judge	Winston C. Matanzima Maqutu Judge	Arlette Ramaroson Judge

[Seal of the Tribunal]

[13] Prosecutor v. Semanza, *Decision on Defence Motion for Leave to Call Rejoinder Witnesses*, 30 April 2002; paragraph 5

[14] Prosecutor v. Delalic *et al.*, *Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case*, ICTY, 19 August 1998; paragraph 23