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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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HWS

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 13 December 2011

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL RECORDS ARCHIVES
ICTR
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**DECISION ON DEFENCE MOTION FOR RECONSIDERATION AND/OR
CERTIFICATION TO APPEAL THE TRIAL CHAMBER'S
DECISION OF 14 NOVEMBER 2011 ON REBUTTAL EVIDENCE**

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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 "Defence Motion for Reconsideration and/or Certification to Appeal the Trial Chamber's Decision of 14 November 2011 on Rebuttal Evidence", filed on 21 November 2011 (the "Defence Motion");

CONSIDERING:

- (a) The "Prosecution's Response to Defence Motion for Reconsideration and/or Certification to Appeal the Trial Chamber's Decision of 14 November 2011 on Rebuttal Evidence", filed on 28 November 2011 (the "Prosecution Response");
- (b) The "Defence Reply to Prosecution's Response and Additional Submissions to the to Defence Motion for Reconsideration and/or Certification to Appeal the Trial Chamber's Decision of 14 November 2011 on Rebuttal Evidence", filed on 2 December 2011 (the "Defence Reply");
- (c) The "Prosecution's Response to Defence Reply to Prosecution's Response and Additional Submissions to the to Defence Motion for Reconsideration and/or Certification to Appeal the Trial Chamber's Decision of 14 November 2011 on Rebuttal Evidence", filed on 6 December 2011 (the "Prosecution Second Response"); and
- (d) The "Defence Reply to Prosecution's Response to Defence Reply to Prosecution's Response and Additional Submissions to the to Defence Motion for Reconsideration and/or Certification to Appeal the Trial Chamber's Decision of 14 November 2011 on Rebuttal Evidence", filed on 8 December 2011 (the "Defence Second 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 Rule 73 of the Rules.

INTRODUCTION

1. On 26 October 2011, the Chamber adjourned the proceedings until 30 January 2012.¹
2. On 14 November 2011, the Chamber rendered a Decision (the "Impugned Decision") granting the "Prosecutor's Motion for Leave to Present Evidence in Rebuttal

¹ T. 26 October 2011, pp. 86-87.

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to the Alibi Defence Discovered in the Course of Presentation of the Defence Case” (the “Prosecution Rebuttal Motion”). The Chamber allowed the Prosecution to call eight rebuttal witnesses, PRWI, PRWII, PRWIII, PRWIV, PRWV, PRWVI, PRWVII, and PRWVIII, immediately after the close of the Defence case, extended protective measures to these individuals, ordered the Prosecution to immediately disclose any notes and/or recordings taken of interviews that PRWI may have conducted with his fellow rebuttal witnesses, and directed the Prosecution to disclose statements of PRWII, PRWIII, PRWIV, PRWV, PRWVI, PRWVII, and/or PRWVIII, and responses to “*Commissions Rogatoires Internationales*”, as soon as they are available.²

3. On 21 November 2011, the Defence filed the present Motion seeking reconsideration and/or certification to appeal the Impugned Decision.

4. On 28 November 2011, the Prosecution disclosed to the Defence a series of documents, some of which seem to suggest that the Accused engaged in media interviews in Senegal on 1 and 4 May 1994.³

SUBMISSIONS OF THE PARTIES

Defence Motion

Reconsideration

5. The Defence submits that there is reason to believe that the Impugned Decision is erroneous in law and in fact, and constitutes an abuse of discretion resulting in an injustice to the Accused, and should therefore be reconsidered.⁴

6. First, the Defence faults the Chamber for issuing protective measures for the rebuttal witnesses. The Defence contends that the Chamber failed to establish any basis for these witnesses to fear for their safety, considering that they are neither citizens nor residents of Rwanda, so as to justify the issuance of protective measures. The Chamber thus failed to strike a fair and proper balance between the right of the Accused to a fair trial and the protection of witnesses.⁵

7. Second, the Chamber improperly appreciated the relevance and probative value of the anticipated testimonies of the rebuttal witnesses. The Chamber failed to appreciate that due the limited scope of the rebuttal evidence, its probative value was insufficient to justify the calling of rebuttal witnesses. The Defence highlights that the rebuttal evidence focuses on less than 10 days of the Accused’s alibi for the period of 23 April to 23 May 1994.⁶

² Decision on Prosecution Motion for Leave to Present Rebuttal Evidence (TC), 14 November 2011, p. 14.

³ Prosecutor v Augustin NGIRABATWARE: Disclosures to the Defence and the Trial Chamber under Rules 67(D) and 68 of the Rules of Procedure and Evidence, 28 November 2011, paras. 1-2.

⁴ Defence Motion, paras. 6-8.

⁵ *Id.*, paras. 9-17.

⁶ *Id.*, paras. 18-22.

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8. Third, the Chamber failed to consider the Defence submission that PRWI was qualified neither as an expert witness nor as a factual witness.⁷

9. Fourth, the Chamber did not explain how the deferral of the Accused's cross-examination on his belatedly disclosed alibis was insufficient to remedy any prejudice caused by such late notice. As the Prosecution had been granted ample opportunity to investigate and address the alibis, there is no longer any justification for the presentation of rebuttal evidence thereon.⁸

10. The Chamber erroneously concluded that the Prosecution could not have reasonably foreseen these alibis to the extent that it could have addressed them during the cross-examination of the Accused. On the contrary, the Prosecution was in possession of various materials containing references to the alibis long before the trial commenced in 2009, namely, the 24 May 1994 Radio Rwanda broadcast, the handwritten notes of the Accused, and a Radio Afrique No. 1 radio broadcast. The Chamber further contradicted itself when it stated that the 24 May 1994 Radio Rwanda broadcast was a "random radio broadcast transcript among the tens of thousands of documents uploaded to the EDS" despite having previously ruled that this was potentially exculpatory.⁹

11. The Defence submits that the Chamber confused the concept of notice of the Accused's alibis with that of whether these were foreseeable. The test for allowing rebuttal evidence is whether the alibis were foreseeable considering the evidence in the Prosecution's possession, and not whether this evidence constituted adequate notice under Rule 67(A)(ii)(a).¹⁰

12. Fifth, the Chamber did not address the cumulative nature of the rebuttal evidence, in contravention of jurisprudence denying leave to call rebuttal evidence cumulative of previously adduced evidence. The Defence stresses that most of the documents and supporting materials that the Prosecution relies on to justify the presentation of rebuttal evidence are already in evidence, and various exhibits have previously been admitted to challenge the Accused's alibi.¹¹

13. Sixth, the Chamber disregarded the Defence submissions on the lack of particulars furnished concerning the rebuttal witnesses. The Defence recalls that it was required to furnish the particulars of its witnesses 30 days before trial, and was further required to disclose the complete residential addresses of its witnesses residing outside Rwanda or explain why such information was lacking.¹²

14. Seventh, the Chamber did not enforce the 60-day period between disclosure of statements of witnesses and their testimonies under Rule 66(A)(ii). Instead, the Chamber did not impose any deadline upon the Prosecution to furnish the missing statements of six

⁷ *Id.*, paras. 23-24.

⁸ *Id.*, paras. 25-28.

⁹ *Id.*, paras. 29-32.

¹⁰ *Id.*, para. 33.

¹¹ *Id.*, paras. 34-36.

¹² *Id.*, paras. 37-40.

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of the eight rebuttal witnesses and ordered that the rebuttal evidence will be heard immediately after the close of the Defence case.¹³

Certification to Appeal

15. The Defence notes that certification to appeal has been granted where the impugned Decision may concern broad categories of evidence or pivotal procedural or evidentiary matters, which the Defence submits includes rebuttal evidence.¹⁴

16. The Defence submits that the Impugned Decision affects the fairness of the proceedings as the lack of the rebuttal witnesses' particulars and the failure of the Chamber to enforce the 60-day requirement under Rule 66(A)(ii) for the disclosure of witness statements prevent the Defence from conducting any investigations on them and preparing for their cross-examination.¹⁵

17. The Defence argues that the Impugned Decision likewise affects the expeditiousness of the proceedings as the period of time necessary to hear the eight rebuttal witnesses will seriously delay the proceedings. Moreover, the Defence will have to call an equivalent number of rejoinder witnesses in response, thereby further lengthening the proceedings.¹⁶

18. The Defence's inability to properly prepare for the cross-examination of the rebuttal witnesses places the Accused at a disadvantage and will necessarily affect the outcome of the trial.¹⁷

19. Finally, the Defence submits that an immediate resolution of this issue by the Appeals Chamber will materially advance the proceedings. If the Appeals Chamber were not to review the Impugned Decision at this stage of the proceedings, the prejudice that the Accused will suffer cannot be remedied at the appeal stage. The Defence will be forced to cross-examine the rebuttal witnesses without having had the opportunity to fully prepare therefor.¹⁸

Prosecution Response

Reconsideration

20. The Prosecution submits that the Chamber correctly extended protective measures to the rebuttal witnesses, as the Chamber previously found that there is an objective fear for Prosecution witnesses who reside both within and outside Rwanda. The Prosecution

¹³ *Id.*, paras. 41-42.

¹⁴ *Id.*, paras. 43-46.

¹⁵ *Id.*, paras. 47-51.

¹⁶ *Id.*, paras. 52-55.

¹⁷ *Id.*, paras. 56-57.

¹⁸ *Id.*, paras. 58-61.

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notes that the Chamber similarly issued protective measures to Defence witnesses without specifically addressing their objective fear.¹⁹

21. The Chamber correctly held that the rebuttal evidence has significant probative value, even if it did not cover the entirety of the alibi periods. The Prosecution points out that the second alibi period is critical to the determination of the Accused's guilt. As the rebuttal evidence addresses significant portions of this alibi period, it is of sufficient probative value.²⁰

22. The Chamber further correctly granted leave for PRWI to be called as a rebuttal witness, as the Prosecution did not intend to present him as an expert witness. As an investigator, PRWI may properly serve as a vehicle through which evidence gathered through his investigations may be introduced.²¹

23. The Prosecution points out that the rebuttal evidence is not cumulative of previously admitted evidence as it has not had a chance to address the rebuttal evidence during its case, with the alibis in question having been introduced only during the Defence case.²²

24. Contrary to the Defence contention, the Chamber addressed the issue of missing statements within the 60-day disclosure period stipulated in Rule 66(A)(ii) for rebuttal witnesses PRWIII to PRWVIII, and concluded that the Prosecution could only disclose their statements when it received them. The Prosecution notes that the particulars of witnesses will be furnished along with their statements. The Chamber in fact went on to direct the Prosecution to disclose any additional materials that amount to witness statements under Rule 66(A)(ii).²³

25. Accordingly, the Prosecution submits that the Defence has failed to establish that the Impugned Decision merits reconsideration on the ground of error or abuse of discretion.²⁴

Certification to Appeal

26. The Defence has failed to establish that the Impugned Decision significantly affects the fair and expeditious conduct of the proceedings. The Prosecution asserts that the Defence merely reiterated the submissions made in its Response to the Prosecution Rebuttal Motion. The Impugned Decision does not impact the fairness of the proceedings, and in fact mitigates the prejudice suffered by the Prosecution as a result of the Defence's belated disclosure of the Accused's alibis. In addition, the rebuttal witnesses will only testify on a narrow and discrete set of facts, and will only require a

¹⁹ Prosecution Response, para. 16(i).

²⁰ *Id.*, para. 16(ii).

²¹ *Id.*, para. 16(iii).

²² *Id.*, para. 16(vi).

²³ *Id.*, para. 16(vii).

²⁴ *Id.*, para. 17.

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total of approximately six hours for their examinations-in-chief. Their testimonies may thus be completed in two days.²⁵

27. The Prosecution points out that the Defence does not articulate how the outcome of the trial will be significantly affected by the Impugned Decision. The Defence again merely reiterates the submissions made in its Response to the Prosecution Rebuttal Motion.²⁶

28. Contrary to the Defence argument that an immediate resolution of the issue by the Appeals Chamber will materially advance the proceedings, an interlocutory appeal will instead impede the trial.²⁷

Defence Reply

Additional Submissions

29. The Defence Reply incorporates Additional Submissions to the Defence Motion. The Defence submits that the Impugned Decision should also be reversed on the other two grounds for reconsideration: (1) a new fact has been discovered that was not previously known to the Trial Chamber at the time of issuance of the Impugned Decision; and (2) there has been a material change in circumstances since the issuance of the Impugned Decision.²⁸

30. The Defence brings to the attention of the Chamber that on 28 November 2011, the Prosecution disclosed an email referring to an interview of the Accused which took place in Dakar, Senegal on 4 May 1994. The Prosecution likewise disclosed what it describes as a Pan-African News Agency report of an interview granted by the Accused in Dakar on 1 May 1994. The Defence opines that as these documents confirm the Accused's presence in Dakar in early May 1994, it would be frivolous for the Prosecution to call rebuttal witnesses disputing the Accused's visit to Senegal during this period. The rebuttal evidence must refute the Accused's alibi in its entirety. As it cannot, hearing the rebuttal witnesses would only infringe the Accused's right to a fair trial and waste the Tribunal's time and resources.²⁹

31. The Defence contends that these newly disclosed documents constitute new facts and a material change in circumstances warranting reconsideration of the Impugned Decision.³⁰

Error and Abuse of Discretion

32. The Prosecution cites no legal or factual basis for its contention that rebuttal evidence has probative value even if it does not cover the entirety of the Accused's alibis.

²⁵ *Id.*, paras. 29(i)-(ii).

²⁶ *Id.*, para. 30.

²⁷ *Id.*, para. 31.

²⁸ Defence Reply, paras. 6-7.

²⁹ *Id.*, paras. 8-23.

³⁰ *Id.*, paras. 24-27.

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The Defence stresses that even if the rebuttal evidence were accepted, most of the alibi period of 23 April to 23 May 1994 would remain unchallenged. As such, the threshold level of probative value necessary to justify the presentation of rebuttal evidence has not been met.³¹

33. The Defence states that protective measures must be granted on a case-by-case basis rather than bestowed upon all witnesses. The Chamber failed to distinguish between the present context and that surrounding the Chamber's Decision of 6 May 2009, wherein the Prosecution witnesses concerned were Rwandese, unlike the rebuttal witnesses who are neither Rwandan citizens nor residents.³²

34. The Defence reiterates the submissions in its Response to the Prosecution Rebuttal Motion regarding rebuttal witness PRWI being neither a factual nor an expert witness. The Defence adds that the Prosecution Response lacks legal or factual basis for many of the submissions therein.³³

Certification to Appeal

35. The Defence stresses that in demonstrating how the Impugned Decision affects the fairness of the proceedings and the outcome of the trial, reference necessarily had to be made to matters previously addressed in the Defence Response to the Prosecution Rebuttal Motion, namely, whether the Accused's alibi was reasonably foreseeable, the cumulative nature of the rebuttal evidence, and the breach of the Prosecution's disclosure obligations.³⁴

36. The Defence points out that the Prosecution contention that granting certification to appeal would impede the proceedings assumes that an interlocutory appeal would fail. On the contrary, only an immediate resolution of the issue by the Appeals Chamber will materially advance the proceedings, as once the rebuttal evidence is heard, the only remaining remedy will be the exclusion of such evidence.³⁵

Prosecution Second Response

37. The Prosecution asserts that it disclosed the documents since they merely suggest, but by no means constitute irrefutable evidence of, the innocence of the Accused or mitigate his guilt, or affect the credibility of the Prosecution evidence. These documents have not been admitted into evidence, and the mere fact that these have been disclosed by the Prosecution, emanate from the French authorities, and/or bear K numbers does not automatically render them authentic and reliable.³⁶

38. Accordingly, the Prosecution submits that the disclosure of these documents does not invalidate the Impugned Decision. Even if the Chamber were aware of these

³¹ *Id.*, paras. 31-32.

³² *Id.*, paras. 28-30.

³³ *Id.*, paras. 33-46.

³⁴ *Id.*, paras. 47-54.

³⁵ *Id.*, para. 55.

³⁶ *Id.*, paras. 13-16.

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documents prior to issuing the Impugned Decision, it would have still had to resolve whether rebuttal evidence was justified in light of the Defence's belated notice of alibis.³⁷

39. The Prosecution adds that while the disclosed material purportedly addresses some days of the alibi period of 23 April to 23 May 1994, the bulk of the alibi period can still be challenged by rebuttal evidence.³⁸

Defence Second Reply

40. The Defence notes that the Prosecution does not contest, and therefore impliedly admits, that the newly disclosed evidence confirms that the Accused visited Dakar, Senegal in early May 1994. The Prosecution likewise does not challenge the reliability, relevance or probative value of these documents.³⁹

41. Any prejudice suffered by the Prosecution as a result of the late notice of alibi is immaterial to reconsideration of the Impugned Decision, particularly in light of the newly disclosed documents. These documents bear sufficient indicia of reliability and authenticity, having been disclosed by the Prosecution and having emanated from official channels. By way of contrast, the rebuttal witnesses were not in Senegal at the material time and are therefore unreliable. This new fact and material change in circumstances therefore render nugatory any probative value the rebuttal evidence may have had. The rebuttal evidence likewise only focuses on the Accused's presence in Senegal, contrary to the Prosecution submission that the bulk of the alibi period remains subject to challenge.⁴⁰

DELIBERATIONS

Multiple Submissions

42. The Chamber has indicated on four previous occasions that the Parties should avoid filing multiple submissions beyond those allowed by the Rules.⁴¹ Barring truly exceptional circumstances, the Chamber does not expect to receive any extra submissions in the future, from either Party.

43. The Defence Reply includes Additional Submissions raising new grounds for reconsideration in response to documents disclosed by the Prosecution after the Defence Motion was filed. As the Prosecution Second Response is limited to these additional

³⁷ *Id.*, paras. 17-19.

³⁸ *Id.*, para. 20.

³⁹ Defence Second Reply, para. 9.

⁴⁰ *Id.*, paras. 12-25.

⁴¹ Decision on Defence Motion for Inspection of Materials in the Prosecution's Custody (TC), 29 August 2011, para. 27; Decision on Defence Motion to Declare Written Statements Admissible and for Leave for Certification of These Written Statements by a Presiding Officer (TC), 11 April 2011, para. 18; Decision on Defence Motion for Reconsideration of the Decision Rendered on 28 October 2009 (TC), 15 October 2010, para. 20; Decision on Defence Motion for Second Reconsideration of Witness Protective Measures (TC), 15 July 2010, para. 15.

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submissions,⁴² the Chamber finds it to be in the interest of justice to accept the Prosecution Second Response and the Defence Second Reply and take the submissions therein into consideration in resolving the Defence Motion.

Reconsideration

44. The Chamber recalls the Tribunal's jurisprudence on reconsideration:⁴³

...the Rules do not provide for the reconsideration of the decision. The Tribunal has an interest in the certainty and finality of its decisions, in order that parties may rely on its decisions, without fear that they will be easily altered. The fact that the Rules are silent as to reconsideration, however, is not, in itself, determinative of the issue whether or not reconsideration is available in "particular circumstances", and a judicial body has inherent jurisdiction to reconsider its decision in "particular circumstances". Therefore, although the Rules do not explicitly provide for it, the Chamber has an inherent power to reconsider its own decisions. However, it is clear that reconsideration is an exceptional measure that is available only in particular circumstances.⁴⁴

45. Reconsideration is permissible when: (1) a new fact has been discovered that was not known to the Chamber at the time it made its original decision, (2) there has been a material change in circumstances since it made its original decision, or (3) 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. The burden rests upon the party seeking reconsideration to demonstrate the existence of sufficiently special circumstances.⁴⁵

46. The Defence seeks reconsideration on the basis of all three grounds. The Chamber will address these in turn.

New Fact or Material Change in Circumstances

47. In its Reply, the Defence submits that the Prosecution's disclosure of documents which appear to confirm the Accused's presence in Senegal in early May 1994, amount to a new fact that has been discovered that was not known to the Chamber at the time of the Impugned Decision, and there has been a material change in circumstances since the Impugned Decision.

48. In its Response to the Prosecution Rebuttal Motion, the Defence highlighted that the very statement of one rebuttal witness contains the statement of another individual,

⁴² Prosecution Second Response, para. 11.

⁴³ *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T ("*Bagosora et al.*"), Decision on Prosecutor's Second 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), 14 July 2004, para. 7; *Bagosora et al.*, 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 ("*Bagosora et al.* Decision of 15 June 2004"), para. 7.

⁴⁴ *Bagosora et al.* Decision of 15 June 2004, para. 7.

⁴⁵ *Id.*, para. 9; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Decision on Motion for Reconsideration of Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza (TC), 29 September 2008, para. 4.

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Mr. Amadou Abdoul Ly, who confirmed that he met the Accused in May 1994 in Senegal.⁴⁶ The Chamber, however, considered that while this may impact upon the weight to be accorded to the evidence at a later stage of the proceedings, this does not detract from its significant probative value. The Chamber concluded that the evidence could nevertheless tend to disprove part of the Accused's alibi.⁴⁷

49. Accordingly, the Chamber was made aware prior to the Impugned Decision of an apparent statement of Mr. Amadou Abdoul Ly which points to the possibility that the Accused was in Dakar, Senegal sometime in May 1994. The disclosure of additional documents to this effect thus does not amount to new facts or a material change in circumstances which merit reconsideration of the Impugned Decision. As held in the Impugned Decision, such documents may impact upon the weight to be accorded to the rebuttal evidence, but it may still tend to disprove part of the Accused's alibi.

Error or Abuse of Power

50. The Chamber recalls that 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 value to the resolution of an issue central to the determination of the guilt or innocence of the Accused.⁴⁸ 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.⁴⁹

⁴⁶ Defence Response to Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, 14 October 2011.

⁴⁷ Impugned Decision, para. 53.

⁴⁸ *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 Ndingiyimana et al.*, Case No. ICTR-00-56-T, Decision on the Prosecution Motion to Call Rebuttal Evidence (TC), 20 February 2009 ("*Ndingiyimana 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.

⁴⁹ *Naletilić et al.* Appeals Judgement, para. 258; *Kordić et al.* Appeals Judgement, para. 220; *Nizeyimana* Trial Decision, para. 20; *Nzabonimana* Trial Decision, para. 36; *Ndingiyimana et al.* Trial Decision, para. 4; *Orić* Trial Decision, p. 4; *Halilović* Trial Decision, p. 3.

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Whether Alibi Reasonably Foreseeable

51. The Defence has not demonstrated that the Chamber erred in finding that the Prosecution could not have reasonably foreseen the belatedly disclosed alibi period of 23 April to 23 May 1994. While the Defence asserts that the Chamber erroneously muddled the concepts of notice of alibi and whether the alibi period was reasonably foreseeable, the Chamber considers that these are in fact inextricably intertwined.

52. Notice of alibi with sufficient particularity is required prior to the commencement of trial under Rule 67(A)(ii)(a) to enable the Prosecution to properly prepare its case-in-chief.⁵⁰ As the Defence did not provide such notice of the alibi period of 23 April to 23 May 1994, and any references thereto in the evidence or in the documents cited by the Defence lack the level of detail necessary to investigate the same, such alibi cannot be considered reasonably foreseeable to the Prosecution so as to preclude rebuttal evidence thereon.

Probative Value

53. While the limited scope of the rebuttal evidence vis-à-vis the alibi period of 23 April to 23 May 1994 may impact upon the weight to be accorded thereto at a later stage of the proceedings, this does not deprive the evidence of significant probative value. The Chamber therefore considers that the Defence submission on this matter has no merit.

Deferral of Cross-Examination does not Preclude Rebuttal Evidence

54. The Defence opines that the deferral of the Accused's cross-examination as regards the belatedly disclosed alibi periods of 23 April to 23 May 1994 and 23 June to 7 July 1994 sufficiently addressed any prejudice the Prosecution may have suffered, and there is no justification for rebuttal evidence to further address this issue.⁵¹ In its Impugned Decision, the Chamber held that the deferral of the Accused's cross-examination on the two alibi periods does not preclude the calling of rebuttal witnesses thereon.⁵²

55. While the deferral of the cross-examination of the Accused on the belatedly disclosed alibi periods, and the calling of rebuttal evidence thereon both arise from the failure of the Defence to comply with Rule 67(A)(ii)(a), the Chamber notes that these are two separate and distinct remedies. The deferral was granted so the Prosecution could properly cross-examine the Accused with respect to the new alibi periods. The matters

⁵⁰ See *The Prosecutor v. Clément Kayishema et al.*, Case No. ICTR-95-1-A, Judgement (Reasons) (AC), 1 June 2001, para. 111; *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003, para. 241.

⁵¹ *Defence Motion*, paras. 25-28.

⁵² *Impugned Decision*, para. 42.



the Prosecution could address in cross-examination were nonetheless limited by the period within which it could investigate the two alibi periods,⁵³ and by Rule 90(G).

56. Leave to present rebuttal evidence was granted, on the other hand, in order that the Prosecution may be able to introduce its own evidence challenging the alibi period of 23 April to 23 May 1994, free from the constraints of Rule 90(G). The Defence is thus misguided in arguing that the deferral of cross-examination precludes the calling of rebuttal witnesses, and has therefore not established any basis for reconsideration of the Impugned Decision in this regard.

PRWI as an Expert Witness

57. The Chamber recalls that it devoted a separate section of the Impugned Decision to addressing the Defence submissions on whether rebuttal witness PRWI was qualified as an expert witness. The Chamber concluded that the Prosecution does not seek to present PRWI as an expert witness. The Chamber further considered 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.⁵⁴ The Defence therefore has no basis to argue that its submissions on this matter were not addressed by the Chamber in the Impugned Decision.

Cumulative Nature of Rebuttal Evidence

58. The Defence further faults the Chamber for failing to address the cumulative nature of the rebuttal evidence, and refers to various Prosecution exhibits on record.⁵⁵ The Chamber recalls, however, that these documents were admitted into evidence during the cross-examination of the Accused. The Chamber notes that the rebuttal witnesses include individuals who may be able to explain the contents of these documents. The rebuttal evidence is therefore not cumulative of evidence already on record, but may offer additional information thereon and insight thereto.

Protective Measures

59. The Chamber recalls that it extended protective measures to the rebuttal witnesses on the basis of the previously established need for protective measures for both Prosecution and Defence witnesses, regardless of their place of residence and nationality.⁵⁶ In issuing protective measures to Prosecution and Defence witnesses, the Chamber considered that there is an objective fear that the disclosure of these witnesses'

⁵³ The Chamber recalls that while the Accused's cross-examination on the two alibi periods was deferred from 6 December 2010 to the resumption of trial, the cross-examination ultimately continued until 14 February 2011. The Defence commenced and completed its re-examination of the Accused on 14 February 2011. See T. 14 February 2011, p. 14.

⁵⁴ Impugned Decision, paras. 54-56.

⁵⁵ Defence Motion, paras. 34-36, referring to Prosecution Exhibits 33, and 37 to 44.

⁵⁶ Impugned Decision, para. 58, citing Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others (TC), 6 May 2009, paras. 19, 21; and Decision on Defence Urgent Motion for Witness Protective Measures (TC), 9 February 2010, paras. 22-23.

participation in the proceedings of this Tribunal may threaten their safety and security.⁵⁷ The granting of protective measures was therefore based on this evaluation, and therefore cannot be said to be erroneous or an abuse of discretion.

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Rule 66(A)(ii) Disclosure of Witness Statements

60. The Defence contests the absence of any directive in the Impugned Decision for the statements of the rebuttal witnesses to be disclosed not later than 60 days before the commencement of their testimonies in accordance with Rule 66(A)(ii) and for their particulars to be furnished in a timely manner.⁵⁸ The Chamber recalls that it considered that it has insufficient information to determine whether there has been a breach of Rule 66(A)(ii). The Chamber did, however, direct the Prosecution to disclose any notes and/or recordings of any interviews PRWI conducted of the other rebuttal witnesses, insofar as these consist of their answers to questions asked of them, and therefore comprise witness statements in accordance with the *Niyitegeka* Appeals Judgement.⁵⁹ The Chamber also stated that it expects the Prosecution to fulfil its commitment to disclose any statements of its rebuttal witnesses it receives in the future, as well as the responses to "*Commissions Rogatoires Internationales*".⁶⁰

Disclosure of Witness Particulars/Identifying Information

61. The absence of any directive in the Impugned Decision for the Prosecution to disclose the identifying information of the rebuttal witnesses does not amount to an error or abuse of discretion meriting reconsideration. The Chamber nevertheless considers that it would assist the Defence in its investigations of the rebuttal witnesses that the Prosecution disclose as soon as possible the identifying information of these witnesses. The Chamber recalls in this regard that it previously ordered the Prosecution to disclose the identifying information of all its protected witnesses immediately, and in any event no less than 30 days prior to the commencement of its case-in-chief.⁶¹

Conclusion

62. As the Defence has neither established that the Chamber committed an error or abuse of power in issuing the Impugned Decision, resulting in an injustice, nor that a new fact or material change in circumstances merits reconsideration of the Impugned Decision, the reconsideration aspect of the Defence Motion is hereby denied in its entirety.

⁵⁷ Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others (TC), 6 May 2009 ("Decision of 6 May 2009"), para. 19; Decision on Defence Urgent Motion for Witness Protective Measures (TC), 9 February 2010, para. 22.

⁵⁸ Defence Motion, paras. 37-42.

⁵⁹ *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004, paras. 33-35.

⁶⁰ Impugned Decision, para. 63.

⁶¹ Decision of 6 May 2009, p. 7.

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Certification to Appeal

63. Rule 73 (B) of the Rules requires that two criteria be satisfied before a Trial Chamber may grant an application for certification to appeal: (1) the decision in question must involve an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (2) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.

64. Even where both requirements of the Rule are satisfied, certification is not automatic, but it remains at the discretion of the Trial Chamber. Moreover, certification to appeal must remain exceptional.⁶²

65. The Chamber recalls that when determining whether to grant leave to appeal, it is not concerned with the correctness of its impugned decision. All considerations such as whether there was an error of law or abuse of discretion in the decision at stake are for the consideration of the Appeals Chamber after certification to appeal has been granted, and are therefore irrelevant to the decision for certification. Insofar as the Parties have made such arguments, the Trial Chamber will not consider them.⁶³

66. The Chamber does not consider that the Impugned Decision involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. On the contrary, the Impugned Decision ensures the fairness of the proceedings by addressing the prejudice suffered by the Prosecution when the Defence failed to provide timely notice of the alibi periods of 23 April to 23 May 1994 and 23 June to 7 July 1994 in accordance with Rule 66(A)(ii)(a).

67. Considering that rebuttal evidence in this case was deemed necessary as a result of the Defence's failure to disclose alibis in accordance with Rule 66(A)(ii)(a), the Chamber considers that the Impugned Decision likewise does not significantly affect the expeditiousness of the proceedings.

68. In addition, the Defence has not demonstrated that the Impugned Decision involves an issue which would significantly affect the outcome of the trial. The Defence

⁶² *Karemera et al.*, Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on 24th Rule 66 Violation (TC), 20 May 2009, para. 2; Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision on Defence Extremely Urgent Motion for Reconsideration of the Trial Chamber's Decision on the Trial Date Rendered on 15 July 2009 (TC), 10 August 2009, para. 11; *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT, Decision on Defence Motion for Reconsideration or Certification to Appeal the Chamber's Decision of 22 February 2008 on Disclosure (TC), 19 February 2009, para. 5.

⁶³ *Bagosora et al.*, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4; *Prosecutor v. Slobodan Milošević*, ICTY Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding (TC), 20 June 2005, para. 4; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Bicomumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicomumpaka and Mugenzi for Disclosure of Relevant Material." (TC), 4 February 2005, para. 28.



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itself acknowledges that the rebuttal evidence only addresses a small portion of the alibi period of 23 April to 23 May 1994.⁶⁴

69. The first limb of Rule 73(B) not having been satisfied, the Chamber therefore denies the Defence Motion insofar as it seeks certification to appeal the Impugned Decision.

Concluding Observations

70. The Chamber observes that the Defence Motion essentially reiterates the submissions in the Defence Response to the Prosecution Rebuttal Motion. The Chamber reminds the Defence that reconsideration is an exceptional measure⁶⁵ that is available only when one of the three grounds therefor is clearly present. Recasting previously rejected submissions in the form of a motion for reconsideration simply wastes the time and scarce resources of the Chamber.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion; and

ORDERS the Prosecution to disclose as soon as possible the identifying information of PRWI, PRWII, PRWIII, PRWIV, PRWV, PRWVI, PRWVII, and PRWVIII, bearing in mind that the rebuttal witnesses are to testify immediately after the close of the Defence case.

Arusha, 13 December 2011



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]



⁶⁴ Defence Motion, paras. 18-22.

⁶⁵ *Bagosora et al.* Decision of 15 June 2004, para. 7.