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(27-01-2011)
(10087-10080)

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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: 27 January 2011

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

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DECISION ON DEFENCE MOTION FOR RECONSIDERATION OF THE
ORAL DECISION RENDERED ON 6 DECEMBER 2010

Office of the Prosecutor

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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 "Extremely Urgent Defence Motion for Reconsideration of the Trial Chamber's Oral Decision Rendered on 6 December 2010", filed confidentially on 13 December 2010 (the "Defence Motion");

CONSIDERING the:

- i. "Prosecutor's Response to Extremely Urgent Defence Motion for Reconsideration of the Trial Chamber's Oral Decision Rendered on 6 December 2010", filed confidentially on 20 December 2010 (the "Prosecution Response"); and
- ii. "Defence Reply to Prosecutor's Response to Defence Extremely Urgent Motion for Reconsideration of the Trial Chamber's Oral Decision Rendered on 6 December 2010," filed on 27 December 2010 (the "Defence Reply");

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

NOW DECIDES the Defence Motion pursuant to Rule 73.

INTRODUCTION

1. The Defence commenced its case on 15 November 2010, and presented the Accused as its first witness. The Accused's examination-in-chief began on 16 November 2010. His cross-examination commenced on 6 December 2010. The 2010 session adjourned on 15 December 2010, with the Prosecution not having completed its cross-examination of the Accused. The proceedings were scheduled to resume on 17 January 2011, but will now recommence on 31 January 2011.¹

2. In the course of his examination-in-chief, the Accused testified that he was out of the country on official business during the periods of 23 April to 23 May 1994, and 23 June to 3 July 1994.²

3. On 2 December 2010, the Prosecution made an Oral Motion to postpone in whole or in part the cross-examination of the Accused ("Oral Prosecution Motion") as he had led new alibi evidence covering the periods of 23 April to 23 May 1994 and 23 June to 3 July 1994 without providing timely notice thereof. The Prosecution argued that the Accused had only provided notice of his alibi for the period of 7 to 12 April 1994.³

¹ Order for the Resumption of Trial, 26 January 2011.

² T. 29 November 2010, pp. 46-74; T. 30 November 2010, pp. 3-6, 17-20.

³ T. 2 December 2010, pp. 48-53. See also Notice of Alibi Pursuant to Rule 67(A)(ii) filed on 23 September 2009.

4. Through its Oral Decision of 6 December 2010 ("Oral Decision"), the Chamber considered that the Accused appeared to have led alibi evidence covering significant periods of time which was not disclosed to the Defence, and granted the Oral Prosecution Motion. The Chamber concluded that this lack of notice materially impacted the Prosecution's ability to conduct its case, particularly to cross-examine the Accused effectively about his alleged alibis. Accordingly, the Chamber directed that the cross-examination of the Accused concerning his alleged new alibis commence on 17 January 2011. The Prosecution, however, was to continue its cross-examination of the Accused with respect to matters not related to the new alibis. Should the cross-examination of the Accused with respect to matters not related to the new alibis be completed before the last session of 2010 and time permits, the Defence was to present its next witness.⁴

5. The Defence seeks reconsideration of the Oral Decision through the present Motion.

SUBMISSIONS OF THE PARTIES

Defence Motion

6. The Defence invites the Chamber to reconsider its Oral Decision as an exceptional measure because there are some reasons to believe that the decision was erroneous or constituted an abuse of power and resulted in an injustice for the Accused.⁵

7. The Defence argues that the alibi evidence covering the periods of 23 April to 23 May 1994 and 23 June to 3 July 1994 is not new, contrary to what the Prosecution argued in its Oral Motion. Accordingly, the Prosecution was never prevented from conducting an effective cross-examination with respect to these alibis.⁶

8. The Defence points out that the Prosecution has custody of the Radio Rwanda audio record dated 24 May 1994 reporting an interview with the Accused, in which he recalls that he was out of Rwanda during the period of 23 April to 23 May 1994. The Radio Rwanda audio record is identified by a "K" number, indicating that it is available in the Electronic Disclosure System ("EDS") of the Prosecution, and is therefore in its custody.⁷

9. The Defence reiterates that the proper remedy for the lack of alibi disclosure is appreciation thereof during the Chamber's final deliberations regarding the alibi. The Defence alleges that the Chamber abused its discretion in postponing the cross-examination of the Accused.⁸

10. The Defence further questions the reference in the Oral Decision to the interruption of the testimonies of three Accused in the *Nyiramasuhuko, et al.* case, namely that of Pauline Nyiramasuhuko, Sylvain Nsabimana, and Arsène Shalom Ntahobali. The Defence points out that it was the examinations-in-chief of Nyiramasuhuko and Nsabimana which were interrupted. Only the cross-examination of Ntahobali was interrupted. The Defence stresses,

⁴ T. 6 December 2010, pp. 1-4.

⁵ Defence Motion, paras. 5-6, 19, 41.

⁶ *Id.*, paras. 7-12.

⁷ *Id.*, paras. 8, 10, 12, 40.

⁸ *Id.*, paras. 17-19, 40.

however, that the suspensions were due to administrative reasons rather than as a result of a Prosecution request for additional time to prepare for cross-examination.⁹

11. Finally, the Defence highlights the Chamber's obligation to respect the rights of the Accused. The Defence notes that the Prosecution has been investigating the case against the Accused for over a decade, as the first Indictment was issued in 1999. The Defence questions the applicability of the *Galić* Appeal Judgement cited in the Oral Decision. The Defence argues that this Judgement does not provide legal basis for the Chamber to postpone the cross-examination of the Accused in order to provide the Prosecution more preparation time.¹⁰

Prosecution Response

12. The Prosecution asks the Chamber to dismiss the Defence Motion, and submits at the outset that the Defence Motion is now moot as the Chamber adjourned the proceedings on 14 December 2010 without the Prosecution having completed its cross-examination of the Accused. Accordingly, there is no longer any prejudice to the Accused as his cross-examination will continue uninterrupted.¹¹

13. In the alternative, the Prosecution submits that the Radio Rwanda transcript dated 24 May 1994 only mentions the Accused's visits to Gabon, Togo, Senegal, Swaziland and Zambia, whereas the Accused had testified about visits to numerous other countries such as Congo, Cameroon, Ivory Coast, Kenya, France, and Italy. The Prosecution adds that the transcript does not mention the dates of the Accused's visits to these countries. Moreover, the Prosecution notes that the Radio Rwanda transcript does not provide details of the Accused's activities in these countries. This information was revealed only when the Accused testified on 29 and 30 November 2010.¹²

14. The Prosecution concludes that the Radio Rwanda transcript is irrelevant and in no way excuses the Defence from its failure to disclose alibi evidence for the period of 23 April to 23 May 1994. Accordingly, the Prosecution asserts that the Chamber was justified in issuing the Oral Decision.¹³

15. The Prosecution counters the Defence assertion that the *Rutaganda* Appeal Judgement¹⁴ supports the latter's contention that its failure to provide timely notice of alibi can only be taken into account in the Chamber's final deliberations. The Prosecution argues that the Defence quoted *Rutaganda* out of context, as this Judgement does not limit the remedies a Trial Chamber may resort to in the case of untimely disclosure of alibi evidence, but merely provided that such untimely disclosure may be taken into account during final deliberations. The Prosecution adds that a Trial Chamber possesses residual powers to determine issues before it in a manner consonant with the spirit of the Tribunal's Statute and the general principles of criminal law, as held by the Appeals Chamber in *Kordić*.¹⁵

⁹ *Id.*, paras. 20-34.

¹⁰ *Id.*, paras. 35-40.

¹¹ Prosecution Response, paras. 6, 22.

¹² *Id.*, paras. 7-8.

¹³ *Id.*, para. 9.

¹⁴ *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003 ("Rutaganda Appeal Judgement"), para. 243.

¹⁵ *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Appeal Regarding Statement of Deceased Witness (AC), 21 July 2000; Prosecution Response, paras. 10-12.

16. The Prosecution refutes the Defence submission that the Chamber's reference to the suspension of the testimonies of three Accused in the *Nyiramasuhuko, et al.* case was inappropriate. The Prosecution points out that the Defence argued that never before had the cross-examination of an Accused been postponed before this Tribunal. The Chamber had properly recalled that the cross-examination of Ntahobali was interrupted. It is irrelevant that this interruption was not in relation to a Prosecution request; the fact remains that the deferral of a cross-examination of an Accused has previously been effected.¹⁶

17. The Prosecution further states that, contrary to the Defence's assertion, the Trial Chamber did not cite the *Galić* Appeal Judgement to support its ability to suspend the cross-examination of an Accused, but to establish that the Chamber possesses a wide scope of discretionary powers to regulate the proceedings, including the testimony of the Accused, under Rule 90(F) of the Rules.¹⁷

18. Lastly, the Prosecution argues that the Accused's right to a fair trial, particularly his right to be tried without undue delay, was not infringed upon as this right is not absolute and must be protected alongside other important principles, such as the equality of arms between the Prosecution and Defence.¹⁸

Defence Reply

19. The Defence refutes the Prosecution's contention that the Defence Motion is now moot. The Defence argues that even if the cross-examination "will appear to be continuous and uninterrupted"¹⁹, the Oral Decision should nevertheless be reconsidered as it was erroneous in law.²⁰

20. The Defence stresses that the reason for the adjournment of the proceedings on 14 December 2010 was completely independent of the Defence Motion. The Defence adds that the prejudice resulting from the Oral Decision persists in spite of the adjournment "because, if this sad event had not occurred, the postponement of the cross-examination of the Accused person would have been effective and would have, hence, unduly delayed his trial."²¹

21. The Defence reiterates that there was no need to disclose alibi information regarding the Accused's whereabouts during the period of 23 April to 23 May 1994 as the Radio Rwanda transcript of 24 May 1994, wherein the Accused was interviewed about his official trips abroad on these dates, is in the Prosecution's custody. The Defence adds that it had no obligation to disclose alibi evidence concerning the periods of 23 April to 23 May 1994 and 23 June to 3 July 1994 as "the Prosecution has deliberately chosen to lead erratic and imprecise evidence during the period running from December 1993 to June 1994"²² except for the dates of 7 and 8 April 1994. For these latter two dates, the Defence filed a notice of alibi covering the period of 6 to 12 April 1994.²³

¹⁶Prosecution Response, paras. 13-15.

¹⁷ *Id.*, paras. 17-19.

¹⁸ *Id.*, paras. 20-21.

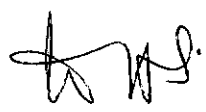
¹⁹ Defence Motion, para. 5.

²⁰ *Id.*, paras. 4-5.

²¹ *Id.*, paras. 6-7.

²² *Id.*, para. 9.

²³ *Id.* paras. 8-9



22. The Defence maintains that the Chamber miscited the *Rutaganda* and *Galić* Appeals Judgements, and that the Chamber's reference to the interruption of the testimonies of three Accused in *Nyiramasuhuko, et al.* is misleading. The Defence points out that even with respect to the accused Ntahobali, whose cross-examination was interrupted, such interruption resulted from the request of counsel of a co-accused, and not from a Prosecution request as in the present case.²⁴

DELIBERATIONS

23. The Prosecution correctly points out that the Defence Motion is now moot as the cross-examination of the Accused had not yet been completed at the time of adjournment on 14 December 2010 and was scheduled to resume on 17 January 2011. The proceedings were, however, adjourned on 17 January 2011,²⁵ and are now scheduled to resume on 31 January 2011.²⁶ Nevertheless, in the interests of justice, the Chamber will proceed to address the legal arguments raised in the Defence Motion.

24. The Chamber recalls the Tribunal's jurisprudence on reconsideration:²⁷

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.²⁸

25. 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

²⁴ *Id.*, paras. 10-14.

²⁵ T. 17 January 2011, p. 2.

²⁶ Order for the Resumption of Trial, 26 January 2011.

²⁷ Decision on Defence Motion for Second Reconsideration of Witness Protective Measures (TC), 15 July 2010, para. 17 ("Decision of 15 July 2010"), citing Decision on Defence Motion for Reconsideration of the Trial Chamber's Oral Decisions Rendered on 23 September 2009 (TC), 7 July 2010 ("Decision of 7 July 2010"), para. 16; 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; *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; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T ("*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 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.

²⁸ *Bagosora et al.* Decision of 15 June 2004, para. 7.

Chamber, resulting in an injustice. The burden rests upon the party seeking reconsideration to demonstrate the existence of sufficiently special circumstances.²⁹

26. By the Defence's own admission, the transcript of the Radio Rwanda audio record dated 24 May 1994 contains an interview with the Accused wherein he recounted having been outside of the country from 23 April to 23 May 1994.³⁰ The Chamber therefore notes that the Defence makes no submission that the Prosecution had knowledge of the Accused's apparently new alibi evidence concerning his travels outside of Rwanda from 23 June to 3 July 1994.

27. It is irrelevant for the Defence to argue that the Prosecution had notice of the Radio Rwanda audio record dated 24 May 1994, as Rule 67(A)(ii)(a) imposes upon the Defence the obligation to not only notify the Prosecution of its intent to enter a defence of alibi, but also to specify the evidence upon which it intends to rely to establish the alibi.³¹ Mere possession of the material by the Prosecution does not constitute notice within the requirements of Rule 67(A)(ii)(a). The Defence is required to provide formal and categorical notice of the alibi and to describe the evidence underlying such alibi with sufficient particularity.

28. The Chamber recalls that the Appeals Chamber in *Rutaganda* upheld the Trial Chamber's ruling that even the Defence's reference in its opening arguments to its intention to call witnesses in support of an alibi of 11 April 1994 did not constitute a clear notice of alibi, when the Notice of Alibi which had been filed only pertained to 12 April 1994.³²

29. The Chamber recalls ruling in its Oral Decision that "the Prosecution's ability to conduct its case, in particular, to cross-examine the accused effectively about his alleged alibis...is an issue distinct from the assessment of alibi evidence which the Chamber will address during final deliberations."³³

30. The Chamber made it clear in its Oral Decision that "the *Galić* appeals judgement confirmed that a Trial Chamber possesses the discretion under Rule 90(F) to regulate an accused's testimony."³⁴ The Chamber holds that this covers situations wherein portions of the Accused's testimony may be postponed when the interests of justice so require, such as in the instant case when Rule 67(A)(ii)(a) has not been complied with.

31. Finally, the Chamber recalls that the Defence, in response to the Oral Prosecution Motion, stated that there has been no previous instance before this Tribunal wherein the cross-examination of an Accused was interrupted.³⁵ In this regard, the Chamber recalls stating in its Oral Decision that:

²⁹ Decision of 15 July 2010, para. 18, citing Decision of 7 July 2010, para. 17; Decision of 31 March 2010, para. 22; *Karemera et al.*, 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.

³⁰ Defence Motion, para. 8.

³¹ *Rutaganda* Appeal Judgement, para. 241.

³² *Id.*, paras. 255-256.

³³ T. 6 December 2010, p. 2.

³⁴ *Id.*, at pp. 2-3.

³⁵ *Id.* (The Defence argued that "[t]he Prosecutor is incapable of quoting any decision where an accused -- an accused's cross-examination has been postponed because, as far as I'm concerned, it has never happened in this Tribunal.").

[c]ontrary to the Defence assertion, there have been instances when exceptional circumstances called for the postponement or interruption of the accused's testimony. For example, the Chamber recalls that in the *Nyiramasuhuko, et al.* case, the testimonies of three accused were suspended for various reasons.³⁶

In the Chamber's view, it matters not which party moves for the interruption of the Accused's testimony, or the reasons therefor, as the fact remains that such interruptions may take place when justified by the circumstances.

32. The Chamber therefore determines that the Defence has failed to establish a reason to believe that the Oral Decision was erroneous or constituted an abuse of power that resulted in an injustice, so as to call for the reconsideration thereof.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha, 27 January 2011



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



[Seal of the Tribunal]



Mparany Rajohnson
Judge

³⁶ *Id.*, at p. 3.