



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER III

Original: English

Before:

Judge Yakov Ostrovsky, Presiding
Judge Lloyd George Williams
Judge Pavel Dolenc

Registrar: Mr. Adama Dieng

Decision of : 27 March 2002

THE PROSECUTOR

versus

LAURENT SEMANZA

Case No. 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**

Counsel for the Prosecutor:

Mr. Chile Eboe-Osuji

Counsel for the Accused:

Mr. Charles A. Taku
Mr. Sadikou Ayo Alao

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

SITTING as Trial Chamber III composed of Judge Yakov Ostrovsky, presiding, Judge
Lloyd George Williams, Q.C. and Judge Pavel Dolenc (the "Chamber");

BEING SEIZED of the Prosecutor's Motion for Leave to Call Rebuttal Evidence (Rules 54, 89(b), 89(c), 85(a)), filed on 5 March 2002 (the "Motion");

BEING SEIZED of the Prosecutor's Supplementary Motion for Leave to Call Rebuttal Evidence (Rules 54, 89(b), 89(c), 85(a)), filed on 7 March 2002 (the "Supplementary Motion");

NOTING the Prosecution Memorial in respect of the Motion, filed on 7 March 2002;

NOTING the Prosecution Book of Authorities in respect of the Motion, filed on 7 March 2002;

CONSIDERING the Defence Reply to the Motion, filed on 21 March 2002;

NOTING the Defence Memorial in Reply to the Prosecution Memorial, filed 21 March 2002;

NOTING the Defence Book of Authorities in Defence Reply to the Motion, filed 21 March 2002;

CONSIDERING the Defence Reply to the Supplementary Motion, filed 21 March 2002;

NOW CONSIDERS the matter without a hearing solely on the briefs of the parties, pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Tribunal (the "Rules").

PLEADINGS

Submissions of the Prosecutor

1. The Prosecutor seeks leave to call seven witnesses to present rebuttal evidence. In the Motion, the Prosecutor submits that the Defence failed to give any notice of alibi and that the defence of alibi was an issue that arose for the first time during the presentation of the Defence case. The Prosecutor consequently seeks leave to present rebuttal evidence through six witnesses to meet the alibi defence.

2. In the Supplementary Motion, the Prosecutor seeks leave to call additional rebuttal evidence through one expert witness. The Prosecutor argues that the Defence case "unexpectedly raised the issue of the alleged method of Tutsis to plot to eliminate Hutus, as part of Tutsi effort to regain power by force of arms, and the related matter of the authenticity of Col. Alexis Kanyarengwe's signature." Consequently, the Prosecutor seeks leave to call additional rebuttal evidence on the subject of Col. Kanyarengwe's signature.

Response of the Defence

3. The Defence submits that the Motion should be dismissed for being frivolous, ill-conceived, and an abuse of process. The Defence argues, *inter alia*, that Rule 85(A) permits rebuttal evidence only when its presentation would be in the interest of justice and that the Prosecution failed to meet this threshold in its Motion. Besides, the Defence submits, if the Prosecutor's application is granted it would be tantamount to reopening the case *de novo* and providing the Prosecutor an opportunity to strengthen its case.

4. The Defence notes that the Prosecutor "complains that he did not become aware of the alibi until very late in the proceedings and therefore was not in a position to rebut the same." However, the Defence points out, that the statements of the witnesses the Prosecutor proposes to call in rebuttal show that the Prosecutor obtained them prior to the commencement of the Defence case and after having been served with Defence witness statements. Therefore, the Prosecutor had the opportunity to seek leave to present the proposed evidence before the commencement of the Defence case.

5. Moreover, the Defence submits that the Prosecutor should have been on notice as to the alibi based on materials that Prosecution communicated to the Defence or on motions filed by the Defence. Additionally, the Defence contends, the Prosecutor surely took into consideration the defence of alibi in Semanza's case when in 1996 "she found that the continuous detention of the defendant was no longer within the 'competence of the Tribunal'."

6. Finally, in respect of the Motion, the Defence submits that Prosecution had the prerogative to cross-examine the Defence witnesses to disprove their claims and that she should not be allowed to do so at this stage under the pretext of rebuttal. The witnesses the Prosecutor intends to call in rebuttal are tainted with bias, or their testimonies are contradictory, or their testimonies would otherwise not be in the interest of justice.

7. The Defence also opposes the Supplementary Motion, *inter alia*, for the following reasons. The Supplementary Motion should have been brought under Rule 89(D), not the Rules under which it was brought. The document that was submitted for forensic testing was not a court document. And, the Prosecution should have made any application in respect of the document at the time it was produced to the court.

FINDINGS

8. Rule 85(A)(iii) of the Rules envisions the possibility of presentation of prosecution evidence in rebuttal. Contrary to the Defence argument, Rule 85(A) does not limit rebuttal evidence to instances when presentation of such evidence would be in the interests of justice. The "interests of justice" provision in Rule 85(A) goes to altering the *sequence* of presentation of evidence, not to determining whether a particular category of evidence may be presented at all. Of course, granting leave to the Prosecutor to present rebuttal evidence does not give rise to reopening the case *de novo*. It is axiomatic that rebuttal evidence is limited to matters that arose out of defence evidence.^[1] Where

however the defence adduces evidence of a fresh matter that the prosecution could not have foreseen, rebuttal evidence may be called.^[2]

9. The Chamber finds that the evidence the Prosecutor proposes to call in rebuttal of the alibi is aimed at refuting evidence that had been adduced by the Defence during its case regarding matters that the Prosecution could not reasonably have foreseen.

10. The Defence of alibi goes directly to the issue of guilt or innocence of the Accused in this case and is therefore a central matter for determination. The Chamber notes that despite the express provision of Rule 67(A)(ii)(a) that the Defence shall notify the Prosecutor of its intent to enter the defence of alibi as early as practicable and in any event prior to the commencement of the trial, the Defence in this case failed to give such notice. While Rule 67(B) stipulates that failure of the defence to give notice of alibi does not limit the right of the accused to rely on such defence, Article 19(1) of the Statute of the Tribunal mandates Trial Chambers to ensure that trials be fair. Fairness requires that Prosecution be granted leave to attempt to refute the alibi, a key issue that arose for the first time during the Defence case.

11. In respect of rebuttal evidence as to Col. Kanyarengwe's signature, the Chamber is of the view that it is not relevant to the determination of the present case. Consequently, the Chamber does not propose to grant leave to the Prosecutor to present such evidence.

12. The Chamber observes that despite the provision of Rule 67(B), Rule 67(A)(ii)(a) provides a legal basis for the expectation that the Defence will notify the Prosecutor of its intent to enter the defence of alibi in a timely manner. Timely notice of the intention to rely on the defence of alibi is crucial for the efficiency of the proceedings. Failure to abide by the requirement of giving a timely notice of alibi leads to expenditure of judicial time for the presentation of evidence in rebuttal and, possibly, rejoinder. Had the Defence given proper notice of alibi, these proceedings would not have been necessary.

FOR THESE REASONS, THE TRIBUNAL

13. **GRANTS** the Prosecutor leave to call rebuttal evidence as proposed in the Motion;

14. **DIRECTS** that all Prosecution witnesses called to present rebuttal evidence appear within the period of 15 through 30 April 2002; and

15. **DENIES** the Supplementary Motion.

Arusha, 27 March 2002.

Yakov Ostrovsky
Judge, presiding

Lloyd George Williams, Q.C.
Judge

Pavel Dolenc
Judge

[Seal of the Tribunal]

^[1] See, e.g. *Prosecutor v. Delalic et al*, Case No. IT-96-21-T, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, Tr. Ch. (ICTY), 19 August 1998, para. 23.

^[2] Phipson on Evidence para. 11-36 (15th ed. 2000).