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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER II**

Before: Judge William H. Sekule, Presiding  
Judge Solomy Balungi Bossa  
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng


Date: 16 April 2010

**The PROSECUTOR**

v.

**Augustin NGIRABATWARE**

Case No. ICTR-99-54-T

JUDICIAL AUTHORITY  
2010 APR 16 AM 11:58  


**DECISION ON PROSECUTOR'S SUPPLEMENTARY MOTION TO COMPEL  
THE ACCUSED TO DISCLOSE PARTICULARS OF HIS ALIBI**

**Office of the Prosecutor**

Mr. Wallace Kapaya  
Mr. William Egbe  
Mr. Patrick Gabaake  
Mr. Iskandar Ismail  
Ms. Faria Rekkas

**Defence Counsel**

Mr. Peter Herbert  
Ms. Mylène Dimitri  
Mr. Deogratias Sebureze  
Ms. Anna-Gaëlle Denier



**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the “Tribunal”),

**SITTING** as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa and Mparany Rajohnson (the “Chamber”);

**BEING SEIZED** of the “Prosecutor’s Supplementary Motion to Compel the Accused to Disclose Particulars of His Alibi [made pursuant to Rules 73(A), 67(A)(ii)(a), 54 and 89(C) of the Rules of Procedure and Evidence and the inherent criminal jurisdiction of the Tribunal]”, filed confidentially on 9 March 2010 (the “Motion”);

**CONSIDERING**

- (a) The “Defence Response to the Prosecutor’s Supplementary Motion to Compel the Accused to Disclose Particulars of His Alibi [made pursuant to Rules 73(A), 67A(ii)(a), 54 and 89(C) of the Rules of Procedure and Evidence and the inherent criminal jurisdiction of the Tribunal]”, filed confidentially on 15 March 2010 (the “Response”); and
- (b) The “Additional Alibi Notice”, filed confidentially by the Defence on 22 March 2010;

**CONSIDERING** also the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

**NOW DECIDES** the Motion pursuant to Rule 73 (B) of the Rules.

**INTRODUCTION**

1. On 23 September 2009, the *Ngirabatware* trial commenced and the Defence filed a “Notice of Alibi Pursuant to Rule 67 (A) (ii)” (the “Notice”). The Notice alleges that the Accused was in Kigali town from 6 to 12 April 1994 and did not leave during that time period.<sup>1</sup>

2. On 4 December 2009, the Chamber requested assistance from France in the provision of certain documents the Defence considers essential to the establishment of the Accused’s alibi.<sup>2</sup>

3. On 7 January 2010, the Prosecutor filed a “Motion for an Order to Compel the Accused to Disclose Particulars of his Alibi”, requesting to be furnished with any evidence upon which *Ngirabatware* intends to rely to establish his alibi.<sup>3</sup> On 16 February 2010, the Chamber granted the motion in part, and directed the Defence to disclose as soon as reasonably practicable, the names and addresses of witnesses and any other

<sup>1</sup> Notice of Alibi Pursuant to Rule 67 (A)(ii), filed 23 September 2009, paras. 1-2.

<sup>2</sup> Decision on Defence Urgent Motion Requesting an Order Directed to France Pursuant to Article 28 of the Statute (TC), 4 December 2009, para. 4, p. 5.

<sup>3</sup> Prosecutor’s Motion for an Order to Compel the Accused to Disclose Particulars of His Alibi [made under the provisions of Rules 73(A), 54, and 67(A) (ii) (a) of the Rules of Procedure and Evidence and the Inherent Criminal Jurisdiction of the Court], filed on 7 January 2010, paras. 5, 20.

evidence upon which the Accused intends to rely to establish the defence of alibi in accordance with Rule 67 (A)(ii)(a).<sup>4</sup>

4. In March 2010, the Republic of France submitted documentation to the Registry of the Tribunal per the Chamber’s request of 4 December 2009. On 22 March 2010, the Defence filed confidentially an additional alibi notice.

**SUBMISSIONS OF THE PARTIES**

**Prosecution Motion**

5. The Prosecution submits that the jurisprudence of the Tribunal permits a Trial Chamber, when assessing the alibi, to consider the Defence’s failure to provide the requisite notice.<sup>5</sup>

6. The Prosecution alleges that the information sought by the Defence with regards to the persons sheltered within the French embassy is publicly accessible in “*Les Crises Politiques au Burundi et au Rwanda (1993-1994)*”, a compilation of essays edited by Professor André Guichaoua.<sup>6</sup> The Defence’s statement that it cannot disclose relevant information before it has received the list of names from the French Embassy is therefore untrue.<sup>7</sup> The Accused must know the persons with whom he consorted at all material times and places.<sup>8</sup>

7. The Prosecution concludes from the Defence’s non-disclosure of the alibi particulars that the Defence has not yet secured witnesses to support the alleged alibi. It also submits that the Defence is deliberately trying to delay the proceedings in order to fish for witnesses supporting its alibi.<sup>9</sup> It considers the alleged alibi a fiction and refers to potential rebuttal witnesses.<sup>10</sup>

<sup>4</sup> Decision on Prosecution Motion for an Order to Compel the Accused to Disclose Particulars of His Alibi (TC), 16 February 2010 (the “Decision”), p. 9.

<sup>5</sup> Motion para. 8, citing *The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentence (TC), 1 December 2003, paras. 164-167; *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-95-54A-T, Judgment (TC), 22 January 2004, para. 82; *The Prosecutor v. Clément Kayishema et al.*, Case No. ICTR-95-1-T, Judgement (TC), 21 May 1999 (“*Kayishema et al. Trial Judgement*”), paras. 233-239; *The Prosecutor v. Clément Kayishema et al.*, Case No. ICTR-95-1-A, Judgement (Reasons) (AC), 1 June 2001, paras. 106, 110-111; *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgement and Sentence (TC), 27 January 2000 (“*Musema Trial Judgement*”), para. 107; *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement and Sentence (TC), 16 May 2003, para. 50; *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence (TC), 15 May 2003, para. 82.

<sup>6</sup> Motion, paras. 9-10.

<sup>7</sup> *Id.*, para. 12.

<sup>8</sup> *Id.*, para. 13.

<sup>9</sup> *Id.*, para. 14.

<sup>10</sup> *Id.*, paras. 15-17.

8. The Prosecution therefore requests the Defence to identify all the individuals who purportedly support the alleged alibi of the Accused, and to provide their particulars.<sup>11</sup> It also requests that the Chamber order the Defence to disclose this information, and take into consideration the failure to provide it in assessing the alibi.<sup>12</sup>

### ***Defence Response***

9. The Defence submits that the Prosecution is revisiting an issue that has already been deliberated upon by the Chamber, thereby seeking to attenuate the direction given by the Chamber, as well as the effect of Rule 67 (B).<sup>13</sup>

10. The Defence recalls that the Chamber directed it to disclose the names and addresses of witnesses, and any other evidence the Accused intends to rely on to establish the alibi, as soon as reasonably practicable.<sup>14</sup> In a letter to the Prosecution dated 22 February 2010, the Defence submitted that it had not been “reasonably practicable” to disclose the alibi particulars.<sup>15</sup>

11. The Defence asserts that in the interests of justice and the conduct of a fair trial, it is imperative that the presence of the Accused at the French Embassy between 6 and 12 April 1994 is independently verified. As he was a public figure at the time, it is likely that the Accused will be identified by persons who took refuge at the embassy.<sup>16</sup>

12. The Defence avers that “*Les Crises Politiques au Burundi et au Rwanda (1993-1994)*” is riddled with inconsistencies and lacks the veracity of a document to be treated as authoritative by the Chamber. Gaps in the list of persons present in the Embassy at the time mean the text has to be considered unreliable.<sup>17</sup> Moreover, Professor Guichaoua, the author, has served as a Prosecution witness in a previous trial and is therefore predisposed to testify in favour of the Prosecution.<sup>18</sup> The list of individuals who sought refuge at the French Embassy between 6 and 12 April 1994 can not be found within the public domain.<sup>19</sup>

13. With regards to the potential alibi rebuttal witnesses, the Defence submits that these are not on the Prosecution list of witnesses who are due to testify before the Chamber.<sup>20</sup> The Prosecution is circumventing the trial process by attacking the alibi in a motion, rather than in court, thereby undermining the Chamber’s decision on this issue.<sup>21</sup>

<sup>11</sup> *Id.*, para. 18.

<sup>12</sup> *Id.*, paras. 19 (i)-(ii).

<sup>13</sup> Response, para. 5, citing Decision, paras. 32-33.

<sup>14</sup> Response, para. 6, citing Decision, paras. 32-33.

<sup>15</sup> Response, para. 6, quoting the Defence Response to the Prosecutor’s Motion for an Order to Compel the Accused to Disclose Particulars of His Alibi, 11 January 2010, para. 12.

<sup>16</sup> Response, para. 7.

<sup>17</sup> *Id.*, para. 9.

<sup>18</sup> *Id.*, para. 10.

<sup>19</sup> *Id.*, para. 11.

<sup>20</sup> *Id.*, para. 12.

<sup>21</sup> *Id.*, para. 13.

14. The Defence affirms that it has made expeditious and strenuous attempts to obtain the requisite list of names from the French Embassy.<sup>22</sup> It stated that upon the receipt of the relevant documents from the French Embassy, it would be in a position to fulfill the requisite disclosure obligations in accordance with Rule 67 (A)(ii)(a).<sup>23</sup>

15. The Defence submits that the Chamber has already ruled on all the issues raised in the Motion. If dissatisfied with the previous Decision, the Prosecution should have requested reconsideration or certification to appeal, not file the motion a second time.<sup>24</sup>

***Additional Alibi Notice from 22 March 2010***

16. On 22 March 2010, the Defence filed an additional alibi notice “in recognition of the duty incumbent on the Defence to make such disclosure in a continuous manner, as directed by the Trial Chamber”.<sup>25</sup>

17. The Defence states that it received, on 18 March 2010, the list of individuals who took refuge at the French Embassy between 6 and 12 April 1994. However, a significant number of names have been omitted from these documents, most likely names of foreign nationals present at the French Embassy at the time.<sup>26</sup> The Defence will follow up this issue with the ERSPS.<sup>27</sup>

18. The Defence reiterates its firm commitment to the disclosure of requested particulars in a continuous manner.<sup>28</sup> It considers that the disclosure of this list constitutes the fulfillments of its obligations up to date, and states that it will continue to press the French Embassy for a complete list of individuals present from 6 to 12 April 1994.<sup>29</sup> All potential alibi witnesses will be contacted upon receipt of the complete list. The Prosecution will be informed of the relevant address details and which witnesses the Defence intends to call as alibi witnesses after contact has been established.<sup>30</sup>

19. The Defence reminds the Prosecution that the Chamber has granted protective measures for all potential Defence witnesses. Therefore the Prosecution is barred from contacting any Defence witnesses without prior permission of the Defence.<sup>31</sup>

**DELIBERATIONS**

20. The Chamber reminds the Parties of its Decision on Prosecution Motion for an Order to Compel the Accused to Disclose Particulars of his Alibi, from 16 February

<sup>22</sup> *Id.*, para. 14.

<sup>23</sup> *Id.*, para. 17.

<sup>24</sup> *Id.*, para. 18.

<sup>25</sup> Additional Alibi Notice, p.1, citing Decision, paras. 32-33.

<sup>26</sup> Additional Alibi Notice, para 1.

<sup>27</sup> *Id.*, para. 2.

<sup>28</sup> *Id.*, para. 4.

<sup>29</sup> *Id.*, paras. 3-4.

<sup>30</sup> *Id.*, para. 4.

<sup>31</sup> *Id.*, para. 5.

2010. The Chamber found that the Notice of Alibi filed by the Defence on 23 September 2009 lacked information and was not in conformity with the requirements of Rule 67 (A)(ii)(a).<sup>32</sup> The Chamber therefore directed the Defence to disclose to the Prosecution as soon as reasonably practicable, the names and addresses of witnesses and any other evidence upon which the Accused intends to rely to establish the defence of alibi, in accordance with Rule 67 (A)(ii)(a).<sup>33</sup>

21. The Chamber recalls that pursuant to Rule 67 (A)(ii)(a), “as early as reasonably practicable and in any event prior to the commencement of the trial [...] the Defence shall notify the Prosecutor of its intent to enter [...] the defence of alibi; in which case the notification shall specify [...] the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi”.<sup>34</sup> The notice of alibi should be tendered in a timely manner, ideally before the commencement of the trial, to ensure good administration of justice and efficient judicial proceedings.<sup>35</sup>

22. The Chamber notes that in its Additional Alibi Notice of 22 March 2010, the Defence disclosed documents provided to it by the French Embassy.<sup>36</sup> These contained lists with dozens of names which the Defence identified as potential alibi witnesses.<sup>37</sup> The Chamber recalls that the reciprocal disclosure of evidence exists to allow the Parties to adequately prepare their respective cases. In the instant case, the list of dozens of potential alibi witnesses provided by the Defence does not allow for adequate preparation.

23. The Chamber also recalls that the Defence does not need to contact specific individuals to file a notice of alibi, as information about where the Accused was at the times specified within the indictment should be within his personal knowledge.<sup>38</sup> The Chamber considers that the Additional Alibi Notice therefore does not fulfil the requirements of Rule 67 (A)(ii)(a).

24. Should the Defence fail in fulfilling the requirements of Rule 67 (A)(ii)(a), Rule 67 (B) provides that the Defence may still rely on evidence in support of an alibi at trial. However, the Chamber recalls that such a failure may be taken into account in the deliberation regarding the alibi.<sup>39</sup>

<sup>32</sup> Decision, para. 31.

<sup>33</sup> Decision, p. 9.

<sup>34</sup> See also Decision, para. 28, citing *The Prosecutor v. Pauline Niyirmasuhuko et al.*, Case No. ICTR-98-42-T, Decision on the Confidential Prosecutor’s Motion to be Served with Particulars of Alibi Pursuant to Rule 67(A)(ii)(a) (TC), 1 March 2005, para. 27; *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-PT, Decision on Prosecutor Motion for Notice of Alibi and Reciprocal Disclosure (TC), 14 June 2005, para. 7; *Musema* Trial Judgement, para. 106.

<sup>35</sup> *Georges Rutaganda v. The Prosecutor*, Case No. ICTR-93-A, Judgement (AC), 26 May 2003 (“*Rutaganda* Appeal Judgement”), para. 243.

<sup>36</sup> Additional Alibi Notice, Annex.

<sup>37</sup> Additional Alibi Notice, para. 4.

<sup>38</sup> Decision on Defence Urgent Motion for an Order Directed at the Kingdom of Belgium Pursuant to Article 28 of the Statute (TC), 16 September 2009, para. 11; Decision on Defence Extremely Urgent Motion on Issues Related to the Preparation of the Trial, 17 September 2009 (TC), para. 41.

<sup>39</sup> *Rutaganda*, Appeal Judgement, para. 243, note 392; *Musema* Trial Judgement, para. 107, citing *Kayishema et al.* Trial Judgement, para. 237.

25. The Chamber therefore directs the Defence to immediately make the appropriate disclosures in accordance with Rule 67 (A)(ii)(a) if it intends to rely on the defence of alibi.

**FOR THE ABOVE REASONS, THE CHAMBER**

**GRANTS** the Motion in part;

**DIRECTS** the Defence to disclose to the Prosecution immediately the names and addresses of witnesses and any other evidence upon which the Accused intends to rely to establish the defence of alibi, in accordance with Rule 67 (A)(ii)(a);

**REMINDS** the Defence that, should it fail to make the appropriate disclosures, this may be taken into account in the deliberation regarding the alibi and;

**DENIES** the Motion in all other respects.

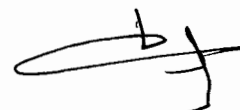
Arusha, 16 April 2010



William H. Sekule  
Presiding Judge



Solomy Balungi Bossa  
Judge



Mparany Rajohnson  
Judge

[Seal of the Tribunal]