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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

0393

TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Bakhtiyar Tuzmukhamedov
Mparany Rajohnson

Registrar: Adama Dieng

Date: 8 March 2011

THE PROSECUTOR

v.

Callixte NZABONIMANA
Case No. ICTR-98-44D-T

DECISION ON PROSECUTION MOTION TO CALL REBUTTAL EVIDENCE

Rules 54, 73 and 85(A) (iii) of the Rules of Procedure and Evidence

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INTRODUCTION

1. On 31 January 2011, the Prosecution filed a Motion seeking leave to call a witness to rebut the Defence alibi.¹ The Prosecution contends that notice of the details of the alibi first arose during the Defence case, and must therefore be challenged with new evidence.
2. On 7 February 2011, the Defence filed a Response opposing the Motion, asserting that the Prosecution was on notice of the Defence alibi long before the start of the Prosecution case.²
3. On 10 February 2011, the Prosecution filed a reply.³

PROCEDURAL HISTORY-ALIBI

4. On 19 June 2009, the Defence filed a Motion requesting that the Pre-Trial Chamber order the Government of France ("France") to cooperate with the Defence. In that Motion, the Defence requested that France provide information that would allow it to establish the presence of the Accused at the French Embassy in Kigali between 7 and 11 April 1994.⁴
5. On 2 July 2009, the Pre-Trial Chamber granted the Defence request stating that it "[...] considers that Callixte Nzabonimana has indicated the nature of the assistance sought and the importance of this assistance for the trial...".⁵
6. On 19 October 2009, the Trial Chamber issued a Decision on Nzabonimana's Motion asking the Chamber to request the President of the Tribunal to report the matter of France's refusal to cooperate with the Tribunal to the Security Council.⁶ In its Decision, the Trial Chamber recalled the determination of the Pre-Trial Chamber that "the Defence has shown good cause

¹ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Motion to Call Rebuttal Evidence Pursuant to Rules 54, 73 and 85 (A) (iii) of the Rules of Procedure and Evidence ("Motion"), 31 January 2011.

² *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Defence Response to Prosecutor's Motion to Call Rebuttal Evidence Pursuant to Rules 54, 73 and 85 (A) (iii) of the Rules of Procedure and Evidence ("Response"), 7 February 2011.

³ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Reply to Nzabonimana's Response to the Prosecutor's Motion to Call Rebuttal Evidence Pursuant to Rules 54, 73 and 85 (A) (iii) of the Rules of Procedure and Evidence ("Reply"), 10 February 2011

⁴ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-PT, Urgent Motion of Defendant Nzabonimana Requesting an Order Directed at France (Article 28 of the Statute of the Tribunal ("19 June 2009 Motion"), 19 June 2009.

⁵ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-PT, Un official Translation: Décision sur la Requête Urgente de Callixte Nzabonimana Demandant a la Chambre D'Ordonner à la France Coopération et Assistance, 2 July 2009, para. 5.

⁶ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Nzabonimana's Motion Asking the Chamber to Request the President to Report the Matter of France's Refusal to Co-operate to the Security Council (TC) ("19 October 2009 Decision"), 19 October 2009.

for seeking the information requested” and that it considered the “matter urgent as the trial in this case is scheduled to commence on 9 November 2009.”⁷

7. On 30 October 2009, the Trial Chamber denied a Defence request for the postponement of Trial based in part of the issue of French cooperation with the Defence on the issue of alibi. The Trial Chamber observed, *inter alia*, that the French Government has provided the Defence with copies of the diplomatic telegrams suggesting that Nzabonimana was at the French Embassy on 7, 9 and 11 April 1994.⁸ The Chamber added that the Defence could adduce any further information received during the presentation of its case, and the question of “where the accused was a matter within his personal knowledge and should not prevent him from filing a notice of alibi.”⁹
8. On 9 November 2009, the trial of Callixte Nzabonimana commenced.
9. On 13 November 2009, the Trial Chamber issued a Decision on a Defence Motion requesting, *inter alia*, reconsideration of the Trial Chamber’s 30 October 2009 Decision with respect to French cooperation.¹⁰ In that Decision, the Trial Chamber again “noted that the Defence ha[s] shown good cause for seeking the information requested [from France].”¹¹
10. On 17 December 2009, the Trial Chamber issued a Decision¹² which, *inter alia*, responded to a Prosecution countermotion asking that the Trial Chamber direct the Defence to file a notice of alibi pursuant to Rule 67. In that decision, the Trial Chamber took the position that

⁷ 19 October 2009 Decision, paras. 16-17.

⁸ *Prosecution v. Callixte Nzabonimana*, TPIR 98-44D-PT, Télécopie de M. Jacques Champagne de Labriolle, Ambassadeur de France en Tanzanie adressée a M. Adama Dieng, Greffier du Tribunal Pénal International pour le Rwanda, 29 janvier 2009 ; Annexes : *Note Verbale* No. 66/TPIR concernant la transmission des extraits diplomatiques en date des 7, 9, et 11 avril 1994 portant sur les personnes réfugiées à l’Ambassade de France à Kigali, 29 janvier 2009; télégrammes diplomatiques, Objet : Personnalités réfugiées à l’Ambassade de France, 7, 9 et 11 avril 1994.

⁹ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Defence Motion for the Postponement of the Start of Trial (TC) (“30 October 2009 Decision”), 30 October 2009, para. 65.

¹⁰ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Defence Motion for Stay of Proceedings, for Reconsideration and/or Certification of Decision Rendered on 29 October 2009; and Reconsideration and/or Certification of the Decision Rendered on 30 October 2009 (“13 November 2009 Decision”), 13 November 2009.

¹¹ 13 November 2009 Decision, para. 38.

¹² *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on 2nd Motion of Defendant Nzabonimana for Disclosure of Evidence, for Renewed Authorization to Interview Certain Prosecution Witnesses and for Postponement of the Testimony of Witnesses CNA and CNAC (“17 December 2009 Decision”), 17 December 2009.

...in its various motions related to the Cooperation of France, the Defence has clearly indicated that it intends to introduce an alibi for the days of 7-11 April 1994. The Trial Chamber reminds the Defence that in respect of its alibi, the question of where the accused was is a matter within his personal knowledge and should not prevent him from filing an alibi notice.¹³

11. On 22 February 2010, the Defence filed a Notice of Alibi pursuant to Rule 67.¹⁴
12. On 4 March 2010, the Trial Chamber issued a Decision requesting that the President report the matter of France's non-compliance with the Tribunal to the Security Council pursuant to Rule 7 bis.¹⁵ In its Decision, the Trial Chamber stated that:

The Trial Chamber concurs with the assessment of the Pre-Trial Chamber in its 2 July Decision that the Defence has shown good cause for the information requested in order to support the defence of alibi[...]¹⁶ The Trial Chamber believes that France may have in its possession information that could be critical for the pursuit of justice in this trial¹⁷ [...] Given the failure of France to cooperate with and provide judicial assistance to the Tribunal in this matter, the Trial Chamber finds that a Rule 7 bis referral is appropriate in the current circumstances as "a remedy of last resort."¹⁸

13. On 16 March 2010, the Registry received a *Note Verbale* from the French Embassy to which were appended several documents containing new information, including lists of persons who took refuge at the French Embassy in Kigali between 7 and 11 April 1994, copies of telegrams sent by the Embassy to Paris during this period, and a more complete list of personnel working at the French Embassy in Kigali between 7 and 11 April 1994 that had been provided in prior correspondence.¹⁹

¹³ 17 December 2009 Decision, para. 38.

¹⁴ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Avis D'Alibi ("Notice of Alibi"), 22 February 2010.

¹⁵ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Defence Motion to Reconsider Prior Trial Chamber Decisions on France's Cooperation with the Tribunal ("7 bis Decision"), 4 March 2010.

¹⁶ 7 bis Decision, para. 36.

¹⁷ 7 bis Decision, para. 40.

¹⁸ 7 bis Decision, para. 43.

¹⁹ *Note Verbale* from the French Embassy to the Registry received on 16 March 2010 ("16 March 2010 Documents").

14. The Prosecution closed its case on 13 April 2010. The Defence case commenced on 14 April 2010.
15. At a Status Conference held on 20 May 2010, the Trial Chamber requested that the Prosecution indicate whether it intended to call rebuttal evidence “with specific details about the number of witnesses [...] and time required” for their testimonies.²⁰ On 21 May 2010, the Prosecution indicated that it intended to call two rebuttal witnesses and presented the Trial Chamber with a provisional list of its rebuttal witnesses.²¹
16. On 20 September 2010, the Appeals Chamber issued a Decision on a Defence interlocutory appeal in which it noted, *inter alia*, that “Nzabonimana has sought the cooperation of French authorities in obtaining information relevant to his alibi since January 2009. And the Trial Chamber has issued a number of orders and decisions addressing alleged difficulties with the requested co-operation.”²²

SUBMISSIONS OF THE PARTIES

Prosecution Motion

17. The Prosecution seeks to call Witness CNR1 to rebut the alibi of the Accused. Specifically, the witness will testify that Callixte Nzabonimana’s alleged presence at the French Embassy from 7 to 11 April 1994 did not preclude him from having been in Gitarama “at any time of the day.”²³ According to the Prosecution, Witness CNR1 was a driver in April 1994. He will testify that on 7 April 1994, he escorted Nzabonimana and his family to the French Embassy, and that on 8 April 1994 he escorted Nzabonimana to Gitarama.²⁴ The Prosecution notes that the Indictment alleges that Nzabonimana was in Gitarama between 8 and 9 April 1994 and that Witness CNR1 will show that Nzabonimana went to Gitarama on 8 April 1994.²⁵ The Prosecution argues that the rebuttal evidence has significant probative value, is not cumulative,²⁶ and will not cause a needless consumption of time.²⁷

²⁰ Status Conference, T. 20 May 2010, pp. 15-16.

²¹ Proposed Provisional List of Rebuttal Witnesses for the Prosecutor, dated 21 May 2010.

²² *Callixte Nzabonimana v. Prosecutor*, Case No. ICTR-98-44D-AR7bis/ AR7bis.2, Decision on Callixte Nzabonimana’s Interlocutory Appeal on the Order Rescinding the 4 March 2010 Decision and the Motion for Leave to Appeal the President’s Decision dated 5 May 2010 (“20 September 2010 Appeals Decision”), 20 September 2010, para. 3.

²³ Motion, para. 2.

²⁴ Motion, para. 3.

²⁵ Motion, para. 33.

²⁶ Motion, para. 30.

²⁷ Motion, para. 22.

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18. The Prosecution submits that the Defence did not furnish its alibi notice and details of its alibi in timely manner.²⁸ Specifically, it notes that the Defence filed its notice of alibi on 22 February 2010, and for the first time provided “details” of the alibi. “By then, the Prosecution case was almost complete and the Defence case already scheduled to commence immediately after the last Prosecution witness testified on 14 April 2010.”²⁹ The Prosecution claims that it did not have sufficient time to investigate the alibi of the Accused, and rebut it, during the presentation of its case.³⁰ In particular the Prosecution argues that it did not anticipate the details of the alibi provided by Defence witnesses, T5, T7, T9 and Mechtilde Mukandagijimana.³¹ Thus, the Prosecution must now call rebuttal evidence to cure the prejudice.³²
19. The Prosecution also notes that on 7 May 2010 the Trial Chamber entered into evidence Defence documents, transmitted by France on 16 March 2010, containing names of former Staff at the French Embassy in 1994.³³ The Defence has since remained silent on the status of ongoing investigations based on this information.³⁴ Thus it is not clear whether the last Defence alibi witness has been heard, or if “the 16 March 2010 [...] documents are being maintained on the evidentiary record superficially.”³⁵ The Prosecution concludes that the silence of the Defence regarding the protracted issue of France’s cooperation causes uncertainty³⁶ and requests clarification from the Defence on the matter.³⁷

Defence Response

20. In its response, the Defence rejects the Prosecution contention that it did not receive notice of the alibi in a timely manner, and argues that the Prosecution knew of the defence alibi before the commencement of the Defence case on 14 April 2010.³⁸ According to the Defence, it first provided details of the alibi to the Prosecution in a Defence motion dated 19 June 2009,³⁹ in which the Defence specifically sought the cooperation of France to obtain

²⁸ Motion, para. 16.

²⁹ Motion, para. 17.

³⁰ Motion, para. 18.

³¹ Motion, para. 21.

³² Motion, para. 19.

³³ Motion, paras. 23-24, *see Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Defence Motion for the Admission of Documentary Evidence, filed 7 May 2010.

³⁴ Motion, paras. 24-25.

³⁵ Motion, para. 26.

³⁶ Motion, para. 22.

³⁷ Motion, para. 29.

³⁸ Response, para. 27.

³⁹ *see* 19 June 2009 Motion.

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information to support Nzabonimana's alibi that he was at the French Embassy between 7 and 11 April 1994.⁴⁰ The Defence submits that the Prosecution was therefore well aware of its alibi, and was on notice at least 5 months prior to the commencement of the trial on 9 November 2009.⁴¹

21. The Defence also notes that it filed several subsequent motions seeking the Chamber's assistance in obtaining from France material supporting Nzabonimana's alibi.⁴² Thus, had the Prosecution exercised reasonable diligence, it would have foreseen that the Defence intended to present evidence to support Nzabonimana's alibi that he was at the French Embassy between "7 and 12 April 1994".⁴³ The Defence states that the Prosecution should have called witnesses to counter the alibi during its case.⁴⁴
22. The Defence observes that its first alibi witness testified on 14 April 2010 and contends that the Prosecution therefore had approximately 11 months to conduct any investigations.⁴⁵
23. The Defence also recalls that during the 20 May 2010 Status Conference, the Trial Chamber requested that the Prosecution rapidly forward any information regarding any rebuttal witnesses it intended to call, by identifying the names and time required for each witness to testify,⁴⁶ and that the Prosecution only indicated that it intended to call 2 rebuttal witnesses without providing any further details about the witnesses.⁴⁷ The Defence also notes that it has serious concerns regarding the Prosecution's sudden decision to call this rebuttal witness for reasons related to his protective measures.⁴⁸
24. The Defence contends that the timing of the instant Motion is prejudicial to the Accused bearing in mind the tight Trial schedule from 28 February 2011⁴⁹ which requires that the Defence call 3 witnesses per week.⁵⁰ Therefore, the Trial Chamber should take into consideration the fairness of the trial and avoid the needless consumption of time.⁵¹ The

⁴⁰ Response, paras. 32; see 19 June 2009 Motion.

⁴¹ Response, paras. 33-35.

⁴² Response, paras. 36-37.

⁴³ Response, para. 39.

⁴⁴ Response, para. 39.

⁴⁵ Response, paras. 38, 40.

⁴⁶ Response, paras. 44-45.

⁴⁷ Response, para. 46.

⁴⁸ Response, para. 47.

⁴⁹ Response, para. 42.

⁵⁰ Response, para. 42.

⁵¹ Response, para. 48.

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Defence concludes that adding this rebuttal witness to the Trial session will cause serious prejudice to the fair trial rights of the Accused.⁵²

25. With respect the content of the proposed evidence, the Defence contends that the rebuttal evidence has no probative value, and notes that the Prosecution has attached no statement or summary of the witness' testimony save to say in its Motion that the witness "on 7th April 1994 escorted the Accused and his family to the French Embassy, and on 8 April 1994 he escorted the Accused to Gitarama."⁵³ According to the Defence, this evidence does not contradict Nzabonimana's alibi, it only corroborates the evidence of Defence Witnesses T9 and Mechtilde Mukandagijimana who both placed Nzabonimana at the French Embassy "at the end of the afternoon."⁵⁴ The Defence recalls that official telegrams and documents place Nzabonimana at the French Embassy at that time,⁵⁵ and argues that if Nzabonimana left the French Embassy on 8 April 1994, "there is insufficient information as to when and where Mr. Nzabonimana went."⁵⁶ The Defence therefore concludes that the Prosecution has not established the probative value of the proposed rebuttal evidence.⁵⁷

26. With regards to the Prosecution submission that the Defence provide a clarification on the evidentiary purpose of the 16 March 2010 documents, the Defence states that these documents were deemed to be relevant and have probative value by the Trial Chamber in its Decision of 7 May 2010.⁵⁸ The issue of French cooperation is ongoing and the Defence will inform the Prosecution of any further developments.⁵⁹

27. On a separate matter, the Defence alleges that the Prosecution violated protective measures accorded to Witness CNR1.⁶⁰

Prosecution Reply

28. In its Reply, the Prosecution reiterates its submission that the Defence failed to advise it of the details of the Defence alibi in a timely manner as prescribed by Rule 67(A) (ii).⁶¹ The

⁵² Response, para. 48.

⁵³ Response, para. 50.

⁵⁴ Response, para. 51.

⁵⁵ Response, para. 52.

⁵⁶ Response, para. 52.

⁵⁷ Response, para. 53.

⁵⁸ Response, paras. 54-55.

⁵⁹ Response, para. 56.

⁶⁰ Response, paras. 23-24.

⁶¹ Reply, para. 37.

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Prosecution submits that although the Defence indicated its intention to raise an alibi defence “several times prior to and during the trial”, the Defence did not fulfil its disclosure obligations until 22 February 2010.⁶² The Prosecution argues that the Defence motions requesting the cooperation of France did not amount to a notice of alibi pursuant to Rule 67(A)(ii). It is the view of the Prosecution that the Defence motions were “actually a way to seek information which could be used to prove the alibi, and not in themselves notice of the alibi.”⁶³ The Prosecution opines that “the details which the Defence elicited from that information are actually the details that the Defence are supposed to give as part of their notice of alibi to the Prosecutor.”⁶⁴

29. The Prosecution further contends that no prejudice has been caused to the Defence by the timing of the instant Motion,⁶⁵ and adds that the rebuttal evidence is of significant probative value because it covers dates referred to in the Indictment, and will show that Nzabonimana was not at the French Embassy at all times.⁶⁶ The Prosecution also notes that the Trial Chamber has planned for the possibility of rebuttal evidence, and that there will therefore be no needless consumption of time.⁶⁷

30. Finally, the Prosecution argues that as the Defence should know its alibi, and that the Trial Chamber must exercise its discretion and give “an ultimatum” to the Defence regarding its pursuit of French cooperation in relation to its alibi.⁶⁸

31. On the issue of protective measures, the Prosecution claims that Witness CNR1 was originally a Prosecution witness, that it is the Defence that violated his protective measures. The Defence also violated protective measures accorded to a second Prosecution witness.⁶⁹

DELIBERATIONS

Applicable Law

32. Pursuant to Rule 67 (A)(ii)(a):

⁶² Reply, para. 38.

⁶³ Reply, para. 40.

⁶⁴ Reply, para. 40.

⁶⁵ Reply, paras. 41-43.

⁶⁶ Reply, para. 44.

⁶⁷ Reply, para. 45.

⁶⁸ Reply, paras. 46-47.

⁶⁹ Reply, paras. 18-30

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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 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.

33. Pursuant to Rule 67 (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 defences.

34. Trial Chambers have held that Rule 67(A) stipulates that the Defence, “[a]s early as reasonably practicable and in any event prior to the commencement of the trial,” shall notify the Prosecution of any “defence of alibi” or “special defence. The purpose of this reciprocal pre-trial disclosure obligation is to allow the Prosecution to organise its evidence and to prepare its case prior to the commencement of the trial, so as to ensure the efficient administration of justice.⁷⁰ The requirements of Rule 67 (A) (ii) are satisfied when the Defence has notified the Prosecution of the required particulars of the alibi, without necessarily producing the evidence.⁷¹ However, if the Defence fails to strictly conform with the requirements of Rule 67 (A) (ii), it may still rely on evidence supporting an alibi at trial, pursuant to Rule 67 (B).⁷²

35. Pursuant to Rule 85

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

- (i) Evidence for the prosecution;
- (ii) Evidence for the defence;
- (iii) Prosecution evidence in Rebuttal;
- (iv) Defence evidence in rejoinder;

⁷⁰ *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Appeal Judgement (“*Rutaganda Appeal Judgement*”), 26 May 2003, para.241, citing the *Kayishema and Ruzindana Appeal Judgement*, paras. 109-110. See also *Prosecutor v. Karera*, Case No. ICTR-01-74-T, Decision on Motion for Further Alibi Particulars, 7 March 2006, para. 2, footnote 1.

⁷¹ *Rutaganda Appeal Judgement*, para. 242.

⁷² *Ibid.*, para. 243.

- (v) Evidence ordered by the Trial Chamber pursuant to Rule 98 [...]

36. 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 Prosecution 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 the rebuttal in order to ensure that the trial proceeds expeditiously, without unfairness and needless consumption of time.⁷³ The jurisprudence of the Tribunal has established that a 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 Defence case that was not reasonably foreseeable.⁷⁴ However, rebuttal evidence is not intended to allow the Prosecution to re-open its case,⁷⁵ and rebuttal evidence must have significant probative value on a certain central issue in the case and must not be cumulative.⁷⁶ The Chamber will not grant leave to call evidence in rebuttal where the Prosecution seeks to use such evidence to challenge the credibility of a Defence witnesses or other collateral matters in a case.⁷⁷

Preliminary Matter

37. Both parties in their submissions allege that the opposing party has violated the protective measures accorded to one or more of their witnesses. As the Trial Chamber has not been properly moved to consider these various allegations regarding protective measures, it will not consider them in this Decision.

Notice of Alibi in the instant case

38. In support of its request to call Witness CNR1 in rebuttal, the Prosecution submits that it was not made aware of the details of the Defence alibi in a timely manner and that the details of the alibi of the Accused “appeared for the first time in his defence.”⁷⁸ The Prosecution

⁷³ *The Prosecutor v. Ntagerura et al.*, 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 (TC), 21 May 2003, para 31 [“Ntagerura Decision”]; see also Article 20 (2), (4) (c) of the Statute and Rule 90 (F).

⁷⁴ *The Prosecutor v. Semanza*, 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, 27 March 2002, para. 3; *The Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Decision on the Prosecution’s Alternative request to Reopen the Prosecution’s Case (TC), 19 August 1998, para. 23.

⁷⁵ *Ntagerura Decision*, para. 32.

⁷⁶ *The Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Decision of 9 May 2003 on the Prosecutor’s Application for Rebuttal Witnesses as Corrected According to the Order of 13 May 2003 (TC), 13 May 2003, para. 44.

⁷⁷ *Ntagerura Decision* para. 33

⁷⁸ Motion, para. 1.

contends that the Defence only “gave notice [of the alibi], with details...” on 22 February 2010.⁷⁹ It specifically states that “this was the first time that the Defence specified the place or places at which the Accused claimed to have been present at the time of the alleged crimes and the names and addresses of witnesses and any other evidence upon which the accused intended to rely to establish the alibi.”⁸⁰ It further submits that four Defence alibi witnesses gave details of the alibi of the Accused “only after the presentation of the Prosecution case, and the Prosecutor had no basis to have anticipated such details so as to have referred to it [sic] during the presentation of his case.”⁸¹

39. The Trial Chamber recalls that the Defence first provided some detail of its prospective alibi when it moved the Pre-Trial Chamber on 19 June 2009, for an order to the Government of France (“France”) to cooperate with the Tribunal in order to assist the Defence in establishing an alibi for the Accused.⁸² In its Motion, the Defence specifically stated that it was “seeking to obtain the names of individuals susceptible to support the alibi for Nzabonimana, namely that he was present at the French Embassy between 7 and 11 April 1994.”⁸³ The Defence indicated that with those names it could then “obtain more information about the procedures that were followed with regards to the Rwandese nationals that took shelter at the French Embassy between 7 and 11 April 1994.”⁸⁴ The Defence outlined the allegations contained in nine paragraphs of the Indictment that fall within “the period of 7-11 April 1994, a period during which Nzabonimana took shelter at the French Embassy.”⁸⁵

40. In its 2 July 2009 Decision on that motion, the Pre-Trial Chamber noted that the Defence had asserted that the information it was seeking was “important for the preparation for the Defence [of Nzabonimana] and in particular to establish that he was at the French Embassy

⁷⁹ Motion, para. 2.

⁸⁰ Motion, para. 17.

⁸¹ Motion, paras. 18, 21.

⁸² *Prosecutor v. Callixte Nzabonimana*, ICT-98-44D-PT, Urgent Motion of Defendant Nzabonimana Requesting an Order Directed at France (“19 June 2009 Motion”), 19 June 2009.

⁸³ *Prosecutor v. Callixte Nzabonimana*, ICT-98-44D-PT, 19 June 2009 Motion, para. 7. See also paras. 1 & 9.

⁸⁴ 19 June 2009 Motion, para. 9. See also 19 June 2009 Motion, Annex B, Letter by Lead Counsel Vincent Courcelle-Labrousse to French Foreign Minister, transmitted by the Registry on 19 May 2009, in which Counsel lays out the purpose for which he is seeking the assistance of the French government.

⁸⁵ 19 June 2009 Motion, paras. 12-21.

in Kigali between 7 and 11 April 1994 a period during which the Indictment and certain Prosecution witnesses place him in other places committing crimes under the Statute.”⁸⁶

41. In a decision dated 17 December 2009, addressing a Prosecution counter-motion, in which the Prosecution requested, *inter alia*, that the Trial Chamber direct the Defence to file a Notice of Alibi pursuant to Rules 67 (A) and (B), the Trial Chamber stated:

The Trial Chamber notes that in its various motions related to the Cooperation of France, the Defence has clearly indicated that it intends to introduce an alibi for the days of 7-11 April 1994. The Trial Chamber reminds the Defence that in respect of its alibi, the question of where the accused was is a matter within his personal knowledge and should not prevent him from filing an alibi notice.

The Trial Chamber recalls that the Appeals Chamber held in *Rutaganda* that the disclosure of complete notice of alibi at the earliest stage of the proceedings ensures the fairness of the trial and proper administration of justice.⁸⁷ The Trial Chamber also notes that Rule 67 (B) makes clear, Rule 67 (A) (ii) (a) notification and disclosure with respect to alibi is not mandatory.

Accordingly, the Trial Chamber denies the Prosecution’s counter-Motion requesting the Defence to file a notice of alibi.⁸⁸

42. While the Trial Chamber observes that the Prosecution received indications, as early as 19 June 2009 that the Accused intended to adduce evidence that he sought refuge at the French Embassy in Kigali between 7-11 April 1994, the Defence did not provide any information regarding its prospective witnesses, or any other evidence on which it intended to rely, as required by Rule 67 (A) (ii), until 22 February 2010.

43. In *Nizeyimana*, the Trial Chamber affirmed that the explicit requirements of Rule 67 are not discretionary, including those provisions relating to the timing of notifications.⁸⁹ Thus, the

⁸⁶ *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-PT, Unofficial Translation: Décision sur la Requête Urgente de Callixte Nzabonimana Demandant à la Chambre D’Ordonner à la France Coopération et Assistance, 2 July 2009, para. 5.

⁸⁷ *Prosecutor v. Rutaganda*, Case No. ICTR-93-A, Judgement (AC), 12 May 2003, para. 241; Decision on Rwamakuba’s Notice of Alibi, para. 7.

⁸⁸ 17 December 2009 Decision, paras. 38-39.

⁸⁹ *Prosecutor v. Ildephonse Nizeyimana*, ICTR-2000-55C-PT, Decision on Prosecution Motion for Disclosure of the Particulars of a Defence pursuant to Rule 67 (A)(ii), filed 11 January 2011, para. 5.

Trial Chamber considers that information provided by the Defence as of 19 June 2009 did not constitute compliance with the requirements of Rule 67 (A) (ii).

Rule 98- Ascertainment of the truth and the interests of justice

44. Trial Chambers enjoys wide discretion in determining which measures it considers to be necessary for the ascertainment of the truth and the interests of justice. This wide discretion is reflected in Rules 54 and 98.


45. The Trial Chamber considers that the proposed evidence of Witness CNR1 is relevant, has probative value, and is not of a cumulative nature. It is further of the view that hearing the evidence of the witness may assist the Chamber in assessing other evidence adduced during the course of the trial, and more generally in its quest to ascertain the truth. The Defence argues that hearing this witness would cause prejudice to its case. The Trial Chamber rejects this argument as the Defence has had knowledge of this witness' statement since the start of the Prosecution case. For these reasons, the Trial Chamber considers that it is in the interests of justice to allow Witness CNR1 to testify as a Prosecution rebuttal witness on the issue of the Defence alibi for the dates of 7-11 April 1994.

FOR THESE REASONS, THE TRIAL CHAMBER

GRANTS the Motion, and permits the Prosecution to call Witness CNR1 to testify immediately after the close of the Defence case;

DIRECTS the parties, should they wish to do so, to file proper submissions relating to the issues raised with respect to the protective measures of witnesses within seven days together with all relevant documentation.

Arusha, 8 March 2011, done in English.


Solomy Balungi Bossa
Presiding Judge


Bakhtiyar Tazmukhamedov
Judge


Mparany Rajohnson
Judge

