

ICTR-99-54-T
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(6319-6316)

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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: 3 June 2010

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL RECORDS/ARCHIVES
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DECISION ON DEFENCE MOTION FOR IMMEDIATE WITHDRAWAL OF
THE ALLEGATION OF DIVERSION OF FUNDS

Office of the Prosecutor

Mr. Wallace Kapaya
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Defence Counsel

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Mr. Deogratias Sebureze
Ms. Anna-Gaëlle Denier
Ms. Chloé Gaden-Gistucci

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 Urgent Motion Requesting the Trial Chamber to Withdraw Immediately the Allegation of Diversion of Funds (Article 20 of the Statute and Rule 54 of the RPE)”, filed confidentially on 13 May 2010 (the “Motion”);

CONSIDERING

- (a) The “Prosecutor’s Response to Defence Urgent Motion Requesting the Trial Chamber to Withdraw Immediately the Allegation of Diversion of Funds (Article 20 of the statute Rule 54 of the RPE)”, filed confidentially on 18 May 2010 (the “Response”); and
- (b) The “Defence Reply to the Prosecution Response to the Defence Motion Requesting the Trial Chamber to Withdraw Immediately the Allegations Regarding Diversion of Funds”, filed confidentially on 24 May 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 Rules 54 and 73 (B) of the Rules.

INTRODUCTION

1. According to the Prosecution’s Pre-Trial Brief, the allegations in Indictment paragraphs 5, 15 and 38 were to be supported by the anticipated testimonies of Prosecution Witnesses ANAB, ANAC and ANAP.¹
2. On 28 January 2010, the Chamber granted the Prosecution’s request to drop Witness ANAB from its witness list.²
3. From 23 February through 25 February 2010, Witness ANAP testified.³
4. On 24 May 2010, the Chamber granted the variation of the Prosecution’s witness list by dropping Witness ANAC from it.⁴

¹ The Prosecutor’s Revised Pre-Trial Brief (Filed pursuant to Court Order dated 19 May 2009 and Rule 73 (B) (i) *bis* of the Rules of Procedure and Evidence), dated 25 May 2009, Annex 1, pp. 1-2, 14.

² Decision on Prosecution Motion for Leave to Vary Its Witness List (TC), 28 January 2010, para. 4, p. 15.

³ See generally T. 23 February 2010; T. 24 February 2010; T. 25 February 2010.

⁴ Decision on Prosecution Motion to Vacate the Trial Date (TC), 24 May 2010 (“Decision of 24 May 2010”), p. 9.

SUBMISSIONS OF THE PARTIES

Defence Motion

5. The Defence requests the Chamber to exercise, *proprio motu*, its inherent power to order the withdrawal of the allegations of diversion of funds. According to the Defence, the Prosecution has failed to adduce any evidence to substantiate these allegations as set out in paragraphs 15 and 38 of the Indictment. Moreover, the Prosecution has admitted its inability to prove these charges.⁵

6. The Defence submits that being charged with allegations not brought by any witness at trial, and thus not subject to cross-examination, would breach the Accused's right to a fair trial.⁶

7. Furthermore, these allegations are complex and will require significant judicial and Tribunal resources to hear additional Defence witnesses and to secure cooperation from various States and organizations. In addition to wasting public funds, this will prolong the trial unnecessarily.⁷

Prosecution Response

8. The Prosecution replies that diversion of funds is not a count under the Indictment. Moreover, it is not even a charge, but merely a manner in which the Accused allegedly participated in the unlawful killing of Tutsis. As such, it is not subject to withdrawal.⁸

9. The Prosecution characterizes the Defence Motion as, in substance, a Rule 98*bis* motion. Because the Prosecution has not closed its case, and because it may call other witnesses to prove these allegations, such a motion is premature and should be dismissed.⁹

Defence Reply

10. The Defence requests the removal of the allegations in paragraphs 5, 15 and 38 from the Indictment.¹⁰

11. Although the Prosecution has not closed its case, it has indicated that it will not seek to call further witnesses to support the allegations of diversion of funds. As to these allegations, the Defence reiterates that the Prosecution has not established a *prima facie*

⁵ Motion, paras. 1, 19-45, 54, 68-70, quoting T. 18 March 2010, p. 3.

⁶ Motion, paras. 46-54.

⁷ *Id.*, paras. 55-68.

⁸ Response, paras. 19-27, 42, 46.

⁹ *Id.*, paras. 28-46

¹⁰ Reply, para. 21.



case. The Defence prays for the Chamber to exercise its inherent jurisdiction to regulate the length and conduct of the proceedings by having these allegations removed.¹¹

DELIBERATIONS

12. The Chamber notes that the Prosecution has not yet closed its case-in-chief. Although no witnesses remain on the Prosecution's list as of now, the Chamber has considered that the Prosecution should be given an opportunity to present additional witnesses during its case-in-chief in order to rebut the Defence alibi.¹²

13. Rule 98*bis* of the Rules states that:

If after the close of the case for the prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment, the Trial Chamber, on a motion of an accused filed within seven days after the close of the Prosecutor's case-in-chief, unless the Chamber orders otherwise, or *proprio motu*, shall order the entry of judgement of acquittal in respect of those counts.

14. The Chamber considers that, as the Prosecution case-in-chief remains open, the Defence request to remove Indictment paragraphs is premature. As such, the Chamber declines to exercise at this time any inherent power to remove paragraphs from the Indictment.

15. Furthermore, the Chamber does not deem it appropriate to assess the Prosecution case in a piecemeal manner. Instead, the Chamber prefers to evaluate the evidence as a whole when making a final determination on its sufficiency, probative value, or weight.

16. To the extent that some of the Defence submissions fall within the scope of Rule 98*bis*, the Defence may raise them again for consideration under this Rule.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion.


Arusha, 3 June 2010



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

¹¹ *Id.*, paras. 4-7, 9-17, 21.

¹² Decision of 24 May 2010, para. 36.