



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-99-54-T
07-07-10
(7398-7393)

7398
PM

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 7 July 2010

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL RECORDS/ARCHIVES
UNICTR
RECEIVED

2010 JUL -7 11 A 2:41

**DECISION ON DEFENCE MOTION FOR RECONSIDERATION OF THE
TRIAL CHAMBER'S ORAL DECISIONS RENDERED ON 23 SEPTEMBER 2009**

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Iskandar Ismail
Ms. Faria Rekkas

Defence Counsel

Mr. Peter Herbert
Ms. Mylène Dimitri
Mr. Deogratias Sebureze
Ms. Anne-Gaëlle Denier
Ms. Chloé Gaden

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 Motion for Reconsideration of the Trial Chamber’s Oral Decisions Rendered on 23 September 2009”, filed confidentially on 13 May 2010 (the “Motion”);

CONSIDERING:

- (a) The “Prosecutor’s Response to Defence Motion for Reconsideration of the Trial Chambers Oral Decisions Rendered on 23rd September 2009”, filed confidentially on 18 May 2010 (the “Response”); and
- (b) The “Defence Reply to the Prosecution Response to the Defence Motion for Reconsideration of the Trial Chamber’s Oral Decisions Rendered on 23 September 2009”, 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 Rule 73 of the Rules.

INTRODUCTION

1. On 23 September 2009, the trial commenced and Prosecution Witness André Delvaux, who works for the Prosecution as an Investigator,¹ testified before this Chamber.

2. During the course of Delvaux’s examination-in-chief on 23 September 2009, the Chamber admitted, over Defence objections, several documents into evidence (the “Impugned Decisions”). These documents included Prosecution Exhibit 2,² which appears to be a 1996 preliminary report entitled “Use of Rwanda’s External Debt (1990/1994) The Responsibility of Donors: Analysis and Recommendations”, authored by two persons initially scheduled to testify as Prosecution Witnesses ANAB and ANAC.³ The Chamber also admitted two sets of documents as Prosecution Exhibits 3 and 4 that Delvaux said he received from Witness ANAC.⁴ Prosecution Exhibit 5 consists

¹ T. 23 September 2009, p. 20; Prosecution Exhibit 1 (Curriculum Vitae of André Delvaux).

² T. 23 September 2009, pp. 24-28; Prosecution Exhibit 2 (preliminary report). The Chamber notes that Prosecution Exhibit 2 appears to contain both an English and a French version of the preliminary report.

³ 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), 25 May 2009, Annex 1, pp. 1-2.

⁴ T. 23 September 2009, pp. 30, 33, 36-37; Prosecution Exhibit 3 (“Annexes given by ANAC during his interview on 27/02/08 by the Brussels Federal Police”); Prosecution Exhibit 4 (“Annexes given by ANAC to the Brussels Federal Police and transmitted by Procès-Verbal subsequent on 01/04/08”).



of documents that Delvaux found at the National Bank of Rwanda and that he thought might be relevant to Prosecution Exhibit 2.⁵

3. On 28 January 2010, the Chamber granted the Prosecution's request to drop Witness ANAB from its witness list.⁶

4. On 29 April 2010, the Prosecutor moved the Chamber for leave to vary its witness list, in part, by removing Witness ANAC.⁷

5. The Defence filed the present Motion on 13 May 2010.

6. On 24 May 2010, the Chamber granted the variation of the Prosecution's witness list by dropping Witness ANAC from it.⁸

SUBMISSIONS OF THE PARTIES

Defence Motion

7. The Defence requests that the Chamber reconsider the Impugned Decisions, and order the withdrawal of Prosecution Exhibits 2, 3, 4 and 5.⁹

8. The Defence submits that the Prosecution's withdrawal of Witness ANAC is a newly discovered fact that was unknown to the Chamber at the time of the Impugned Decisions. This withdrawal also constitutes a material change in circumstances. The Chamber admitted the contested exhibits solely because of this Witness's anticipated testimony, without which there is no basis for the documents' admission.¹⁰

9. The Defence considers that the Chamber did not admit the four exhibits to prove their contents. Instead, the Chamber admitted them "as such" in order to allow the Prosecution to use them prior to the evidence of Witnesses ANAB and ANAC. As these two Witnesses are no longer scheduled to testify, the four exhibits are no longer relevant.¹¹

10. Because the Defence will not be able to cross-examine anyone on the content and origins of the exhibits, it will suffer significant prejudice if these exhibits are maintained

⁵ T. 23 September 2009, pp. 30, 40-41, 44, 46, 51; Prosecution Exhibit 5 ("Documents found in The National Bank of Rwanda (NBR) Searching carried out in July 2009").

⁶ Decision on Defence Motion for Immediate Withdrawal of the Allegation of Diversion of Funds (TC), 3 June 2010 ("Decision of 3 June 2010"), para. 2, citing Decision on Prosecution Motion for Leave to Vary Its Witness List (TC), 28 January 2010, para. 4, p. 15.

⁷ See Decision on Prosecution Motion to Vacate the Trial Date (TC), 24 May 2010 ("Decision of 24 May 2010"), para. 13.

⁸ Decision of 3 June 2010, para. 4, citing Decision of 24 May 2010, p. 9.

⁹ Motion, paras. 14, 19, 26, 39, 41-42.

¹⁰ *Id.*, paras. 16-20, 40.

¹¹ *Id.*, paras. 21-28, 30.



in the record. Ngirabatware cannot be charged with evidence unless it is brought by a witness at trial who can be challenged via cross-examination.¹²

11. Finally, the Defence contends that Prosecution Exhibit 2 amounts to a statement by Witness ANAB. Because this Witness will not testify, his statement cannot be admitted.¹³

Prosecution Response

12. The Prosecution requests that the Motion be dismissed, and submits that the Chamber admitted the exhibits after the Prosecution established a connection between them and Delvaux.¹⁴

13. Moreover, the Defence confuses issues of admissibility and probative value. The Chamber has not yet applied any weight to the documents, and thus the Defence claim of prejudice is premature and unfounded.¹⁵

Defence Reply

14. The Defence disputes that the Prosecution has linked these exhibits to the evidence of Delvaux or any other witness. In light of this, the documents are irrelevant and fail the threshold test for admissibility.¹⁶

15. Because these exhibits are irrelevant, their continued inclusion in the record would prejudice Ngirabatware's right to cross-examine the evidence against him.¹⁷

DELIBERATIONS

16. The Chamber recalls the Tribunal's jurisprudence on reconsideration:¹⁸

¹² *Id.*, paras. 28, 30-33, 41.

¹³ *Id.*, paras. 34-35.

¹⁴ Response, paras. 18-19. The Chamber notes that the Prosecution Response initially identifies all four contested exhibits, but later appears to make its submissions pursuant only to Prosecution Exhibits 3, 4 and 5. *Id.*, paras. 2, 16, 18. The Response concludes, however, by requesting the Chamber to dismiss the Defence Motion in its entirety. *Id.*, para. 24. Under these circumstances, the Chamber considers that the submissions stated in the Prosecution Response were intended to apply to all four contested Prosecution Exhibits.

¹⁵ *Id.*, paras. 17, 20-23.

¹⁶ Reply, paras. 4-9, quoting *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T (“*Bagosora et al.*”), Decision on Admission of Statements of Deceased Witnesses (TC), 19 January 2005, para. 17, and citing *Bagosora et al.*, Decision on Admissibility of Evidence of Witness DBQ (TC), 18 November 2003, para. 8.

¹⁷ Reply, paras. 5-6, 8, 10.

¹⁸ See Decision on Defence Motion for Reconsideration of the Decision on the Defence Motion for Protective Measures of 9 February 2010 (TC), 31 March 2010 (“Decision of 31 March 2010”), para.21, citing *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for Reconsideration of the “Decision on Ntahobali's Motion for Separate Trial” (TC), 22 February 2005, para. 17; *Bagosora et al.*, Decision on Prosecutor's Second Motion for Reconsideration of the Trial Chamber's “Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E)” (TC), 14 July 2004, para. 7; *Bagosora et al.*, Decision on Prosecutor's Motion for

The Chamber notes at the outset that the Rules do not provide for the reconsideration of the decision. The Tribunal has an interest in the certainty and finality of its decisions, in order that parties may rely on its decisions, without fear that they will be easily altered. The fact that the Rules are silent as to reconsideration, however, is not, in itself, determinative of the issue whether or not reconsideration is available in “particular circumstances”, and a judicial body has inherent jurisdiction to reconsider its decision in “particular circumstances”. Therefore, although the Rules do not explicitly provide for it, the Chamber has an inherent power to reconsider its own decisions. However, it is clear that reconsideration is an exceptional measure that is available only in particular circumstances.¹⁹

17. Reconsideration is permissible when: (1) a new fact has been discovered that was not known to the Chamber at the time it made its original decision; (2) there has been a material change in circumstances since it made its original decision; or (3) there is reason to believe that its original decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice. The burden rests upon the party seeking reconsideration to demonstrate the existence of sufficiently special circumstances.²⁰

18. The Chamber recalls that prior to the admission of Prosecutions Exhibits 2, 3, 4 and 5, the Prosecution established a link between these documents and Prosecution Witness André Delvaux. This link formed the basis of the Chamber’s decisions to admit these documents into evidence.²¹

19. Because these Exhibits were entered into evidence based on this link with Witness Delvaux, the subsequent withdrawal of Prosecution Witnesses ANAB and ANAC presents neither a newly discovered fact nor a material change in circumstances. The Defence has not satisfied its burden of demonstrating sufficiently special circumstances which would permit reconsideration. Accordingly, the Motion is denied.

Reconsideration of the Trial Chamber’s “Decision on Prosecutor’s Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E)” (TC), 15 June 2004, (“*Bagosora et al.* Decision of 15 June 2004”) para. 7.

¹⁹ *Bagosora et al.* Decision of 15 June 2004, para. 7.

²⁰ Decision of 31 March 2010, para. 22, citing *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion for Reconsideration of Decision on Joseph Nzirorera’s Motion for Inspection: Michel Bagaragaza (TC), 29 September 2008, para. 4; *Bagosora et al.* Decision of 15 June 2004, para. 9.

²¹ T. 23 September 2009, pp. 23-24, 28 (“Mr. President: . . . [Prosecution Exhibit 2] will be admitted into evidence at this stage. The witness has established his connection with that document.”), 29 (“Mr. President: . . . We have [Prosecution Exhibit 2] which the witness received, went on to Belgium, discussed this – or identified it or discussed it with the person whom he has identified as one of the authors. I think that’s what the evidence is. And he has been connected with it. He has identified it. It is being admitted as such.”), 30, 33, 36, 37 (“Mr. President: . . . A connection [between Witness Delvaux and Prosecution Exhibit 3] has been established, and identification has been made, and the linkage has been established, and the Trial Chamber has no problem to have this document admitted as such. . . . Mr. Kapaya: I produce [another] document as a Prosecution exhibit. Mr. President: Any objection? Ms. Dimitri: Well, I’ll respect your decision, Mr. President, but for the record, it’s the same objection. Mr. President: All right. We take note of the observation and objection of the Defence that has been made. The document will be admitted as Prosecution Exhibit Number 4.”), 40-41, 43-44, 46, 50 (Mr. President: . . . according to the witness so far, he has said he’s the one who collected [Prosecution Exhibit 5] in Rwanda. He has explained why he collected them. And from his evidence so far they appear to be relevant to be admitted into evidence and we rule that they be admitted into evidence. Issues of actual weight – of actual probative value, these are issues that be addressed later or subsequently . . .”), 51.



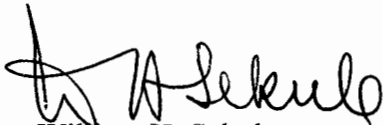
20. Moreover, the Chamber considers that, in this case, reconsideration may entail an evaluation of the probative value of the evidence. The Chamber does not deem it appropriate to assess the weight of these Exhibits at this stage of the proceedings.

21. The Chamber further recalls the Appeals Chamber's recent reaffirmation that "[a] decision to admit a document has no bearing on the weight the Trial Chamber will ultimately accord it."²²

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion.

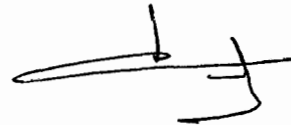
Arusha, 7 July 2010



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

²² *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-A, Judgement (AC), 19 May 2010, para. 196.