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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

TRIAL CHAMBER III

Original: English

Before: Judge Lloyd George Williams, Q.C., Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registrar: Mr. Adama Dieng

Date: **21 May 2003**

THE PROSECUTOR
v.

ANDRE NTAGERURA,
EMMANUEL BAGAMBIKI, and
SAMUEL IMANISHIMWE

Case No. ICTR-99-46-T

DECISION ON THE PROSECUTOR'S MOTION FOR LEAVE TO CALL EVIDENCE IN REBUTTAL PURSUANT TO RULES 54, 73, and 85 (A) (iii) of THE RULES OF PROCEDURE AND EVIDENCE

The Office of the Prosecutor

Mr. Richard Karegyesa
Mr. Holo Makwaia
Ms. Andra Mobberley

Defence Counsel for the Accused

Mr. Benoît Henry
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Mr. Jean Pierre Fofe

3916

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("TRIBUNAL")

SITTING as Trial Chamber III, composed of Judges Lloyd George Williams, Q.C., Presiding, Yakov Ostrovsky and Pavel Dolenc (the "Chamber");

BEING SEISED of the Prosecutor's Motion for Leave to call Evidence in Rebuttal Pursuant to Rules 54, 73 and 85(A)(iii) of the Rules of Procedure and Evidence, filed confidentially and under seal, 17 April 2003 (the "Motion");

CONSIDERING the *Réponse de la Défense de André Ntagerura à la Requête du Procureur Pour Permission de Présenter une Preuve en Réplique Selon les Article 54, 73 et 85(a)(ii) du Règlement de Procédure et de Preuve*, filed on 8 May 2003 (the "Ntagerura Response");

CONSIDERING the *Réponse de la Défense de Samuel Imanishimwe à la Requête du Procureur en Présentations des Élements de Preuve Supplémentaires, Conformement à L'Article 73 du Règlement de Procédure et de Preuve et à la Lettre No. ICTR/JUD-11-6-3-03/119 du Grèffe*, filed 8 May 2003, (the "Imanishimwe Response");

CONSIDERING the *Réponse de la Défense de Monsieur Emmanuel Bagambiki à la Requête du Procureur* "for leave to call evidence in rebuttal Pursuant to Rules 54, 73, and 85(A)(iii) of the Rules of Procedure and Evidence," filed 9 May 2003, (the "Bagambiki Response");

CONSIDERING the Prosecutor's Rejoinder to the Defence Responses to Prosecutor's Rebuttal Motion, filed 13 May 2003 (the "Rejoinder");

CONSIDERING the Requête de la Défense de André Ntagerura pour Autorisation de Déposer une Réponse Supplémentaire et Réponse Supplémentaire à la Requête du Procureur Pour Autorisation de Déposer une Preuve en Réplique Selon les Articles 73, 54, et 85A)iii) du RPP, filed 15 May 2002;

CONSIDERING the Prosecutor's Response to the Supplementary Response by the Defence of Andre Ntagerura on the Motion, filed 20 May 2003;

RECALLING the Decision on the Prosecutor's Extremely Urgent Motion for an Extension of Time for Filing an Application for Rebuttal dated 11 May 2003 (Judge Ostrovsky dissenting) (the "Extension Decision");

NOW DECIDES the Motion solely on the basis of the written submissions of the parties.

I.

SUBMISSIONS OF THE PARTIES

A. SUBMISSIONS OF THE PROSECUTOR

1. Pursuant to the Extension Decision, the Prosecutor filed the instant Motion seeking leave to present evidence in rebuttal with respect to all three Accused in this case. The Prosecutor invokes Rules 54, 73, and 85(A)(iii) in support of her claim to present rebuttal evidence that falls into four categories: (i) evidence to rebut the alibi defence presented by Ntagerura for 10 and 11 April 1994; (ii) evidence to refute the alibi of Imanishimwe for 12 April 1994; (iii)

evidence to contest the reliability and impugn the provenance of certain documents admitted through Witness JNQ on behalf of Bagambiki; and (iv) evidence to demonstrate that BAH and PNB, committed perjury during their testimony.

2. The Prosecutor argues that the Tribunal's pronouncements in *Prosecutor v. Semanza*[1], prescribe a two-pronged test to determine the admissibility of rebuttal evidence. First, the evidence must relate to matters that arise directly from the Defence's case-in-chief. Second, rebuttal evidence must advance "non-collateral" issues that will assist the Chamber in determining the guilt or innocence of an accused.

3. Applying the Semanza test to the facts of this case, the Prosecutor submits she is entitled to call rebuttal evidence and other evidence on non-collateral issues of false testimony of certain Defence witnesses and documentary evidence of unreliable provenance and questionable authenticity. In support of her arguments, the Prosecutor appends to the Motion exhibits, including, the regulations of the CEPGL, a letter dated 9 April 2003 from the Ministry of Foreign Affairs of Rwanda concerning the practice and usage of diplomatic passports, the written statements of the witnesses she seeks to call in rebuttal, and Annex A, a summary of some of her proposed rebuttal witnesses and the anticipated length of their testimony.[2]

4. First, with regard to the alibi defence propounded by Ntagerura and Imanishimwe, the Prosecutor contends that she should be permitted to call evidence to rebut their alibis because the Defence "sprung" the defence for the first time after the close of the Prosecution's case. In this respect, the Prosecutor avers that she learned of the particulars of the Accused's alibi defence for the first time during the Defence case, when they presented documents, including passports, in support of the alibi. Moreover, the Prosecutor observes that in its Pre-Defence Briefs filed by both Accused pursuant to Rule 73 *ter*, the Defence failed to provide the requisite notice to the Prosecutor that they intended to rely on the special defence of alibi as envisaged by Rule 67(A)(ii). Relying on Rule 67, the Prosecutor argues that permitting her to call rebuttal evidence would remedy the Defence's failure to give timely and adequate notice of their intention to rely on an alibi defence. Moreover, the Prosecutor warns that if the Chamber does not grant her leave to call evidence in rebuttal of the alibi, such a decision would necessarily deprive the Chamber of the right to accord any probative weight to the Defence evidence in support of the alibis.

5. The Prosecutor proposes to present the following evidence in rebuttal of the alibi defence advanced by Ntagerura. First, the Prosecutor seeks to call witnesses PR1 and proffer documentary evidence about the practice and usage of CEPGL (Economic Community of the Great Lakes) with regard to stamping passports of persons from member states, to rebut the testimony and evidence submitted by witnesses for the Defence, namely, the Accused, Leoncie Bongwa, Charles Nkurunzinza and BSH. The foregoing Defence witnesses claimed the Accused was not in Cyangugu on 10 April 1994 because he was accompanying the remains of the late Burundian president to Burundi. In addition, the Prosecutor hopes to call evidence to

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[1] Case No., ICTR-97-20-T, Decision on the Prosecutor's Motion for Leave to call Rebuttal Evidence and the Prosecutor's Supplementary Motion for Leave to call Rebuttal Evidence, Tr. Ch. III, (ICTR), 27 March 2002.

[2] Noting that the witness statements had been redacted, deleting what is presumed to be information susceptible of revealing the identity of protected witnesses, and other particulars about dates and locations, the Chamber asked the Prosecutor to submit to the Chamber, for the Chamber's exclusive use at this stage, copies of the unredacted versions of the statements of witnesses the Prosecutor intends to call at trial as well as those for witnesses whose statements she intends to submit into evidence pursuant to Rule 92 *bis*.

rebut the Accused's claim that diplomatic passports were kept in at the offices of the ministry of Foreign Affairs, causing him to use his civilian passport on his mission of 10 April 1994.

6. With regard to the Accused Imanishimwe, the Prosecutor wishes to call witnesses PR6 to refute his alibi for 12 April 1994. The Accused testified that he was in Bukavu, Democratic Republic of the Congo, from about 8:00 o'clock in the morning to 5:00 o'clock in the afternoon, rather than at Gashirabobwa football field as averred by the Prosecutor' witnesses. Witness PR6 will testify that the Accused was at the Kwamufti roadblock in the middle of the afternoon of 12 April 1994.

7. Second, the Prosecutor seeks to call witnesses PR5 to demonstrate that Defence Witnesses JNQ and Bagambiki produced documents of "unreliable" provenance and questionable authenticity to contest the testimony of Prosecution Witness LAP, which documents were admitted into evidence over the objections of the Prosecutor as Exhibits D-EBA, 10, 11, 12, 13, and 14. The Prosecutor submits that the Defence purported that the foregoing exhibits were letters written by Prosecution witnesses LAP, LAJ, and LAH. Citing to the matter of the *Prosecutor v. Kvocka, et al.*, [3] the Prosecutor argues that the authenticity of the documents submitted by the Defence is a non-collateral issues because it is a necessary threshold consideration for the determination of the reliability of LAP's testimony. LAP, a detained witness, testified that he participated in and witnessed certain events. The Prosecutor intends to call Witness PR5 to show that witness LAP was not dismissed from the Rwandan Armed Forces, as claimed in the impugned exhibits. In addition, the Prosecutor proposes to call witnesses PR3 and PR 4 to contest the documents placed into evidence through Defence witness JNQ.

8. Finally, the Prosecutor seeks to call witnesses PR10G, PR10D, PR10C, and PR11 and tender the written statements of witnesses PR10A, PR10B, PR10C, PR10E, and PR10F, pursuant to Rule 92 *bis* to demonstrate that Defence Witnesses, BAH and PNB gave false testimony under oath before this Chamber regarding the whereabouts of Defence witness BAH from 11 April 10 17 July 1994 and witness PNB in July 2002. The witnesses claimed they were at the Centre de Santé St. François d'Assise on the foregoing dates.

9. The Prosecutor submits that when a witness has testified falsely, there are two alternative remedial procedures prescribed by the Rules. The Chamber may grant leave for the aggrieved party to call evidence establishing the perjury in rebuttal. Alternatively, the Chamber may direct the Prosecutor to investigate the matter with a view to the presentation of an indictment for false testimony. *See* Rule 91. Appealing to the rules and jurisprudence in the Federal courts of the United States of America, the Prosecutor contends that the evidence she seeks to submit to demonstrate the perjury of the Defence witnesses is a non-collateral matter because the determination of the credibility of the Defence witnesses is "a precondition to assessing the value of the prosecution evidence." *See e.g., United States v. Abel*, 469 U.S. 45, 52-53 (United States Supreme Court, 1984). The Prosecutor argues that the Chamber should expand the categories of permissible rebuttal to include evidence going to the core, non-collateral issues of the credibility of witnesses, and thereby permit a party to submit extrinsic evidence in rebuttal.

10. In her Rejoinder, the Prosecutor reiterates the arguments she made in the Motion and ads the following significant arguments. First, the Prosecutor argues that she has not breached her duty

[3] Case No., IT-98-30-PT, (ICTY), Order Granting Request for Admission of Documentary Evidence, Tr. Ch., 17 March 1999.

to disclose exculpatory evidence to the Defence as claimed in the Ntagerura Response because none of the witness statements in question provides specific dates to support the alibi interposed by the Defence. Second, the Prosecutor claims that she intends to call witness PR13 to testify that he accompanied the remains of the late Burundian President to Burundi on 10 and 11 April because he has relevant evidence that directly contradicts the alibi testimony of Ntagerura. Alternatively, the Prosecutor request that the Chamber call PR13 pursuant to Rule 98.

11. In addition, the Prosecutor admits that the statements she seeks to tender pursuant to Rule 92 *bis* do not, in their current form, conform to the requirements of the Rule, but that she would ensure that they be brought in compliance if the Motion were granted. Moreover, the Prosecutor claims that the evidence she seeks to submit in rebuttal to the documentary evidence submitted on behalf of Bagambiki could not have been reasonably anticipated prior to or during the case since none of the issues raised in the documents had been put to witness LAP during cross-examination. Furthermore, the Prosecutor submits that rebuttal is anticipated in the Rules and that any delay in the trial proceeding occasioned by the presentation of her rebuttal is a direct consequence of the Defence failure to provide her with notice of their intention to interpose an alibi defence. Additionally, the Prosecutor argues that notice of alibi received only after the close of the Prosecutor's case does not constitute adequate notice under the Rules. The Prosecutor also claims that she did not violate the witness protection order in this case because she did not disclose to prospective witness PR11 the fact that witness PNB had testified before the Tribunal. A breach of the protective order can only occur, claims the Prosecutor, when a party not bound by the order is advised that a witness will testify or is given information that tends to identify a witness. Finally, the Prosecutor notes that the testimony of proposed rebuttal witnesses PR10C, D and G is relevant to alibi of Ntagerura rather than Imanishimwe, as inadvertently stated in the Motion.

B. SUBMISSIONS OF THE DEFENCE FOR NTAGERURA

12. In the Ntagerura Response, the Defence advances the following principal arguments in opposition to the Motion. Relying on the authority of the *Semanza* case, the Defence argues that the Chamber enjoys a discretionary power to permit the Prosecutor to present evidence in rebuttal and that rebuttal is not allowed merely to confirm or reinforce the Prosecutor's case or to deal with collateral issues. *Semanza*, *supra*, at para. 5. Moreover, claims the Defence, the first principle to respect is that the Prosecutor may not "split" her case, and therefore must present all her evidence regarding the guilt of the accused in her case-in-chief. The purpose of this rule is to afford the accused an opportunity to learn the full case against him and an opportunity to present a complete defence in response to the prosecution's case. It is for this reason that the Chamber in the *Semanza* case stated that rebuttal evidence was to be limited to issues raised during the presentation of the defence's case that could not have been foreseen by the Prosecutor. *Semanza, supra*, at para. 8. In addition, the rebuttal evidence must relate to a central issue. *Id.*, at para. 10.

13. Citing to various correspondence to the Prosecutor from 1998 to 2000, the Defence observes that the Accused has, since the confirmation of the Indictment, consistently maintained that he should obtain full disclosure of all the proof against him before presenting his defence.

14. Challenging the particular evidence the Prosecutor seeks to bring in rebuttal of Ntagerura's alibi for 10 and 11 April 1994, the Defence indicates that it is shocked that the Prosecutor should contest the alibi because the Accused had indeed accompanied the remains of the President of Burundi on 10 and 11 April 1994. In addition, through investigations carried out in April 2003,

the Defence has uncovered additional independent witnesses, who are nationals of Burundi who are prepared to corroborate the Accused's account of his whereabouts on those dates. The investigation also revealed that the Office of the Prosecutor was fully aware of the existence of the foregoing witnesses and of their version of the facts concerning the Accused's alibi, by reason of investigations the Prosecutor carried out toward the end of March 2003. In support of this claim, the Defence has appended to the Ntagerura Response Annexes 1- 6, which are correspondence between investigators from the Office of the Prosecutor and various Burundian governmental authorities in pursuit of interviews with witnesses able to refute Ntagerura's alibi. Among other witnesses corroborating the Accused's alibi, the Defence claims the Prosecutor's investigators encountered one Burundian authority, who confirmed that he was an eyewitness to Ntagerura's visit to Burundi accompanying the mortal remains of the President on 10 and 11 April 1994. However, contrary to her disclosure obligation under Rules 68 and 67, the Prosecutor never informed the Defence of the existence of these witnesses who possess exculpatory evidence. This is a grave breach by the Prosecutor, claims the Defence.

15. Moreover, the Defence remonstrates that the Prosecutor fails to clearly explain the utility of witness PR13, who the Prosecutor intends to call to testify that he accompanied the remains of the Burundian president from 14 to 17 April 1994. The Defence stresses that the statements of Witness PR13 are unsigned and were made on 8 and 9 April 1999 by investigators from the Office of the Prosecutor. However, the Defence has learned that witness PR13 was not in the post the Prosecutor claimed he occupied in April 1994. Rather, the Defence claims that witness PR13 was detained in Cameroon on suspicion of having committed genocide in Rwanda in 1994. Finally, on 3 May 2003, the Defence obtained from Witness PR13 a written statement, Annex 7 to the Ntagerura Response, in which he explains that the mission of accompanying the remains of the Burundian president to Bujumbura on 10 and 11 April 1994 was entrusted to Ntagerura, while PR13 went to the funeral from 14 to 17 April 1994. The Defence concludes, that the evidence the Prosecutor seeks to submit will reinforce rather than weaken Ntagerura's alibi.

16. With respect to proposed rebuttal Witness PR1, the Defence contend that the testimony of this witness has no probative value since is not likely to aid the Chamber in determining the guilt of the Accused. Based on Annexes 4, 5, and 6 to the Ntagerura Response, it is those persons in charge of protocol who are responsible for affixing stamps to the Accused's passport on 10 and 11 April 1994. The anticipated testimony of PR1 regarding the free movement of nationals of member states of the CEPGL and the stamping of passports, would interpret the general provisions of convention on the free movement of person with the CEPGL but it would not provide any particulars about how it was adopted and implemented at lower levels to fit a given situation. Significantly, notes the Defence, the testimony about the Accused's mission to Burundi speaks only of the necessity to obtain visas and does not address the issue of affixing stamps to passports of persons crossing the borders of member states of the CEPGL. *See* Trial Transcript 30 September 2002 pp. 51-56. The testimony of the Accused and of the other witnesses is that the protocol officer for the delegation took charge of obtaining the appropriate stamps during the border crossings on 10 and 11 April 1994. The statement of Witness PR1 indicates that the member states of the CEPGL who adopted distinct formalities for the movement of persons and that these measures varied from time to time according to the security situation.

17. As to proposed rebuttal witness PR7, the Defence claims that his anticipated testimony will do no more than establish that he could not verify the pages of the log at the border Akanyaru-Haut for 10 and 11 April 1994 and that the relevant pages were missing. In such an instance,

the Chamber could not draw any definitive inferences regarding the guilt of the Accused. The state of affairs is at once consistent with the guilt and the innocence of the Accused.

18. The Defence challenges the proposed testimony of Witness PR8 because the Prosecutor has failed to submit his or her witnesses statement so as to enable the Chamber to assess the probative value of her anticipated testimony or to determine whether the witness was an eyewitness to the meeting of the Council of Ministers in *Kigali* on 11 April 1994 or whether he will testify on the basis of hearsay. More important, the Defence claims that this witness's testimony should be disallowed in rebuttal because it should have been elicited by the Prosecutor in her case-in-chief since it is part of the facts she must prove pursuant to para. 9.2 of the Indictment where she has alleged that the Accused conducted a meeting in *Cyangugu* on 11 April 1994.

19. Addressing the propriety of calling proposed rebuttal witness PR9, the Defence contends that the Prosecutor has again failed to demonstrate the probative worth of this witness's anticipated testimony about whether there was a practice of leaving diplomatic passports at the offices of the Minister of Foreign Affairs between missions since it does not concern a central fact at issue in this case. The determination of whether such a practice existed or not will not aid the Chamber in determining whether the Accused went on mission to Burundi. At best, the issue is one that is only incidental or collateral to the central facts at issue in this case. Moreover, although the Prosecutor hopes to tender through PR9 a letter dated 9 April 2002 from the Minister of Foreign Affaires establishing the practice and the method of guarding diplomatic passports in 1994, she fails to indicate whether this witness is competent to respond to questions relative to these practices as such. Moreover, the practice of keeping diplomatic passports between missions at the Ministry's office in 1994 cannot validly be explained by investigators from the Office of the Prosecutor or by the Rwandan authorities who are presently in Kigali, who are by all appearances not the same who occupied those posts in 1994.

20. In addition, with respect to proposed rebuttal witnesses PR10G and PR10C who the Prosecutor hopes to call to refute the testimony of BAH to the effect that he was at the Centre de Santé Sainte François during the period 11 April to 17 July 1994, the Defence argues that such testimony is not relevant to the determination of the guilt of the Accused Ntagerura. Similarly, the Defence contends that the witness statements of proposed rebuttal witnesses PR10A, PR10B, PR10E and PR10F are, by the Prosecutor's own admission, not admissible in rebuttal because in order to meet the requirements of Rule 92 *bis*, the Rule pursuant to which the Prosecutor seeks their admission into evidence, the statements cannot touch upon the acts or behavior of the Accused. If the statements meet the requirements of Rule 92 *bis*, they are *not* suitable direct evidence of material issues for the assessment of the guilt of the Accused.

21. The Defence further submits that there is no Rule that suggests that the Chamber must make a determination about the falsity of a witness's statement before it may make an assessment of the guilt or innocence of an accused. Finally, the Defence argues that were the Chamber to grant leave to the Prosecutor to present rebuttal evidence, this would cause delay in the proceedings because it would entail granting to the Defence a continuance to conduct investigations about the Prosecutor's rebuttal witnesses and leave to present a rejoinder case.

22. Consequently, the Defence asks that the Chamber deny the Motion or order the Prosecutor to disclose unredacted witness statements for all her proposed rebuttal witnesses and to grant the Defence a continuance so that it may conduct its investigations to meet the Prosecutor's rebuttal case.

3910

C. SUBMISSIONS OF THE DEFENCE FOR IMANISHIMWE

23. In addition to some of the principal arguments made in the Ntagerura Response, the Imanishimwe Response advances the following major arguments.

24. First, the Defence stresses that the main thrust of the rules regarding the propriety of permitting the Prosecutor to present rebuttal evidence is that the Prosecutor is forbidden from splitting her evidence. This rule, claims the Defence, enjoys virtual universal acceptance in both civil and common-law jurisdictions. By forbidding the Prosecutor from splitting her case, the rule fosters orderly progression of the trial without unjustified surprises. Moreover, the Defence contends that the principle against splitting of the prosecution's may be abrogated only in the event where the defence has presented elements of proof which are new and reasonably unforeseeable.

25. Addressing the particular facts of this case, the Defence submits that the Prosecutor has failed to demonstrate her entitlement to rebuttal because she has failed to make a threshold showing that the Defence introduced new facts that the Prosecutor could not have reasonably anticipated. The Defence contends that the Prosecutor knew of Imanishimwe's alibi for 12 April 1994 as early as 14 January 2002. In addition, the Prosecutor probed the issue of the Accused's alibi during the cross-examination of Defence Witness PKA on 15 October 2002. To permit the Prosecutor to bring additional witnesses on the alibi would be to permit her an opportunity to perfect her evidence and to split her case-in-chief.

26. The Defence then performs an analysis of the propriety of permitting the Prosecutor to call certain witnesses in rebuttal. As to Witness PR6, whom the Prosecutor hopes to bring to testify that he saw the Accused at the road block in Kwamufti in the afternoon of 12 April 1994, the Defence claims that such testimony would do nothing to negate the alibi since it would merely corroborate the accounts of other witnesses who claimed they saw the Accused Imanishimwe at Gashirabobwa on 12 April. More distressing, contends the Defence, is the fact that the Prosecutor knew of the content of PR6's statement since June 1999 and had previously included this witness on her list of witnesses she intended to call at trial, but for some reason elected not to call him.

27. The testimony of proposed rebuttal witnesses PR10G, PR10D, and PR10C should be disallowed because it would merely counter the collateral issue of whether Defence Witness PNB was in the Centre de Santé St. François between 11 and 17 April July 1994. The testimony for witness PR11 should be excluded because it would merely parrot the testimony of Witness MG, her sister, whom the Prosecutor called to testify in February 2001 with respect to the disappearance of X from a camp in Karambo.

28. Finally, the Defence claims that the Prosecutor violated the standing witness protective order in this case because she must have revealed the identity of witness PNB in order to learn that PR11 claims that she had not met her in Kigali in July 2002. In addition, the Defence contends that the Prosecutor made a misrepresentation to the Chamber when she stated at the Status Conference that it was not until the conclusion of the Bagambiki defence that she was able to determine whether she would be seeking leave to present rebuttal evidence against the Accused Ntagerura and Imanishimwe. For the forgoing lapses, the Defence requests that the Chamber declare that the Prosecutor has violated the witness protection order and her code of professional

conduct and deem that she has made misrepresentations to the Chamber. The Defence requests that the Chamber impose appropriate sanctions.

D. SUBMISSIONS OF THE DEFENCE FOR BAGAMBIKI

29. In the Bagambiki Response, the Defence declares that the only party of the Motion that is relevant to its case is the portion seeking to challenge the documentary evidence presented by Defence witnesses JNQ since the Accused Bagambiki never interposed an alibi defence or presented any witnesses whom the Prosecutor suspects of having committed perjury. The Defence reiterates the applicable legal tests for the determination of whether leave for rebuttal should be granted as announced in *Semanza*. The Defence, stresses however, relying on the Dissent of Judge Ostrovsky in the Extension Decision, that the Prosecutor has made no showing that any of the evidence she seeks to challenge was new or not reasonably foreseeable.

30. The Defence claims generally that the Prosecutor cannot claim surprise with regard to certain Defence Exhibits because they figured on the list of intended trial exhibits that was disclosed to the Prosecutor before the commencement of the Defence case. Addressing the propriety of particular witnesses, the Defence argues that Witness PR5, whom the Prosecutor hopes to call to contest the testimony of the Accused to the effect that Prosecution witness LAP had been terminated by the Rwandan Armed Forces for disciplinary reasons, is not relevant to the determination of the guilt of the Accused. The testimony of PR5 should be not be permitted in rebuttal because nothing in his statement neither mentions witness LAP nor relates to this trial. Whereas to Witnesses PR3 and PR4, the Defence claims that their proposed testimony is not relevant to this trial and does not meet the requirements for admissibility as part of the Prosecutor's rebuttal evidence. Their testimony will merely put at issue the credibility Defence witness JNQ, an issue that must be decided by the Judge of the Chamber alone.

II.

DELIBERATIONS

31. Rule 85 prescribes the sequence in which the Chamber is to receive evidence during the trial proceeding. The Rule does not create an entitlement for the Prosecutor to present evidence in rebuttal. In determining the propriety of granting leave to call rebuttal evidence, the Chamber enjoys wide discretion to limit or preclude the presentation of rebuttal in order to insure that the trial proceeds expeditiously, without unfairness and needless consumption of time. *See* Article 20 (2), (4)(c) of the Statute; Rule 90 (F). The Chamber has the power to enforce the traditional purpose of rebuttal, which is to afford the prosecution an opportunity to refute evidence of a new matter submitted in the course of the case of the defence that was not reasonably foreseeable. *See, Semanza, supra,* at para. 8; *Prosecutor v. Delalic et al.*,[4]

A. Test for Leave to Submit Rebuttal Evidence

32. . Generally speaking, within the common law "rebuttal" evidence denotes evidence introduced by the prosecution to explain, repel, counteract, or disprove testimony or facts introduced by the defence for the first time its case-in-chief. *Semanza, supra,* at para. 8. As previously stated in the *Semanza* decision, rebuttal may not be used to corroborate or perfect the

[4] Case No. IT-96-21-T, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, Tr. Ch. (ICTY), 19 August 1998, para. 23.

proofs that the prosecutor has already presented in her case-in-chief. Nor is rebuttal a license for the Prosecutor to re-open her case-in-chief. Rather, rebuttal provides the Prosecutor with the opportunity to address new matters raised in the Defence's case-in-chief. *Id.* 8 In addition, rebuttal evidence must have significant probative value on a central issue and not be merely cumulative. *Prosecutor v. Nahimana et al.*,[5].

33. Moreover, although the Prosecutor is not generally expected to anticipate and rebut an alibi defence when she has not received adequate prior notice, the Prosecutor is not entitled to present rebuttal evidence where the evidence she seeks to tender in rebuttal aims to prove a constituent element of the crimes charged that she would have had to establish in order to prove the guilt of an accused. *See Nahimana, supra*, at para. 47. (Citing to *Prosecutor v. Delalic, et al.*[6]). In such instances, the Trial Chamber may legitimately exercise its discretion to preclude the Prosecutor from presenting evidence that merely fills in lacunae she left in her case-in-chief. Similarly, when the proposed rebuttal evidence challenges the credibility of a witness, or other *collateral matters*, the Chamber should exclude it in rebuttal. *Nahimana, supra*, at para. 51.

34. As the party seeking to present rebuttal evidence, the Prosecutor must make a showing of the following two elements: (i) the evidence she seeks to rebut arose directly *ex improviso* during the presentation of the Defence's case-in-chief and could not, despite the exercise of reasonable diligence, have been foreseen *Semanza, supra*, at para. 8; and (ii) the proposed rebuttal evidence has significant probative value to the determination of an issue central to the determination of the guilt or innocence of the Accused. *Nahimana, supra*, at paras. 42, 44.

B. Proposed Rebuttal Evidence to Refute Alibi of the Accused Ntagerura

35. As a threshold matter, the Chamber observers that the Prosecutor has failed to relate any of her proposed rebuttal testimony or evidence to any of the allegations or counts of the Indictment, leaving the Chamber to conjecture or perform an extensive analysis of the trial record and the Indictment in order to determine the propriety of rebuttal evidence in this proceedings. As the proponent for rebuttal, the Prosecutor was obligated to provide the Chamber with a detailed justification complete with citations to the trial record or the Indictment to support her claim for each piece of rebuttal evidence she seeks to present. *See Prosecutor v. Kajelijeli*,[7] ; *Prosecutor v. Kamuhanda.* [8] Nevertheless, the Chamber finds that the proposed rebuttal evidence to challenge the alibi is related to the events of 10 and 11 April 1994.

36. With respect to the evidence she seeks to tender in rebuttal of the alibi of Ntagerura, the Chamber holds that the Prosecutor has failed to demonstrate that the matter regarding the presence of the Accused at particular places and his activities on the dates in question arose for the first time in the Defence's case. Indeed, a review of the Amended Indictment, *Prosecutor v. Ntagerura*, [9] reveals that the Prosecutor, as part of her burden of proof on Counts 1, 2, 4, 5, and 6, had from the beginning of her case-in-chief an obligation to present evidence to prove the presence in Cyangugu and acts of the Accused on at least one of the dates in question, namely,

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[5] Case No. ICTR-99-52-T, Decision on the Prosecutor's Application for Rebuttal Witnesses, (ICTR), Tr. Ch., para. 43.
[6] *Supra*, at para. 23.
[7] Case No. ICTR-98-44A-T, Decision on the Prosecution Motion for Leave to Call Rebuttal Evidence (Rule 85), (ICTR), Tr. Ch., 12 May 2003.
[8] Case No. ICTR-99-54A-T, Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence Pursuant to Rules 85(A)(iii) of the Rules of Procedure and Evidence, (ICTR), Tr. Ch., 13 May 2003.
[9] Case No. ICTR-96-10-I, (ICTR), 29 January 1998.

11 April 1994. At para. 9.2 of the Amended Indictment, the Prosecutor alleges as follows: "Consequently, on 11 April 1994, after the death of President Habyarimana when the plane in which he was traveling crashed, André Ntagerura conducted a meeting in Cyangugu."

37. The witnesses the Prosecutor seeks to call in rebuttal of the alibi would merely corroborate or buttress the testimony and evidence that the Prosecutor has already led with respect the presence of the Accused at particular sites on the dates in question. As such, none of the proposed evidence legitimately serves the purposes of "rebuttal" evidence because it would not even attempt to *refute* the alibi of the Accused.

38. The Chamber further finds that the Prosecutor has failed to make any showing as to why since the pendency of this case, through the exercise of due diligence, she could not have discovered the evidence she now seeks to submit in rebuttal to the Accused's alibi and why she could not have presented it during her case-in-chief. In view of the foregoing facts, the Chamber is constrained to exercise its discretion to exclude all proposed rebuttal evidence regarding Ntagerura's alibi for 11 April 1994. To permit the Prosecutor to supplement evidence she should have presented in her case-in-chief would be to violate one of the cardinal precepts preventing the prosecutor from splitting her proofs and condone the practice of presenting cases piecemeal for the Defence to answer. In such circumstances, the Chamber should exercise its discretion to exclude such evidence when offered in rebuttal.

39. Accordingly, the following proposed rebuttal witnesses and evidence do not properly constitute, as they must, evidence to refute the alibi. Upon reviewing the witness statements of the proposed rebuttal witnesses, the Chamber finds that their anticipated testimony does not possess significant probative value to the determination of the veracity of the Accused's alibi. Rather, the statements show that the witnesses will testify about collateral issues: (i) Witness PR1's anticipated testimony relates to the practice and usage regarding the stamping of nationals passports of CEPGL member states; (ii) Witness PR7 would testify that he could not check the Burundian immigration records for the dates of the Accused alibi; (iii) Witness PR8 would merely provide cumulative evidence to corroborate that of previous Prosecution witnesses to the effect that the Accused was at a cabinet meeting in Kigali on 11 April 1994; (iv) Witness PR9 will merely place into evidence a letter from the Ministry of Foreign Affairs regarding the custody of diplomatic passports; and (v) Witness PR13 will testify that he attended the funeral of the late Burundian President on 14 through 17 April 1994.

40. Nevertheless, pursuant to Rule 98, the Chamber *proprio motu* directs that the Prosecutor introduce into evidence the regulations of the CEPGL regarding the processing of passports of nationals of member states extant on the dates in question, i.e., 10 and 11 April 1994.

C. Proposed Rebuttal Evidence to Refute the Alibi of the Accused Imanishimwe

41. As to the rebuttal evidence the Prosecutor seeks to submit to refute the alibi of the Accused Imanishimwe for 12 April 1994, the Chamber finds that the Prosecutor has again lapsed in her threshold duty to relate her proposed evidence to a crime charge in the Indictment.[10] Having reviewed the Indictment, the Chamber finds that the date of 12 April 1994 is not specifically mentioned. Notwithstanding, because the Prosecutor led evidence that the Accused was present at a massacre on that date and because the Defence has entered an alibi for that date, the

[10] *Prosecutor v. Bagambiki, et a*Case No. ICTR-97-36-I, (ICTR), 13 October 1997.

3906

Chamber considers the propriety of permitting the Prosecutor to present rebuttal evidence to refute it.

42. The Prosecutor has already led evidence about the presence of the Accused at Gashirabwoba field on 12 April 1994, indicating that she reasonably foresaw the significant relevance of the presence of the Accused on the date in question. The Chamber believes that it would not foster the expeditious trial of this case to permit her to supplement or perfect her case in rebuttal what she could have presented in her case-in-chief. The Prosecutor seeks to call witness PR6 merely to corroborate the testimony of other Prosecution witnesses placing the Accused at a roadblock in Kwamufti on 12 April 1994. This is not the intended purpose of rebuttal. Consequently, proposed rebuttal witness PR6 would not refute the alibi as such, and is not admissible for that reason.

43. Moreover, the statements of proposed testimony of witnesses PR10G, PR10D, PR10C and PR11 and their relevant witness statement as well as the statements of witnesses PR10A, PR10B, PR10C, PR10E, and PR10F are not admissible in rebuttal because they would merely contest the *collateral* matter of Witness PNB's claim that he was at the Centre de Santé St. François between 11 April and 17 July 1994. For similar, reasons, the proposed testimony of PR11 is not admissible on the collateral issue regarding the disappearance of X from a camp in Karambo.

D. Proposed Rebuttal Evidence to Challenge Provenance of Documents Admitted through JNQ, Witnesses for the Accused Bagambiki

44. The Prosecutor seeks leave to submit rebuttal evidence that would challenge the provenance and reliability of documents that were admitted into evidence incident to the testimony of Witness JNQ. Here again, the Chamber finds that the Prosecutor has failed to make even a threshold showing that she is entitled to tender evidence to rebut the provenance of the documents in question. The Chamber notes that proposed rebuttal witness PR3 is one and the same person as LAP, a Prosecution witness who has already testified in this case. Other than incanting that the testimony of witnesses PR3 and PR5 would prove that he was not dismissed by the FAR, as alleged in the documents tendered by JNQ, the Prosecutor provides no evidence indicating that the issues raised in the documents were reasonably unforeseeable despite the exercise of reasonable diligence. Moreover, even if the Prosecutor were able to overcome this threshold failure, the Chamber would nevertheless be constrained to exclude rebuttal evidence on this issue because it is collateral to the determination of one of the central issues in this trial, the guilt or innocence of the Accused Bagambiki. The proposed rebuttal testimony of these witnesses the Prosecutor wishes to call to buttress the credibility of witness LAP would merely place before the Chamber a question regarding the credibility of witness JNQ, an issue that is already and necessarily part of the determination the Chamber must make at the time of its deliberation of this case.

45. For similar reasons, the Chamber finds that the anticipated testimony of witnesses PR3 and PR4 relates to matters that are not of significant probative value to the determination of a central issue in this case, because they would merely testify that they are not the authors of the letters tendered into evidence through JNQ. Moreover, the Defence did not allege that PR4 was the author of any of the letters at issue. Accordingly, the Chamber sees no legitimate reason to exercise its discretion to unnecessarily prolong the trial proceeding to permit the Prosecutor to submit evidence on a matter not essential to the determination of the guilt of the Accused.

3905

E. Proposed Rebuttal Evidence to Demonstrate that Defence Witnesses PNB and BAH Committed Perjury

46. Finally, as to the Prosecutor's wish to conduct a trial within a trial about the alleged perjury committed by Defence witnesses BAH and PNB, in pursuit of an expeditious and orderly conduct of the trial, the Chamber is again constrained to preclude rebuttal evidence on the alleged perjury in context of this trial. The Chamber finds that in order to make a *prima facie* showing that the witnesses have indeed perjured themselves; the Prosecutor ought, at the very least, allege facts demonstrating the bare elements of the charge. In order to establish a prima facie case of perjury, the Prosecutor must allege that the witnesses: (i) willfully or intentionally misrepresented under oath; and (ii) a fact that is material to the inquiry in question. Nowhere within the Motion or in the Rejoinder does the Prosecutor allege that these essential elements exist. Consequently, the Chamber is left to consider the issue of perjury on the bare and conclusory allegation of the Prosecutor that she has in her possession evidence that she proposes to submit in the context of a perjury inquiry as envisioned by Rule 91. The Chamber finds that such conclusory allegations fail to demonstrate that the Prosecutor is entitled to submit evidence in rebuttal in the context of this trial or trigger the investigation into claims of perjury sanctioned in Rule 91. In light of these lacunae, the Chamber exercises its discretion to exclude the proposed rebuttal testimony and statements of witnesses PR10C, PR10D, PR10G and PR11.

F. Relief Sought by the Defence for the Conduct of the Prosecutor

47. The Chamber has considered all the arguments presented by the respective Defence teams regarding the Prosecutor's alleged failure to produce exculpatory evidence pursuant to Rule 68. The Chamber reminds the Prosecutor of her ongoing obligation to disclose to the defence the existence of potentially exculpatory evidence and evidence that may affect the credibility of prosecution evidence.

48. In addition, the Chamber considered the claim of the Defence that the Prosecutor made misrepresentations during the Status Conference and her purported violation of the witness protective order in this case. The Chamber finds these claims to be unsubstantiated. Consequently, the Chamber denies in the entirety the declarations and sanctions the Defence requested that the Chamber impose upon the Prosecutor for her purported breaches. The Chamber also finds that is not necessary in the current circumstances to grant the Defence for Ntagerura permission to file a supplementary brief in response to the Prosecutor's Rejoinder. Moreover, considering that the Chamber did not grant the Defence permission to submit a supplementary brief, the Chamber discounts the submissions of the Prosecutor's Response to the Supplementary Response by the Defence of Andre Ntagerura.

49. Finally, the Chamber notes that the parties have reverted to using the docket numbers of the individual cases before they were joined for trial. As a matter of the orderly administration of this matter the parties are directed to use the joint trial case number, i.e., ICTR-99-46-T in all their future filings and correspondence in this matter.

50. For the foregoing reasons, the Tribunal

DENIES the Motion in its entirety; and further

3904

DIRECTS the Prosecutor, pursuant to Rule 98, to tender into evidence the regulations of the CEPGL regarding the handling of passports of nationals of member states extant during April 1994.

Arusha, 21 May 2003

Lloyd George Williams, Q.C. Judge, Presiding	Yakov Ostrovsky Judge	Pavel Dolenc Judge

[Seal of the Tribunal]