



UNITED NATIONS  
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ICTR-00-61-T  
18-12-2009  
(3333 - 3329)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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1094

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Khalida Rachid Khan, presiding  
Lee Gacuiga Muthoga  
Aydin Sefa Akay

**Registrar:** Mr. Adama Dieng

**Date:** 18 December 2009

**THE PROSECUTOR**

v.

**Jean-Baptiste GATETE**

**Case No. ICTR-2000-61-T**

JUDICIAL RECOVERIES  
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**DECISION ON PROSECUTION MOTION FOR THE DISCLOSURE OF THE  
PARTICULARS OF THE ACCUSED'S ALIBI**

*Rule 67 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Richard Karegyesa  
Adelaide Whest  
Drew White  
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Yasmine Chubin

**For the Accused:**

Marie-Pierre Poulain  
Kate Gibson

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## INTRODUCTION

1. The trial in this case commenced on 20 October 2009.<sup>1</sup> The Prosecution closed its case on 16 November 2009. The Defence case is scheduled to start on 1 March 2010.<sup>2</sup>
2. On 12 November 2009, the Prosecution made oral submissions pursuant to Rule 67 (A)(ii)(a) alleging that the Defence sought to rely on a defence of alibi through its propositions to Prosecution Witnesses BBT, BBR, AIZ, AIK and BBP.<sup>3</sup> Towards the end of their cross-examination, the Defence proposed to Prosecution Witnesses that the Accused was not present at the time of the alleged crimes.<sup>4</sup>
3. On 17 November 2009, the Prosecution filed a Motion submitting that the Defence was in breach of its obligations under Rule 67 (A)(ii)(a) and requesting that the Chamber order immediate disclosure of the particulars of the Accused's alibi if the Defence wishes to rely on such a defence.<sup>5</sup>
4. The Defence filed its Response on 23 November 2009 in which it submits that the Prosecution has failed to show that the Defence was raising an alibi defence, thereby rendering any submissions in that respect moot.<sup>6</sup> The Prosecution replied on 24 November 2009.<sup>7</sup>

## DISCUSSION

### *Applicable Law on Alibi*

5. Rule 67 (A)(ii)(a) requires that the Defence shall, as early as reasonably practicable and in any event prior to the commencement of the trial, notify the Prosecution of its intent to enter the defence of alibi. The notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi.<sup>8</sup> However, Rule 67 (B) provides that failure of the Defence to provide such notice shall not limit the right of the accused to rely on the defence of alibi.<sup>9</sup>

<sup>1</sup> *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-PT, Scheduling Order, 30 September 2009.

<sup>2</sup> Scheduling Order regarding Commencement of Defence Case, 19 November 2009.

<sup>3</sup> T. 12 November 2009, pp. 97-99.

<sup>4</sup> Witnesses BBT (T. 10 November 2009, p. 87), BBR (T. 11 November 2009, p. 39) and AIZ (T. 11 November 2009, p. 73) testified on events at Rwankuba. AIK (T. 12 November 2009, p. 92) testified on events in Kiramuruzi and BBP (T. 20 October 2009, p. 49) testified on events at Kiziguro.

<sup>5</sup> Prosecutor's Motion for the Disclosure of the Particulars of the Alibi of the Accused Jean-Baptiste Gatete, 17 November 2009 ("Prosecution Motion").

<sup>6</sup> Response to Prosecution Motion for the Disclosure of the Particulars of the Alibi of the Accused Jean-Baptiste Gatete, 23 November 2009 ("Defence Response").

<sup>7</sup> Reply to Defence Response to Prosecutor's Motion for the Disclosure of the Particulars of the Alibi of the Accused Jean-Baptiste Gatete, 24 November 2009 ("Prosecution Reply").

<sup>8</sup> *The Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-2001-63-T, Decision on Defence Compliance with Rule 67 of the Rule, 5 April 2007 ("Nchamihigo Decision"), para. 6.

<sup>9</sup> See also *Nchamihigo* Decision, para. 6; *The Prosecutor v. Édouard Karemera et al.*, case No. ICTR-98-44-T, Decision on Prosecutor's Motion for an Order to File Notice of Alibi, 22 March 2007 ("Karemera Decision"), para. 16: "failure to give notice does not exclude testimony on an alibi".



6. By raising an alibi, an accused is denying that he was in a position to commit the crime with which he is charged,<sup>10</sup> “by reason of his presence at a particular place at a particular time, such that he was unlikely to have been where the offence is alleged to have been committed at the time of its alleged commission”.<sup>11</sup> The Appeals Chamber has held that the accused must “produce the evidence tending to show that he was not present at the time of the alleged crime”.<sup>12</sup>

#### *Parties' Submissions*

7. The Prosecution submits that the Defence propositions to Prosecution witnesses, that the Accused was not present at the place that the witnesses allege to have seen him, indicate an intention to rely on an alibi.<sup>13</sup> The Prosecution submits that the Defence is in breach of Rule 67 (A)(ii)(a) as it has not provided a notice of alibi and this is impeding its ability to prepare its case, as it is unable to investigate the alibi.<sup>14</sup> The Prosecution requests that the Chamber order the Defence to disclose the particulars of the alibi, if it wishes to rely on such a defence.<sup>15</sup>

8. The Defence responds that the Prosecution has mischaracterized the pleading of an alibi.<sup>16</sup> The Defence explains that during cross-examination of the Prosecution witnesses, it merely submitted that the Accused was not at the place alleged by them, without specifying that the Accused was at another location.<sup>17</sup> The Defence asserts that “it has not proffered its intention to call a defence of alibi and that it has not been putting questions [...] that suggest it would do so”.<sup>18</sup>

9. The Prosecution replies that the Defence does not state that an alibi claim will not be made, which indicates that the Defence intends to put forth alibi evidence without revealing information supporting it at this stage.<sup>19</sup> The Prosecution reiterates its submission that it appears the Defence is in possession of information supporting an alibi.<sup>20</sup>

#### *Is the Defence in Breach of Rule 67(A)(ii)(a)?*

10. The Chamber notes that Prosecution Witnesses BBT, BBR and AIZ testified on events at Rwankuba on 7 April 1994. Witness AIK testified on events in Kiramuruzi on 7 April 1994 and Witness BBP on events at Kiziguro on 11 April 1994. The Chamber observes that the proposition put to Witnesses BBT, BBR, and AIZ was that the Accused “was never in Rwankuba”<sup>21</sup> or “never came to Rwankuba”.<sup>22</sup> The Defence further proposed to Witness AIZ

<sup>10</sup> *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Judgement (AC), 16 November 2009, (“*Zigiranyirazo Judgement (AC)*”), para. 17.

<sup>11</sup> *Nchamihigo Decision*, para. 7; *Karemera Decision*, para. 13.

<sup>12</sup> *Zigiranyirazo Judgement (AC)*, para. 17 citing *Alfred Musema v. The Prosecutor*, Case No. ICTR-96-13-A, Judgement (AC), 16 November 2001, para. 202.

<sup>13</sup> Prosecution Motion, paras 5, 9.

<sup>14</sup> Prosecution Motion, paras 3, 15, 17. See also Prosecution Reply, para. 4.

<sup>15</sup> Prosecution Motion, paras 3, 21.

<sup>16</sup> Defence Response, para. 6.

<sup>17</sup> Defence Response, para. 10.

<sup>18</sup> Defence Response, para. 12.

<sup>19</sup> Prosecution Reply, para. 2.

<sup>20</sup> Prosecution Reply, para. 6 referring to Defence Response, p. 5 (footnote 16).

<sup>21</sup> See T. 10 November 2009, p. 87 (lines 27-29) for Witness BBT.



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that the Accused "never stepped foot in Kiramuruzi Centre on 7 April 1994".<sup>23</sup> Regarding Witness BBP, the Defence suggested that the Witness could not have seen the Accused in Kiziguro on 10 or 11 April 1994 "because he [the Accused] had already left for Kayonza".<sup>24</sup>

11. The Chamber recalls that in order to compel the Defence to give notice of an alibi, it must be shown that the Accused intends to enter a defence of alibi.<sup>25</sup> The Chamber observes that during cross-examination of Witnesses BBT, BBR, AIZ and AIK, the Defence did not suggest that the Accused was at another location. Therefore, the Chamber is not satisfied that the propositions put to Witnesses BBT, BBR, AIZ and AIK amount to the pleading of an alibi as the Defence did not suggest that the Accused was at a particular place, at a particular time such that he could not have been at the scene of the crime at the time of its commission.<sup>26</sup>

12. In respect of Witness BBP's cross-examination, the Defence suggested that the Accused had left for Kayonza and so the witness could not have seen him in Kiziguro on 10 or 11 April 1994. However, the Chamber notes that no further details of the Accused's whereabouts were suggested by the Defence during Witness BBP's cross-examination. In addition, the Defence has submitted that it is aware of its obligations under Rule 67 (A)(ii)(a).<sup>27</sup>

13. Accordingly, the Chamber is not satisfied, at this stage, that the information before it is sufficient to conclude that the Defence intends to enter a defence of alibi. However, since, as submitted by the Prosecution, the Defence Response does not expressly rule out the possibility of relying on an alibi, and it was suggested by the Defence that the Accused was on his way to Kayonza, the Chamber reminds the Defence of its obligation pursuant to Rule 67 and as set out in paragraph 5 above. Indeed, disclosure of complete notice of alibi at the earliest stage of the proceedings ensures the fairness of the trial and proper administration of justice.<sup>28</sup> Furthermore, the Chamber reminds the Defence that a Trial Chamber is entitled to take into account a failure to provide timely notice of an alibi when weighing the credibility of the alibi testimony.<sup>29</sup>

14. In view of the above, the Chamber is not satisfied at this stage that the information before it is sufficient to conclude that the Defence intends to rely on the defence of alibi and therefore finds that an order to file a notice of alibi is unwarranted.

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<sup>22</sup> See T. 11 November 2009, p. 39 (lines 9-11) for Witness BBR and p. 73 (lines 1-3) (Closed Session) for Witness AIZ.

<sup>23</sup> See T. 12 November 2009, p. 92 (lines 29-30).

<sup>24</sup> See T. 20 October 2009, p. 49 (lines 36-37).

<sup>25</sup> *Karemera* Decision, para. 14.

<sup>26</sup> *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR- 99-54A-A, 19 September 2005, Judgement (AC), para. 167.

<sup>27</sup> Defence Reply, para. 16.

<sup>28</sup> See *Karemera* Decision, para. 16 citing *Prosecutor v. Rutaganda*, Case No. ICTR-93-A, Judgement (AC), 12 May 2003, para. 241.

<sup>29</sup> *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgement (TC), 27 January 2000, para. 107. See also *Emmanuel Ndinabahizi v. The Prosecutor*, Case No. ICTR-01-71-A, Judgement (AC), 16 January 2007, para. 66: "the jurisprudence permits a Trial Chamber to consider the failure to provide the requisite notice in its assessment of the alibi".





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**FOR THESE REASONS** the Chamber,

**DENIES** the Prosecution Motion.

Arusha, 18 December 2009

  
Khalida Rachid Khan  
Presiding Judge

  
Lee Gacuga Muthoga  
Judge

  
For and with the consent of  
Aydin Sefa Akay  
Judge

[Seal of the Tribunal]

