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(2523-2817)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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UNITED
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OR: ENG

TRIAL CHAMBER III

Before Judges: Florence Rita Arrey, Presiding
Bakhtiyar Tuzmukhamedov
Aydin Sefa Akay

Registrar: Adama Dieng

Date: 07 December 2010

JUDICIAL RECORDS SECTION
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THE PROSECUTOR

v.

GREGOIRE NDAHIMANA

Case No. ICTR-2001-68-PT

DECISION ON THE PROSECUTOR'S MOTION FOR PARTICULARS OF ALIBI

Rule 67 of the Rules of Procedure and Evidence

Office of the Prosecutor

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Introduction

1. On 3 September 2010, the Defence filed its Notice of Alibi pursuant to Rule 67 (A) (ii) of the Rules of Procedure and Evidence ("Notice of Alibi").¹
2. On 7 September 2010, the Prosecution filed a response requesting particulars for the witnesses the Defence intended to call in support of its alibi ("Response to Notice of Alibi").²
3. On 21 September 2010, the Defence filed supplementary information to its Notice ("Supplement to the Notice of Alibi"), disclosing the names of some potential witnesses, and promising to provide names and addresses for the other witnesses "very soon."³
4. On 19 October 2010, the Prosecution filed a motion again requesting the Trial Chamber to direct the Defence to furnish complete identifying information for all of the alibi witnesses it intends to call in support of its alibi ("Motion").⁴ On 25 October 2010, the Defence filed its response to the Prosecution Motion ("Defence Response") and a Corrigendum thereto.⁵
5. On 1 November 2010, the Prosecution orally opposed the Defence Response and Supplement to the Notice of Alibi, expressing dissatisfaction at the failure of the Defence to provide complete identifying information for all of the alibi witnesses.⁶ The Defence responded that its investigators had encountered difficulties in tracing certain of its alibi witnesses.⁷ The Defence submitted that it had provided all information regarding its alibi witnesses of which it was currently availed.⁸ The Trial Chamber noted that the Defence would not be able to call witnesses for whom it had no information.⁹

¹ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Notice of Alibi for the Defence of Ndahimana Grégoire Pursuant to Rule 67 (A) (ii) of the Rules of Procedure and Evidence ("Notice of Alibi"), 3 September 2010.

² *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Prosecutor's Response to the Notice of Alibi from the Defence of Grégoire Ndahimana (Under Rule 67 (A) (ii) of the Rules of Procedure and Evidence) ("Response to Notice of Alibi"), 7 September 2010.

³ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Supplement to the Notice of Alibi Filed on 3rd September 2010 (Supplement to the Notice), 21 September 2010.

⁴ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Prosecutor's Motion for Particulars of Alibi under rule 67 (A) (ii) of the Rules of Procedure and Evidence ("Motion"), 19 October 2010.

⁵ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Defence Response to the Prosecutor's Motion for Particulars of Alibi under Rule 67 (A) (ii) of the Rules of Procedure and Evidence ("Response"), 25 October 2010; *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Corrigendum to the Defence Response to the Prosecutor's Motion for Particulars of Alibi under Rule 67 (A) (ii) of the Rules of Procedure and Evidence, 25 October 2010.

⁶ T. 1 November 2010, p. 2.

⁷ T. 1 November 2010, p. 2.

⁸ T. November 2010, p. 2.

⁹ T. 1 November 2010, p. 3.

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Submissions of the Parties

6. The Prosecution submits that the Defence Notice of Alibi violates Rule 67 (A) (ii) (a) of the Rules of Procedure and Evidence because it does not provide either names or addresses for several of its proposed alibi witnesses, as stipulated by Rule 67.¹⁰ In asserting the importance of having all particulars for all alibi witnesses in order to fully prepare its case, the Prosecution highlights the 1 November 2010 date when its case re-commenced.¹¹ The Prosecution argues that the failure of the Defence to furnish particulars for all intended alibi witnesses occasions prejudice to the Prosecution.¹² The Prosecution requests that the Trial Chamber direct the Defence to provide the names, addresses, and other identifying information for all alibi witnesses.¹³

7. The Defence filed a Supplement to the Notice of Alibi, providing identifying information for several proposed alibi witnesses.¹⁴ However, the Prosecution finds this Supplement to the Notice deficient.¹⁵ The Prosecution further states that the Defence Supplement to the Notice does not correct its violation of Rule 67 because the Supplement to the Notice still omits the names of three witnesses, and lists only one name and an alias for another witness.¹⁶

8. Additionally, the Prosecution takes issue with the failure of the Defence to identify any witnesses between the hours of 2pm and 4pm on 6 April 1994, when the Defence claims that the Accused was at the German Consulate.¹⁷ The Prosecution claims that the failure of the Defence to disclose any information regarding witnesses to substantiate this portion of the alibi renders it impossible for the Prosecution to investigate this part of the alibi.¹⁸

9. The Prosecution asserts that by requiring the proper disclosure of the particulars of intended alibi witnesses, Rule 67 (A) (ii) (a) facilitates the Prosecution investigation into the alibi.¹⁹ The Prosecution relies on the principle that "the aim of disclosure of either the defence of alibi or other special defence is to enable the other party to prepare its case and to

¹⁰ Motion, paras. 8-10; Response to the Notice of Alibi, paras. 4-5.

¹¹ Response to the Notice of Alibi, para. 9.

¹² Motion, para. 10.

¹³ Motion, Prayer.

¹⁴ Supplement to the Notice.

¹⁵ Motion, para. 2.

¹⁶ Motion, paras. 4-5.

¹⁷ Motion, para. 6.

¹⁸ Motion, para. 6.

¹⁹ Response to the Notice of Alibi, para. 5.

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controvert evidence mentioned by the defence," citing Trial Chamber II in *Prosecutor v. Kayishema and Ruzindana*.²⁰

10. The Prosecution submits that timely disclosure of particulars of alibi witnesses is necessary to prevent delay, as untimely disclosure may cause the Prosecution to resort to time-consuming measures, such as rebuttal or the recall of witnesses.²¹

11. The Prosecution opposes the security concerns the Defence asserts, reiterating its right to know the identities of the witnesses prior to the commencement of trial.²² The Prosecution notes the ability of the Defence to provide this information confidentially.²³

12. Finally, as to its understanding of the meaning of Rule 67 (B), the Prosecution cites the opinion expressed in the *Butare* case that Rule 67 clearly requires the Defence to notify the Prosecution of its intention to enter the defence of alibi, and to specify names and addresses for intended alibi witnesses as early as reasonably practicable and in any event prior to the commencement of trial.²⁴

13. In response, the Defence asserts that it has provided all information in its possession.²⁵ Regarding the missing particulars, the Defence states that its investigators have been unable to locate the remaining witnesses.²⁶

14. More concretely, the Defence provides information for one of the three undisclosed witnesses and states that this witness is reported to have died.²⁷ The Defence also submits the full name of the witness for whom it had previously provided only one name and an alias.²⁸ Finally, the Defence submits that it has been unable to locate any particular witnesses for the period of the alibi the Accused spent at the German Consulate.²⁹

15. The Defence requests that the request of the Prosecution be deemed as satisfied.³⁰

16. The Prosecution expresses dissatisfaction with the Defence Response, reiterating its assertion that the Defence is in breach of Rule 67.³¹

²⁰ Response to the Notice of Alibi, para. 4.

²¹ Response to the Notice of Alibi, para. 5.

²² Response to the Notice of Alibi, para. 6.

²³ Response to the Notice of Alibi, para. 6.

²⁴ Response to the Notice of Alibi, para. 7.

²⁵ Defence Response, para. 5; T. November 1, p. 2.

²⁶ T. November 1, p. 2; Defence Response, para. 2.

²⁷ Defence Response, para. 1.

²⁸ Defence Response, para. 3.

²⁹ Defence Response, para. 4.

³⁰ Defence Response, Prayer.

³¹ T. November 1, p. 2.

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Applicable Law

17. Rule 67 reads, in part:

(A) As early as reasonably practicable and in any event before the commencement of trial: . . .

(ii) the Defence shall notify the Prosecutor of its intent to enter:

(a) The Defence of alibi; in which case 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.

(B) Failure of the Defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defence.

18. As this Tribunal has acknowledged in *Kajelijeli*, it is the established jurisprudence of the Tribunal that, at the pre-trial phase, Rule 67 (A) (ii) (a) solely requires the Defence to notify the Prosecution of its intention to rely on the defence of alibi, and to disclose the evidence upon which it intends to rely to establish the alibi.³² As to Rule 67 (B), although it provides that “the failure to give such notice does not limit the right of the Accused to rely on the alibi, the Chamber may take such failure into account when weighing the credibility of the alibi.”³³

Deliberations

19. The Prosecution has submitted that the failure of the Defence to provide the particulars for its entire list of proposed alibi witnesses renders the Prosecution unable to fully prepare its case.³⁴ The Trial Chamber recalls the established principle that facilitating the ability of the Prosecution to investigate the alibi is, in fact, “the purpose of entering a defence of alibi or establishing it at the stage of reciprocal disclosure.”³⁵ The Trial Chamber observes that the Defence disclosed notice of its intention to enter the defence of alibi on 3 September 2010, prior to the commencement of trial.

³² See e.g., *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Judgment and Sentence, 1 December 2003, para. 167; See also *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement, 26 May 2003, paras. 241-244.

³³ *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Judgment and Sentence, 1 December 2003, para. 164

³⁴ Response to the Notice of Alibi, paras. 4, 7; Motion, paras. 3, 9-10.

³⁵ *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgement, 21 May 1999, para. 111; *Prosecutor v. Kalimanzira*, ICTR-0588-T, Judgement, 22 June 2009, para. 63.

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20. The Prosecution has cited neither any provision under Rule 67 (A) (ii) (a) nor any jurisprudence of this Tribunal mandating that the Defence must provide names and addresses for all of the alibi witnesses at this time. Rather, the Trial Chamber notes that the Defence is required to notify the Prosecution of its intention to enter an alibi and of the particulars thereof "as early as reasonably practicable."³⁶ "Timely" notice envisaged by Rule 67 (A) (ii) (a), occurs "ideally before the commencement of the trial."³⁷ However, it is not mandatory at this stage.

21. In the Trial Chamber's opinion, although total failure on the part of the Defence to comply with requirements of Rule 67 (A) (ii) may indeed hinder the Prosecution and delay proceedings, the inability of the Defence to provide names and addresses for all of its intended alibi witnesses at this time does not harm the rights of the Prosecution. Pre-trial provision of all particulars of the alibi witnesses under Rule 67 (A) (ii) (a) is not mandatory.³⁸ Furthermore, the failure of the Defence to provide this information does not currently reach the threshold necessary to violate the principle under Tribunal jurisprudence that the Defence should disclose these particulars in a 'timely' manner, to allow the Prosecution to controvert evidence put forth.

22. The Trial Chamber reiterates that the Defence would not be able to call witnesses for whom it had no information.³⁹ The Trial Chamber reaffirms its prior Order that the Defence should provide identifying information for all of its witnesses, alibi and other, no later than 21 days prior to the commencement of the Defence case.⁴⁰

23. With respect to the Prosecution submission that the Trial Chamber may consider a lack of sufficient notice when assessing the merits of an alibi, the Trial Chamber recalls that the Appeals Chamber addressed the same argument in *Semanza*.⁴¹ According to Tribunal jurisprudence, if the Defence does not show good cause for its failure to notify the Prosecution of its intent to enter the defence of alibi, the Trial Chamber may indeed consider such failure when evaluating the credibility of an alibi.⁴² This does not prejudice the right of

³⁶ *Prosecutor v. Nchamihigo*, ICTR-01-63-T, Judgment and Sentence, 12 November 2008, para. 20. See also *Kamuhanda*, ICTR-99-54A-T, Judgment and Sentence, 22 January 2004, para. 82; *Prosecutor v. Rukondo*, ICTR-2001-70-T, Judgement, 27 February 2009, para. 539.

³⁷ See e.g. *Kayishema and Ruzindana*, ICTR-95-1-T, Judgement, 21 May 1999, para. 111.

³⁸ See e.g. *Kayishema and Ruzindana*, ICTR-95-1-T, Judgement, 21 May 1999, para. 111.

³⁹ T. 1 November 2010, p. 3.

⁴⁰ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Decision on Protective Measures for Defence Witnesses, 30 September 2010, paras. 17-18.

⁴¹ *Prosecutor v. Semanza*, ICTR-97-20-A, Judgement, 20 May 2005.

⁴² See e.g., *Semanza*, ICTR-97-20-A, Judgement, 20 May 2005, para. 93; *Prosecutor v. Kamuhanda*, ICTR-95-54A-T, Judgment and Sentence, 22 January 2004, para. 82; *Kayishema and Ruzindana*, ICTR-95-1-T,

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the Defence under Rule 67 (B) to rely upon the alibi,⁴³ as required by the presumption of innocence, and the duty of the Prosecution to prove guilt beyond a reasonable doubt,⁴⁴ even in the instance when the Defence fails to provide timely notice and particulars of the alibi.

24. Finally, while the Trial Chamber has declined to direct the Defence to provide all particulars for its alibi witnesses at this time, this decision is in no way intended to prevent the Prosecution from filing a later motion to compel the Defence to disclose particulars for unidentified alibi witnesses.

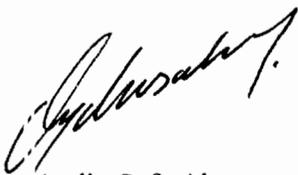
FOR THESE REASONS, THE CHAMBER

DENIES the Prosecution's Motion.

Arusha 07 December 2010, done in English.


Florence Rita Arrey
Residing Judge


Bakhtiyar Tuzmukhamedov
Judge


Aydin Sefa Akay
Judge



Judgement, 21 May 1999, para. 237; See also, *Nchamihigo*, ICTR-01-63-T, Judgment and Sentence, 12 November 2008, para. 20; *Rukondo*, ICTR-2001-70-T, Judgment, 27 February 2009, para. 539; *Kalimanzira*, ICTR-0588-T, Judgment, 22 June 2009, para. 66.

⁴³ See e.g., *Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, para. 243; *Kalimanzira*, ICTR-0588-T, Judgment, 22 June 2009, para. 66.

⁴⁴ See e.g., *Nchamihigo*, ICTR-01-63-T, Judgment and Sentence, 12 November 2008, para. 20.