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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 17 September 2009

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-PT

JUDICIAL RECORDS SECTION
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**DECISION ON DEFENCE EXTREMELY URGENT MOTION ON ISSUES
RELATED TO THE PREPARATION OF THE TRIAL**

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Brian Wallace
Mr. Iskandar Ismail

Defence Counsel

Mr. Peter Herbert
Ms. Mylène Dimitri

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 "Trial Chamber");

BEING SEIZED of the "Defence Extremely Urgent Motion on Issues Relating to the Preparation of the Trial", filed on 4 September 2009 (the "Motion");

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

CONSIDERING the:

- (a) "Prosecution's Response to Defence Extremely Urgent Motion on Issues Related to the Preparation of the Trial", filed on 14 September 2009 (the "Response");
- (b) "Registrar's Submission under Rule 33(B) of the Rules of Procedure and Evidence on the 'Defence Extremely Urgent Motion on Issues Related to the Preparation of the Trial', filed on 14 September 2009 (the "Registry Submission");
- (c) "Defence's Confidential Reply to the Prosecutor's Response to the Extremely Urgent Motion on Issues Relating to the Preparation of the Trial," filed 15 September 2009 (the "Reply");

NOW DECIDES the Motion pursuant to Rule 73 of the Rules.

INTRODUCTION

1. On 12 June 2009, the Chamber set the date for trial at 3 August 2009.¹ On 15 July 2009, the Chamber granted reconsideration of its 12 June Decision and set the date for commencement of trial at 23 September 2009 (the "Trial Date Decision").² On 10 August 2009, the Chamber denied the Defence motion for certification to appeal the Trial Date Decision.³

2. On 11 September 2009, the Defence filed the Motion.

¹ Decision on Trial Date, 12 June 2009.

² Decision on Defence Extremely Urgent Motion for Reconsideration of the Trial Chamber's Decision on the Trial Date, 15 July 2009.

³ Decision on Defence Motion for Certification to Appeal the Trial Chamber's Decision on Defence Extremely Urgent Motion for Reconsideration of the Trial Chamber's Decision on the Trial Date filed 15 July 2009, 10 August 2009 ("Certification Decision").



SUBMISSIONS OF THE PARTIES

Defence Motion

3. The Defence submits that several new facts and material changes in circumstance have occurred since the Trial Date Decision which affect the Defence's ability to prepare for trial by 23 September 2009.⁴ Accordingly, the Defence asks that the Chamber reconsider the Trial Date Decision.⁵

4. Initially, the Defence sets forth two changes in circumstance which it alleges justify reconsideration of the Trial Date Decision: the recent incarceration of Defence investigator Edouard Habimana in Rwanda,⁶ and the pending departure of Defence legal assistant Sophie Maurice at the end of September 2009.⁷

5. The Defence further raises four new facts which it alleges justify reconsideration: pending Defence requests for cooperation of states under Article 28 of the Statute⁸; various issues relating to Prosecution witnesses, including delayed receipt of Witness ANAP's immigration records in Belgium, the Defence's pending request to meet Witness ANAE's husband, pending Prosecution motions under Rule 90bis, allegedly incomplete information regarding certain witnesses, and the recent addition of Witness ANAQ to the Prosecution's witness list⁹; various issues relating to the Prosecution's disclosure obligations¹⁰; and the status of pending translation requests.¹¹

6. Moreover, the Defence avers, in the *Gatete* case more time was afforded the Accused between Indictment and trial, and the *Nzabonimana* case was recently postponed *sine die* due to the Prosecution's failure to cooperate adequately with the Defence.¹²

7. Accordingly, the Defence requests that the Chamber reconsider the Trial Date Decision and postpone the trial *sine die*, allow the Defence to meet with witness ANAE's husband together with a representative of the Victims and Witness Support Section, direct the Prosecution to respect its disclosure obligations and set clear sanctions for further noncompliance, and direct that the Prosecution is required to assist the Defence in obtaining documents related to Prosecution witnesses.¹³

Prosecution Response

⁴ Motion, para. 13.

⁵ Motion, para. 14.

⁶ Motion, paras. 15-23.

⁷ Motion, paras. 24-26.

⁸ Motion, paras. 27-49.

⁹ Motion, paras. 50-71.

¹⁰ Motion, paras. 72-91.

¹¹ Motion, paras. 92-102.

¹² Motion, paras. 109-111.

¹³ Motion, para. 113.

8. The Prosecution maintains that the Motion "lacks foundation in law and fact," opposes it in its entirety, and requests that the Chamber find the Annexes to the Motion unnecessary and an abuse of process and impose a sanction of non-payment of fees.¹⁴

9. As to the staffing of the Defence team, the Prosecution avers that the Defence has been adequately staffed at all times and so the replacement of an Investigator and resignation of a Legal Assistant "does not constitute a change, let alone a material one".¹⁵

10. Moreover, the Defence's search for witnesses and evidence from various foreign countries amounts to no more than a fishing expedition, and the Defence has not adequately substantiated the issue to justify postponing the commencement of trial.¹⁶ Furthermore, the Defence does not need access to any witnesses other than the Accused to determine whether to file a notice of alibi, and the Prosecution has disclosed upwards of 2000 pages of impeachment evidence.¹⁷

11. The Prosecution submits that the delay in the Defence receipt of witness ANAP's immigration records is attributable to the Defence, which did not seek the consent of the Prosecution for more than one month after the Kingdom of Belgium informed the Defence that such consent was necessary.¹⁸

12. The Prosecution opposes the Defence request for a meeting with Witness ANAE's husband unless either a member of the Prosecution team is present or the Prosecution is furnished with a transcript of the interview.¹⁹

13. The Prosecution submits that the information it has provided regarding witnesses is accurate and complete, and that the Defence was so notified on 30 July 2009.²⁰

14. The Prosecution submits that Witness ANAQ was added to its witness list legally and in a timely manner, and that the Defence's allegation that this witness' addition justifies the postponement of trial is spurious.²¹

15. The Prosecution submits that its Rule 90*bis* motions were filed in good faith and, regardless of their disposition, do not justify the postponement of trial.²²

16. The Prosecution submits that the disclosure issues referenced by the Defence have been addressed in previous decisions, and so cannot constitute new facts justifying reconsideration. Moreover, the Prosecution asserts that it has fulfilled its disclosure obligations under Rules 66(A)(i), 66(A)(ii), and 67(D) in a timely and diligent manner.

¹⁴ Response, paras. 4-5.

¹⁵ Response, para. 8.

¹⁶ Response, paras. 9-11.

¹⁷ Response, paras. 12-13.

¹⁸ Response, paras. 14-15.

¹⁹ Response, paras. 16-18.

²⁰ Response, para. 19.

²¹ Response, paras. 20-21.

²² Response, paras. 22-24.

The Prosecution avers that, where material is not in the Prosecution's possession, the primary responsibility for procuring that material falls on the Defence.²³

17. The Prosecution further submits that the translation issues referenced by the Defence have been addressed in previous decisions and so cannot constitute new facts justifying reconsideration, and that except for an inadvertent omission all documents were timely transmitted to the Language Services Section for translation.²⁴

18. The Prosecution asks that the Chamber dismiss the Motion in its entirety, find the filing of the Annexes to the Motion constituted an abuse of process, and impose sanctions by non-payment of fees as a result.²⁵

Registry Submission

19. At the Chamber's request, the Registry filed a submission summarizing the status of the staffing of the Defence team.

20. The Registry notes that the Lead Counsel for the Defence is Mr. Peter Herbert, appointed 1 July 2009 after the Accused requested the replacement of his previous lead counsel, and that the Co-Counsel is Ms. Mylène Dimitri, appointed 1 June 2009.²⁶

21. The Registry notes that the Defence currently has two legal assistants, having proceeded with three until one was replaced by an additional Investigator. The Registry further notes the impending resignation of one Defence legal assistant, and submits that it will appoint a replacement as soon as one is named by the Defence.²⁷

22. The Registry further submits that, though a Defence investigator was arrested in Rwanda in July, a replacement has been appointed and the Defence was, at that time, operating with three investigators as the Registry appointed an additional investigator especially for financial issues on 15 July 2009.²⁸

23. The Registry concludes that, except for a legal assistant to replace Ms. Sophie Maurice, the Defence team is fully staffed.²⁹

Defence Reply

24. The Defence admits that reconsideration is an exceptional measure, but asserts that it is available where a party has been subjected to unfairness through no fault of its own.³⁰ The Defence asserts that the arguments in the Motion were not known to the

²³ Response, paras. 25-31.

²⁴ Response, paras. 32-33.

²⁵ Response, para. 35.

²⁶ Registry Submission, para. 2.

²⁷ Registry submission, paras. 3, 5.

²⁸ Registry submission, para. 4.

²⁹ Registry submission, para. 5.

³⁰ Reply, para. 17.



Chamber at the time of the Trial Date Decision.³¹ Moreover, the Defence requests that the Chamber consider the arguments in the Motion cumulatively, rather than separately.³²

25. The Defence rejects the Prosecution's request for sanctions on the basis of the Annexes to the Motion, arguing that such Annexes might be useful in placing the necessary documentation before the Chamber rather than requiring the Chamber to locate the various documents itself.³³

26. Regarding the staffing of the Defence team, the Defence submits that it lost several weeks of work when its first Investigator was arrested, and clarifies that it has only two Legal Assistants one of whom will be leaving the team shortly.³⁴

27. The Defence asserts that it is not on a fishing expedition, but must go through detailed procedures to identify and contact potential witnesses. Moreover, the Defence asserts, it cannot file a notice of alibi without meeting with potential alibi witnesses, as once such a notice is filed the Prosecution will have the right to meet with such witnesses. The Defence avers, the *Nzabonimana* Trial Chamber granted a delay on this basis, implicitly rejecting the Prosecution's assertion that a notice of alibi can be filed solely on the basis of information provided by the Accused.³⁵

28. The Defence further avers that the quantity of the Prosecution's disclosure is irrelevant, and the quality of that disclosure has been lacking as several disclosure requests received unsatisfactory responses.³⁶

29. The Defence avers that, regarding witness ANAP's immigration records, for technical reasons it did not receive ERSPP's communication averring that the Belgian government would not provide those records without the consent of the Prosecution.³⁷ The Defence further avers that the Prosecution is obstructing its proposed meeting with the husband of Witness ANAE, when the protective measures for that person require only a representative of the Witness and Victim Support Section be present at the meeting rather than a representative of the Office of the Prosecutor. The Defence submits that the meeting now cannot happen before the start of the trial.³⁸

30. The Defence maintains that the identifying information for Witnesses ANAE and ANAL is inconsistent.³⁹ The Defence submits these inconsistencies call the reliability of the witnesses into question and constitute a new fact justifying reconsideration.⁴⁰

³¹ Reply, para. 18.

³² Reply, para. 19.

³³ Reply, paras. 20-22.

³⁴ Reply, paras. 23-27.

³⁵ Reply, paras. 28-33.

³⁶ Reply, paras. 34-37.

³⁷ Reply, para. 38.

³⁸ Reply, paras. 40-46.

³⁹ Reply, paras. 48-50.

⁴⁰ Reply, paras. 54-55.

31. The Defence notes that it is not accusing the Prosecutor of bad faith regarding his Rule 90bis motions, simply reiterating the procedure for such motions.⁴¹

32. The Defence reiterates its allegations that the Prosecution has failed to fulfill its disclosure obligations under the Rules.⁴² Moreover, the Defence maintains, the Prosecution has not followed the Chamber's invitation to assist the Defence in procuring documents which the Defence is unable to obtain on its own.⁴³

33. The Defence challenges the Prosecution's assertion that its failure to transmit certain documents to the Language Services Section for translation expeditiously was "inadvertent," alleging that such failure occurred repeatedly despite Defence requests for translation of the documents concerned.⁴⁴

34. The Defence again cites the *Nzabonimana* decision and asserts that, if the Motion is denied, the decision will *ipso facto* not satisfy the standards of international justice and prioritize the Tribunal's Completion Strategy over the rights of the Accused.⁴⁵

35. Consequently, the Defence requests the Chamber grant the Motion.⁴⁶

DELIBERATIONS

36. Reconsideration is appropriate when one of three circumstances exists:

- A new fact has been discovered that was not known to the Chamber at the time it made its original decision and which bears on that decision;
- A material change in circumstances has taken place since the original decision; or
- There is reason to believe that the original decision was erroneous, or resulted in an injustice.⁴⁷

37. The Chamber recalls it recently granted reconsideration of the date for commencement of trial in the Trial Date Decision.⁴⁸ In determining whether to grant a second reconsideration, the Chamber recalls the various factors that bear on its discretionary determination of the appropriate date for trial.⁴⁹

⁴¹ Reply, paras. 56-57.

⁴² Reply, paras. 58-65.

⁴³ Reply, paras. 66-67.

⁴⁴ Reply, paras. 71-72.

⁴⁵ Reply, para. 73.

⁴⁶ Reply, para. 75.

⁴⁷ See, e.g., *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for Reconsideration of the Decision of March 2006, 11 June 2007, at paras. 9, 10.

⁴⁸ Decision on Defence Extremely Urgent Motion for Reconsideration of the Trial Chamber's Decision on the Trial Date, 15 July 2009.

⁴⁹ These factors include which include the complexity of the case, the number of counts and charges, the gravity of the crimes charged, the individual circumstances of the accused, the status and scale of the

Staffing of the Defence Team

38. The primary Defence argument is that changes in the staffing of the Defence Team - the arrest of an Investigator and pending resignation of a Legal Assistant - are material changes in circumstance which justify reconsideration. The staffing of the Defence team is evaluated in light of the resources available to the Defence "since the beginning of the case."⁵⁰

39. The Chamber observes that an additional Defence investigator was appointed after the pleadings were filed in the Trial Date Decision, so the Defence never had less investigative staff than contemplated in that decision. Moreover, the Defence legal assistant has not yet ceased her employment with the Defence. In this regard, the Registrar submits that a new legal assistant will be appointed as soon as the Defence provides the name of its desired candidate to the Registry.⁵¹ In light of the above, the Chamber does not find any material change in the staffing of the Defence team which might warrant reconsideration of the date of commencement of the trial.

Translation Issues

40. Regarding translation matters, the Chamber notes the Prosecution's letter to the Language Services Section of 11 September 2009, averring that as of 6 September 2009 36 documents remained to be translated into English and 18 documents remained to be translated into French.⁵² In this regard, the Chamber has instructed the Defence to use all its resources to prepare for trial.⁵³ Moreover, the translation issues are not new, and the Defence does not plead any resultant prejudice with the required specificity. Thus, this issue does not justify reconsideration.

Attempted Cooperation with Various States

41. The Chamber recalls its Decision of 16 September 2009 and reiterates that it does not consider that the Defence needs to contact the named Belgians to determine whether to file a notice of alibi, as information about where the Accused was at the times

Prosecution's disclosure, and the staffing of the Defence team. See *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR-73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004, paras. 8-19.

⁵⁰ Certification Decision, para. 17, citing *The Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Decision on (Second) Defence Motion for Adjournment, 4 March 2005, para.9.

⁵¹ Registry Submission, para. 5.

⁵² In the Matter of *Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T: Status of Translation of Witnesses Statements and Other Documents as of 6 September 2009, Confidential Letter filed 11 September 2009.

⁵³ See Trial Date Decision, para. 33.

specified in the Indictment should be within the personal knowledge of the Accused.⁵⁴ In any event, this issue has no bearing on the date of trial. Accordingly, the issue does not justify reconsideration.

Pending Rule 90bis Motions

42. These motions will be dealt with individually and on their own merit, and do not directly bear on the date for commencement of trial. Moreover, the Chamber notes that as one Rule 90bis motion was pending as of the Trial Date Decision, these pending motions do not constitute a "new fact" which might justify reconsideration.

Witness ANAP's Immigration Records

43. The Defence does not explain why it requires Witness ANAP's immigration records in order to cross-examine him properly, nor does it demonstrate that this issue bears on the date for trial. Thus, this issue does not justify reconsideration.

Witness ANAE's Husband

44. The Chamber notes that the Parties have corresponded extensively on this important issue, but that neither Party has filed a formal Motion on the subject and the raising of the issue in the context of another Motion to which it is only tangentially related has not produced enough information for the Chamber to make a determination on the issue. Moreover, in the event Witness ANAE's husband were to give information that would warrant the recall of witness ANAE, the concerned party could formally raise the issue with the Chamber. Accordingly, the Chamber will not grant reconsideration on this basis.

Identifying Information of Prosecution Witnesses

45. The Chamber notes the alleged discrepancies between Witness ANAE's 16 October 2002 statement and her marriage certificate, as well as between ANAL's statements of 17 June 1999 and 26 March 2004. The Defence asserts that these inconsistencies affect the credibility of the witnesses. However, credibility is a matter for cross-examination and does not impact the setting of the trial date. Moreover, regarding Witness ANAL, the allegedly inconsistent documents were both disclosed before the Trial Date Decision.⁵⁵ Accordingly, this is not a "new fact"; if the Trial Chamber was not made aware of this fact at the time of the Trial Date Decision, that is attributable to the Defence and does not justify reconsideration.

46. The assertion that other Prosecution witnesses may have given incomplete or inaccurate identifying information is unsubstantiated and speculative. Thus, it is not a "fact", and consequently cannot be a "new fact" and does not justify reconsideration.

⁵⁴ Decision on Defence Urgent Motion for an Order Directed at the Kingdom of Belgium Pursuant to Article 28 of the Statute, 16 September 2009, para. 11.

⁵⁵ See Response, Annex A.



Witness ANAQ

47. Witness ANAQ was added to the Prosecution's witness list approximately one month before trial, and two months prior to his testimony, which has been scheduled towards the end of the Prosecution case.⁵⁶ The Defence has not shown it will not have had adequate time to investigate Witness ANAQ prior to his testimony. Furthermore, appropriate remedies exist to deal with any issues which might be discovered by Defence investigation after the testimony of Witness ANAQ, including the recall of this witness. Accordingly, the Chamber denies the request for reconsideration on the basis of this witness.

Disclosure Issues

48. The Chamber recalls all the disclosure issues raised by the Defence. The Chamber considers that it has previously addressed most of these issues.⁵⁷ The Chamber nonetheless reiterates that disclosure obligations under Rule 66 (A) and in particular, Rule 66(A) (ii), could have an impact on the commencement of trial. On the other hand, inspection under Rule 66(B) is triggered by a request from the Defence and it could be an ongoing process which may not necessarily impact on the scheduling of the trial date. Moreover, material requested under this rule must be in the custody of the Prosecution, and such a request gives rise to reciprocal disclosure obligations.

49. The Chamber recalls its direction to the parties that where material sought is not in the custody of the Prosecution, the primary obligation falls on the Defence to conduct a diligent investigation to locate it, however, where the Defence has not been able to do so and the Prosecution is in a position to assist the Defence access the material, the Prosecution should provide such assistance.⁵⁸

50. The Chamber notes that the Defence request for the prior statements of Witness ANAI may not be a disclosure issue. In any case, it was the Defence that made it before the wrong Chamber in the first place, thus creating the delay in obtaining the statement. As to the prior testimonies of Witnesses ANAI and ANAD, the Chamber considers that these were made in public session and the Defence has not shown they are in the custody of the Prosecution.

51. The Chamber considers that there is nothing in the disclosure issues raised that demonstrates prejudice or an impact on the commencement of the trial so as to warrant reconsideration of the Trial Date Decision.

Decisions Cited by the Defence

52. The Chamber considers that the decisions of other Trial Chambers cited by the Defence may not be relevant to the facts of this case. First, regarding whether the *Gatete*

⁵⁶ Notice of Addition of Witness ANAQ to Prosecutor's Witness List and Disclosure of Witness Statement of Witness ANAQ, 25 August 2009.

⁵⁷ Decision on Trial Date 12 June 2009, para 43.

⁵⁸ See Requests for Disclosure and Inspection Issues, 9 September 2009, para. 2.

Defence was allegedly afforded more preparation time than the Defence in this case, the Defence does not show that the two cases are similar. In any event, these determinations must be made on a case-by-case basis. Second, in *Nzabonimana*, the Prosecution had not fully complied with a disclosure order, filed a translated Indictment, or corrected its Pre-Trial Brief and Proofing Chart.⁵⁹ In this case, the Prosecution is not in violation of any orders filed by the Chamber, and has filed a satisfactory Pre-Trial Brief and witness list. Moreover, any pending translation matters do not touch on any document as fundamental as the Indictment.

Cumulative Effect of the Various Issues Raised by the Defence

53. Finally, having considered the totality of the parties' submissions, the Chamber concludes that the Defence arguments do not, taken as a whole, warrant reconsideration of the Trial Date Decision.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion.

Arusha, 17 September 2009



William H. Sekule
Presiding Judge



Solomy Balungi Bossa



Mparany Rajohnson
Judge



⁵⁹ *The Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-PT, Decision on Motion for the Transfer of Witnesses and Other Issues Relating to the Preparation of the Trial, 24 August 2009, paras. 11, 14, 16.