



ICTR-99-54-T
14 - 11 - 2011
(105997 - 105984)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

105997
Mwamp

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 14 November 2011

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

2011 NOV 14 P 3:21
JUDICIAL RECORDS/ARCHIVES
RECEIVED
UNICTR

**DECISION ON PROSECUTION MOTION FOR LEAVE
TO PRESENT REBUTTAL EVIDENCE**

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. Rashid Rashid
Mr. Patrick Gabaake
Mr. Iskandar Ismail
Mr. Michael Kalisa
Ms. Faria Rekkas

Defence Counsel

Mr. Peter Herbert
Ms. Mylène Dimitri
Mr. Deogratias Sebureze
Ms. Anne-Gaëlle Denier
Mr. Gregg Shankman

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa, and Mparany Rajohnson (the "Chamber");

BEING SEIZED of the "Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence Discovered in the Course of Presentation of the Defence Case", filed confidentially on 4 October 2011 (the "Prosecution Motion");

CONSIDERING:

- (a) The "Defence Response to Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence Discovered in the Course of Presentation of the Defence Case", filed confidentially on 14 October 2011 (the "Defence Response");
- (b) The "Corrigendum to Defence Response to Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence Discovered in the Course of Presentation of the Defence Case", filed confidentially on 18 October 2011; and
- (c) The "Prosecutor's Reply to Defence Response to Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence Discovered in the Course of Presentation of the Defence Case", filed confidentially on 24 October 2011 (the "Prosecution Reply");

CONSIDERING also the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion pursuant to Rules 73 and 85 of the Rules.

INTRODUCTION

1. Shortly before the commencement of trial on 23 September 2009, the Defence filed what it contended to be a Notice of Alibi pursuant to Rule 67(A)(ii).¹ This Notice alleged that the Accused was in Kigali town from 6 to 12 April 1994 and that at no time between the evening of 6 April and the morning of 12 April did the Accused leave Kigali town. The Defence merely stated therein that "[s]everal witnesses may be able to confirm the...alibi, but the Defence of Ngirabatware is awaiting information and documents in order to fulfil our obligations under Rule 67(A)(ii)(a)."²

2. On 7 January 2010, the Prosecution filed a Motion for an Order to Compel the Accused to Disclose Particulars of his Alibi. The Prosecution submitted therein that the

¹ T. 23 September 2009, p. 6.

² Notice of Alibi Pursuant to Rule 67(A)(ii), 23 September 2009, para. 3.

2 

Defence omitted the names and addresses of witnesses or any other evidence on which the Defence intended to rely to establish the Accused's alibi, and also did not indicate the exact location of the Accused in Kigali on the dates referred to.³

3. The Chamber granted the Prosecution Motion in part and urged the Defence to disclose the requested particulars as soon as possible to the Prosecution and in a continuous manner. The Chamber further reminded the Defence that, should it fail in this regard, this may be taken into account in the deliberations regarding the alibi.⁴

4. In compliance with the Chamber's Decision, the Defence provided additional particulars of the Accused's alibi on two occasions.⁵

5. The Prosecution case closed on 30 August 2010, and the Defence case commenced on 16 November 2010. The Defence notified the Prosecution that the Accused would testify on his own behalf as the first Defence witness only on Friday, 12 November 2010. The Defence case was scheduled to commence the following Monday, 15 November 2010, but this day was devoted to oral submissions on a Prosecution Motion to postpone the commencement of the Defence case. The Chamber issued its Oral Decision denying the Prosecution Motion on the following day, 16 November 2010.⁶

6. In the course of his testimony, the Accused raised what appeared to be new alibis for the periods of 23 April to 23 May 1994, and 23 June to 7 July 1994. The Prosecution requested time to investigate these new alibis. In an Oral Decision on 6 December 2010, the Chamber found that the Defence failed to give timely notice to the Prosecution of what appears to be new alibi evidence, and allowed the Prosecution to defer its cross-examination on matters related thereto to 17 January 2011, when the proceedings were scheduled to resume following judicial recess. The Chamber took note of the Prosecution submissions regarding rebuttal evidence, but refrained from addressing them at that stage of the proceedings. The Chamber nevertheless indicated that it "may consider such an issue if raised at the close of Defence case within the context of Rule 85(A)(iii) and the Appeals Judgement in *Nchamihigo* and *Semanza*."⁷

7. On 9 February 2011, the Prosecution sought to tender into evidence a *proces verbale* from Mr. Moustapha Niasse, Senegal's former Minister of Foreign Affairs. This document appeared to contradict the Accused's alibi that he was in Senegal between 30 April and 7 May 1994, and 10 to 11 May 1994. The Chamber sustained the Defence

³ Prosecutor's Motion for an Order to Compel the Accused to Disclose Particulars of his Alibi, 7 January 2010, para. 3.

⁴ Decision on Prosecution Motion for an Order to Compel the Accused to Disclose Particulars of his Alibi (TC), 16 February 2010, paras. 31-32.

⁵ Correspondence from the Defence to the Prosecution: (1) Additional Alibi Notice, 22 March 2010; and (2) Second Additional Notice of Alibi, 4 May 2010.

⁶ T. 16 November 2010, pp. 2-5.

⁷ T. 6 December 2010, pp. 1-4. The Chamber later denied the Defence Motion seeking reconsideration of this Oral Decision. See Decision on Motion for Reconsideration of the Oral Decision Rendered on 6 Dec. 2010 (TC), 27 January 2011, para. 32.

objection to the document's admission into evidence. The Chamber nevertheless stated that the Prosecution may follow up this matter through other legal means, if it so wished.⁸

8. The Prosecution sought reconsideration or certification to appeal this Oral Decision of 9 February 2011, which the Chamber denied. The Chamber indicated that the Prosecution was not precluded from introducing the documents through other avenues, such as by calling Mr. Niasse as a rebuttal witness, so as not to run afoul of the Accused's right to confront the witnesses against him.⁹

9. On 4 October 2011, the Prosecution filed the present Motion.

10. On 5 October 2011, the Defence requested an additional four days to file its Response. The Chamber heard oral submissions and granted the request on 6 October 2011. The Prosecution was given the same period of nine days to file its Reply.¹⁰

SUBMISSIONS OF THE PARTIES

Prosecution Motion

11. The Prosecution requests leave to present eight witnesses to rebut the belatedly disclosed alibis of the Accused for the periods 23 April to 23 May 1994 and 23 June to 7 July 1994. The Prosecution submits that the prejudice it suffered by the late disclosure of the Accused's alibis for these periods can only be cured by hearing these rebuttal witnesses.¹¹

12. The Prosecution submits that these eight rebuttal witnesses will rebut, among others, the Accused's alibi insofar as he visited Senegal and Swaziland.¹²

13. The Prosecution requests that the protective measures earlier issued by the Chamber in relation to Prosecution witnesses be extended to these individuals.¹³

Defence Response

14. The Defence submits that the Prosecution has failed to establish the two elements which must be present before the Chamber can allow the presentation of rebuttal evidence: (1) the evidence the movant seeks to rebut arose directly *ex improviso* during the Defence case-in-chief and could not, despite the exercise of reasonable diligence, have been foreseen; and (2) the proposed rebuttal evidence has significant probative

⁸ T. 9 February 2011, pp. 56-57.

⁹ Decision on Prosecution Motion for Reconsideration or Certification to Appeal the Oral Decision Rendered on 9 Feb. 2011 (TC), 10 May 2011, para. 27.

¹⁰ T. 6 October 2011, p. 56.

¹¹ Prosecution Motion, para. 22.

¹² *Id.*, paras. 30-37.

¹³ *Id.*, para. 4.

value to the determination of an issue central to the determination of the guilt or innocence of the Accused.¹⁴

Alibis Reasonably Foreseeable

15. The Defence first notes that the proposed rebuttal evidence pertains only to the Accused's alibi for the period of 23 April to 23 May 1994, and does not rebut the Accused's alibi for the period of 23 June to 3 July 1994. The Defence contends that the Prosecution was clearly aware of the Accused's alibi for the period of 23 April to 23 May 1994, as can be gleaned from various sources.¹⁵

16. First, the Defence points out that Prosecution has long been in possession of the audio recording of a 24 May 1994 Radio Rwanda broadcast of an interview with the Accused. In this interview, the Accused refers to his recently concluded official visits to Gabon, Togo, Senegal, Swaziland, and Zambia.¹⁶

17. The Defence further notes that the attached witness statement of potential rebuttal witness PRWI includes a table outlining the details of all three periods of the Accused's alibis, that is, from 6 to 12 April 1994, 23 April to 23 May 1994, and 23 June to 3 July 1994. Found in this table is a reference to the Accused's speech broadcast on 27 April 1994 on *Radio Afrique No. 1*, complete with references to K numbers of a transcript thereof.¹⁷

18. The Defence also asserts that the Prosecution is in custody of the Accused's handwritten notes seized from him when he was arrested in 2007, which contain references to the official missions he embarked upon during the two alibi periods of 23 April to 23 May 1994 and 23 June to 3 July 1994.¹⁸

19. In addition, the Defence puts forth that there are references to various aspects of these alibis in the will-say statements of Defence witnesses Jérôme-Clément Bicamumpaka, DWAN-29, and DWAN-148, which were attached to the Pre-Defence Brief filed on 21 October 2010. The Prosecution was likewise present when Mr. Bicamumpaka was interviewed by the Defence on 18 August 2010. Mr. Bicamumpaka revealed therein that he saw the Accused in France in May 1994.¹⁹

Probative Value

20. The Defence argues that the proposed rebuttal evidence fails to meet the threshold for probative value. The Defence contends, for instance, that the genuineness of the Accused's passports, previously admitted as Defence Exhibits 112 and 113, cannot be challenged. Furthermore, the Defence observes that the majority of the proposed rebuttal witnesses focus on the Accused's visit to Senegal, except for PRWIV who refers to the

¹⁴ Defence Response, paras. 7-10.

¹⁵ *Id.*, para. 86.

¹⁶ *Id.*, para. 22.

¹⁷ *Id.*, para. 25.

¹⁸ *Id.*, para. 28.

¹⁹ *Id.*, paras. 32-38.

Accused's trip to Swaziland, and all of the rebuttal witnesses are concerned solely with the alibi period of 23 April to 23 May 1994.²⁰

21. The Defence highlights that attached to the Prosecution Motion is a statement of Mr. Amadou Abdoul Ly, which confirms that he met the Accused in May 1994 in Dakar, Senegal. The Defence alleges that for the Prosecution to assert that the Accused was never in Senegal despite clear documentary evidence to the contrary constitutes bad faith.²¹

22. The Defence contends that while the Prosecution seeks to present rebuttal evidence solely in relation to the Accused's alibi for the period of 23 April to 23 May 1994, the Prosecution further seeks to have potential rebuttal witnesses PRWII and PRWVII challenge the credibility of Defence witnesses. The Defence submits that such evidence should be excluded in rebuttal.²²

Protective Measures

23. The Defence contends that the Prosecution has not substantiated the need of its potential rebuttal witnesses for protective measures. The Defence notes that they all reside outside Rwanda, and several occupy public positions in their countries.²³

Breach of Disclosure Obligations

24. The Defence further alleges that by failing to include witness statements of six of the eight proposed rebuttal witnesses, the Prosecution is in breach of its obligation to disclose statements of its witnesses under Rule 66(A)(ii). The summaries of their anticipated testimonies are insufficient in this regard.²⁴

PRWI Not an Expert Witness

25. The Defence notes that PRWI, as an investigator in the Office of the Prosecutor, is neither qualified to testify as an expert under Rule 94 *bis* on the authenticity of visas and passport stamps, nor is he a factual witness who can testify on events in Senegal in 1994. Accordingly, his anticipated testimony lacks relevance and reliability so as to qualify as a rebuttal witness.²⁵

Delay of Proceedings

26. The Defence adds that the calling of rebuttal witnesses will unduly delay the proceedings. The Prosecution unrealistically expects to be able to present all eight rebuttal witnesses in two trial days. Moreover, a 60-day period will have to be granted to

²⁰ *Id.*, paras. 83-86.

²¹ *Id.*, paras. 89-91.

²² *Id.*, paras. 93-95.

²³ *Id.*, paras. 41-51.

²⁴ *Id.*, paras. 54-78.

²⁵ *Id.*, paras. 79-82.

6 

the Defence between the disclosure of witness statements under Rule 66(A)(ii) and the commencement of the witnesses' testimonies.²⁶

Prosecution Reply

27. The Prosecution submits that the Chamber's deferral of the cross-examination of the Accused regarding the two additional alibi periods was a separate and distinct remedy from the presentation of rebuttal witnesses. The Prosecution further stresses that alibis go to the guilt or innocence of the Accused, and therefore evidence rebutting such alibis is highly relevant, probative, and non-cumulative.²⁷

28. The Prosecution argues that the alibis for the periods of 23 April to 23 May 1994 and 23 June to 3 July 1994 were not reasonably foreseeable, and the Defence cannot rely on a few, scattered pieces of information to assert otherwise. The Prosecution cites the *Nizeyimana* Trial Decision allowing the presentation of rebuttal evidence in light of the Defence's piecemeal compliance with its obligation to disclose alibi particulars under Rule 67(A)(ii).²⁸

29. In particular, the Radio Rwanda broadcast of 24 May 1994 did not mention the dates of the Accused's travels outside Rwanda. Moreover, there is no indication that the "Radio Afrique No. 1" referred to by PRWI in his outline of the Accused's alibis is a Gabonese radio station, and that the K-numbers specified in the outline correspond to a transcript of a radio broadcast in Gabon. Third, the handwritten notes of the Accused do not provide the context thereof, and the dates therein differ from the alibi periods. Fourth, the will-say statements of various Defence witnesses which indicate that the Accused was outside Rwanda during the alibi periods were filed long after the commencement of trial.²⁹

30. The Prosecution points out that only three out of the 12 documents annexed to the Prosecution Motion have been previously admitted into evidence. The Prosecution adds that the availability of another three of these 12 documents during the Accused's cross-examination does not bar the calling of rebuttal witnesses who will testify thereon.³⁰

31. The Prosecution rejects the Defence assertion that the statement of Mr. Amadou Abdoul Ly attached to the Prosecution Motion which allegedly confirms the presence of the Accused in Dakar, Senegal deprives the proposed rebuttal evidence of any reliability and probative value. The Prosecution notes that this statement does not identify the particular day in May 1994 that the Accused met Mr. Ly. As this meeting may have taken place outside the alibi periods, this statement does not necessarily contradict the

²⁶ *Id.*, paras. 96-100.

²⁷ Prosecution Reply, paras. 4-11.

²⁸ *Id.*, paras. 12-14, citing *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 (TC), 7 June 2011, para. 25.

²⁹ Prosecution Reply, paras. 15-19.

³⁰ *Id.*, paras. 21-25.

proposal rebuttal evidence. In fact, the Prosecution observes that Mr. Ly's statement attests to the Accused's anti-Tutsi sentiments.³¹

32. The Prosecution points out that it is not seeking to call PRWI as an expert witness. As the person who investigated the two alibi periods, he will serve as the vehicle through which evidence thereon can be tendered. He will testify principally on the chain of custody of evidence and the provenance and authenticity of documents, as well as provide context for other rebuttal witnesses.³²

33. The Prosecution submits that the Chamber's 6 May 2009 Decision granting protective measures to Prosecution witnesses applies to potential rebuttal witnesses residing outside Rwanda.³³

34. The Prosecution states that it has not contravened its disclosure obligations under Rule 66(A)(ii) as regards statements of PRWI and PRWII, as it has yet to obtain such statements. The Prosecution is still awaiting the responses of the relevant national authorities. The Prosecution investigator did not send written interrogatories to the proposed rebuttal witnesses or record any other statements. Instead, the Prosecution sent *Commissions Rogatoires Internationales* ("CRIs") to certain countries and authorities, prior to the conduct of informal interviews. The Prosecution submits that any statements or materials received in response to these CRIs will be disclosed under Rule 67(D) once received.³⁴

35. Finally, the Prosecution states that, in the interests of justice and a fair trial, it may call rebuttal witnesses even if this will delay the proceedings.³⁵

DELIBERATIONS

36. Rule 85 indicates the sequence by which evidence is to be presented by the Parties during trial, unless otherwise directed by the Trial Chamber in the interests of justice. Under Rule 85(A)(iii), the Prosecution may be allowed by the Trial Chamber to present rebuttal evidence after the completion of the Defence case.

37. It is well-established in the jurisprudence of the *ad hoc* Tribunals that the Trial Chamber enjoys wide discretion in determining whether to grant leave to call rebuttal evidence. The Prosecution must establish two elements before it can be allowed to present rebuttal evidence: (1) the evidence it seeks to rebut arose directly *ex improviso* during the Defence case-in-chief and was not foreseeable through the exercise of reasonable diligence; and (2) the proposed rebuttal evidence has significant probative

³¹ *Id.*, paras. 31-34.

³² *Id.*, paras. 38-39.

³³ *Id.*, paras. 40-44.

³⁴ *Id.*, paras. 45-51.

³⁵ *Id.*, paras. 52-55.

value to the resolution of an issue central to the determination of the guilt or innocence of the Accused.³⁶

38. The Chamber further recalls that rebuttal evidence is not a means for the Prosecution to re-open or reinforce its case, to counter evidence presented during the Defence case-in-chief that could have been reasonably foreseen, or to seek solely to challenge the credibility of a Defence witness or peripheral or background issues.³⁷

39. The Prosecution seeks to call eight rebuttal witnesses to rebut the alibi of the Accused for the period of 23 April to 23 May 1994, which was only disclosed in the course of his testimony as the first Defence witness. The Chamber previously ruled that this belated disclosure was in contravention of Rule 67(A)(ii).³⁸

40. The Defence contends that the Prosecution has not met the two requisites for leave to present rebuttal evidence to be granted. First, the Prosecution could have foreseen the two alibi periods through reasonable diligence. In particular, interviews of the Accused with Radio Rwanda on 24 May 1994 and with *Radio Afrique No. 1*, handwritten notes of the Accused, and the will-say statements of Jérôme-Clément Bicamumpaka, DWAN-29, and DWAN-148, should have put the Prosecution on notice as regards the two alibi periods. Second, the proposed rebuttal evidence fails to meet the threshold level of probative value. The Defence points out that the potential rebuttal witnesses will only testify on one of the two alibi periods in contention, 23 April to 23 May 1994. Moreover, the statement of PRWII annexed to the Prosecution Motion includes the statement of another individual, Mr. Amadou Abdoul Ly, who actually confirms the Accused's presence in Dakar, Senegal in May 1994 rather than refutes it.³⁹

41. Regardless of the Defence submissions to the contrary, the Chamber recalls that it did not comply with its alibi disclosure obligations under Rule 67(A)(ii). As regards any alibi notice which may be read into will-say statements annexed to the Pre-Defence Brief,

³⁶ *Prosecutor v. Mladen Naletilić et al.*, ICTY Case No. IT-98-34-A, Judgement (AC), 3 May 2006 ("Naletilić et al. Appeals Judgement"), para. 258; *Prosecutor v. Dario Kordić et al.*, ICTY Case No. IT-95-14/2-A, Judgement (AC), 17 December 2004 ("Kordić et al. Appeals Judgement"), para. 220; *Prosecutor v. Zejnil Delalić et al.*, ICTY Case No. IT-96-21-A, Judgement (AC), 20 February 2001, para. 273; *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 (TC), 7 June 2011 ("Nizeyimana Trial Decision"), paras. 19, 22; *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Prosecution Motion to Call Rebuttal Evidence (TC), 8 March 2011 ("Nzabonimana Trial Decision"), para. 36; *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on the Prosecution Motion to Call Rebuttal Evidence (TC), 20 February 2009 (*Ndindiliyimana et al. Trial Decision*), paras. 3-4; *Prosecutor v. Naser Orić*, ICTY Case No. IT-03-68-T, Decision on the Prosecution Motion with Addendum and Urgent Addendum to Present Rebuttal Evidence Pursuant to Rule 85(A)(iii) (TC), 9 February 2006 ("Orić Trial Decision"), p. 3; *Prosecutor v. Sefer Halilović*, ICTY Case No. IT-01-48-T, Decision on Prosecution Motion to Call Rebuttal Evidence (TC), 21 July 2005 ("Halilović Trial Decision"), pp. 1-2.

³⁷ *Naletilić et al. Appeals Judgement*, para. 258; *Kordić et al. Appeals Judgement*, para. 220; *Nizeyimana Trial Decision*, para. 20; *Nzabonimana Trial Decision*, para. 36; *Ndindiliyimana et al. Trial Decision*, para. 4; *Orić Trial Decision*, p. 4; *Halilović Trial Decision*, p. 3.

³⁸ T. 6 December 2010, pp. 1-4.

³⁹ See generally Defence Response, paras. 22-40, 83-95.

the Appeals Chamber has held that such purported notice "fails to conform to the Rule since [the Pre-Defence Brief] was filed after the commencement of the trial, following the close of the Prosecution case, and because it lacks any description of the witnesses or evidence supporting the alibi."⁴⁰

42. While the failure to disclose alibi particulars in a timely manner under Rule 67(A)(ii) does not prevent the Defence from relying on alibis under Rule 67(B), the prejudice suffered by the Prosecution as a result may justify the presentation of rebuttal evidence. The deferral of the Accused's cross-examination on the two alibi periods does not preclude the calling of rebuttal witnesses thereon.

43. The Chamber recalls that leave has been granted in other cases before this Tribunal to the Prosecution to present evidence to rebut alibis which were belatedly disclosed or disclosed in a piecemeal fashion.⁴¹ The Appeals Chamber in *Semanza* in fact found the calling of rebuttal witnesses proper under such circumstances.⁴² Accordingly, the Chamber will proceed to address the two prerequisites for leave to present rebuttal evidence.

Whether Alibis Reasonably Foreseeable

44. The Chamber has already held that the alibi evidence for the two periods of 23 April to 23 May 1994 and 23 June to 7 July 1994 arose only in the course of the Accused's testimony, in contravention of the Defence's disclosure obligations under Rule 67(A)(ii).⁴³ The Chamber considers that the Prosecution could not have reasonably foreseen the Accused's alibis over these two periods based on references thereto in the interviews of the Accused with Radio Rwanda on 24 May 1994 and with *Radio Afrique No. 1*, handwritten notes of the Accused, and the will-say statements of Jérôme-Clément Bicomumpaka, DWAN-29, and DWAN-148, to the extent that it could have fully addressed them during the cross-examination of the Accused. The Prosecution could not have properly investigated such alibi references without more details having been provided, such as the exact dates the Accused traveled, the particular places he visited and the people he met in order to make the necessary inquiries. At any rate, the Prosecution was clearly not in a position to rebut these alibis during its case-in-chief.

45. The will-say statements were only disclosed when the Pre-Defence Brief was filed on 21 October 2010, after the close of the Prosecution case. As noted earlier, the Appeals Chamber in *Munyakazi* ruled that alibi references in will-say statements in the Pre-Defence Brief did not discharge the Defence's Rule 67(A)(ii) disclosure obligations.⁴⁴

⁴⁰ *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36A-A, Judgement (AC), 28 September 2011 ("Munyakazi Appeals Judgement"), para. 17.

⁴¹ *Nizeyimana* Trial Decision, para. 20; *Nzabonimana* Trial Decision, para. 45.

⁴² *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Judgement (AC), 20 May 2005, para. 28.

⁴³ T. 6 December 2010, pp. 1-4. The Chamber later denied the Defence Motion seeking reconsideration of this Oral Decision. See Decision on Motion for Reconsideration of the Oral Decision Rendered on 6 December 2010 (TC), 27 January 2011, para. 32.

⁴⁴ *Munyakazi* Appeals Judgement, para. 17.

46. The mere fact that the transcript of a Radio Rwanda broadcast of 24 May 1994 bears K-numbers and is contained in the Prosecution's Electronic Disclosure System ("EDS") is insufficient to render the two alibi periods as reasonably foreseeable to the Prosecution. The Defence cannot benefit from the mere inclusion of a random radio broadcast transcript among the "tens of thousands of documents"⁴⁵ uploaded into the EDS so as to preclude the Prosecution from calling rebuttal witnesses.

47. Furthermore, the Chamber has previously ruled that mere possession of the Radio Rwanda broadcast transcript does not constitute notice within the requirements of Rule 67(A)(ii).⁴⁶ The Appeals Chamber has likewise held that the Defence's reference in its opening arguments to its intention to call witnesses in support of an alibi of 11 April 1994 did not constitute a clear notice of alibi, when the Notice of Alibi which had been filed only pertained to 12 April 1994.⁴⁷

48. The Chamber therefore considers that the Accused's alibi for the period of 23 April to 23 May 1994 was not reasonably foreseeable with the degree of detail necessary to preclude the calling of rebuttal evidence thereon.

Probative Value

PRWII to PRWVIII

49. The Chamber observes that seven of the eight proposed rebuttal witnesses, PRWII to PRWVIII, will testify on matters within their personal knowledge relevant to the alibi period of 23 April to 23 May 1994, such as whether they met the Accused in Senegal, whether certain visas were issued to or required of the Accused, or whether documents are found in a particular company's archives.

50. The Chamber considers that the anticipated testimony of these witnesses may contradict portions of the Accused's alibi for the period of 23 April to 23 May 1994. Accordingly, the Chamber finds that the anticipated testimonies of these seven rebuttal witnesses have significant probative value. By raising an alibi, an accused is denying that he was in a position to commit the crime with which he was charged. An alibi need only be reasonably possibly true to be accepted.⁴⁸ Evidence which tends to rebut an alibi thus has significant probative value, as it could impact upon the guilt or innocence of the Accused.

⁴⁵ *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations (AC), 30 June 2006, para. 13.

⁴⁶ Decision on Defence Motion for Reconsideration of the Oral Decision Rendered on 6 December 2010 (TC), 27 January 2011, para. 27.

⁴⁷ *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003, paras. 255-256.

⁴⁸ *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Judgement (AC), 16 November 2009, para. 17.

51. The Defence submits that the Accused's passports, Defence Exhibits 112 and 113, are "irrefutable documentary evidence that cannot be challenged."⁴⁹ The Defence does not cite any legal or factual basis for this statement. The Chamber considers that it is within the remit of rebuttal evidence to challenge the authenticity of any document, regardless of its nature, provided there are reasonable grounds to do so.

52. The Defence highlights that the proposed rebuttal witnesses focus only on one alibi period, that of 23 April to 23 May 1994. Moreover, six of the eight proposed rebuttal witnesses will testify solely on the absence of the Accused in Senegal during this period, while one will make reference to the Accused's alleged visit to Swaziland. The Defence likewise stresses that the statement of Mr. Amadou Abdoul Ly, which is combined with that of PRWII, actually confirms the presence of the Accused in Senegal in May 1994.⁵⁰

53. While these concerns may impact upon the weight that the Chamber will accord to the evidence at a later stage of the proceedings, the Chamber considers that the anticipated testimonies of proposed rebuttal witnesses PRWII to PRVIII have significant probative value, as they could tend to disprove part of the Accused's alibi.

PRWI

54. The Defence submits that PRWI is not qualified to testify as an expert witness under Rule 94 *bis*. The Defence asserts that he is not trained to testify on the authenticity of visas and passport stamps, and can only give his opinion on the actions of the Senegalese government in 1994. Moreover, he is a staff member of the Office of the Prosecutor and therefore cannot be an impartial or objective witness.⁵¹

55. The Prosecution submits that PRWI will testify on the investigations he conducted into the two alibi periods, and will serve as a vehicle through which the documents obtained can be tendered.⁵²

56. The Chamber finds that the Prosecution does not seek to present PRWI as an expert witness, and thus the Defence submissions in this regard are misplaced. The Chamber considers that PRWI may be able to provide context to the investigations he carried out into the Accused's alibis, and may establish the chain of custody over the documents obtained in the course of his investigations. Accordingly, the Chamber finds that PRWI's anticipated testimony has significant probative value in relation to the Accused's alibis.

No Undue Delay

57. The need for rebuttal evidence having resulted from the Defence's failure to comply with its Rule 67(A)(ii) disclosure obligations, the time required for this additional evidence phase cannot be characterized as an undue delay in the proceedings.

⁴⁹ Defence Response, para. 85.

⁵⁰ *Id.*, paras. 86, 89.

⁵¹ *Id.*, paras. 79-82.

⁵² Prosecution Reply, paras. 38-39.

Protective Measures

58. The Defence argues that the Prosecution has failed to establish the need for protective measures for the proposed rebuttal witnesses.⁵³ The Chamber recalls that it has previously ordered that protective measures be granted to all Prosecution and Defence witnesses, as well as to other witnesses the Prosecution and the Defence may call to testify. These protective measures apply to Prosecution and Defence witnesses, whether they reside in or outside Rwanda.⁵⁴

59. The Chamber recalls that in its 6 May 2009 Decision, it ruled that protective measures apply even to future Prosecution witnesses. The Chamber therefore extends protective measures to the Prosecution rebuttal witnesses.

Alleged Breach of Prosecution's Disclosure Obligations

60. The Defence contends that the Prosecution is in breach of its disclosure obligations under Rule 66(A)(ii) by failing to attach to the Prosecution Motion the statements of six out of the eight proposed rebuttal witnesses, namely, that of PRWIII, PRWIV, PRWV, PRWVI, PRWVII, and PRWVIII.⁵⁵

61. The Prosecution points out that it is still awaiting the statements of these six individuals, as well as the responses to the requests for information ("*Commissions Rogatoires Internationales*") it sent to various countries and authorities but commits to disclose them as soon as they are available. The Prosecution claims that it did not record any other statements.⁵⁶ The Prosecution does not clarify whether PRWI personally interviewed his fellow potential rebuttal witnesses. If he did, the Defence seeks disclosure of his notes of such interviews insofar as these constitute witness statements in accordance with the *Niyitegeka* Appeals Judgement.⁵⁷

62. The *Niyitegeka* Appeals Chamber held that records of questions put to witnesses by the Prosecution and the answers thereto constitute witness statements pursuant to Rule 66(A)(ii). In addition, witness statements which do not conform to this standard nevertheless remain subject to disclosure under the aforementioned Rule. The Appeals Chamber clarified that a Party cannot seek to avoid its disclosure obligations by resorting to Rule 70(A), which provides that internal documents prepared by a Party are not subject to disclosure. The Appeals Chamber emphasized that once questions are put to a witness, these no longer fall within the protection of Rule 70(A) and must be disclosed under Rule 66(A)(ii).⁵⁸

⁵³ Defence Response, paras. 41-53.

⁵⁴ Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others (TC), 6 May 2009, paras. 19, 21; Decision on Defence Urgent Motion for Witness Protective Measures (TC), 9 February 2010, paras. 22-23.

⁵⁵ Defence Response, paras. 54-78.

⁵⁶ Prosecution Reply, paras. 45-51.

⁵⁷ Defence Response, para. 65.

⁵⁸ *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004 ("*Niyitegeka* Appeals Judgement"), paras. 33-35.

63. The Prosecution submits that it currently does not possess any other material regarding the potential rebuttal witnesses subject to disclosure under Rule 66(A)(ii) or 67(D).⁵⁹ The Chamber therefore has insufficient information to determine whether there has been a breach of Rule 66(A)(ii). The Chamber considers, however, that if PRWI did conduct interviews of the other potential rebuttal witnesses, wherein questions were put to them and answers given, these would, in accordance with the *Niyitegeka* Appeals Judgement, constitute witness statements subject to disclosure under Rule 66(A)(ii) and would not fall within the ambit of Rule 70(A).⁶⁰ Any notes and/or recordings of such questions and answers should be immediately disclosed to the Defence. The Chamber also expects the Prosecution to fulfill its commitment to disclose any statements of its rebuttal witnesses it receives in the future, as well as the responses to the CRIs.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution Motion;

ALLOWS the Prosecution to call PRWI, PRWII, PRWIII, PRWIV, PRWV, PRWVI, PRWVII, and PRWVIII as rebuttal witnesses immediately after the close of the Defence case;

EXTENDS protective measures to PRWI, PRWII, PRWIII, PRWIV, PRWV, PRWVI, PRWVII, and PRWVIII;

ORDERS the Prosecution to immediately disclose any notes and/or recordings taken of interviews that PRWI may have conducted with PRWII, PRWIII, PRWIV, PRWV, PRWVI, PRWVII, and/or PRWVIII; and

DIRECTS the Prosecution to disclose statements of PRWII, PRWIII, PRWIV, PRWV, PRWVI, PRWVII, and/or PRWVIII, and responses to CRIs, as soon as they are available.

Arusha, 14 November 2011



William H. Sekule
Presiding Judge



Solomon Banda Bossa



Mparany Rajohnson
Judge

⁵⁹ Prosecution Reply, para. 51.

⁶⁰ *Niyitegeka* Appeals Judgement, paras. 33-35.