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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Lee Gacuiga Muthoga, *Presiding*  
Seon Ki Park  
Robert Fremr

**Registrar:** Adama Dieng

**Date:** 1 July 2011

**THE PROSECUTOR**

v.

**Ildéphonse NIZEYIMANA**

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

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**DECISION ON DEFENCE MOTION TO RECONSIDER THE JUNE 15 DECISION  
ON THE EXTREMELY URGENT MOTION FOR RECONSIDERATION OF TRIAL  
CHAMBER 7 JUNE 2011 DECISION ON PROSECUTOR'S MOTION FOR LEAVE  
TO PRESENT EVIDENCE IN REBUTTAL TO THE ALIBI DEFENCE**

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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 closed its case on 16 June 2011, after having called 38 witnesses.

2. On 25 May 2011, the Office of the Prosecutor (“Prosecution”) filed a motion seeking the Chamber’s leave to present evidence in rebuttal to the Accused’s alibi defence.<sup>1</sup> The Prosecution submitted, *inter alia*, that it had not received sufficient notice of the Accused’s alibi defence, and that the resulting prejudice would be best cured by the presentation of rebuttal evidence.<sup>2</sup> The Prosecution provided a detailed summary of the three rebuttal witnesses it seeks to call.<sup>3</sup>

3. On 30 May 2011, the Defence team of the Accused, Ildéphonse Nizeyimana (“the Defence” and “the Accused” respectively) filed its response.<sup>4</sup> The Defence submitted that (1) it provided timely and adequate notice of the Accused’s alibi,<sup>5</sup> (2) the Prosecution did not demonstrate that it suffered prejudice,<sup>6</sup> (3) the content of the alibi evidence was reasonably foreseeable to the Prosecution,<sup>7</sup> (4) the Prosecution failed to demonstrate that it could not locate the three rebuttal witnesses before the closing of the Prosecution case,<sup>8</sup> and (5) the proposed testimony of the rebuttal witness is cumulative as Prosecution witnesses have already testified on this matter.<sup>9</sup>

4. The Prosecution filed its reply on 31 May 2011.<sup>10</sup> The Prosecution submitted that (1) the notice of the Accused’s alibi was not provided as early as was reasonably practicable,<sup>11</sup> (2) the alibi defence was not reasonably foreseeable and could thus not have been

<sup>1</sup> Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence (“Motion for Rebuttal”), 25 May 2011.

<sup>2</sup> Motion for Rebuttal, paras. 29-33.

<sup>3</sup> Motion for Rebuttal, paras. 38-40.

<sup>4</sup> Defence Response to Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence (“Response to Motion for Rebuttal”), 30 May 2011.

<sup>5</sup> Response to Motion for Rebuttal, paras. 25-26.

<sup>6</sup> Response to Motion for Rebuttal, paras. 25-39, 49-53.

<sup>7</sup> Response to Motion for Rebuttal, paras. 40-45.

<sup>8</sup> Response to Motion for Rebuttal, paras. 46-48.

<sup>9</sup> Response to Motion for Rebuttal, paras. 54-57.

<sup>10</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 to Rebuttal Motion”), 31 May 2011.

<sup>11</sup> Reply to Rebuttal Motion, paras. 10-15.

investigated beforehand,<sup>12</sup> and (3) rebuttal evidence is not rendered cumulative by virtue of it being corroborative.<sup>13</sup>

5. On 7 June 2011, the Chamber rendered its Decision in which it granted the Prosecution's Motion for Rebuttal.<sup>14</sup> The Chamber held that it has broad discretion to hear evidence that will assist in the determination of the truth and found it in the interest of justice to allow the Prosecution to present evidence in rebuttal to the alibi defence.<sup>15</sup>

6. On 10 June 2011, the Defence filed a motion for reconsideration of the Impugned Decision.<sup>16</sup> The Defence submitted, *inter alia*, that the Impugned Decision (1) misinterpreted the facts and the law on the matter of rebuttal and failed to rule on issues raised by the Parties' in their submissions,<sup>17</sup> (2) constituted an abuse of power and caused the Accused to suffer injustice and prejudice,<sup>18</sup> (3) that the Prosecution was in violation of its Rule 66(A)(ii) disclosure obligations,<sup>19</sup> and (4) it caused considerable problems with the management of the case.<sup>20</sup>

7. On 13 June 2011, the Prosecution filed a response to the Defence Motion for Reconsideration.<sup>21</sup> The Prosecution submitted, *inter alia*, that the Defence request did not meet the standard for reconsideration, as there was "insufficient reason to believe the original decision was erroneous or constituted an abuse of power."<sup>22</sup>

8. On 14 June 2011, the Defence filed a reply to the Prosecution Response.<sup>23</sup> The Defence submitted, *inter alia*, that it could not commence investigations until the close of the Defence case, due to the limited resources available to it.<sup>24</sup> The Defence further reiterated the

<sup>12</sup> Reply to Rebuttal Motion, paras. 16-19.

<sup>13</sup> Reply Rebuttal Motion, paras. 20-23.

<sup>14</sup> Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence ("Impugned Decision"), 7 June 2011.

<sup>15</sup> Impugned Decision, para. 26.

<sup>16</sup> Extremely Urgent Motion for Reconsideration of the Trial Chamber 7 June 2011 Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence ("Motion for Reconsideration"), 10 June 2011.

<sup>17</sup> Motion for Reconsideration, para. 10.

<sup>18</sup> *Ibid.*

<sup>19</sup> Motion for Reconsideration, paras. 19-32.

<sup>20</sup> Motion for Reconsideration, paras. 33-35.

<sup>21</sup> Prosecution Response to Extremely Urgent Motion for Reconsideration of the Trial Chamber 7 June 2011 Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence ("Response to Motion for Reconsideration"), 13 June 2011.

<sup>22</sup> Response to Motion for Reconsideration, paras. 7-11.

<sup>23</sup> Defence Reply to Prosecution Response to Extremely Urgent Motion for Reconsideration of the Trial Chamber 7 June 2011 Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence ("Reply to Motion for Reconsideration"), 14 June 2011.

<sup>24</sup> Reply to Motion for Reconsideration, paras. 8-9, 16. P. 6, paras. 4-5.

fact that it is entitled to a “reasoned opinion” as part of the Accused’s right to a fair trial.<sup>25</sup> The Defence clarified that where more limited standards are in place as set out in the jurisprudence, the general standard related to the “interest of justice” does not govern.<sup>26</sup>

9. On 15 June 2011, the Chamber rendered its decision on the Motion for Reconsideration.<sup>27</sup> The Chamber was persuaded by the Defence’s submission that it needed additional time to investigate and prepare for both the rebuttal witnesses and potential rejoinder witnesses.<sup>28</sup> The Chamber ordered that any potential rejoinder take place immediately following the rebuttal case, and that the Defence disclose any potential rejoinder statements to the Prosecution at least 30 days before the testimony of the rejoinder witnesses.<sup>29</sup>

10. On 20 June 2011, the Defence filed a second motion for reconsideration.<sup>30</sup> The Defence requests that the Chamber reconsider its Decision on the Motion for Reconsideration with respect to the issue of the scheduling of potential rejoinder witnesses.<sup>31</sup> The Defence submits that it is not feasible to make an application to hear rejoinder witnesses immediately following the rebuttal case, nor is it possible to provide information on potential rejoinder witnesses 30 days prior to their hearing.<sup>32</sup> The Defence lastly submits that it will have insufficient time to seek protective measures for its potential rejoinder witnesses.<sup>33</sup>

11. On 27 June 2011, the Prosecution filed its response to the Second Motion for Reconsideration.<sup>34</sup> The Prosecution submits that reliance on reconsideration is “misplaced” and the Defence is merely attempting to re-litigate the same issue.<sup>35</sup>

<sup>25</sup> Reply to Motion for Reconsideration, paras. 13-14.

<sup>26</sup> Reply to Motion for Reconsideration, para. 17.

<sup>27</sup> Decision on Extremely Urgent Motion for Reconsideration of the Trial Chamber 7 June 2011 Decision on Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence (“Decision on Motion for Reconsideration”), 15 June 2011.

<sup>28</sup> Decision on Motion for Reconsideration, paras. 35-36.

<sup>29</sup> Decision on Motion for Reconsideration, paras. 36, 38.

<sup>30</sup> Motion to Reconsider the June 15 Decision on the Extremely Urgent Motion for Reconsideration of the Trial Chamber 7 June 2011 Decision on Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence (“Second Motion for Reconsideration”), 20 June 2011.

<sup>31</sup> Second Motion for Reconsideration, p. 8.

<sup>32</sup> Second Motion for Reconsideration, paras. 7, 16-32, 37-40.

<sup>33</sup> Second Motion for Reconsideration, paras. 33-35.

<sup>34</sup> Prosecutor’s Response to Defence Motion to Reconsider the June 15 Decision on the Extremely Urgent Motion for Reconsideration of the Trial Chamber 7 June 2011 Decision on Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence (“Response to Second Motion for Reconsideration”), 27 June 2011.

<sup>35</sup> Response to Second Motion for Reconsideration, paras. 6, 10-11, 16.



12. On 28 June 2011, the Defence filed its reply in which it reiterates its inability to find witnesses, produce witness summaries and apply for protective measures if the rejoinder evidence is to take place immediately following the rebuttal case.<sup>36</sup>

### DELIBERATIONS

#### *Applicable Law on Reconsideration*

13. The Chamber recalls that according to the Tribunal's jurisprudence, a Trial Chamber may exercise its discretion to reconsider a decision when one of the following criteria has been met: "(i) a new fact has been discovered that was not known to the Chamber at the time it made its original Decision; (ii) there has been a material change in circumstances since it made its original Decision; or (iii) there is reason to believe that its original Decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice."<sup>37</sup> The party seeking reconsideration bears the burden of demonstrating the existence of the enumerated circumstances.<sup>38</sup>

14. The Chamber notes at the outset that it does not consider a motion for reconsideration the proper vehicle for the relief sought by the Defence. The Second Motion for Reconsideration would have been better served and characterized as an application for an extension of time, rather than a motion for reconsideration. The Chamber will therefore treat the Defence motion as such.

15. The Chamber notes the very limited nature of the rebuttal evidence. The Prosecution attached a summary for each Witness, detailing the exact nature of his/her testimony with respect to the specific dates upon which the Accused was allegedly present in Butare.<sup>39</sup> While the Chamber is persuaded that the interest of justice calls for an extension of time between

<sup>36</sup> Reply to Prosecutor's Response to Defence Motion to Reconsider the June 15 Decision on the Extremely Urgent Motion for Reconsideration of the Trial Chamber 7 June 2011 Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, 28 June 2011, paras. 2-7, p. 6.

<sup>37</sup> *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-T, Decision on the Defence Motion for Reconsideration of the Chamber's 13 January 2010 Decision on Video-Link Testimony (TC), 29 January 2010, para. 5; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion for Reconsideration of Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza (TC) ("Karemera Decision of 29 September 2008"), 29 September 2008, para. 4. See also *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.14, Decision on Mathieu Ndirumpatse's Appeal from the Trial Chamber Decision of 17 September 2008 (AC), 30 January 2009, para. 13; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E)" (TC), 15 June 2004, paras. 8-9.

<sup>38</sup> See e.g., *Prosecutor v. Nindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Prosecution's Motion for Reconsideration of the Chamber's Decision Dated 18 February 2009 (TC), 19 March 2009, para. 2; Karemera Decision of 29 September 2008, para. 4.

<sup>39</sup> Motion for Rebuttal, Confidential Annex A.

the hearing of the rebuttal and the presentation of the potential rejoinder evidence, it does not find the nature of the evidence such that the Defence requires an additional 40 days after the close of the rebuttal case,<sup>40</sup> nor does the Defence have an explicit right thereto according to the Rules.<sup>41</sup>

16. The Chamber notes the efforts made by the Prosecution to accommodate a more expeditious hearing,<sup>42</sup> and notes the very limited scope of the rebuttal witnesses. In light of these circumstances, the Chamber directs that if the Defence is granted leave to present evidence in rejoinder, this shall take place within two weeks following the close of the rebuttal case. The Chamber further orders the Defence to disclose the statements of the potential rejoinder witness to the Prosecution no later than 7 days before the testimony of the witness is given.

**FOR THESE REASONS, THE CHAMBER**

**GRANTS** the Defence Motion in part;

**ORDERS** the presentation of rejoinder evidence to take place within two weeks after the rebuttal case, if approved by the Chamber;

**ORDERS** the Defence to disclose the statements of potential rejoinder witnesses to the Prosecution no later than 7 days before the testimony of the witness; and

**DENIES** the Defence Motion in all other aspects.

Arusha, 1 July 2011, done in English.

*[Handwritten signatures of the judges]*

Ge Gacumba Muthoga  
Presiding Judge

Seon Ki Park  
Judge

Robert Fremr  
Judge

[Seal of the Tribunal]

[Absent at the time of signing]



<sup>40</sup> Second Motion for Reconsideration, p. 8.

<sup>41</sup> See Rule 85(A).

<sup>42</sup> Response to Second Motion for Reconsideration, para. 15.