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**Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda**

**TRIAL CHAMBER III**

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

**Registrar:** Adama Dieng

**Filed on:** 9 September 2011

**THE PROSECUTOR**

v.

**ILDEPHONSE NIZEYIMANA  
Case No. ICTR-00-55-T**

JUDICIAL RECORDS ARCHIVES  
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**MOTION FOR EXCLUSION OF THE TESTIMONY OF REBUTTAL WITNESSES**

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## INTRODUCTION

1. On 17 January 2011, the Trial commenced. The Prosecution presented 38 witnesses terminating on 25 February 2011. The Defence case presented 38 witnesses between 9 May 2011 and 16 June 2011. An additional witness BNN07 was heard on 6 September 2011. The Defence case is not yet closed outstanding co-operation issues.
2. On 7 June 2011, the Trial Chamber rendered its Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence (hereinafter "Impugned Decision"), granting the hearing of 3 rebuttal witnesses.
3. The limited scope of the rebuttal evidence was confirmed in several subsequent decisions of the Trial Chamber and filings from the Prosecution.<sup>1</sup>
4. Three Alibi witnesses were heard on 7 and 8 September 2011.
5. The Defence hereby moves the Chamber to exclude their testimony in its entirety or subsidiarily in part as described below.
6. The Defence will refer to draft transcripts of 7 and 8 September. As drafts, their page numbering is incorrect, the 7 September transcript running from 1-22 and then 1-25, and the 8 September running from 1-44 and 1-7. This motion will refer to the numbering on the draft transcripts.

## SUBMISSIONS

7. As will be shown by the Defence, the testimony of the three rebuttal witnesses heard on 7 and 8 September 2011 is inadmissible for several reasons: their testimony was foreseeable, as shown in chief and during their cross-examination, part of their testimony exceeds the limited scope of the rebuttal evidence and goes to collateral matters in the case; no notice was given to the Defence of this content.

### I. GROUND 1

8. The testimony of all three rebuttal witnesses is not admissible following the applicable law and the rulings made by the Trial Chamber on admissibility of rebuttal evidence. The

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<sup>1</sup> See *Infra*, Ground 2.

cross examination of each of them has now clearly shown that they were contacted by the Prosecution long before 25 May 2011. The Prosecutor waited for the completion of the almost totality of the Defence case to apply to hear them. This constitutes a splitting of the Prosecution case and caused prejudice to Mr. Nizeyimana. The testimony of each rebuttal witness was available before the commencement of the Defence case and long before 25 May 2011. All three witnesses could have been called to testify prior to the start of the Defence case.

9. In its 25 May 2011 Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, the Prosecution stated:

"...due to the timing and piecemeal nature of the alibi notices, the Prosecution lost the opportunity to fully investigate the alibi claims, to prepare its case on the facts at issue regarding the alibi defence, and to systematically address the alibi during the case-in-chief."<sup>2</sup>

(...)

"Thus the Prosecution did not have sufficient information to rebut the testimony of these anticipated Defence witnesses for over two weeks of its case."<sup>3</sup>

(...)

"As a result of this breach, during its own case-in-chief the Prosecution could not address the new issues arising from the Defence's case, namely the alibi defence. The Prosecution suffered prejudice as it was unable to directly address the alibi evidence since the prosecution could not reasonably have foreseen the details and information that it eventually received."<sup>4</sup>

10. These statements have now been shown to be false. All rebuttal witnesses were met at the latest by April 2011 and should have been met by the first week of March 2011.

11. All of the rebuttal witnesses testified to allegations, which were provided for in the first notice of alibi of 11 January 2011. The Prosecution could have found and called those three witnesses solely on the basis of the first alibi notice.

**a. Antoinette BIZIMENYERA**

12. Witness Antoinette Bizimenyera testified that she first met with the Prosecution in January 2011 in order to provide a death certificate for her late husband<sup>5</sup>.

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<sup>2</sup> Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, 25 May 2011, para. 31.

<sup>3</sup> Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, 25 May 2011, para. 32.

<sup>4</sup> Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, 25 May 2011, para. 33.

<sup>5</sup> T. 8 September 2011, p.44 (draft transcripts)

13. That was a lie, or a gross error. She mentioned the name of Roger (Andriamampionona) but he had in fact met her before August 2010. On 9 August 2010, the Prosecution filed its Prosecutor's Motion to Admit into Evidence the Statements of Six Deceased Witnesses Pursuant to Rules 89(C) and 92 *bis*(B) containing the death certificate of the witness' husband on page 17. This Motion contained an affidavit of Roger Andriamampionona.

14. The Prosecution was fully aware that this woman was a potential witness. The Prosecution disclosed on 10 December 2010 a statement<sup>6</sup> by their proposed rebuttal Witness Antoinette Bizimenyera made on 6 October 1995. The statement mentioned her arrival at Nizeyimana's house and that he had saved her and her family. Nizeyimana was a moderate and he was involved in training youth to become soldiers in the last months of the war.

15. She also testified that she was visited in April 2011, by Roger Andriamampionona, Helen Moenback, and others.<sup>7</sup> This was prior to the opening of the Defence case and over a month before the Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence.

16. The Prosecution was in contact with this witness before August 2010. The Prosecution knew she had arrived in Butare around 20 April 1994 and that she had stayed at the home of Nizeyimana. The Prosecution was not diligent in meeting this witness after receiving the Alibi notice on 11 January 2011. The Prosecution waited until April 2011 to visit this witness with the investigator Roger Andriamampionona. This investigator Roger Andriamampionona could easily have met her in January or February 2011 on the alibi issue and called her in the Prosecution case in Chief.

**b. Cosma Twagirayezu**

17. Cosma Twagirayezu testified that he met the Prosecution for the first time in July 2011<sup>8</sup> but the Prosecution Motion containing his will-say in an annex was filed on 25 May 2011.

18. He later gave a confused answer that he met the Prosecution just after the commemorations of the genocide in Rwanda this year.<sup>9</sup> This could only mean around 7 April 2011 in spite of continued assertions that it was in July.

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<sup>6</sup> K0302505-506.

<sup>7</sup> T 8 September 2011 p. 44.

<sup>8</sup> T. 8 September 2011, p.4-6 (draft transcripts)

19. Once again the Prosecution was in contact with this witness about one month prior to the start of the Defence case on 9 May 2011 but chose to wait until 25 May 2011 and the completion of the quasi entirety of the Defence case-in-chief to apply to bring this witness in rebuttal. This effectively prejudiced the Accused in allowing the Prosecution to split its case.

**c. Witness Fulgence Rwirahira**

20. Fulgence Rwirahira testified that he met with members of the Prosecution “early this year”<sup>10</sup> or “at the beginning of this year”<sup>11</sup> and “at least by the end of March”<sup>12</sup>. His testimony shows that the Prosecution was aware of him long before the start of the Defence case and instead waited until 25 May 2011 to apply to bring him as a rebuttal witness. The prejudice caused to NIZEYIMANA is the same.

21. The alibi notice stated<sup>13</sup>:

10. He left Butare in the morning of 21 April 1994 to the following day late in the afternoon. He travelled to Mata to set up a training center.

11. Secondly, Captain Nizeyimana left Butare for Mata on 26 April 1994 and only came back once on or about. He stayed in Mata until 26 May 1994. He was then transferred to the front in Masange.

22. For all three witnesses, the “alibi questions” asked by the Prosecutor was closely related to the notice of alibi. The questions were not related to the testimony of defence witnesses.

- a. Fulgence Rwahira: “What would you say to the suggestion that Captain Nizeyimana left the ESO camp on 26 April 1994 and that he came back to ESO only once, on our about 26<sup>th</sup> May 1994.” These dates were mentioned repeatedly.<sup>14</sup>
- b. Cosma Twagirayezu: “What would you say to the suggestion that Captain Nizeyimana arrived at the Mata Tea Factory and that he stayed there continuously until on our about the 26<sup>th</sup> May 1994. (...) frequency with

<sup>9</sup> T. 8 September 2011, p.4-6 (draft transcripts)

<sup>10</sup> T. 7 September 2011, p.7, 13 (draft transcripts)

<sup>11</sup> T. 7 September 2011, p.13 (draft transcripts)

<sup>12</sup> T. 7 September 2011, p.13, 14 (draft transcripts)

<sup>13</sup> Alibi Notice filed on 11 January 2011

<sup>14</sup> T. 7 September 2011, p.10 (draft transcripts). The dates were mentioned twice on page 10, and on page 11.

which you saw Captain Nizeyimana between 26 April and 26 May.”<sup>15</sup> The witness answered it is false and a lie and that he saw him often. And “What would you say to the suggestion that Captain Nizeyimana stayed overnight at the Mata Tea Factory on the 21<sup>st</sup> and the 22<sup>nd</sup> of April 1994”<sup>16</sup> Once more, according to the witness, it was a lie.

- c. Antoinette Bizimenyera: “What would you say to the suggestion that Captain Nizeyimana left Butare town on 26 April 1994 and the he stayed away continuously until on our about the 26<sup>th</sup> May 1994.”<sup>17</sup> She testified in chief about the days of 20, 21 and 22 April 1994 to contradict the alibi.<sup>18</sup>

23. The testimonies of these three witnesses were a direct response to the alibi notice and have no relation to defence testimony rendered after May 9, 2011. The rebuttal witnesses are not a response to the defence case but to the alibi notice. The rebuttal testimony did not relate to unforeseen issues arising from the Defence case.

24. The evidence was available in April. Furthermore, with diligence the Prosecutor would not have waited until April to visit these witnesses and could have travelled to Rwanda on 26 February 2011. With diligence, the evidence would have been available by the first week of March 2011.

#### **Conclusion:**

25. The examination in chief and the cross-examination of all three rebuttal witnesses has shown that the Prosecution knew of them and met them long before its 25 May 2011 Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence and well before the start of the Defence case on 9 May 2011. They should have been brought in chief according to the principle that all predictable evidence should be brought in chief. Only evidence which could not be foreseen with reasonable diligence can be brought in rebuttal. All the evidence brought in rebuttal was fully available before the defence commenced. No attempt was made to bring them prior to the start of the Defence case allowing the tailoring of their evidence to the Defence case-in-chief and the splitting the Prosecution’s case. Their testimony should be excluded entirely on those grounds.

<sup>15</sup> T. 7 September 2011, p.11 (draft transcripts) Testimony of Cosma Twagirayezu (N.B. there is an error in page numbering in the draft transcripts)

<sup>16</sup> T. 7 September 2011, p.11 (draft transcripts) Testimony of Cosma Twagirayezu (N.B. there is an error in page numbering in the draft transcripts)

<sup>17</sup> T 7 September 2011, p. 22 (draft transcripts) Testimony of Antoinette Bizimenyera.

<sup>18</sup> T 7 September 2011, p. 20-21

### The nature of Ground 1 of this motion

26. This motion relates to the nature of this rebuttal testimony and stands on its own.
27. It also may be considered as a motion for reconsideration of the 7 June 2011 Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence ("Impugned Decision").
28. As stated above in its 25 May 2011 Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, the Prosecution stated:

"...due to the timing and piecemeal nature of the alibi notices, the Prosecution lost the opportunity to fully investigate the alibi claims, to prepare its case on the facts at issue regarding the alibi defence, and to systematically address the alibi during the case-in-chief."<sup>19</sup>

(...)

"Thus the Prosecution did not have sufficient information to rebut the testimony of these anticipated Defence witnesses for over two weeks of its case."<sup>20</sup>

(...)

"As a result of this breach, during its own case-in-chief the Prosecution could not address the new issues arising from the Defence's case, namely the alibi defence. The Prosecution suffered prejudice as it was unable to directly address the alibi evidence since the prosecution could not reasonably have foreseen the details and information that it eventually received."<sup>21</sup>

29. The allegations of inability to foresee and investigate mentioned above were one of the bases for the Impugned Decision.<sup>22</sup> It has been shown that these allegations are false and that the Prosecutor was well able to present this alibi "rebuttal evidence" in chief since the witnesses were available and their testimony was known well prior to the beginning of the defence case on 9 May 2011.

30. On the issue of reconsideration, the Chamber also previously held:

"The Chamber recalls that the Tribunal's jurisprudence provides that 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 circumstance 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,

<sup>19</sup> Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, 25 May 2011, para. 31.

<sup>20</sup> Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, 25 May 2011, para. 32.

<sup>21</sup> Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, 25 May 2011, para. 33.

<sup>22</sup> In particular, para. 20 of the Impugned Decision

resulting in an injustice.’ The party seeking reconsideration bears the burden of demonstrating the existence of the enumerated circumstances.”<sup>23</sup>

31. Given the evidence of the rebuttal witnesses, there is a new fact about the availability of the “rebuttal” testimony prior to the commencement of the Defence case. Unlike the Prosecution allegation, the evidence was readily available and should have been at least by early March 2011. Furthermore, given this new fact, it has now become apparent that the original Impugned Decision was erroneous.

32. The grounds for reconsideration are sufficient to reverse the Impugned Decision and therefore to exclude the rebuttal testimony from the record.

## II. GROUND 2

33. Subsidiarily to ground 1 for exclusion of the testimony of the three rebuttal witnesses parts of Fulgence Rwirahira’s testimony went beyond the limited scope of the rebuttal and should be excluded as such.

34. The Chamber’s 7 June 2011 Decision on Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence ruled:

“The chamber recalls that the purpose of rebuttal evidence is to afford the Prosecution an opportunity to refute evidence of a new matter arising in the course of the Defence case that was not reasonably foreseeable. However, **rebuttal evidence must not be used by the Prosecution to re-open or perfect its case.** Rebuttal evidence must have significant probative value on a central issue in the case and must not be cumulative. **The Chamber will not grant leave to call evidence in rebuttal where the Prosecution seeks to use such evidence to challenge the credibility of a Defence witness or other collateral matters in a case.**”<sup>24</sup>

“... 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 consideration of the goal of ascertaining the truth and the **possible prejudice to the Accused.**”<sup>25</sup>

<sup>23</sup> Decision on Extremely Urgent motion for Reconsideration of the Trial Chamber 18 April 2011 Decision on Defence Motion for a Hearing by Video-Link of witness BEJ01 and Cooperation Pursuant to Article 28 of the Statute, 6 June 2011, para. 17.

<sup>24</sup> Decision on Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, 7 June 2011, para. 20 (emphasis added).

<sup>25</sup> Decision on Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, 7 June 2011, para. 23 (emphasis added).

“... the Trial Chamber considers that it is in the interests of justice to allow Witness A, B and C to testify as Prosecution rebuttal witnesses **in response to the alibi defence for the dates of the morning of 21 April 1994 to the late afternoon of 22 April 1994 and from 26 April to on or about 17 May 1994.**”<sup>26</sup>

35. Paragraphs 21 to 25 of the Decision defined the scope of the rebuttal as pertaining to the Accused’s alibi asserting that NIZEYIMANA was not in Butare on 21-22 April and from 26 April to 17 May 1994.

36. Paragraph 29 of the 15 June 2011 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 stated:

“The Chamber finds that the limited scope of the rebuttal testimonies responds to alibi evidence proffered by the Defence. Moreover, the Chamber does not find that the rebuttal evidence is introduced with the intent to challenge the credibility of a Defence witness or other collateral matters in the case.”

37. In the 1 July 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, twice, in paragraphs 15 and 16 the Chamber noted “the very limited scope of the rebuttal evidence”.

38. The parties are aware that the Chamber stressed this limited scope of rebuttal evidence during the hearing on 7 September 2011.

39. Additionally, the Prosecution itself stated in its 25 May 2011 Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence:

“Rebuttal evidence is not intended to allow the Prosecution to re-open its case. In other words, rebuttal may not be used to corroborate evidence that the Prosecution has already presented its case-in-chief.”<sup>27</sup>

40. In spite of these numerous rulings about the very limited scope of the rebuttal, evidence on a meeting was led beyond it, on a meeting. This relates to collateral matters to the alibi and for which the Defence received no notice by way of the will-say disclosed by the Prosecution in its *25 May 2011 Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, Confidential Annex A*.

<sup>26</sup> Decision on Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, 7 June 2011, para. 26 (emphasis added).

<sup>27</sup> Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, 25 May 2011, Para. 27.

41. The 1 July Decision held:

“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>28</sup>

42. On 7 September 2011, Fulgence RWIRAHIRA testified “Thank you. If someone were to put that suggestion to me, I would answer him or her as follows: the country’s president at that time, whose name was Sindikubwabo, visited Butare. At the end of his visit or following his visit he left, and Nizeyimana and the other officers brought us together after the president had left.”<sup>29</sup>

43. The will say statement of Fulgence Rwirahira disclosed on 25 May 2011 contained no notice of evidence pertaining to meetings.

44. The Defence has never heard of such a meeting in any charging document or disclosure.

45. Meetings are collateral to the alibi, and have nothing to do with the scope of this rebuttal.

46. This evidence ought to be excluded.

**FOR THE REASONS SET OUT HEREIN ILDEPHONSE NIZEYIMANA, BY AND THROUGH HIS DEFENCE COUNSEL PRAY THIS TRIAL CHAMBER TO:**

**EXCLUDE** the entirety of the three rebuttal witnesses’ testimony on ground I.

**SUBSIDIARILY** on ground II,

the Defence requests the exclusion of the testimony given by witness Fulgence Rwirahira described above.


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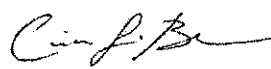
<sup>28</sup> Decision on Defence Motion to Reconsider the June 15 Decision on the Extremely Urgent Motion for Reconsideration of Trial Chamber 7 June 2011 Decision on Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, 1 July 2011, para. 15.

<sup>29</sup> T. 7 September 2011, p. 10, (Draft Transcript).

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Signed in Arusha, on the 9th day of September 2011

  
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Lead Counsel for Ildephonse NIZEYIMANA

  
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