

ICTR-99-54-T
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(5539-5535)

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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: 12 March 2010

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL ARCHIVES

2010 MAR 12 P 2:50

**DECISION ON DEFENCE URGENT MOTION TO POSTPONE
THE TESTIMONY OF WITNESS ANAC**

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. William Egbe
Mr. Patrick Gabaake
Mr. Iskandar Ismail
Mr. Faria Rekkas

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 “Chamber”);

BEING SEIZED of the “Defence Extremely Urgent Motion to Postpone the Testimony of ANAC”, filed confidentially on 4 March 2010 (the “Motion”);

CONSIDERING the “Prosecutor’s Response to the Defence Extremely Urgent Motion to Postpone the Testimony of Witness ANAC”, filed on 8 March 2010 (the “Response”), and the “Defence Reply to the Prosecutor’s Response to Defence Extremely Urgent Motion to Postpone the Testimony of Witness ANAC”, filed on 10 March 2010 (the “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 (B) of the Rules.

INTRODUCTION

1. The anticipated testimony of Prosecution Witness ANAC pertains to the Ministry of Planning’s alleged misuse of foreign funds. In his *pro justitia* statement dated 27 February 2008 and disclosed by the Prosecution on 13 March 2009, the Witness recounts that the Ministry of Planning provided an office to “a foreigner” who collected information and prepared tables concerning foreign funds.

2. The Prosecution, in its Pre-Trial Brief of 19 March 2009, listed Witness ANAC as an expert witness.¹ On 23 March 2009, the Defence notified the Chamber that it did not accept Witness ANAC’s qualifications or statements to be those of an expert, and that it intended to cross-examine Witness ANAC.²

3. On 19 May 2009, the Defence requested that the Prosecution identify the foreigners working at the Ministry of Planning who were also alleged accomplices in the diversion of funds.³

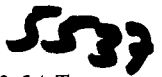
4. On 12 June 2009, the Chamber clarified that the witness’s mention of foreigners at the Ministry of Planning is “best left for the cross-examination of Witness ANAC.”⁴

¹ The Prosecutor’s Pre Trial Brief, filed 19 March 2009, Annex I pp. 2-3.

² Defence Notice Pursuant to Rule 94 *bis* (B) of the Rules of Procedure and Evidence Regarding Statements of Prosecution Witnesses ANAB and ANAC as Expert Witnesses, filed 23 March 2009, p. 2.

³ Dr. Ngirabatware’s Submissions Regarding an Appropriate Trial Date Pursuant to the Trial Chamber’s Scheduling Order, filed 18 May 2009, para. 10 (g).

⁴ Decision on Trial Date, filed 12 June 2009, para. 49.



5. On 20 August 2009, the Defence contacted the Prosecution to request the names of all foreigners working in the Accused's office.⁵

6. On 23 September 2009, the Chamber admitted into evidence Prosecution Exhibit 2, which appears to be a report written, in part, by Witness ANAC that details the alleged misuse of foreign funds by the Rwandan government.⁶ The Chamber also admitted annexes purportedly provided by the Witness.⁷

7. On 1 February 2010, the Prosecution filed its Revised Order of Appearance of Prosecution Witnesses. In it, the Prosecution scheduled the testimony of Witness ANAC for 15 to 19 March 2010.⁸

SUBMISSIONS OF THE PARTIES

Defence Motion

8. The Defence asserts that it has diligently tried to identify every foreigner with whom the Accused worked, and to obtain documents referenced by Witness ANAC's report. Numerous cooperation requests have been sent to four international organisations, three states and an observer to the United Nations.⁹ Despite these efforts, the Defence has been unable to obtain the desired information and documents.¹⁰

9. The Defence submits that these materials are relevant to the report and anticipated testimony of Witness ANAC.¹¹ In addition to potentially affecting the Witness's credibility, these materials are directly related to paragraphs 4, 5, 15 and 38 of the Indictment.¹²

10. The Defence further contends that, until it possesses this information and these documents, it is entirely unable to prepare itself to cross-examine the Witness. As a consequence, the Defence will be unable to conduct the cross-examination of Witness ANAC.¹³ This will impact the Accused's right to a fair trial.¹⁴

11. Finally, the Defence notes the complexity of these allegations, and submits that it will never be possible to conclude the examination-in-chief and cross-examination of Witness ANAC over the course of four trial days. If the Witness testifies as scheduled, he will need to complete his testimony at a later date.¹⁵

⁵ Letter from the Defence to Mr. Wallace Kapaya, dated 20 August 2009, p. 3.

⁶ Prosecution Exhibit 2 (report).

⁷ Prosecution Exhibit 3 (list of documents).

⁸ Revised Order of Appearance of Prosecution Witnesses: 01 February – 19 March 2010, filed 1 February 2010.

⁹ Motion, paras. 6, 8-10, 12-23, 28-36, 42-56, 62-67, 71-76, 78-92, 97-101, 106-107, 113-118.

¹⁰ *Id.* paras. 10, 23, 36, 56, 67, 76, 92, 101, 107.

¹¹ *Id.* paras. 24-27, 37-41, 57-61, 68-70, 77, 93-96, 102-105.

¹² *Id.* para. 127.

¹³ *Id.* paras. 26-27, 41, 61, 70, 77, 96, 104-105, 112, 119-129, 134.

¹⁴ *Id.* para. 26.

¹⁵ *Id.* para. 131.

12. Accordingly, the Defence requests the Chamber to postpone the testimony of Witness ANAC, or alternatively his cross-examination, until the Defence obtains full cooperation from the targeted States and Institutions.¹⁶

Prosecution Response

13. The Prosecution does not oppose the postponement of Witness ANAC's evidence. It submits, however, that the Chamber may not postpone only the cross-examination of the Witness, as his anticipated testimony is not new. The Prosecution also notes that Witness ANAC may be recalled should the Defence obtain new information.¹⁷

Defence Reply

14. The Defence notes the Prosecution's position. It also reiterates that, in light of the complex allegations, it will be unable to cross-examine Witness ANAC without securing the full cooperation of various entities.¹⁸

DELIBERATIONS

15. As a preliminary matter, the Chamber recalls that it has discretion in the scheduling of proceedings before it. This discretion, however, is not unlimited.¹⁹ Article 20 (4)(b) of the Statute guarantees that the Accused shall enjoy adequate time to prepare his defence.²⁰ The Chamber is aware that it has an obligation to balance this right alongside the need for an expeditious trial.²¹

16. The Defence prays the Chamber to postpone the cross-examination of Witness ANAC until after the Defence obtains *cooperation* from eight States or Institutions.²² According to the Defence, contacts with these eight entities were made between August and October 2009.²³ There appears to be no estimation of when the Defence might receive the desired responses.²⁴

17. The Chamber notes that the Defence claims to require a meeting with a specific individual who, evidently, the Defence has been unable to locate. The Defence does not

¹⁶ *Id.* paras. 137-138.

¹⁷ Response, paras. 6, 9-13.

¹⁸ Reply, paras. 4-13.

¹⁹ Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date (AC), 12 May 2009 ("Appeals Chamber Decision"), para. 22, citing *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.14, Decision on Mathieu Ngirumpatse's Appeal From the Trial Chamber Decision of 17 September 2008 (AC), 30 January 2009, para. 17; *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case (AC), 20 January 2004, para. 16.

²⁰ Appeals Chamber Decision, paras. 22, 27.

²¹ *Id.* para. 23

²² Motion, paras. 137-138 (emphasis added).

²³ *Id.* paras. 12, 28, 42, 62, 71, 79, 97, 106.

²⁴ *Id.* paras. 117-118.

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submit that it knows this person's location or how to contact him to set up the requisite meeting.

18. The Chamber recalls that the issue of State cooperation was raised by the Defence in an earlier motion addressing the scheduling of the case. In that submission, the Defence referred to its pending requests for cooperation, and prayed for a postponement of the entire trial.²⁵ The Chamber considered this argument, and ultimately found it insufficient.²⁶ While the present motion seeks to postpone the testimony or cross-examination of Witness ANAC, the Chamber considers that it is not dissimilar to other Defence arguments to delay aspects of the trial.

19. There is no indication as to when the Defence will be able to secure the cooperation that it seeks. Therefore, the Chamber considers that there is no basis to postpone either the testimony of Witness ANAC or his cross-examination.

20. The Chamber recalls the possibility that the Defence may succeed in obtaining new material information after the evidence of the Witness. In such a circumstance, the Defence retains the option of formally raising whether this information would warrant the recall of Witness ANAC.²⁷

FOR THE ABOVE REASONS, THE TRIBUNAL DENIES the Motion.

Arusha, 12 March 2010



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

²⁵ Defence Extremely Urgent Motion on Issues Relating to the Preparation of the Trial, filed 11 September 2009, paras. 27-49.

²⁶ Decision on Defence Extremely Urgent Motion on Issues Related to the Preparation of the Trial, dated 17 September 2009, paras. 5, 41, 53.

²⁷ See also *id.* para. 44.