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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER I

Before: Judge Navanethem Pillay, presiding
Judge Erik Møse
Judge Asoka de Zoysa Gunawardana

Registrar: Adama Dieng

Date: 13 May 2003

THE PROSECUTOR
v.
FERDINAND NAHIMANA
JEAN-BOSCO BARAYAGWIZA
HASSAN NGEZE
Case No. ICTR-99-52-T

DECISION OF 9 MAY 2003 ON THE PROSECUTOR'S APPLICATION FOR REBUTTAL WITNESSES AS CORRECTED ACCORDING TO THE ORDER OF 13 MAY 2003

Office of the Prosecutor:
Mr Stephen Rapp
Ms Simone Monasebian
Ms Charity Kagwi
Mr William Egbe

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Diana Ellis, Q.C.

Counsel for Hassan Ngeze:
Mr John Floyd, III
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Counsel for Jean-Bosco Barayagwiza:
Mr Giacomo Barletta-Caldarera

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NOTIFICATION RECEIVED

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

SITTING as Trial Chamber I, composed of Judge Navanethem Pillay, presiding, Judge Erik Møse, and Judge Asoka de Zoysa Gunawardana ("the Chamber");

CONSIDERING:
1. The Prosecutor's Application for Rebuttal Witnesses, filed on 24 April 2003 (the "Motion") in which the Prosecutor requests ten witnesses in rebuttal;

2. The Prosecutor's Supplementary Application for additional rebuttal witnesses on Hassan Ngeze's alibi defence filed on 28 April 2003 (the "Supplementary Motion"), requesting one further witness in rebuttal;

3. The Reply of the Defence for Hassan Ngeze, filed on 1 May 2003;

4. The Reply of the Defence for Jean-Bosco Barayagwiza, filed on 1 May 2003;

5. The Reply of the Defence for Ferdinand Nahimana, filed on 5 May 2003;

6. The Reply of the Defence entitled the Opposition to the Supplementary Prosecutor's Application for Additional Rebuttal Witnesses on Hassan Ngeze's Alibi Defence filed on 5 May 2003;

7. The Prosecutor's Consolidated Response to the Defence Opposition to Her Request for Leave to Call Rebuttal Witnesses in the Current Trial filed on 6 May 2003;

NOW DECIDES the matter based solely on the written briefs of the parties, pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Tribunal (the "Rules").

INTRODUCTION

1. On 12 July 2002, the Prosecution rested its case after having called 47 witnesses. During the 11 April 2003 status conference, the Prosecution informed the Chamber that it would be filing a motion to request rebuttal witnesses.

2. On 16 April 2003 a motion for the deposition of rebuttal Witness AZZA was filed by the Prosecution. The Chamber rendered a Decision on 25 April 2003 denying the deposition of AZZA.

3. As requested, the Prosecutor filed a rebuttal motion on 24 April 2003.

4. The Defence for Ferdinand Nahimana filed its notice of alibi on 7 December 2000, in which it indicated that on 29 March 1994, Nahimana was not in the Commune of Gatonde but was in Kigali. On 12 April 1994, Nahimana was in Kigali and thereafter

travelled to Bujumbura. On 14 – 16 April 1994, Ferdinand Nahimana was in Bujumbura, from where he did not leave and therefore he was not at Gatonde and Musasa or at the Janka Secondary School in Kiragarago on these days, respectively. On 20 April 1994, Nahimana was not at Rutake Church but in Bukavu, Zaire and on 28 April 1994 he was not at Gatonde Commune but at Cyangugu.

5. On 20 October 2000 the Defence for Hassan Ngeze filed a Pre-trial Brief in which it states that "there will be in excess of twenty (20) alibis for Hassan Ngeze".

6. On 20 January 2003 Hassan Ngeze's Defence filed a notice of alibi.

SUBMISSIONS

Witness AZZA

The Prosecution

7. The Prosecution submits that this witness would testify *inter alia* that he had seen Ferdinand Nahimana with Phocas Habimana coming out of the Minister of Defence's Office in May 1994. The witness would rebut the testimony of Ferdinand Nahimana that (i) RTLM had been taken over by extremists in April 1994, that (ii) he had no meetings with the government on behalf of RTLM apart from one in November 1993 and one in February 1994, that (iii) he never saw Phocas Habimana or any other individuals working for RTLM between 9 April 1994 and 7 July 1994 and that (iv) he never returned to Kigali after 12 April 1994. The Prosecution further submits that during the testimony of Defence witness Valerie Bemeriki she claimed that Ferdinand Nahimana was no longer involved with RTLM after April 1994. The Prosecution states that it alleged in its Indictment that Nahimana had command and control of RTLM from its 1993 inception, through its mid-July 1994 demise. The Defence's Notice of Alibi and Pre-trial Brief, dated 16 October 2000, did not give the Prosecution notice that the Accused would be claiming that he never once went to Kigali between 29 April and mid-May 1994. The Prosecution also claims that it received no indication that the Defence would be claiming that a group of extremists took over RTLM after April.

8. The Prosecution submits that although a statement was taken from this witness on 13 October 2001, it was only on 13 April 2003 that the witness authorized the Office of the Prosecution to disclose his name to the Defence, and for the first time agreed to become a witness for the Prosecution.

Defence for Barayagwiza

9. The Defence for Barayagwiza submits that the Prosecution had a statement from 13 October 2001 before the closure of the Prosecution case and that this could have been evaluated at that time and that this witness should therefore have been called earlier.

Defence for Nahimana

10. It is submitted that the Indictment does not allege the presence of the Accused in Kigali and that the Accused does not contest his presence partially in Rwanda during

May to July 1994. Moreover, the Defence formally contested the charges against the Accused and especially all control of RTLM by the Accused. Further, that the Prosecutor cannot reasonably state that the importance of the witness was not apparent until after the presentation of the evidence by the Defence. It is also submitted that to hear this witness in rebuttal would be against the rules of equitable process as set out in Article 20 of the Statute as the Prosecution introduce a new charge. Finally, the Prosecution has taken far too long to bring this witness and it would be prejudicial to the Defence to allow him to be called.

Witness AZZC

The Prosecution

11. The Prosecution submits that this witness would testify that he himself and Ambassador Gerard personally told Nahimana that the character of RTLM broadcasts was deplorable and that these broadcasts must stop, particularly those threatening General Dallaire and UNAMIR. According to the Prosecution, the witness would state that Nahimana agreed to do this and shortly afterwards he heard that such broadcasts did in fact stop. This evidence would rebut what Nahimana testified during his direct-examination, namely that during the three meetings he had with French officials from Operation Turquoise in July 1994, there was no discussion of putting an end to RTLM's incendiary broadcasts, and that he never discussed RTLM at all with the said officials in any of those meetings.

12. The Prosecution produced a summary of what they anticipate this witness's testimony would be and the witness confirmed it by telephone on 22 April 2003. However, the witness statement is yet to be signed due to formal procedures as he is a French Government witness. The Prosecution submits that the witness could alternatively be called as a Rule 98 Chambers witness, as was done with similar types of governmental witnesses in the *Blaskic* case in the ICTY, at the end of that trial.[1] The Prosecution submits that it is essential to truth-seeking to call this witness.

Defence for Barayagwiza

13. It is contended that this witness had statements dated 18 March 2000 and 19 February 2003, the first of which was used by the Prosecution in its cross-examination of 17 October 2002. The Prosecution was therefore aware of the evidence that could be produced by this witness before the closure of its case.

Defence for Nahimana

14. The Defence for Nahimana submits that Rule 98 is not applicable to this evidence. This witness would not show that the Accused controlled RTLM during the month of July 1994 through the giving of instructions to journalists. The witness is a person who was involved in "Operation Turquoise" and was well known before the beginning of the trial.

[1] *The Prosecutor v. Tihomir Blaskic* (IT-95-14).

Witness AZZD

The Prosecution

15. The Prosecution submits that it needs this witness to testify that on 10 or 11 April 1994, he attended a meeting at the Kigali-Ville Prefecture where Ngeze, Nahimana and Barayagwiza were present. The primary purpose of the meeting was to fuse all of the youth parties into one grand militia of the *Interahamwe*. The witness's statement dated 18 March 2000 was disclosed to the Defence on 11 April 2003 (redacted) and on 18 March 2000 (unredacted). The Prosecution submits that this witness will rebut the alibi of Nahimana that he stayed in the French Embassy from 7 April to 11 April 1994 except for once on 8 April 1994. The evidence would also rebut the testimony of both Ngeze and Nahimana that they had only seen each other once in the April – July 1994 period.

Defence for Ngeze

16. The Defence for Ngeze submits that Witness AZZD should have been called by the Prosecution in its case in chief as his statements were available to the Prosecution before the end of its case. Further, the Ngeze Defence submits that this witness will merely repeat what has been said by other Prosecution witnesses.

Defence for Nahimana

17. The Defence for Nahimana submits that the Prosecution is trying to introduce a new charge in its reference to Nahimana's participation in meeting civil and military authorities in Kigali in April 1994. They further submit that the evidence was available to the Prosecution in March 2000.

Defence for Barayagwiza

18. The Defence for Barayagwiza submits that as the first statement was made on 18 May 2000, this witness who allegedly made such important allegations about the meeting and members of the *Interahamwe* should have been called earlier.

Witness AZZB

The Prosecution

19. According to the Prosecution, this witness would testify that he saw Ferdinand Nahimana with RTLM announcer Valerie Bemeriki in the RTLM vehicle between 7 and 12 April 1994. He would say that they left the vehicle and looked at corpses and thereafter Bemeriki, speaking through a loudspeaker, congratulated the people of the neighbourhood for doing good work. Further, that Bemeriki stated on RTLM that she had been out with the chief of RTLM who was very happy at what he had seen. On another date, between 7 and 12 April, the witness saw Nahimana arrive at a roadblock in Muhima, where he was congratulated by *Interahamwe* who stated that RTLM encouraged them. The Prosecution submits that this evidence would rebut the Accused's claim that he was stuck at the French embassy from 7 to 11 April and that therefore his only contact with RTLM journalists during this period was limited to a brief visit to the RTLM studios

on 8 April 1994. The witness would also rebut testimony given by Valerie Bemeriki and Ferdinand Nahimana that the only time they saw each other after 6 April was in early July in Gisenyi. The witness statement dated 20 October 2001 was disclosed to the Defence on 10 December 2001.

Defence for Barayagwiza
20. It is submitted that the date of the witness statement clearly precedes the closure of the Prosecution case and that they therefore had sufficient information to enable them to call the witness earlier.

Defence for Nahimana
21. It is submitted that the Prosecution is trying to introduce a new charge, namely control of RTLM by the Accused's presence in Kigali in April and by implication through the journalist Valerie Bemeriki in the actions of inciting to kill and the participation of the Accused in the interim government of Gitarama in May of 1994. This evidence was available to the Prosecution in October 2001 and cannot be adduced at such a late stage of the trial.

Witness AFI

The Prosecution
22. The Prosecution submits that this witness, who was a journalist, would testify that she met Valerie Bemeriki in Gisenyi and that she had told her that RTLM would broadcast from Gisenyi as of Saturday, 9 July 1994. This witness would testify that she spoke to Yannick Gerard, a high-ranking French civilian envoy of "Operation Turquoise", who told her that he had spoken to Ferdinand Nahimana in person on putting an end to the calls for murder on RTLM radio. According to her, these instructions were immediately carried out. The Prosecution submits that this testimony would rebut Valerie Bemeriki's testimony that she never spoke to other journalists about RTLM or any other matters while she was in Gisenyi. The witness would also rebut Nahimana's testimony that he never spoke to Operation Turquoise officials about RTLM, in July 1994. The Prosecution states that if Witness AZZC was allowed to be called and was authorised to testify by his country, the Office of the Prosecutor would not examine Witness AFI on her conversation with Mr. Gerard about Nahimana.

Defence for Barayagwiza
23. It is submitted that given the date of the witness statement the Prosecution was aware of the evidence of this witness.

Defence for Nahimana
24. It is submitted that the witness was dealt with by the Chamber in its Decision of 26 June 2001 and confirmed on 10 July 2001. His position has not changed.

Witness AFX

The Prosecution

25. This witness testified before the Tribunal on 5 May, 7 May and 8 May 2001. The Prosecution submits that the witness would testify that he had never been a member of IBUKA and that he knew nothing of the death of Modeste Tabaro, that he was not given any financial reward for testifying in Arusha, that he has not discussed his testimony with anyone and that he was not hiding in Hassan Ngeze's house. The Prosecution argues that his testimony would rebut Defence evidence that this witness had fabricated his evidence in his testimony before the Tribunal and engaged in tampering with former Prosecution witnesses to bring false evidence against Ngeze regarding the killing of Modeste Tabaro. The Prosecution submits that should this witness not be recalled, the evidence from Defence witnesses about Witness AFX's alleged tampering with witnesses and giving false evidence before the Tribunal should be given no weight by the Trial Chamber.

Defence for Ngeze and Nahimana

26. It is submitted that as this witness has already been called he cannot be a rebuttal witness but rather that the Prosecutor wishes to recall the witness. They submit that in order to do this a party must show good cause and that the Prosecution has not done so. They further submit that Witness AFX's anticipated testimony does not respond to any element presented by the Defence case and does not assist the Trial Chamber in its determination of the case. Finally they submit that the Prosecution only proposed Witness AFX in order to re-establish his credibility and that this should have been done during cross-examination of Defence witnesses.

Defence for Barayagwiza

27. It is submitted that a rebuttal witness should not be called merely for corroboration and to question the credibility of persons already called.

Witness PA2

The Prosecution

28. The Prosecution submits that this witness would testify as to Ngeze's involvement in roadblocks, the *Interahamwe* and the distribution of arms during the relevant period in Rwanda. On 7 April, the witness saw Ngeze accompanied by about 100 youths armed with guns and other types of arms, patrolling the town of Gisenyi. This evidence would rebut the evidence given by Ngeze, who testified that between 6 and 9 April 1994 he was in custody, as did several of his Defence witnesses. No notice of alibi was given prior to the commencement of trial in violation of the provisions of Rule 67 (A). The witness would further rebut Defence evidence that the Accused was never seen at any roadblock and never gave orders to the *Interahamwe* militia.

29. Defence for Ngeze, Barayagwiza and Nahimana

The Defence submits that Witness PA2 should have been called by the Prosecution during its case as his statements were available to the Prosecution before the end of its case (the statement is dated 21 June 1998). With regard to the rebuttal of late alibi notice

of the Ngeze Defence, the Ngeze Defence submits that its position was clear since the beginning of the trial. Further the Ngeze Defence submits that this witness will merely repeat what has been said by other Prosecution witnesses.

Antipas Nyanjwa

The Prosecution
30. This witness is a handwriting expert who was called by the Prosecution in July 2002. The Prosecution submits that the witness would put into evidence a report indicating whether Witness RM 10 is the signatory to each page of Exhibit P219. The handwriting report has yet to be finalised. The Prosecution argues that this evidence would rebut Witness RM10's testimony that she did not sign her name on her Prosecution witness statement.

Defence for Ngeze, Nahimana and Barayagwiza
31. The Defence submits that, when this witness testified at the Tribunal he was an incompetent witness. It is further submitted that this is a collateral issue not relevant for the determination of the case, which only goes to credibility.

David Chappell

The Prosecution
32. The Prosecution would like this witness, who is a WVSS Officer, to produce a report on when Witness AAW, who later became Witness RM14, was at the safe house. According to the Prosecution, this evidence will rebut the testimony RM14 gave on the conduct of Protection officer David Chappell and other witnesses who were present at the safe house with him during the duration of his stay in Arusha in 2001. The Prosecutor submits that if the report is not allowed the Trial Chamber should give no weight to the testimony given by Witness RM14 regarding the above matters.

Defence for Ngeze, Nahimana and Barayagwiza
33. It is submitted that this witness is being called to discredit a Defence witness about a fact, which is not related to the main issues in the case. The Defence further submits that Mr Chappell cannot be a witness since he is an employee of the Registrar and was directly involved in the matter presented by Witness RM14. According to the Defence, the Chamber should consider the relevance of events of minor importance and look at the quality of Defence witness RM14 and AAW, as this would be a supplementary witness.

Saidou Guindo

The Prosecution
34. The Prosecution submits that Mr Saidou Guindo, the UNDF Commander would testify that Ngeze gave him Exhibit P251, that he discussed with the Accused the sending of emails to the Prosecution, and that the Accused told the Commander that he would continue to do so. This would rebut the Accused's statement on 7 April 2003 and other

days of his testimony, that the email address does not belong to him and that he never sent emails to the Prosecution.

Defence for Ngeze, Nahimana and Barayagwiza

35. The Defence submits that this witness should be disallowed on public policy grounds. It is submitted that the relationship between Commander Guindo and Ngeze is not good and that the Accused believes Mr. Guindo bears a grudge against him. The Defence argues that whatever Commander Guindo might say would be legally irrelevant and that it would be more prejudicial than probative.

Witness AZZE

The Prosecution

36. The Prosecution submits that this witness would testify that he was on duty as a prison guard in Gisenyi Prison in April 1994, and that Hassan Ngeze was never in prison during the month of April. This evidence will rebut Ngeze's alibi that he was in prison for much of the relevant period. The Prosecution argues that this alibi evidence was raised without notice to the Prosecution before the commencement of the trial and could not reasonably have been foreseen and presented in the Prosecution's case.

Defence for Ngeze

37. The Ngeze Defence submits that it is impossible that the identity of the witness was not known to the Prosecution before 25 April 2003. The witness indicated in his statement that it was not the first time that he had met with investigators of ICTR. At least three of the Ngeze Defence witnesses said they knew that Ngeze was detained at the military camp (RM13, BAZ31 and BAZ1). BAZ6 said that Ngeze was arrested by soldiers. Hassan Ngeze testified that on 6, 7, 8 and 9 April he was in custody in Gisenyi and that he saw and met the commanding military officer of the Gisenyi camp, Anatole Nsengiyumva. The evidence presented by the Ngeze Defence was therefore that Hassan Ngeze was detained by the military at the military camp and not at the Gisenyi prison. The Ngeze Defence submits that the position of the Ngeze Defence was clear since the beginning of the trial and the Prosecutor cannot pretend that the late alibi notice requires testimony of a rebuttal witness at this stage of the trial.

General submissions

38. The Defence for each of the three Defendants request that the Prosecution application be denied. Defence Counsel for Ngeze submits that the Defence has been cut short of calling important witnesses because of time considerations. It also argues that it would be unfair to grant the Prosecution's application since it is without legal or logical merit. Finally, it is stated that if the Chamber allows the Prosecution to bring its rebuttal witnesses the Ngeze Defence will seek the right to bring evidence in rejoinder and will require the right to have a real opportunity (i.e. time and money) to do so. The Defence for Barayagwiza requests a delay of three months should the request be granted.

39. Defence Counsel for Mr Nahimana submits that the Prosecution wants to justify the rebuttal evidence by arguing that it suddenly discovered new matters through the

Defence's presentation of witnesses and evidence. In the Defence's submissions, the Defence had clearly indicated its position during the Prosecution case. In its Pre-trial Brief the Defence for Nahimana informed the Prosecution of its position facing the accusations and particularly indicated that it would be contesting the authority and control of the persons working at RTLM. The alibi notice was clearly dated. The Defence submits that the Accused indicated that he could not understand why the Indictment did not specify dates and places in order that he could better anticipate the allegations during the process of the hearing. Therefore, it is not the alibi notice that should be criticized but the Indictment itself as concerns places and times. This imperfection in the Indictment is irrefutable by the Prosecution. It will prejudice the Accused and therefore cannot be justified by the present request. The Defence for Nahimana further submits that during its cross-examination of Prosecution witnesses, the Defence systematically contested the allegations by setting out the position of the Accused. It was on the basis of this position that the Prosecution demanded and obtained permission to modify its list of witnesses.[2] As a result, the Prosecution cannot claim to have been in ignorance of the position of the Accused.

40. In the Prosecution's consolidated response to the Defence opposition it is submitted that it would not be reasonable to expect the Prosecution to adduce evidence beforehand in every criminal case to counter vague and imprecise statements as to the alibi defence that the Accused may raise. It is submitted that the information given by the Ngeze Defence does not live up to the required standard of adequate and timely notice to plead alibi as a defence. The Prosecution lays out the *Semanza* test that evidence is admissible on rebuttal if it (a) responds to or refutes evidence put forth during the Defence case-in-chief, and (b) is related "directly to the guilt or innocence of the Accused."[3] The Prosecution submits that the evidence of witnesses AZZA, AZZC, AZZD, AZZB and AFI meets the requirements of the *Semanza* test. The Prosecution argues that the applications to call rebuttal witnesses are not attempts to fill in gaps or call new evidence to support its case. The Prosecution submits that in the United States, there is authority for the proposition that the credibility of a witness is always treated as a non-collateral matter, upon which extrinsic evidence may be called in rebuttal as long as certain conditions are met.[4] The Prosecution contends that in the United States impeachment evidence is generally deemed to be non-collateral, particularly with respect to alleged bias or prejudice of a witness.

DELIBERATIONS

Legal Principles

41. The Chamber is cognizant of Rule 85(A) (iii) of the Rules, which envisages the possibility of the presenting of evidence in rebuttal by the Prosecution.

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[2] "Decision on the Prosecutors Oral Motion for Leave to Amend the List of Selected Witnesses" *Prosecutor v. Ferdinand Nahimana, Hassan Ngeze, Jean Bosco Barayagwiza* dated 26 June 2001.
[3] "Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence and the Prosecutor's Supplementary Motion for Leave to Call Rebuttal Evidence", *Prosecutor v Semanza* dated 27 March 2002.
[4] The Prosecution cites *U.S. V. Abel*, 469 U.S. 45, 52-53 (1984); *Behler v. Hanlon*, 199F.R.F. 553, 556-7. (D.Md. 2001).

42. The Chamber refers to the Decision dated 27 March 2002 relating to rebuttal witnesses, in the case of *Prosecutor v Semanza.*[5] In that Decision, it was held by the Chamber that it should be satisfied that the evidence the Prosecutor proposes to call in rebuttal of the alibi is aimed at refuting evidence that had been adduced by the Defence during its case regarding matters that the Prosecution could not reasonably have foreseen.[6] Where the defence of alibi is a central matter for determination and the Defence has not given notice to the Prosecution before the commencement of the Trial, the Defence can still rely on the alibi. However, the Trial Chamber must ensure the trials are fair, therefore the Prosecution should be granted leave to attempt to refute the alibi, a key issue that arose for the first time during the Defence case.[7]

43. The Chamber is also persuaded by ICTY jurisprudence on rebuttal.[8] The principles laid out by the ICTY Decisions are set out below.

44. Rebuttal evidence should be of significant probative value and not of a cumulative nature.[9]

45. If the Trial Chamber is sufficiently informed to properly appreciate the weight of the original evidence then rebuttal evidence as to weight is not necessary. [10]

46. The significance of the proposed rebuttal evidence must also be considered. If it is not sufficiently significant it should not be admitted in rebuttal.[11]

47. Rebuttal evidence should be 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 to grant 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. However, if any matter arises *ex improviso* and unforeseen, the Trial Chamber will exercise its discretion and will allow such evidence to be adduced. On the other hand, evidence available to the Prosecution *ab initio*, the relevance of which does

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[5] "Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence and the Prosecutor's Supplementary Motion for Leave to Call Rebuttal Evidence" *Prosecutor v Semanza* dated 27 March 2002.
[6] *ibid* paragraph 9.
[7] *ibid* paragraph 10.
[8] "Decision on Rebuttal Case" *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, dated 28 September 2000; "Decision on Rebuttal Evidence" *Prosecutor v Stanislav Galic*, dated 2 April 2003; "Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case" *Prosecutor v Zejnil Delalic and others* dated 19 August 1998.
[9] "Decision on Rebuttal Evidence" *Prosecutor v Stanislav Galic*, dated 2 April 2003 paragraph 7.
[10] *ibid* paragraph 27.
[11] *ibid* paragraph 27.

not arise *ex improviso*, and which remedies a defect in the case of the Prosecution is generally not admissible.[12]

48. The advanced stage of the trial must be a relevant consideration. The Trial Chamber must also consider the delay likely to be caused by a re-opening of the Prosecution case, and the suitability of a possible adjournment in the overall context of the trial. The probative value of the proposed evidence must be such that it outweighs any prejudice caused to the accused. Great caution must be exercised by the Trial Chamber lest injustice be done to the accused, and it is therefore only in exceptional circumstances where the justice of the case so demands, that the Trial Chamber will exercise its discretion to allow the Prosecution to adduce new evidence after the parties to a criminal trial have closed their case.[13]

49. The Prosecution has the burden of demonstrating that with reasonable diligence the proposed evidence could not have been previously obtained and presented as part of the Prosecution case.[14] The Prosecution must satisfactorily explain the failure to obtain the evidence during the presentation of the case of the Prosecution.[15]

50. Other relevant provisions include:[16] When deciding whether to allow evidence in rebuttal the court has to recognize that the Prosecution is expected to react reasonably to what may be suggested as pre-trial warnings of evidence likely to be given which calls for denial beforehand, and also to suggestions put in cross-examination of their witnesses. They are not expected to take notice of fanciful and unreal statements no matter from what source they emanate.[17] If evidence was available to the Prosecution from the beginning and the relevance of it does not arise unexpectedly the evidence is inadmissible.[18] Evidence which does fall within the *ex improviso* principle i.e. where a matter has arisen unexpectedly is admissible subject to the trial judge's discretion.[19] Evidence which was available to the Prosecution from the beginning of its case but the relevance of which was only marginal is admissible subject to the trial judge's discretion. The Court of Appeal of England has held that the principle is that if the Prosecution could reasonably have foreseen that a particular piece of evidence was necessary to prove their case, they should have put it before the court as part of their case.[20]

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[12] "Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case" *Prosecutor v Zejnil Delalic and others* dated 19 August 1998 paragraph 23.
[13] *ibid* paragraph 27.
[14] *ibid* paragraph 30.
[15] *ibid* paragraph 37.
[16] Principles set out in Archbold Criminal Pleading Evidence and Practice 2000 pages 431 and 432.
[17] *R v Hutchinson*, 82 Cr. App. R. 51 at 59, CA.
[18] *R v Day*, 27 Cr. App.R. 168, CCA.
[19] *R v. Frost* (1839) 9 C. & P. R v Blick, 50 Cr. App.R.280 CCA.
[20] *R v Scott* (A.S.), 79 Cr. App.R.49.

51. It also follows from English case law that when an attack is made upon the veracity of a witness by reference to particular facts, "the matter is collateral, and a denial cannot be rebutted". [21]

52. In considering the admissibility of the proposed Prosecution witnesses the above stated principles will be applied.

Other Considerations

53. The Chamber has considered the Prosecution's reasons for seeking to call witnesses in rebuttal as well as the Defence responses.

54. The Chamber notes that the Defence of Ferdinand Nahimana had given notice of the Accused's alibi as early as 7 December 2000 in which he indicated his whereabouts on seven dates, as stated above. Thus the Prosecution could reasonably have foreseen that Nahimana would adduce evidence of his absence from the scenes of crime on these dates.

55. Concerning the Defence of Hassan Ngeze, although a notice of alibi was served late by the Defence and only after the closure of the Prosecution's case, the Defence raised the alibi in their cross-examination of the Prosecution witnesses. Rule 67 (B) permits the Accused to rely on the alibi. Moreover, the Pre-trial Brief filed on Ngeze's behalf makes reference to over 20 alibi witnesses that would be presented.

Findings

56. The Chamber finds that the Prosecution has not demonstrated that with reasonable diligence the proposed evidence could not have been previously obtained and presented as part of the Prosecution case. The Prosecution has not satisfactorily explained the failure to obtain the evidence during the presentation of its case.[22]

Witness AZZA

57. This witness's statement was recorded on 13 October 2001, thus the Prosecution were in possession of this evidence from that date. There is nothing to show that the Prosecution had wanted to call this witness earlier and that he had refused at that stage. When the Accused gave evidence, he stated that he had not come to Kigali in the months of April, May, June, July and met with Phocas Habimana. It is at that stage that the Accused should have been confronted with this matter, which the Prosecution had notice of, but this was not done. It would not be in the interest of justice and contrary to the principles regulating rebuttal evidence to permit the Prosecution to lead evidence at this stage, to fill a gap in the presentation of its case. Moreover, the evidence that this witness would be able to give would not be sufficient to rebut the evidence that Nahimana was not involved in the running of RTLM. The evidence only suggests that he was at the

[21] *R v Hamilton* (1998) Times, 25 July, reaffirming *R v Wood* [1951] 2 All ER 112n, 35 Cr App Rep 61, *R v Redgrave* (1981) 74 Cr App Rep 10. Cross and Tapper on Evidence pg 332.
[22] See paragraph 49.

Ministry and with the person named. The purpose for which Nahimana went to the Ministry is not clarified by the evidence.

58. The Prosecution argues that because of the information in the Indictment the Defence should have produced a notice of alibi explaining certain facts, which later came out in evidence. However, the Defence for Nahimana contend that the Indictment was not specific enough for them to be required to produce a more specific notice of alibi. It would therefore not be unfair to refuse the Prosecution's request to call this witness.

Witness AZZC

59. The Prosecution questioned Nahimana on his meetings with Ambassador Gérard and Witness AZZC during his cross-examination on 17 October 2002.[23]

> Q. Mr. Nahimana, when you met with Ambassador Gérard, it's true, isn't it, that Jean Christophe Belliard and I'll spell Belliard, B-E-L-L-I-A-R-D, of the French Foreign Ministry, was also there; yes?
>
> A. In any case, what I know and what I can tell the Chamber is that Yannick Gérard never received me alone. He was often accompanied by his assistants, so, if Belliard – because I only retained the name of Yannick Gérard because he was in the head, otherwise, amongst those who are accompanying him there was this person you mentioned and I don't have any reason to deny that he was present.
>
> Q. And you are, indeed, aware, are you not, that both Mr. Belliard and Mr. Gérard have several times stated openly that they did speak with you about RTLM on the 6th of July, despite your saying that you did not speak to anybody on the 6th of July, despite your saying that you did not speak to anybody on the 6th of July about RTLM. You are aware they say that publicly and openly; yes?
>
> A. Madam President, I believe the Prosecutor is trying to distort the facts. It was after Mr. Yannick Gérard had met the president, President Sindikubwabo, in Gisenyi, and I use this term so that was when I met a large number of journalists who came successively, some of them came to my small house, a house I had rented, and some more interviewed – were not interviewed as such but they spoke with me, but I don't see where, exactly, you say Yannick Gérard said that we had discussions over on the radio. This information –
>
> Q. (Interpreter-s microphone on) ... By discussions on the radio, discussions concerning the radio, yes?
>
> A. Madam President, Yours Honours, I said during the meeting with the Ambassador Yannick Gérard, we spoke only about the setting up of the Operation Turquoise and the limiting of the buffer zone.

The questions asked in cross-examination show that all information that came from the witness statement was known to the Prosecution. They were therefore aware of the matter for which they wish to call this witness and it could not be said that it took them

[23] T17-10-02 page 46 line 30 to page 48 line 2.

by surprise. The Accused should have been presented with the Prosecution's position at that stage. In fact it would be the Prosecution surprising the Defence if they were allowed to produce this rebuttal witness when they put facts to the Accused without disclosing their source. The Chamber sees no reason to call this witness under Rule 98 and does not find it "essential to truth-seeking" to do so.

Witness AZZD

60. The matter of the Accused's involvement in a meeting the primary purpose of which was to fuse all of the youth parties into one grand militia of the *Interahamwe* is something which was of obvious relevance from the time the Prosecution received the witness statement which is dated 18 March 2000. The fact that Nahimana was at the French Embassy from 7 to 11 April 1994 except for a brief departure on 8 April 1994 is something which should have been stated in his notice of alibi. In Nahimana's notice of alibi dated 24 October 2000 the dates specified are 29 March 1994, 12 April 1994, 14 April 1994, 15 April 1994, 16 April 1994, 20 April 1994 and 28 April 1994. The information was, however, made known to the Prosecution on 5 March 2002 in the cross-examination of Georges Ruggiu:

> Q. Is it correct that on that occasion, Mr. Ferdinand Nahimana told those present that he and his family had sought refuge at the embassy of France on the morning of 7 April?
>
> A. I do not remember his exact words, but he did indeed say he sought refuge not on the morning of the 7th, the evening of the 6th. In any case, he said he sought refuge at the embassy of France.[24]

The Prosecution received notice of evidence likely to be given which calls for reaction. Further, the evidence that Witness AZZD would give would be so prejudicial to the Accused at this late stage of the case that it outweighs the unfairness to the Prosecution of not being able to rebut the alibi evidence. The evidence is relevant to the Prosecution case and should have been led in evidence in the presentation of the Prosecution. If such evidence were presented at this stage it would be tantamount to the Prosecution reopening its case.

Witness AZZB

61. The testimony of this witness which may be relevant to the proof of guilt of Nahimana, i.e. regarding Nahimana's position as chief of RTLM, his involvement with the *Interahamwe* etc should have been presented by the Prosecution earlier. The Chamber notes that the statement of the witness is dated 20 October 2001. It is the Chamber's opinion that although this evidence may rebut the alibi given by Nahimana it cannot be allowed at this stage of the trial for the same reasons explained in the above paragraph.

Witness AFI

62. In the Chamber's view the matter of rebutting the evidence as to whom Bemeriki spoke to in Gisenyi is collateral and not directly related to the guilt of the Accused. As far

[24] T5-3-02, Page 10 Line 22.

as rebutting the evidence that Nahimana never spoke to "Operation Turquoise" officials about RTLM is concerned, this is also not directly relevant and would not in any case establish that Nahimana did in fact have control of RTLM. The Chamber refers to its Decision on the Prosecutor's oral motion for leave to amend the list of selected witnesses of 26 June 2001 where it stated that Witness AFI's statement "mainly contains indirect evidence and would seem to be of limited value for the Chamber".[25]

Witness AFX

63. The Chamber is of the view that if Witness AFX were re-called as a rebuttal witness his testimony would go to his credibility.[26] The Prosecution itself put the matter of weight of evidence in the alternative. The Trial Chamber already has sufficient information to evaluate the testimony of this witness.[27] Further, this witness was already called to testify in this trial and it would not be appropriate to call him back as a rebuttal witness.

Witness PA2

64. It seems that the relevance of the evidence of this witness should have been clear to the Prosecution from the beginning, i.e. Ngeze's involvement in roadblocks and Ngeze distributing arms. Further the Chamber has already heard evidence on this matter and corroboration is excluded from rebuttal evidence.[28] The Prosecution also contends that this witness will rebut the alibi given by Ngeze, that he was in custody on 7 April. As noted above the Prosecution was on notice that Ngeze would be calling alibi witnesses. Further the matter of Ngeze's arrests was put to Prosecution witnesses in their cross-examination.[29] This evidence is in any event too prejudicial to be allowed as rebuttal evidence.

Antipas Nyanjwa

65. The matter of whether RM10 had actually signed her witness statement is not crucial to the determination of the present case.[30]

David Chappell

66. This witness is to give evidence on the testimony of Witness RM14. The rebuttal evidence therefore only goes to credibility and is a collateral matter as discussed in paragraph 62. The Prosecution itself refers to the element of weight in the alternative and

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[25] "Decision on the Prosecutors Oral Motion for Leave to Amend the List of Selected Witnesses" The *Prosecutor v. Ferdinand Nahimana, Hassan Ngeze, Jean Bosco Barayagwiza* dated 26 June 2001.

[26] The Chamber notes the conflict in national jurisprudence; see the American position set out in paragraph 40, where credibility is a non-collateral matter, and the English position set out at paragraph 51 where credibility is a collateral matter. The Chamber is persuaded by international jurisprudence and refers to the "Decision on Rebuttal Evidence" *Prosecutor v Stanislav Galic*, dated 2 April 2003 at paragraph 27.

[27] *ibid* paragraph 27.

[28] The Chamber notes the evidence given by Omar Serushago on 16 November 2001 (T16-11-01, page 54) and the "Decision on Rebuttal Evidence" *Prosecutor v Stanislav Galic*, dated 2 April 2003 paragraph 7.

[29] The Chamber notes the cross examination of witnesses AHA (T7-11-00, pages 60 – 81), ABE (T27-11-01, page 40), EB (T17-5-01, pages 47-48), GO (T6-6-01, pages 116-117) and AHI (T10-9-01 pages 92-94).

[30] Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence and the Prosecutor's Supplementary Motion for Leave to Call Rebuttal Evidence *Prosecutor v Semanza* dated 27 March 2002 paragraph 11.

the Trial Chamber will be able to assess the weight of the evidence of RM14 without the additional evidence of Mr Chappell.[31]

Saido Guindo

67. This witness would be testifying on collateral matters such as the credibility of the Accused and the Accused's email address. This is not the kind of evidence that should be permitted to be adduced in rebuttal. The Chamber observes that where it is sufficiently informed to properly appreciate the weight of the original evidence then rebuttal evidence as to weight is not necessary.[32]

Witness AZZE

68. This witness would only testify as to whether Ngeze was in prison in Gisenyi in the month of April 1994. The evidence of the Accused and his witnesses was that he was detained in a military camp. It is not therefore clear that this witness would be referring to the same place. Further, the fact that one prison guard did not see him in custody at Gisenyi would not in any case suffice to prove that he was not in prison.

69. Finally, if any of the above witnesses were allowed, this would also lead to the Accused wanting to present evidence in rejoinder, which would unnecessarily prolong a trial, which has already been delayed.

FOR THESE REASONS, THE TRIBUNAL

DENIES the Prosecution motion to call all the listed witnesses, namely AFX, David Chappell, Antipas Nyanjwa, AZZA, AZZC, AFI, Saido Guindo, AZZB, AZZD, PA2 and AZZE.

Arusha, 13 May 2003

Navanethem Pillay
Judge, presiding

Erik Møse
Judge

Asoka de Zoysa Gunawardana
Judge

[Seal of the Tribunal]

[31] "Decision on Rebuttal Evidence" *Prosecutor v Stanislav Galic*, dated 2 April 2003 paragraph 27.
[32] See paragraph 45.