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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before Judges: Taghrid Hikmet, Presiding
Seon Ki Park
Joseph Masanche

Registrar: Adama Dieng

Date: 26 November 2009

THE PROSECUTOR

v.

Gaspard KANYARUKIGA

Case No. ICTR-2002-78-T

JUDICIAL RECORDS ARCHIVES
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DECISION ON PROSECUTION REQUEST FOR FURTHER ALIBI
PARTICULARS

Office of the Prosecutor:

Holo Makwaia
Althea Alexis Windsor
Cheikh Tidiane Mara
Lansana Dumbuya

Defence Counsel:

David Jacobs
Claver Sindayigaya
Marc Nerenberg

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INTRODUCTION

1. The trial in this case commenced on 31 August 2009. After calling eleven witnesses over fourteen trial days, the Prosecution closed its case on 17 September 2009. The Defence case is scheduled to occur between 18 January and 12 February 2010.¹
2. On 29 September 2009, the Prosecution filed a motion for disclosure of the Accused's alibi particulars, pursuant to Rule 67(A)(ii)(a) of the Rules of Procedure and Evidence (the "Rules").²
3. On 30 September 2009, the Defence filed a "Provisional Formal Notice of Alibi" ("Notice of Alibi").³ The Defence identified eight potential alibi witnesses but submitted that it anticipates adding other alibi witnesses when the lost exculpatory documents are retrieved and when further alibi evidence becomes available.⁴ The Notice of Alibi also specified the places at which the Accused claims to have been present at the time of the alleged crimes at Nyange Parish.⁵
4. On 1 October 2009, the Prosecution filed a response to the Notice of Alibi arguing that the disclosure of the Accused's alibi particulars was insufficient and fell short of the requirements of Rule 67(A)(ii)(a).⁶ The Prosecution requested that the Trial Chamber direct the Defence to sufficiently disclose the names, addresses and other identifying information for any witnesses the Defence intends to call to establish the alibi.⁷
5. On 2 October 2009, the Defence filed a confidential reply, providing names and current countries and cities of residence for four of the eight alibi witnesses mentioned in its Notice of Alibi.⁸
6. On 19 October 2009, the Trial Chamber ordered the Defence to confidentially disclose to the Prosecution, by 6 November 2009, the names, current location, including the country and city of residence, and addresses in April 1994, including the *préfecture*, *commune*, *secteur* and *cellule*, of all witnesses upon whom it intends to rely to establish the Accused's alibi.⁹
7. On 6 November 2009, the Defence confidentially filed witness particulars for 19 potential alibi witnesses, including five of the eight witnesses identified in the Notice of

¹ Scheduling Order following the Status Conference held on 17 September 2009 (TC), 28 September 2009, Order I.

² Prosecutor's Motion for the Disclosure of the Particulars of the Alibi of the Accused Gaspard Kanyarukiga, Rules 67 (A)(ii)(a), filed on 29 September 2009.

³ Provisional Formal Notice of Alibi (Rule 67(A)ii.a. of the Rules of Procedure and Evidence), filed on 30 September 2009 ("Notice of Alibi").

⁴ Notice of Alibi.

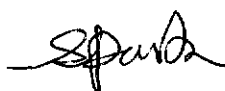
⁵ Notice of Alibi, paras. 2-9.

⁶ Prosecutor's Response (*sic*) Provisional Formal Notice of Alibi, Rules 67 (A)(ii)(a), filed on 1 October 2009 ("Response"), para. 5.

⁷ Response, para. 8.

⁸ Defence Reply to Prosecutor's Response to Provisional Notice of Alibi, (Rule 67(A)ii.a. of the Rules of Procedure and Evidence), filed on 2 October 2009.

⁹ Decision on Prosecution Motion for Alibi Particulars (TC), 19 October 2009.



Alibi.¹⁰ The Defence reiterated its intention to add or remove witnesses as its investigations unfold.¹¹

8. On 10 November 2009, the Prosecution filed a "Rejoinder to 'Defense Alibi Witness Particulars,'" arguing that the Defence had failed to comply with the Chamber's decision of 19 October 2009 as well as with Rule 67(A)(ii)(a) of the Rules.¹²

9. On 16 November 2009, the Defence filed a reply to the Prosecution rejoinder.¹³ The Defence submits that it has fully complied with the Trial Chamber's decision and that Rule 67(A)(ii)(a) does not require it to provide the information requested by the Prosecution.¹⁴

DELIBERATIONS

10. Rule 67(A)(ii)(a) requires the Defence to 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." Rule 67(A)(ii)(a) does not require the Defence to produce all the evidence supporting the alibi, but sufficient details must be given to "[allow] the Prosecution to organise its evidence and to prepare its case prior to the commencement of the trial on the merits".¹⁵

11. The Prosecution submits that, in the instant case, the Defence is in breach of its obligations under Rule 67(A)(ii)(a), as well as the Trial Chamber's decision of 19 October 2009, because it has not provided the place or places at which the Accused claims to have been present at the time of the alleged crimes; a complete list of the witnesses upon whom it intends to rely; details as to how each witness will support the Accused's alibi; the persons with whom the Accused claims to have been present at the time of the alleged crimes; or the addresses and telephone numbers of Defence alibi witnesses.¹⁶

12. The Chamber recalls that, in its provisional Notice of Alibi, the Defence specified the locations at which the Accused claims to have been present during the events at the Nyange Parish Church as well as seven witnesses who allegedly saw the Accused at these locations on the relevant dates.¹⁷ The Chamber therefore finds that the Defence has fulfilled its obligation to disclose the place or places at which the Accused claims to have been present at the time of the alleged crimes.

¹⁰ Defense Alibi Witnesses Particulars, filed on 6 November 2009, Annex.

¹¹ Defense Alibi Witnesses Particulars, filed on 6 November 2009, para. 3.

¹² Prosecutor's Rejoinder to 'Defense Alibi Witness Particulars,' filed on 10 November 2009 ("Rejoinder").

¹³ Reply to the "Prosecutor's Rejoinder to 'Defence Alibi Witness Particulars,'" filed on 16 November 2009.

¹⁴ Reply to the "Prosecutor's Rejoinder to 'Defence Alibi Witness Particulars,'" filed on 16 November 2009, para. 3.

¹⁵ *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003, para. 241. See also *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Judgement (AC), 1 June 2001, para. 111.

¹⁶ Rejoinder, paras. 4-8.

¹⁷ Notice of Alibi, paras. 2-9. The Defence identified an eighth alibi witness (KG20) but did not indicate how this witness would support the Accused's alibi

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13. The Chamber further recalls that, in its decision of 19 October 2009, the Trial Chamber ordered the Defence to disclose the names and addresses of all witnesses upon whom it intends to rely to establish the Accused's alibi.¹⁸ In so doing, the Chamber sought, *inter alia*, to obtain identifying information for the four witnesses who were specified in the Notice of Alibi but for whom the Defence had not provided names or addresses. In responding to the Chamber's order, however, the Defence provided a list of 19 potential alibi witnesses, including just five of those mentioned in the original Notice of Alibi.¹⁹ The Defence has not provided any explanation for the omission of witnesses KG3, KG7 and KG36 from its most recent submission. Nor has the Defence indicated how its fourteen new witnesses may support Kanyarukiga's alibi.

14. The Chamber further notes that the Defence has failed to provide certain address information, including witness KG12's *cellule* of residence in 1994 and witness KG70's *secteur* and *cellule* of residence in 1994. The Chamber finds that the Defence has had ample opportunity to obtain this information.

15. Finally, the Chamber observes that alibi witnesses KG46 and KG67 appear to be the same person.

16. The Chamber therefore instructs the Defence to harmonise its most recent submission with the original Notice of Alibi by providing, *inter alia*, an explanation for the omission of witnesses KG3, KG7 and KG36 from the alibi witness particulars filed on 6 November 2009, information on how each proposed witness will support the Accused's alibi and further details regarding those witnesses mentioned for the first time in the 6 November 2009 submission.

17. With respect to the Prosecution's request for the Defence to "set out with whom the accused claims he was at the time of the alleged crimes,"²⁰ the Chamber notes that Rule 67 (A)(ii)(a) does not require the Defence to disclose this information. Thus, the Chamber finds that the Prosecution request is without merit.

18. Lastly, in light of the protective measures granted to the Defence witnesses in this case,²¹ the Chamber finds the Prosecution request for the witnesses' street addresses and telephone numbers to be without merit.

¹⁸ Decision on Prosecution Motion for Alibi Particulars (TC), 19 October 2009, disposition.

¹⁹ Defense Alibi Witnesses Particulars, filed on 6 November 2009, Annex.

²⁰ Rejoinder, para. 6.

²¹ Decision on the Defence Motion for Witness Protection Measures (TC), 3 September 2009.

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FOR THESE REASONS, the Chamber

ORDERS the Defence to provide, by Tuesday 1 December 2009, further details on how the witnesses identified in its "Defense Alibi Witnesses Particulars" relate to the original Notice of Alibi, including:

- i) Why witnesses KG3, KG7 and KG36 have been omitted from the "Defense Alibi Witnesses Particulars;" and
- ii) How each proposed witness will support the Accused's alibi;

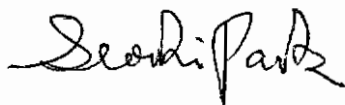
ORDERS the Defence to disclose to the Prosecution, by Tuesday 1 December 2009, witness KG12's *cellule* of residence in 1994 and witness KG70's *secteur* and *cellule* of residence in 1994;

ORDERS the Defence to either remove witness RG46 or witness RG67 from its list of potential alibi witnesses or, if these are two different witnesses, to provide additional identifying information so that they may distinguished;

DISMISSES the remainder of the Prosecution Motion.

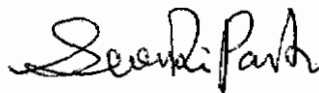
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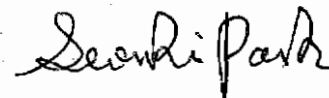
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Taghrid Hikmet
Presiding Judge
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signature]

[read and approved]





Joseph Masanche
Judge
[absent at the time of
signature]