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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

7283  
Am

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Lee Gacuiga Muthoga, *Presiding*  
Seon Ki Park  
Robert Fremr  
**Registrar:** Adama Dieng  
**Date:** 7 June 2011

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**THE PROSECUTOR**

v.

**Ildéphonse NIZEYIMANA**

**CASE NO. ICTR-00-55C-T**

**DECISION ON PROSECUTOR'S MOTION FOR LEAVE TO PRESENT EVIDENCE  
IN REBUTTAL TO THE ALIBI DEFENCE**

**Office of the Prosecution:**  
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## INTRODUCTION

1. The trial commenced on 17 January 2011 with the opening statements of both the Prosecution and the Defence. The Prosecution closed its case-in-chief on 25 February 2011, after having called 38 witnesses. The Defence case commenced on 9 May 2011.
2. On 18 November 2009, at an informal meeting with the President of the Tribunal and the parties, Lead Counsel for the Accused stated that he did not foresee a special defence.
3. On 22 September 2010, at a status conference, Lead Counsel for the Accused demonstrated by means of various comments that the Defence intended to rely on a form of special defence.
4. On 22 December 2010 the Office of the Prosecutor ("Prosecution") filed the "Prosecution Motion for Disclosure of the Particulars of a Defence Pursuant to Rule 67(A)(ii)", requesting that the Chamber, acting under Rule 54 of Procedure and Evidence ("Rules"), order the Defence to make the disclosures required under Rule 67(A)(ii) of the Rules.<sup>1</sup>
5. On 23 December 2010, the Defence team of the Accused, Ildéphonse Nizeyimana, ("Defence" and "the Accused" respectively), filed a response to the motion,<sup>2</sup> arguing that it had until the day before trial starts to disclose any special defence.<sup>3</sup> The Defence submitted that its investigations and arrangements for witness protection were not yet complete, and thus that it was not in a position to provide any notice under Rule 67(A)(ii).<sup>4</sup>
6. On 28 December 2010, the Prosecution filed the "Prosecutor's Reply to Defence Response to Prosecution Motion for Disclosure of the Particulars of a Defence Pursuant to Rule 67(A)(ii)", asking that the Chamber consider whether to order the Defence to disclose any relevant *ex parte* submissions during the course of in-camera meetings.<sup>5</sup>
7. On 11 January 2011, the Chamber issued its "Decision on Prosecution Motion for Disclosure of the Particulars of a Defence Pursuant to Rule 67(A)(ii)" ("11 January Decision"), in which it denied the First Alibi motion.

<sup>1</sup> Prosecution Motion for Disclosure of the Particulars of a Defence Pursuant to Rule 67(A)(ii) ("First Alibi Motion"), 22 December 2010, para. 23.

<sup>2</sup> Response to Prosecution Motion for Disclosure of the Particulars of a Defence Pursuant to Rule 67(A)(ii) ("First Alibi Response"), 23 December 2010.

<sup>3</sup> First Alibi Response, para. 3.

<sup>4</sup> First Alibi Response, paras. 6-7.

<sup>5</sup> First Alibi Reply, para. 24.



8. On 12 January 2011, the Defence filed "Ildéphonse Nizeyimana's Notice of Alibi".<sup>6</sup>
9. On 28 January 2011, Prosecution filed the "Prosecutor's Urgent Second Motion for Disclosure of the Particulars of a Defence of Alibi Pursuant to Rules 54 and 67(A)(ii)".<sup>7</sup> The Prosecution argued therein that the Defence submitted insufficient details concerning its alibi.<sup>8</sup> The Prosecution requested that the Chamber order the Defence to make a number of additional disclosures with respect to the Accused's alibi defence. More specifically, these included: providing greater specificity as to the places the Accused may have been during periods of absence from Butare; the date of his return to Butare from Mata; details as to how each witness appearing in the Alibi Notice will support the alibi; other evidence which the Defence plans to rely on to support the alibi; and particulars for each witness, including their activities in 1994, parentage, birthplace, and current or 1994 residence, as well as full geographical information for alibi witnesses residing in Rwanda.<sup>9</sup>
10. On 31 January 2011, the Defence filed a response to the Second Alibi Motion,<sup>10</sup> arguing that the Prosecution should have challenged any insufficiency in the information accompanying the Alibi Notice sooner, and thus that prejudice suffered by the Prosecution because of delay in provision of additional alibi information should not be held against the Accused.<sup>11</sup> The Second Alibi Response also notes that the Alibi Notice was filed as soon as the Chamber issued a protective order for relevant defence witnesses.<sup>12</sup> In addition, the Response provided additional information regarding the dates of the Accused's travel between Mata and Butare, briefly summarises the alibi witnesses' expected testimony, and provides their current city and country of residence.<sup>13</sup>
11. On 1 February 2011, the Prosecution filed a reply to the Second Alibi Response.<sup>14</sup> The Second Alibi Reply submitted that the Second Alibi Response failed to explain why information that related to unprotected witnesses was not disclosed earlier. The Prosecution again asserted that the geographical information provided for Rwandan alibi witnesses was

<sup>6</sup> Ildéphonse Nizeyimana's Notice of Alibi ("Alibi Notice"), 12 January 2011.

<sup>7</sup> Prosecutor's Urgent Second Motion for Disclosure of the Particulars of a Defence of Alibi Pursuant to Rules 54 and 67(A)(ii) ("Second Alibi Motion"), 28 January 2011.

<sup>8</sup> Second Alibi Motion, para. 14, *citing* Alibi Notice.

<sup>9</sup> Second Alibi Motion, para. 28; Alibi Notice, pp. 3-4.

<sup>10</sup> Response to Prosecutor's Urgent Second Motion for Disclosure of the Particulars of a Defence of Alibi Pursuant to Rules 54 and 67(A)(ii) ("Second Alibi Response"), 31 January 2011.

<sup>11</sup> Second Alibi Response, paras. 3-4.

<sup>12</sup> Second Alibi Response, para. 6.

<sup>13</sup> Second Alibi Response, paras. 9, 11.

<sup>14</sup> Prosecutor's Reply to Defence Response to Prosecutor's Urgent Second Motion for Disclosure of the Particulars of a Defence of Alibi pursuant to Rules 54 and 67(A)(ii) ("Second Alibi Reply"), 1 February 2011.



insufficient, and that more witness particulars should be disclosed.<sup>15</sup> Finally, the Prosecution reiterated that it suffered prejudice because of the incomplete nature and unjustified late filing of the Alibi Notice,<sup>16</sup> and requested that the Chamber order “the Defence to urgently make the necessary disclosures in order to comply with Rule 67(A)(ii)”.<sup>17</sup>

12. On 7 February 2011, the Chamber denied the Second Alibi Motion, finding that the Prosecution had not demonstrated that the Defence was in possession of additional information with respect to alibi witnesses.<sup>18</sup> The Chamber noted that if the interest of justice so required, the Prosecution could exercise “its right to call rebuttal witnesses.”<sup>19</sup>

13. On 28 March 2011, the Defence filed the “Nizeyimana Pre-Defence Brief”, in which it added 11 new alibi witnesses to the original list, totalling 22 alibi witnesses.

14. On 13 April 2011, the Defence filed the “Nizeyimana Defence Supplementary Notice of Alibi”, providing notice that the Defence intends to rely on two additional witnesses to support the Accused’s alibi.<sup>20</sup>

15. On 20 April 2011, the Defence filed the “Nizeyimana Amended Pre-Defen[c]e Brief”, providing additional alibi information for six of the alibi witnesses.<sup>21</sup>

16. On 25 May 2011, the Prosecution filed a motion seeking the Chamber’s leave to present evidence in rebuttal to the Accused’s alibi defence.<sup>22</sup> The Prosecution submits, *inter alia*, that they did not receive sufficient notice of the Accused’s alibi defence, and that the resulting prejudice would be best cured by the presentation of rebuttal evidence.<sup>23</sup> The Prosecution provided a detailed summary of the three rebuttal witnesses they seek to call.<sup>24</sup>

17. On 30 May 2011, the Defence filed its response.<sup>25</sup> The Defence submits that (1) it provided timely and adequate notice of the Accused’s alibi,<sup>26</sup> (2) the Prosecution did not

<sup>15</sup> Second Alibi Reply, para. 7.

<sup>16</sup> Second Alibi Reply, paras. 9-13.

<sup>17</sup> Second Alibi Reply, para. 15.

<sup>18</sup> Decision on Prosecutor’s Urgent Second Motion for Disclosure of the Particulars of a Defence of Alibi Pursuant to Rules 54 and 67(A)(ii) (“Second Alibi Decision”), 7 February 2011, para. 7.

<sup>19</sup> Second Alibi Decision, para. 8.

<sup>20</sup> Nizeyimana Defence Supplementary Notice of Alibi, 13 April 2011. Adding Alphonse Higaniro and SDC01 as alibi witnesses.

<sup>21</sup> Nizeyimana Amended Pre-Defence Brief, 20 April 2011. Adding information for Defence Witnesses CKN10, ZML13, Alphonse Higaniro, SDC01, CKN22, CKN18.

<sup>22</sup> Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence (“Motion”), 25 May 2011.

<sup>23</sup> Motion, paras. 29-33.

<sup>24</sup> Motion, paras. 38-41.

<sup>25</sup> Defence Response to Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence (“Response”), 30 May 2011.

<sup>26</sup> Response, paras. 25-26.

demonstrate that it suffered prejudice,<sup>27</sup> (3) the content of the alibi evidence was reasonably foreseeable by the Prosecution,<sup>28</sup> (4) the Prosecution failed to demonstrate that it could not locate the three rebuttal witnesses before the closing of the Prosecution case,<sup>29</sup> and (5) the proposed testimony of the rebuttal witness is cumulative as Prosecution witnesses have already testified on this matter.<sup>30</sup>

18. The Prosecution filed its reply on 31 May 2011.<sup>31</sup> The Prosecution submits that (1) the notice of the Accused's alibi was not provided as early as was reasonably practicable,<sup>32</sup> (2) the alibi defence was not reasonably foreseeable and could thus not have been investigated beforehand,<sup>33</sup> and (3) rebuttal evidence is not rendered cumulative by virtue of it being corroborative.<sup>34</sup>

### DELIBERATIONS

19. Rule 85 prescribes the sequence in which the Chamber is to receive evidence during the trial proceedings. The Rule does not create an automatic right for the Prosecution to present evidence in rebuttal. The Chamber enjoys a wide discretion in determining whether to grant leave to call rebuttal evidence. In exercising that discretion, the Chamber will consider whether to limit or exclude rebuttal evidence so as to ensure the fairness of the trial and avoid needless consumption of time.<sup>35</sup>

20. The Chamber recalls that the purpose of rebuttal evidence is to afford the Prosecution an opportunity to refute evidence of a new matter arising in the course of the Defence case that was not reasonably foreseeable.<sup>36</sup> However, rebuttal evidence must not be used by the Prosecution to re-open or perfect its case.<sup>37</sup> Rebuttal evidence must have significant probative

<sup>27</sup> Response, paras. 25-39, 49-53.

<sup>28</sup> Response, paras. 40-45.

<sup>29</sup> Response, paras. 46-48.

<sup>30</sup> Response, paras. 54-57.

<sup>31</sup> Prosecutor's Reply to Defence Response to Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence Pursuant to Rules 54, 67(A)(ii) and 85(A)(iii) ("Reply"), 31 May 2011.

<sup>32</sup> Reply, paras. 10-15.

<sup>33</sup> Reply, paras. 16-19.

<sup>34</sup> Reply, paras. 20-23.

<sup>35</sup> *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) ("Ntagerura Decision"), 21 May 2003, para. 31.

<sup>36</sup> *Ibid.* See also *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 ("Semanza Decision"), para. 3; *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.

<sup>37</sup> Ntagerura Decision, para. 32.

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value on a central issue in the case and must not be cumulative.<sup>38</sup> 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 witness or other collateral matters in a case.<sup>39</sup>

21. 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.<sup>40</sup> 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.<sup>41</sup> 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).<sup>42</sup>

22. As the party seeking to present rebuttal evidence, the Prosecution must make a showing of the following two elements: (i) the evidence it seeks to rebut arose directly *ex improviso* during the presentation of the Defence’s case-in-chief and could not, despite the exercise of reasonable diligence, have been foreseen,<sup>43</sup> and (ii) the proposed rebuttal evidence has significant probative value to the resolution of an issue central to the determination of the guilt or innocence of the Accused.<sup>44</sup>

23. The Chamber recalls that Rules 54 and 98 reflect the wide discretion it enjoys in determining which measures it considers necessary to the ascertainment of the truth and the interests of justice. In exercising such discretion, it is imperative for the Chamber to balance the probative value of the evidence and the need to ensure a fair trial which necessarily

<sup>38</sup> *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) (“Nahimana Decision”), 13 May 2003, para. 44.

<sup>39</sup> Nahimana Decision, para. 51; Ntagerura Decision para. 33

<sup>40</sup> *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Appeal Judgement (AC) (“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 (TC), 7 March 2006, para. 2, footnote 1.

<sup>41</sup> Rutaganda Appeal Judgement, para. 242.

<sup>42</sup> Rutaganda Appeal Judgement, para. 243.

<sup>43</sup> Semanza Decision, para. 8

<sup>44</sup> Nahimana Decision, paras. 42, 44.

includes the consideration of the goal of ascertaining the truth and the possible prejudice to the Accused.<sup>45</sup>

24. The Prosecution seeks to present three witnesses in rebuttal to the Accused's alibi defence,<sup>46</sup> which alleges that the Accused was absent from Butare from the morning of 21 April 1994, to the late afternoon of 22 April 1994 and then again from 26 April 1994 to on or about 17 May 1994.<sup>47</sup> The Chamber considers the alibi defence to constitute a central issue in the present case, and therefore highly relevant and probative.

25. While the Trial Chamber observes that the Prosecution received indications as early as 12 January 2011 that the Accused intended to adduce evidence that he was absent from Butare between 21 to 22 April and 26 April to 17 May 1994, the Defence provided piecemeal and delayed information regarding its prospective witnesses, or other evidence on which it intended to rely, as required by Rule 67(A)(ii), until as late as 20 April 2011, in the Amended Pre-Defence Brief.

26. The Trial Chamber considers that the proposed evidence of Witness A, B and C is relevant, has probative value, and is not of a cumulative nature. It is further of the view that hearing the evidence of the witnesses 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. For these reasons, the Trial Chamber considers that it is in the interests of justice to allow Witness A, B and C to testify as Prosecution rebuttal witnesses in response to the alibi defence for the dates of the morning of 21 April 1994 to the late afternoon of 22 April 1994 and from 26 April 1994 to on or about 17 May 1994.

**FOR THESE REASONS, THE CHAMBER**

**GRANTS** the Prosecution Motion; and

**ORDERS** that the Prosecution present its rebuttal evidence immediately following the close of the Defence case, on 21, 22 and 23 June 2011.

<sup>45</sup> *Prosecutor v. Kristic*, Case No. IT-98-33-T, Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance (TC), 4 May 2001, para. 16.

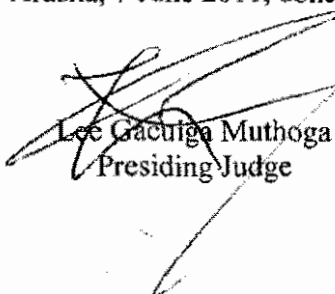
<sup>46</sup> See Motion, paras. 38-40. Confidential Annex A.

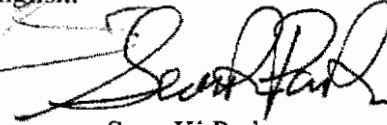
<sup>47</sup> Motion, para. 34.

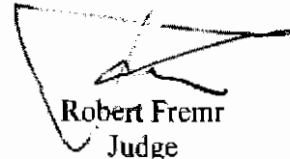


Arusha, 7 June 2011, done in English.

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Presiding Judge

  
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Judge

  
Robert Fremr  
Judge

