



UNITED NATIONS  
NATIONS UNIES

ICTR-98-44D-T

03-05-2011

(7495-7488)

7495

AM

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

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

**Registrar:** Adama Dieng

**Date:** 3 May 2011

**THE PROSECUTOR**

v.

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

**DECISION ON PROSECUTION MOTION TO ORDER THE DEFENCE TO DROP  
WITNESSES T171 AND T400**

*(Rules 54, 73(A) and 98 of the Rules of Procedure and Evidence)*

**Office of the Prosecutor**

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**Defence Counsel**

Vincent Courcelle-Labrousse  
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## INTRODUCTION

1. Throughout the course of the present proceedings, the Defence has long averred that it has consistently encountered difficulties in securing necessary cooperation from the government of France in furtherance of the Accused's alibi that he was present at the French embassy in Kigali from 7 to 11 April 1994. This ongoing issue has engendered protracted litigation, spanning several years, before both the Pre-Trial and Trial Chambers in this case.<sup>1</sup>
2. On 1 April 2011, the Defence filed a motion in which it sought to postpone the impending closure of its case.<sup>2</sup> One of the principal grounds for this request was the revelation that the Defence, in response to 31 questionnaires submitted to the French government on 24 November 2010 "to be filled by persons who may have been at the embassy between 6 and 12 April 1994",<sup>3</sup> had very recently received substantial cooperation from the French authorities and that the requested postponement would allow the Defence to "arrange for interviews of those individuals whose evidence may support the alibi of M. Nzabonimana".<sup>4</sup>
3. On 7 April 2011, the Trial Chamber issued an oral decision with respect to the Defence motion to postpone closure of its case.<sup>5</sup> On the issue of cooperation with France, in light of the Defence's professed intention to conduct interviews of potential alibi witnesses in Paris after 11 April 2011, the Chamber allowed the Defence to call two further alibi witnesses during the next and final scheduled trial session of 3-6 May 2011.<sup>6</sup> The Chamber then

<sup>1</sup> See, e.g., *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Décision sur la Requête Urgente de Callixte Nzabonimana demandant à la Chambre d'ordonner à la France Coopération et Assistance, 2 July 2009; Decision on Nzabonimana's Motion asking the Chamber to Request the President to Report the Matter of France's Refusal to Cooperate to the Security Council, 19 October 2009; Decision on the Defence Motion Requesting the Chamber to Allow Nzabonimana to Present Submissions to the President of the ICTR and the Security Council on the Matter of France's Refusal to Cooperate with the ICTR and to Clarify the Decision of 13 November 2009; Decision on Referral by Trial Chamber of the Matter of French Cooperation with the Tribunal to the President Pursuant to Rule 54, 3 February 2010; Decision on Defence Motion to Reconsider Prior Trial Chamber Decisions on France's Cooperation with the Tribunal, 4 March 2010; Order Requesting the President of the Tribunal to Rescind the Decision of 4 March 2010, 23 April 2010; Decision on Nzabonimana's Motion for the Implementation of the Order of Trial Chamber III of 4 March 2010 and for Allowing the Defence to Make Submissions before the Security Council, 5 May 2010; Decision on Defence Motion for Certification to Appeal the Decision of 23 April 2010, 27 May 2010; Decision on Third Urgent Defence Motion Requesting an Order for Cooperation Directed at France, 4 July 2010; Decision on Defence Motion for Certification to Appeal the "Decision on Third Urgent Defence Motion Requesting an Order for Cooperation Directed at France", 14 July 2010.

<sup>2</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Callixte Nzabonimana's Confidential Motion for postponement of the closure of the evidence presentation phase in the Trial of Prosecutor v. Nzabonimana, 1 April 2011, paras. 9-12 ("Postponement Motion").

<sup>3</sup> Postponement Motion, para. 10.

<sup>4</sup> Postponement Motion, para. 10.

<sup>5</sup> Transcript of Trial Proceedings, 7 April 2011 (English), p. 2, l. 1 – p. 3, l. 25 ("Transcript").

<sup>6</sup> Transcript, p. 2, l. 37 – p. 3, l. 9, p. 3, ll. 18-23; p. 4, ll. 21-22.

formally declared the Defence case closed subject to the testimony of these two witnesses,<sup>7</sup> and ordered the Defence to disclose the said alibi witnesses by 21 April 2011.<sup>8</sup>

4. On 21 April 2011, the Defence sent a correspondence to the Trial Chamber with the identities of three potential alibi witnesses; namely T11, T171 and T400. T400 was listed as a “subsidiary” witness who would testify in the event that their preferred but uncooperative witness, T171, did not appear before the Tribunal.<sup>9</sup> That same day, the Defence filed a motion seeking a subpoena and protective measures for T171.<sup>10</sup>
5. On 27 April 2011, the Prosecution filed a motion seeking to have witnesses T171 and T400 precluded from testifying before the Trial Chamber (“Motion”).<sup>11</sup>
6. On 29 April 2011, the Defence filed a response to the Prosecution Motion (“Response”).<sup>12</sup>
7. On 3 May 2011, the Prosecution provided an oral reply to the Defence Response (“Reply”).<sup>13</sup>

#### SUBMISSIONS OF THE PARTIES

##### *Motion*

8. The Prosecution “moves the Trial Chamber to order the Defence to drop witnesses T400 and T171 forthwith”,<sup>14</sup> because they “do not fall within the purview of the two witnesses that was contemplated by the Trial Chamber’s order of 7 April 2011”.<sup>15</sup> The Prosecution argues that T400 and T171 “are not among the thirty one (31) former employees of the French Embassy in Kigali in 1994”<sup>16</sup> to whom questionnaires were sent by the Defence in November 2010, and that any alibi witnesses called by the Defence pursuant to the Trial Chamber’s decision of 7 April 2011 ought to be confined to that “large pool of witnesses...

<sup>7</sup> Transcript, p. 3, ll. 27-34.

<sup>8</sup> Transcript, p. 11, ll. 5-7.

<sup>9</sup> E-mail from Vincent Courcelle-Labrousse to Trial Chamber dated 21 April 2011.

<sup>10</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana’s Request for Subpoena, Protective Measures and the Cooperation of France in Respect of [Witness T171], 21 April 2011.

<sup>11</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor’s Extremely Urgent Motion for the Trial Chamber to Order the Defence to Drop Witnesses T171 and T400 Forthwith, 27 April 2011.

<sup>12</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana’s Response to “Prosecutor’s Extremely Urgent Motion for the Trial Chamber to Order the Defence to Drop Witnesses T171 and T400 Forthwith Rule 73A, 54 of the RPE”, dated 27 April 2011, 29 April 2011.

<sup>13</sup> Draft Transcript of Trial Proceedings (English), 3 May 2011 (“Draft Transcript”).

<sup>14</sup> Motion, para. 1.

<sup>15</sup> Motion, para. 5.

<sup>16</sup> Motion, para. 15.

authorized by the Chamber”.<sup>17</sup> Since neither T400 nor T171 were drawn from that pool of potential witnesses, the Prosecution submits that to call these witnesses amounts to a “disingenuous act” that runs “contrary to the letter and spirit of the reason for reaping the fruit of the much sought after cooperation with France”, namely the “exceptional measure” of allowing the Defence to call two additional alibi witnesses after the close of its case.<sup>18</sup>

*Response*

9. At the outset, the Defence maintains that the arguments advanced in the Prosecution Motion are unsupported by any “relevant law or jurisprudence”,<sup>19</sup> making the submissions contained therein “based on a purely subjective interpretation of the facts”<sup>20</sup> regarding the proper construction to be afforded the Trial Chamber’s oral decision of 7 April 2011.<sup>21</sup> The Defence then details the bureaucratic imbroglio it claims to have encountered in dealing with French authorities in the weeks following the issuance of that decision,<sup>22</sup> by which Defence “efforts to meet any of the 31 individuals have been in vain [due to] numerous obstacles”.<sup>23</sup> Because of the Defence’s inability to fully and freely canvass the issue of the Accused’s alibi with the sought-after French officials, despite having “made every effort possible to meet the persons listed”,<sup>24</sup> the Defence asserts that it “had no other choice but to seek other witnesses, who were not among the French embassy’s short-list of 31 individuals”.<sup>25</sup>

10. Having purported to demonstrate the impossibility of securing the attendance of any of the 31 French officials in time for the May 2011 trial session, the Defence explains why it was “entitled”<sup>26</sup> to look elsewhere to obtain its two alibi witnesses. In this regard, the Defence refers to arguments contained in its motion to secure a subpoena for T171 as evidence as to how that witness is “necessary and crucial” to the Accused’s alibi,<sup>27</sup> and further explains that T400 “only very recently accepted to meet the Defence team” and that her testimony became necessary in view of the anticipated evidence of a Prosecution rebuttal witness.<sup>28</sup> The Defence also questions why the Prosecution has not objected to the appearance of T11,

<sup>17</sup> Motion, para. 18.

<sup>18</sup> Motion, paras. 27-33.

<sup>19</sup> Response, para. 7.

<sup>20</sup> Response, para. 8.

<sup>21</sup> Response, para. 9.

<sup>22</sup> Response, paras. 15-20.

<sup>23</sup> Response, para. 16.

<sup>24</sup> Response, paras. 21-23.

<sup>25</sup> Response, para. 24.

<sup>26</sup> Response, para. 25.

<sup>27</sup> Response, paras. 26-27.

<sup>28</sup> Response, paras. 30, 33.

stating that this omission “shows that the issue of the appurtenance of the extra alibi witnesses to the list of 31 individuals is a mere pretext raised by the Prosecutor”.<sup>29</sup>

11. Finally, the Defence submits that “the request to have either T400 or T171 testify before this Tribunal is based on a plain reading of the Chamber’s oral decision of 7 April 2011 and ensuing Scheduling order of 12 April 2011”.<sup>30</sup> The Defence notes the lack of language in either edict expressly confining the two alibi witnesses to the list provided by the French authorities, and maintains that the only qualifiers attached to the Chamber’s allowance were that the witnesses be brought “in support of” or “in relation to” to the Accused’s alibi.<sup>31</sup>

#### *Reply*

12. In its Reply, the Prosecution essentially reiterates the points made in its initial Motion, while seeking to expand its request to preclude the proposed Defence alibi witnesses from testifying to include prospective alibi witness T11.<sup>32</sup>

### DELIBERATIONS

#### *Applicable Law*

13. Rule 98 of the Rules of Procedure and Evidence (“Rules”) states that

A Trial Chamber may *proprio motu* order either party to produce additional evidence. It may itself summon witnesses and order their attendance.

“Rule 98 does not give the parties any right to request additional evidence”.<sup>33</sup> Rather, this “provision leaves it to the discretion of the Chamber whether to make such an order”.<sup>34</sup> Examples of where Trial Chambers have resorted to this provision include “when the information could be considered as material for the preparation of the Defence case”.<sup>35</sup>

#### *Preliminary Matter*

14. The Trial Chamber notes at the outset that while the Prosecution Motion did not formally request the Chamber to preclude T11 from testifying as an alibi witness for the Defence,

<sup>29</sup> Response, para. 34.

<sup>30</sup> Response, para. 39.

<sup>31</sup> Response, paras. 40-48.

<sup>32</sup> Draft Transcript.

<sup>33</sup> *Prosecutor v. Karera*, ICTR-01-74-T, Decision on Defence Motion for Additional Disclosure (Rule 98), 1 September 2006, para. 7; citing *Prosecutor v. Semanza*, ICTR-97-20-T, Decision on the Defence Motion for Orders Calling Prosecution Witness VZ Listed in Prosecution Witness List of November 2000, 6 September 2001, para. 6.

<sup>34</sup> *Karera*, paras. 5, 7.

<sup>35</sup> *Karera*, para. 5; citing, *inter alia*, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses, 16 December 2003, para. 7.

because T11's situation is substantially the same as that of T171 and T400 in that none of these prospective witnesses were among the list of 31 French embassy employees to whom questionnaires were sent, the Chamber considers that it is in the interests of justice and judicial economy to render a global ruling with respect to all three witnesses.

*Analysis*

15. The Trial Chamber considers that the crux of the present matter may be distilled into two distinct issues to be resolved: 1) whether the Defence's efforts to call T11, T171 and/or T400 fit within the confines of the Chamber's decision of 7 April 2011 allowing the Defence to call two additional alibi witnesses; and 2) if not, whether the Chamber should nevertheless, in the interests of justice, permit the Defence to call T11, T171 and/or T400 to testify in the instant proceedings.

Do the proposed witnesses conform with the Trial Chamber's Decision of 7 April 2011?

16. As outlined above, the power to summon additional witness pursuant to Rule 98 lies "solely at the disposal of the Chamber, acting in its own deliberative discretion. It is not a Rule upon which parties may rely in seeking to bring evidence before the Tribunal".<sup>36</sup> Given this purpose, it is imperative that any evidence a party purports to bring pursuant to a Rule 98 order conforms with the intent of the Trial Chamber in issuing the said order. For present purposes, the Chamber considers it useful to revisit the entirety of the operative portion of the oral decision rendered 7 April 2011:

French cooperation. Finally, the Defence has informed the Trial Chamber that it has recently received cooperation from the government of France to interview certain witnesses regarding the accused's alibi that he was at the French embassy in Kigali between 7<sup>th</sup> and 11<sup>th</sup> April 1994. The Defence further informs the Chamber that it will be in a position to interview the said witnesses in Paris, France after 11<sup>th</sup> April 2011. The Defence submits that, on 24<sup>th</sup> November 2010, it submitted 31 questionnaires to the French authorities to be filled by persons who may have been at the French embassy between 6<sup>th</sup> and 12<sup>th</sup> April 1994 and that it did not receive a response from the French authorities on this matter until 28<sup>th</sup> March 2011... The Trial Chamber notes that the Defence have consistently sought the assistance of France to secure the attendance of witnesses to support the alibi of the accused. In the circumstances and in the interest of justice and in accordance with Rules 54 and 98, the Trial Chamber considers it appropriate to grant the Defence permission to call two more witnesses to support its alibi in addition to the previous four alibi witnesses... already called by the Defence.<sup>37</sup>

When the above ruling is viewed in its proper context, it is manifestly clear that the intent of the Trial Chamber was to allow the Defence to call two additional witnesses

<sup>36</sup> *Semanza*, para. 6.

<sup>37</sup> Transcript, p. 2, l. 37 – p. 3, l. 9, p. 3, ll. 18-23.

who may ultimately be secured through the fruits of their incipient investigations in Paris, France. It is equally clear that prospective witnesses T11, T171 and T400 have no nexus to the investigations conducted in Paris, and thus, despite the able attempts of the Defence to parse the language of the 7 April 2011 decision, these witnesses do not fit within the ambit of the Chamber's Rule 98 allowance. The Trial Chamber therefore dismisses the argument that calling any of these three alibi witnesses would be in conformity with the intent of its prior decision.

Should the Trial Chamber nevertheless allow the testimony of the two witnesses?

17. Having concluded that the testimony of prospective witnesses T11, T171 and T400 was not envisaged by the Trial Chamber's decision of 7 April 2011, the Chamber believes that it must nevertheless consider whether it is in the interests of justice to allow the testimony of two of these witnesses, as substitutes for the witnesses the Defence may have called from the list of 31 French government employees.
  
18. In this regard, the Trial Chamber takes cognisance of the correspondence produced by the Defence from one Captain Marc Etienney of the National Police of France, in which Captain Etienney outlines a four-step process governing the appearance of French officials before the Tribunal, as agreed to by the government of France and the ICTR.<sup>38</sup> The Chamber further notes that this protocol appears to entail a significant expenditure of time and resources, and acknowledges that it would have been difficult for the Defence to comply with this process in relation to all 31 of the French government officials within the two weeks the Chamber granted the Defence to disclose its two alibi witnesses.
  
19. The Trial Chamber further notes that, according to correspondence recently received from the Registry, both T11 and T400 have already arrived in Arusha,<sup>39</sup> meaning that these witnesses could feasibly be heard prior to the anticipated close of the evidence phase in the present proceedings on 6 May 2011. When this factor is considered alongside the very real possibility that continued attempts by the Defence to comply with the bureaucratic protocol outlined above could result in weeks or even months of additional delays, the Chamber finds that an optimal balance between the right of the Accused to a fair trial in presenting adequate alibi evidence and the need to ensure judicial economy will be achieved by allowing the Defence to present other alibi witnesses in lieu of any French government officials. For

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<sup>38</sup> Annex 2 to Response.

<sup>39</sup> E-mail from Nouhou Diallo of the Court Management Section to Trial Chamber dated 28 April 2011.

these reasons, the Trial Chamber concludes that it would serve the interests of justice to allow the Defence to call T11 and T400 as additional alibi witnesses, notwithstanding the fact that these witnesses do not strictly conform with the purpose of the Chamber's original Rule 98 decision of 7 April 2011. For reasons to be explained in a forthcoming decision, the Trial Chamber does not find that a subpoena for T171 is warranted, and thus declines to exercise its discretion to call that additional witness pursuant to Rule 98.

**FOR THESE REASONS, THE TRIAL CHAMBER**

**DENIES** the Motion;

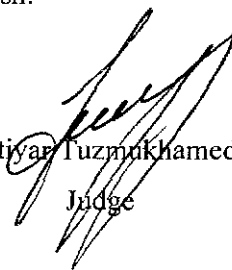
**ALLOWS** the Defence to call T11 and T400 as additional alibi witnesses; and

**REQUESTS** the Registry to make all necessary arrangements to facilitate the testimony of T11 and T400 forthwith.

Arusha, 3 May 2011, done in English.



Solomy Balungi Bossa  
Presiding Judge



Bakhtiyar Tuzmukhamedov  
Judge



Mparany Rajohnson  
Judge

