



**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:** 13 September 2011

**THE PROSECUTOR**

v.

**Ildéphonse NIZEYIMANA**

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

2011 SEP 13 P 5:16  
JUDICIAL RECORDS/ARCHIVES  
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UNICTR

**DECISION MOTION FOR EXCLUSION OF REBUTTAL WITNESSES**

**Office of the Prosecution:**

Drew White  
Kirsten Gray  
Yasmine Chubin  
Astou Mbow

**Defence Counsel for Ildéphonse Nizeyimana:**

John Philpot  
Cainnech Lussiaà-Berdou  
Myriam Bouazdi  
Sébastien Chartrand

## 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, having called 38 witnesses. The Defence closed its case on 16 June 2011, having called 38 witnesses. On 6 September 2011, the Chamber heard one Defence Witness, Witness BNN07. On 8 September 2011, the Prosecution completed the presentation of its evidence in rebuttal to the Defence case.

2. On 9 September 2011, the Defence team of the Accused, Ildéphonse Nizeyimana ("the Defence" and "the Accused" respectively) filed a motion to strike the evidence of the three rebuttal witnesses presented by the Prosecution on 7 and 8 September 2011.<sup>1</sup> The Defence submits that the rebuttal witnesses were contacted well before the Defence case, constituting a "splitting" of the Prosecution case.<sup>2</sup> The Defence further submits that the rebuttal evidence included testimony of which the Defence had no notice, and which fell outside the scope of the rebuttal case.<sup>3</sup>

3. On 12 September 2011, the Office of the Prosecutor ("Prosecution") filed its response.<sup>4</sup> The Prosecution submits, *inter alia*, that the Defence is attempting to re-litigate a matter that has already been decided upon by the Chamber, namely the timing of the alibi notice.<sup>5</sup> The Prosecution argues that the Defence erroneously suggests that the Prosecution should have brought the three rebuttal witnesses prior to the start of the Defence case, or even during the Prosecution's case-in-chief, which ignores the sequence followed by Rule 85 of the Rules of Procedure and Evidence ("Rules").<sup>6</sup> In regards to the second ground advanced by the Defence, the Prosecution submits that the Defence did not meet the high threshold for exclusion of evidence.<sup>7</sup> The Prosecution lastly submits that the Chamber enjoys a wide discretion to admit evidence under Rule 89(C), including rebuttal evidence.<sup>8</sup>

<sup>1</sup> Motion for Exclusion of the Testimony of Rebuttal Witnesses ("Defence Motion"), 9 September 2011.

<sup>2</sup> Defence Motion, paras. 8-11.

<sup>3</sup> Defence Motion, paras. 33-46.

<sup>4</sup> Prosecutor's Response to Defence Motion for Exclusion of the Testimony of Rebuttal Witnesses ("Prosecution Response"), 12 September 2011.

<sup>5</sup> Prosecution Response, paras. 7-13.

<sup>6</sup> Prosecution Response, paras. 15-16.

<sup>7</sup> Prosecution Response, paras. 19-25.

<sup>8</sup> Prosecution Response, paras. 19-21.



**DELIBERATIONS**

4. The Chamber recalls that Rules 54 and 89(C) 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 includes the consideration of the goal of ascertaining the truth and the possible prejudice to the Accused.<sup>9</sup>

5. The Defence seeks to exclude the testimony given by the three rebuttal witnesses on the basis that (1) the Prosecution had access to the witnesses' testimony well before the Defence case and (2) that portions of the evidence presented fell outside the scope of the rebuttal evidence as granted by the Chamber.

6. The Chamber recalls that exclusion of evidence is a remedy which is at the extreme end of a scale of measures available to the Chamber in addressing the prejudice caused to an accused.<sup>10</sup> An accused must demonstrate that he has suffered a degree of prejudice that would justify the extreme remedy of excluding the witness's testimony.<sup>11</sup>

7. The Chamber notes that while the evidence emanating from the cross-examination shows that the Prosecution met with the rebuttal witnesses prior to the start of the Defence case, the Chamber considers, in line with its prior decisions, that the Prosecution was not in a position to fully investigate the alibi defence during its case-in-chief.<sup>12</sup> Indeed, the Chamber noted that it "[did] not premise the decision to hear the rebuttal evidence on the date upon which the Defence disclosed its notice, but upon the ability of the Prosecution to adequately investigate the alibi defence witnesses and evidence and respond thereto."<sup>13</sup>

8. In regards to the second ground advanced by the Defence, the Chamber is of the view that the testimony adduced from Witness Rwirahira regarding a meeting held at the

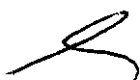
<sup>9</sup> *Prosecutor v. Krstic*, Case No. IT-98-33-T, Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance (TC), 4 May 2001, para. 16.

<sup>10</sup> *Prosecutor v. Karemera, et al.*, Case No ICTR-98-44-T, "Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guichaoua; Defence Motion to Exclude the Witness' Testimony; Decision on Defence Motions to Exclude Testimony of Professor Andre Guichaoua", 20 April 2006, para. 8.

<sup>11</sup> *Prosecutor v. Karemera et al.*, Case No ICTR-98-44-T, "Decision on Joseph Nzirorera's Second Motion to Exclude Testimony of Witness AXA and Edouard Karemera's Motion to Recall the Witness", 4 March 2008, para. 19.

<sup>12</sup> See Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence ("First Decision"), 7 June 2011, para. 25; Decision on 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 ("Second Decision"), 15 June 2011, paras. 33-34.

<sup>13</sup> Second Decision, para. 34.



Accused's house, as well as the presence of an injured house girl at his residence, was obtained through a line of questioning which tried to determine the whereabouts of the Accused on day relevant to the alibi defence.<sup>14</sup> The Chamber therefore does not consider this evidence to fall outside the scope of the rebuttal evidence as delineated by the Chamber in its prior decisions.<sup>15</sup> The Chamber notes that the Defence did not advance arguments regarding the scope of the evidence adduced through Witnesses Antoinette Bizimenyera and Côtma Twagirayezu. The Chamber reminds the parties that once the evidence is admitted, the exact probative weight to be attached thereto is to be determined by the Chamber at a later stage when assessing the totality of the evidence.<sup>16</sup>

9. The Chamber, pursuant to the discretion granted to it according to Rule 89(C), considers the evidence to be of sufficient relevant and probative value to outweigh the prejudice caused to the Defence. The prejudice is further mitigated by the Chamber's decision to grant the Defence leave to present evidence in rejoinder on 20 and 21 September 2011.

10. In light of these circumstances, the Chamber is not satisfied that the Defence discharged its burden of showing that it suffered a degree of prejudice that would justify the extreme measure of excluding the rebuttal evidence provided by Witnesses Antoinette Bizimenyera, Côtma Twagirayezu and Fulgence Rwirahira.

<sup>14</sup> T. 8 September 2011, pp. 43, 47 (draft).

<sup>15</sup> See First Decision, para. 26.; Second Decision, para. 33.

<sup>16</sup> *Prosecutor v. Nyiramasuhuko* Case No ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, paras. 6-7; *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Déo Sebahire Mbonyinkebe (Rule 89(C)) (TC), 2 September 2005, para. 16; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution and for Exclusion of Evidence Outside the Scope of the Indictment (TC), 19 October 2006, para. 18. See also *Prosecutor v. Gatete*, Case No. ICTR-2000-61-T, Decision on Defence Motion on Admissibility of Allegations Outside the Temporal Jurisdiction of the Tribunal (TC), 3 November 2009, para. 17.

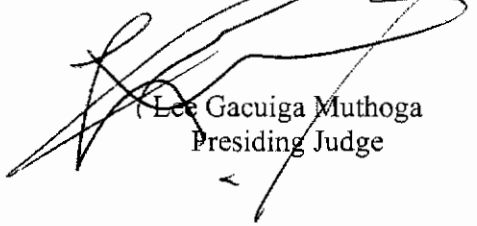
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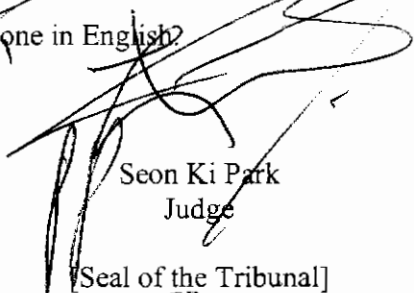


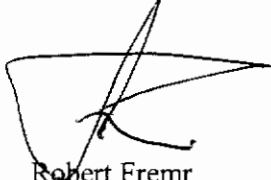
**FOR THESE REASONS, THE CHAMBER**

**DENIES** the Defence Motion.

Arusha, 13 September 2011, done in English?

  
Lee Gacuiga Muthoga  
Presiding Judge

  
Seon Ki Park  
Judge

  
Robert Fremr  
Judge

[Seal of the Tribunal]

