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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

TRIAL CHAMBER III

Before: Judge Khalida Rachid Khan, Presiding Judge
Judge Lee Gacuiga Muthoga
Judge Aydin Sefa Akay

Registrar: Adama Dieng

Filed on: 17 November 2009

THE PROSECUTOR

v.

Jean Baptiste GATETE

Case No. ICTR-00-61-T

2009 NOV 17 P 6:19
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**PROSECUTOR'S MOTION FOR THE DISCLOSURE OF THE
PARTICULARS OF THE ALIBI OF THE ACCUSED JEAN-BAPTISTE
GATETE.**

Rule 67 (A) (ii) (a)

Office of the Prosecutor:

Richard Karegyesa
Adelaide Whest
Drew White
Didace Nyirinkwaya
Yasmine Chubin
Leo Nwoye

For the Accused:

Marie-Pierre Poulain
Kate Gibson

MAY IT PLEASE THE TRIAL CHAMBER:**Introduction:**

1. Pursuant to Rule 67 (A) (ii) (a) of the Rules of Procedure and Evidence ('Rules') the Prosecutor hereby submits this *Motion for the Disclosure of the Particulars of the Alibi of the Accused Jean-Baptiste Gatete*, dated 17 November 2009.
2. The Prosecutor submits that the Defence is seeking to rely on alibi defence as demonstrated by comments in open court. Both the Rules and the jurisprudence of this Tribunal are clear and unambiguous in their interpretation that the Defence is to give specific notice of an alibi defence "*as early as reasonably practicable and in any event prior to the commencement of trial.*"¹
3. To date the Prosecutor has received no notice of an alibi and therefore submits that the Defence is in breach of its disclosure obligation under Rule 67 (A) (ii) (a) and requests that it immediately provides sufficient notice to the Prosecutor of any alibi on which it intends to rely.

Procedural Background:

4. The Trial in the present case commenced on 20 October 2009 and the Prosecution case-in-chief concluded on 16 November 2009, after having heard twenty-two Prosecution witnesses. The Defence case remains to be scheduled.
5. During the cross-examination of Prosecution witnesses, the Defence proposed to the following witnesses that they could not have seen the Accused because he was not present in the area in question during the time period of the alleged crimes, implicit in this proposition is that the Accused was elsewhere.
 - A) BBT - testifying to events in Rwankuba on 7 April 1994² (See [Annex I](#))
 - B) BBR- testifying to events in Rwankuba on 7 April 1994³ (See [Annex II](#))
 - C) AIZ - testifying to events in Rwankuba on 7 April 1994⁴ (See [Annex III](#))
 - D) AIK - testifying to events in Kiramuruzi on 7 April 1994⁵ (See [Annex IV](#))
 - E) BBP - testifying to events at Kiziguro on 11 April 1994⁶ (See [Annex V](#))
6. On 12 November 2009, the Prosecutor made oral submissions pursuant to Rule 67 (A) (ii) (a),⁷ concluding from the above that the Defence is in possession of information it believes is in support of an alibi, that the claim of an alibi defense is a live issue, and asserting the Prosecutor's

¹ Rule 67 (A) (ii) (a) of the Rules of Procedure and Evidence (emphasis added). See also *Prosecutor v. Nyiramashuko et al*, Case No. ICTR- 98-42-T, Decision on the Confidential Prosecutor's Motion to be Served with Particulars of Alibi pursuant to Rule 67 (A) (ii) (a), 1 March 2005, para. 27; *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-PT, Decision on Prosecution Motion for Notice of Alibi and Reciprocal Inspection, 14 June 2005; *Prosecutor v. Nchamihigo* Case No. ICTR-2001-63-T, Decision on Defence Compliance with Rule 67 of the Rules, 5 April 2007; *Prosecutor v. Karemera et al*, Case No ICTR-98-44-T, Decision on Prosecutor's Motion for an Order to File Notice of Alibi, 22 March 2007; *Prosecutor v. Bizimungu et al* Case No ICTR-99-50-T, Decision on Jerome Bicamumpaka's Notice of Alibi, 7 July 2003.

² T. 10 November 2009, p. 84, lines 25-27; P. 86, lines 29-35 (from draft) ([Annex I](#)).

³ T. 11 November 2009, p. 37, lines 10-11 (from draft) ([Annex II](#)).

⁴ T. 11 November 2009, p. 71, lines 2-3 (from draft) ([Annex III](#)).

⁵ T. 12 November 2009, p. 91, lines 28 -30 (from draft) ([Annex IV](#)).

⁶ T. 20 October 2009, p. 49, lines 36-37; p. 50, lines 1-3 ([Annex V](#)).

⁷ Rule 67 (A) (ii) (a) of the Rules of Procedure and Evidence.

entitlement to receive from the Defence at the earliest possible opportunity, notice and details of witnesses and other evidence on which such a claim may be based.⁸

Applicable Law:

7. Rule 67(A)(ii)(a) provides as follows:

(A) As early as reasonably practicable and in any event prior to the commencement of trial:

(ii) The Defence shall notify the Prosecutor of its intent to enter:

(a) The defence of alibi, in which case, the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi.⁹

8. The word “alibi”, from the latin “elsewhere”, has been defined in criminal law as “[a] defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time, or the fact or state of having been elsewhere when an offense was committed.”¹⁰ Most recently, the Appeals Chamber of the Tribunal has stated that “[a]n alibi does not constitute a defence in its proper sense. By raising an alibi, an accused is simply denying that he was in a position to commit the crime with which he was charged.”¹¹

Prosecution Submissions:

The Defence seeks to rely on an alibi defense.

9. The Prosecutor submits that the Defence is clearly relying on alibi as a defence strategy, as is self-evident by the repeated assertions made to Prosecution witnesses during cross-examination that the accused was not present at the time of alleged crimes.¹²

10. The Trial Chamber in *Nchamihigo* held that “[i]f a Defence Counsel receives instructions that his client claims to be at specific place(s) at the time of the alleged crime, then it is his professional obligation to accordingly file a notice of alibi as soon as practicable.”¹³ The Prosecutor submits that there is sufficient evidence from open trial transcripts that the Defence is in possession of information it believes will support an alibi claim.

11. Counsel are under an obligation not to make propositions of fact to a witness without a good faith basis for doing so. As Gatete’s Defence counsel has repeatedly made assertions of fact to

⁸ T. 12 November 2009, p. 96- 97 (from draft).

⁹ Rule 67 (A) (ii) (a) of the Rules of Procedure and Evidence (emphasis added).

¹⁰ Fed. R. Crim. P. 12.1; Black’s Law Dictionary (8th ed. 2004).

¹¹ *Protais Zigiranyairazo v. Prosecutor*, Case No. ICTR 01-73-A, Judgement, 16 November 2009, para 17 (internal citation omitted).

¹² See Annex I - V.

¹³ *Prosecutor v. Nchamihigo* Case No. ICTR-2001-63-T, Decision following Defence Submissions on Compliance with Rule 67 of the Rules, 18 April 2007, para. 7 . Similarly to the case at hand, the Defence, through its comments in open court, indicated that it was intending to rely on an alibi defense. *Nchamihigo*, 18 April 2007, para 8.

five separate witnesses that Gatete was elsewhere when the crime was being committed,¹⁴ counsel must be in possession of information they believe may support such a claim.

12. Additionally, the information in possession of the Defence must have a reasonable degree of detail, because the specific propositions put to several witnesses went beyond merely claiming the accused was not present, but included the qualification that he “was never” present in a significantly large and well-defined locality at the relevant time.¹⁵ These categorical qualifications raise the alibi claim from a mere technical possibility to a strategic possibility, with the proposed facts setting the basis for an eventual alibi claim during the Defence case.
13. The fact that the Defence may or may not presently possess a settled intention to attempt to establish an alibi claim through further evidence is unimportant. Having set the basis for the alibi claim in the course of cross-examination, the Defence has *already* relied on the use of alibi, even though the extent of the claim is imprecise and incomprehensive.
14. The Defence is of course entitled not to make any additional defence, and only has to make such election at a later point. But the right to make further choices about the course of the Defence proceedings, including the right to decide whether to call any evidence, is nonetheless unimpeded by the obligation of Rule 67 (A) (ii) (a) to disclose the basis of alibi evidence “prior to the commencement of trial.”¹⁶ Disclosure itself is not a procedural election.

The Defence is in breach of their obligations under Rule 67 (A) (ii) (a) and should make the particular information of any alibi defense available to the Prosecution.

15. The Prosecutor therefore submits that the Defence is in breach of its disclosure obligations under Rule 67 (A) (ii) (a) for failing to serve the Prosecutor with notice and particulars of alibi as required in a timely manner.
16. The Prosecutor further submits that Rule 67(A) (ii) (a) implies that the obligation is triggered as soon as practicable after the accused becomes aware of the nature and cause of the charges against him and intends to show that by reason of his presence at a particular place or places at a particular time or times, he was unlikely to have been present at the place and time at which the offence is alleged to have been committed.¹⁷
17. Moreover, the Appeals Chamber has held that Rule 67 (A) (ii) (a) “allows the Prosecution to organize its evidence and to prepare its case prior to the commencement of Trial on the merits.”¹⁸ At this point, the information provided has been intermittent and can only be gleaned during the cross-examination by the Defence of the Prosecution witnesses. The Prosecution therefore finds itself unable to investigate the alibi thereby impeding its ability to prepare the case accordingly.

¹⁴ T. 10 November 2009, p. 84, lines 25-27; P. 86, lines 29-35 (from draft) ([Annex I](#)); T. 11 November 2009, p. 37, lines 10-11 (from draft) ([Annex II](#)); T. 11 November 2009, p. 71, lines 2-3 (from draft) ([Annex III](#)); T. 12 November 2009, p. 91, lines 28 -30 (from draft) ([Annex IV](#)); T. 20 October 2009, p. 49, lines 36-37; p. 50, lines 1-3 ([Annex V](#)).

¹⁵ T. 10 November 2009, p. 84, lines 25-27; P. 86, lines 29-35 (Annex I); T. 11 November 2009, p. 37, lines 10-11 (Annex II); T. 11 November 2009, p. 71, lines 2-3 (Annex III); T. 12 November 2009, p. 91, lines 28 -30 (from draft) (Annex IV).

¹⁶ Rule 67 (A) (ii) (a) of the Rules of Procedure and Evidence.

¹⁷ *Prosecutor v. Nchamihigo*, Case No ICTR- Decision on Defence Compliance with Rule 67 of the Rules, 5 April 2007, para. 7; *Prosecutor v. Karemera et al.*, Case No ICTR-98-44-T, Decision on Prosecutor’s Motion for an Order to File Notice of Alibi, 22 March 2007, para. 13.


¹⁸ *Rutaganda*, Appeal Judgement, 26 May 2003, para. 241. See also *Kayishema and Ruzindana* Appeal Judgement, 1 June 2001, para. 111.

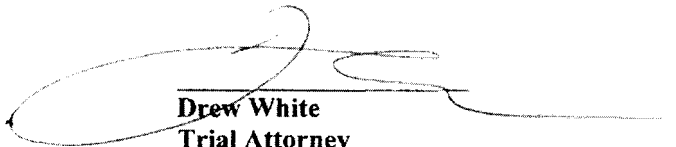
18. The Prosecutor recalls that Article 19 of the Statute of the Tribunal empowers the Chamber to ensure that the trial is fair and expeditious and that proceedings are conducted in accordance with the Rules¹⁹. The Prosecution submits that notwithstanding the provisions of Rule 67(B)²⁰, the failure by the Defence to provide detailed information for a potential alibi claim pursuant to Rule 67 (A) (ii) (a) is contrary to the interests of justice and to the conduct of a fair and expeditious trial.²¹ The Prosecutor submits that “the disclosure of complete notice of alibi at the earliest stage of the proceedings ensures the fairness of the trial and proper administration of justice”.²²
19. Proper disclosure under Rule 67 (A) (ii) (a) facilitates investigations as to the veracity of an alibi claim and timely discovery of relevant documents. The absence of such timely disclosure might potentially be lessened by means of a case in rebuttal or by recalling witnesses.
20. Although Rule 67 (B) provides that in the face of a breach of the alibi disclosure obligations the Defence cannot be prevented from presenting the claim of alibi, the Defence does not have a right to have the alibi claim received with favour, nor to have the alibi claim received without conditions.

Conclusion:

21. Based on the above submissions, and pursuant to Rule 54,²³ the Prosecutor respectfully requests that the Chamber **ORDER** the Defence to immediately make the necessary disclosures in order to comply with Rule 67 (A) (ii) (a) if it wishes to possibly rely on the defence of alibi.

Dated in Arusha, this 17th day of November 2009.


 Richard Karegyesa
 Acting Chief of Prosecutions


 Drew White
 Trial Attorney


 Yasmine Chubin
 Assistant Trial Attorney

¹⁹ Article 19 of the Statute of the International Criminal Tribunal for Rwanda.

²⁰ Rule 67 (B) of the Rules of Procedure and Evidence reads “Failure of the Defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences.”

²¹ *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-PT, Decision on Prosecution Motion for Notice of Alibi and Reciprocal Inspection, 14 June 2005, para. 7; See also *Prosecutor v. Semanza*, ICTR-97-20-T Decision on the Prosecutor’s Motion for Leave to call Rebuttal Evidence and the Prosecutor’s Supplementary Motion for Leave to Call Rebuttal Evidence (TC) 27 March 2002, para. 12; *Prosecutor v. Nyiramashuko et al.*, Case No. ICTR- 98-42-T, Decision on the Confidential Prosecutor’s Motion to Be Served with Particulars of Alibi Pursuant to Rule 67 (A) (ii) (a), 1 March 2005.

²² *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-PT, Decision on Prosecution Motion for Notice of Alibi and Reciprocal Inspection, 14 June 2005, para. 7.

²³ Rule 54 of the Rules of Procedure and Evidence.



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