



ICTR-99-54-T  
09-03-2011  
(102347 — 102341)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

102347

Friday

OR: ENG

**TRIAL CHAMBER II**

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

Registrar: Mr. Adama Dieng

Date: 9 March 2011

**The PROSECUTOR**

v.

**Augustin NGIRABATWARE**

Case No. ICTR-99-54-T

Handwritten signature and stamp: 30.03.11 10:00 AM

**DECISION ON PROSECUTION MOTION TO COMPEL THE DEFENCE TO  
REDUCE THE NUMBER OF DEFENCE WITNESSES,  
DISCLOSE THE ORDER OF APPEARANCE OF DEFENCE WITNESSES,  
AND DISCLOSE DEFENCE WITNESS STATEMENTS**

**Office of the Prosecutor**

Mr. Wallace Kapaya  
Mr. Patrick Gabaake  
Ms. Veronic Wright  
Mr. Iskandar Ismail  
Mr. Michael Kalisa  
Ms. Faria Rekkas

**Defence Counsel**

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

Handwritten signature

**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 “Prosecutor’s Extremely Urgent Motion to Compel the Accused to Immediately Disclose Order of Appearance of Defence Witnesses, Reduce Number of Witnesses and Disclose Defence Witness Statements [*made pursuant to Rules 73 (A), 54, 73 ter (B)(iv)(D) of the Rules of Procedure and Evidence, and the inherent criminal jurisdiction of the Trial Chamber*]”, filed confidentially on 30 December 2010 (the “Prosecution Motion”);

**CONSIDERING** the “Defence Response to Prosecution’s Extremely Urgent Motion to Compel the Accused to Immediately Disclose Order of Appearance of Defence Witnesses, Reduce Number of Witnesses and Disclose Defence Witness Statements [*made pursuant to Rules 73 (A), 54, 73 ter (B) (iv) (D) of the Rules of Procedure and Evidence, and the inherent criminal jurisdiction of the Trial Chamber*]”, filed on 4 January 2011 (the “Defence Response”);

**NOTING** that the Prosecution did not reply to the Defence Response;

**CONSIDERING** the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

**NOW DECIDES** the Prosecution Motion pursuant to Rules 54 and 73 of the Rules.

## INTRODUCTION

1. On 31 August 2010, the Prosecution closed its case-in-chief after having called 20 witnesses.<sup>1</sup>
2. On 21 October 2010, the Defence filed its Pre-Defence Brief, and announced its intention to call 96 witnesses.<sup>2</sup>
3. At a Pre-Defence Conference on 25 October 2010, the Chamber urged the Defence to examine its witness list to ensure that it includes only witnesses that are required for the presentation of an adequate and clear Defence.<sup>3</sup>
4. Also at this Conference, the Prosecution requested the order of appearance “for the first 10 or 15 witnesses”, as well as the statements pertaining to listed Defence

<sup>1</sup> T. 31 August 2010, p. 56. Although the Prosecution recalls in its Motion that it called 22 witnesses, this number is incorrect. See Prosecution Motion, para. 1.

<sup>2</sup> Pre-Defence Brief, 21 October 2010, para. 5.

<sup>3</sup> T. 25 October 2010, p. 7.

witnesses. The Defence agreed to provide the requested order of appearance, as well as the signed statements in its possession, the following day.<sup>4</sup>

5. On 26 October 2010, the Defence disclosed the order of appearance of the first 10 witnesses it intended to call, and disclosed the signed statements that it said were in its possession.<sup>5</sup>

6. On 27 October 2010, the Prosecution moved the Chamber to order the Defence to disclose witness statements for all of the listed Defence witnesses.<sup>6</sup> The Prosecution repeated its desire to obtain signed statements for all Defence witnesses in its Motion of 10 November 2010,<sup>7</sup> as well as in its oral submissions on 15 November 2010.<sup>8</sup>

7. In an Oral Decision on 16 November 2010, the Chamber noted the Defence position that it had disclosed all witness statements in its possession, and denied the Prosecution request for disclosure of additional statements.<sup>9</sup>

8. From 16 November through 14 December 2010, and from 3 February through 14 February 2011, the Accused testified in his own Defence.

9. On 14 February 2011, the Chamber directed the Defence to file, before the end of the first week of March, an updated list of the witnesses that it realistically intends to call.<sup>10</sup>

10. On 28 February 2011, the Chamber issued a Scheduling Order that directed the Defence to file an updated list of the witness that it intends to call, and to identify the order of appearance of at least its next 20 witnesses. The Chamber also ordered that the Defence case-in-chief be scheduled to resume on 6 June 2011.<sup>11</sup>

<sup>4</sup> T. 25 October 2010, pp. 8, 22, 24-26.

<sup>5</sup> Augustin Ngirabatware / ICTR No. 99-54-T / Pre Defence Conference – follow up issues, 26 October 2010, pp. 1-2, Annex 1 (“Order of appearance of the 10 first witnesses the Defence intends to call”), Annexes 3-5 (signed statements of three listed Defence witnesses). This document also stated that the signed statement of a fourth possible Defence witness had been disclosed previously. *Id.*, p. 2, citing Additional Submissions to Defence Motion to Declare Written Statements Admissible and for Leave for Certification by a Presiding Officer of These Written Statements (*Article 92 bis of the Rules of Procedure and Evidence*), 8 October 2010, Annex.

<sup>6</sup> Prosecutor’s Extremely Urgent Motion to Compel the Defence to Immediately Disclose Defence Witness Statements and Other Reliefs [made under Rules 73 *ter*, 54, and the inherent criminal jurisdiction of the Tribunal], 27 October 2010 (“Prosecution Motion of 27 October 2010”), para. 16.

<sup>7</sup> Prosecutor’s Extremely Urgent Motion to Postpone the Date Set for Commencement of Defence Case, 10 November 2010 (“Prosecution Motion of 10 November 2010”), paras. 17, 19-20.

<sup>8</sup> T. 15 November 2010, p. 3.

<sup>9</sup> T. 16 November 2010, p. 4. This Oral Decision also addressed other matters. See *id.*, pp. 2-5.

<sup>10</sup> T. 14 February 2011, pp. 114-116.

<sup>11</sup> Scheduling Order Pursuant to Rule 54 of the Rules of Procedure and Evidence (TC), 28 February 2011 (“Scheduling Order of 28 February 2011”), p. 4.



11. On 4 March 2011, the Defence filed an Amended Pre-Defence Brief, which includes what the Defence describes as a “chart of the 58 witnesses the Defence intends to call”.<sup>12</sup>

### SUBMISSIONS OF THE PARTIES

#### *Prosecution Motion*

12. The Prosecution prays the Chamber “to order the Accused to order the Defence to” reduce the number of Defence witnesses by at least 60 percent, immediately disclose the order of appearance of the next 20 witnesses who will testify after the Accused, and immediately disclose signed witness statements of these next 20 witnesses.<sup>13</sup>

13. The Prosecution notes that the Defence intends to call about five times as many witnesses as the Prosecution brought itself. Moreover, most of the anticipated testimony of the listed Defence witnesses will be unnecessary or irrelevant to the charges facing the Accused. The Chamber should order a reduction of the Defence witness list by at least 60 percent.<sup>14</sup>

14. According to the Prosecution, the Defence has stated that it will not necessarily call the 10 witnesses that it had indicated would follow the Accused’s testimony. The Prosecution should not have to prepare for about 100 witnesses without knowing who might be next, and it asks that the Defence file an order of appearance for its next 20 witnesses.<sup>15</sup>

15. Finally, the Prosecution asks the Chamber to order the Defence to disclose signed statements for the next 20 witnesses. The Prosecution notes that only 4 witness statements have been disclosed by the Defence, and that the Defence claims that it does not possess additional statements. But the Defence has clearly spoken with its witnesses already, and should therefore be ordered to file signed statements.<sup>16</sup>

#### *Defence Response*

16. The Defence asks the Chamber to deny the Prosecution Motion. The Accused is facing numerous allegations, and he should be permitted to bring an adequate number of witnesses to refute these charges. The Defence will be able to discuss the number of witnesses, and their order of appearance, only after the Accused finishes his cross-examination. As for the Prosecution request for witness statements, the Defence notes that this matter has already been decided by the Chamber.<sup>17</sup>

<sup>12</sup> Amended Pre-Defence Brief, 4 March 2011, para. 6. The Chamber notes that the chart appears to list 59 witnesses, and that the chart “does not concern Defence witnesses for which the Defence filed two pending Motions . . . to admit their written statements pursuant to Rule 92 bis”. *Id.*, para. 5.

<sup>13</sup> Prosecution Motion, paras. 7, 15, 18-19.

<sup>14</sup> *Id.*, paras. 1-7, 19.

<sup>15</sup> *Id.*, paras. 8-15, 19.

<sup>16</sup> *Id.*, paras. 16-19.

<sup>17</sup> Defence Response, paras. 6-8, 10, 14-16, 18-19.



**DELIBERATIONS**

17. As a preliminary matter, the Chamber notes that the six-page Prosecution Motion contains no citations.<sup>18</sup> The Chamber also recalls that this is not the first time that a Prosecution Motion has omitted citations to sources.<sup>19</sup> In the future, the Chamber expects that the Prosecution will provide appropriate citations to support the assertions and arguments made in its written pleadings.

18. The Prosecution Motion prays for three types of relief: a reduction of the number of Defence witnesses by at least 60 percent, the immediate disclosure of the order of appearance of the next 20 Defence witnesses, and the immediate disclosure of signed witness statements of the next 20 Defence witnesses.<sup>20</sup> The Chamber will address these prayers in turn.

***Reduction of the Number of Defence Witnesses By At Least 60 Percent***

19. The Prosecution asks that the Chamber order the Defence to reduce the number of listed Defence witnesses by a minimum of 60 percent.<sup>21</sup> The Defence submits that it is facing numerous allegations, and states that it had not been permitted to meet with the Accused during his cross-examination to discuss any reduction in the witness list.<sup>22</sup>

20. The Chamber recalls that it has directed the Defence to file, before the end of the first week of March, an updated list of the witnesses that it realistically intends to call, and has reserved the right to make a determination as to the number of witnesses to be called by the Defence.<sup>23</sup>

21. Because the Prosecution has not adequately supported its prayer for relief, and because the Chamber has addressed the issue of the Defence witness list since the filing of the Prosecution Motion, the Chamber denies the Prosecution request for an order to reduce the witness list by 60 percent at this time.

22. The Chamber also notes that the Defence filed an updated list of witnesses on 4 March 2011. As this updated list was not the subject of the Prosecution Motion at issue here, the Chamber has not addressed this list in the determination of this Motion.

***Immediate Disclosure of the Order of Appearance of the Next 20 Defence Witnesses***

23. The Prosecution asks the Chamber to order the Defence to disclose immediately the order of appearance of its next 20 witnesses.<sup>24</sup> The Defence responds that it could not

<sup>18</sup> See, for example, Prosecution Motion, para. 10 (averring without citation that “in the course of trial on 14 December 2010, the Defence stated . . . [that] it will not necessarily call any or all of the 10 disclosed Defence witnesses”).

<sup>19</sup> See Prosecution Motion of 10 November 2010 (six pages in length, excluding the annex).

<sup>20</sup> Prosecution Motion, para. 19.

<sup>21</sup> *Id.*, paras. 7, 19.

<sup>22</sup> Defence Response, paras. 6-10.

<sup>23</sup> Scheduling Order of 28 February 2011, para. 13, citing T. 14 February 2011, pp. 114-116.

<sup>24</sup> Prosecution Motion, paras. 15, 19.

discuss the order of appearance with the Accused until the completion of his cross-examination.<sup>25</sup>

24. The Chamber recalls that, on 28 February 2011, it directed the Defence to identify, no later than 11 March 2011, the order of appearance of at least its next 20 witnesses. The Chamber also ordered that the Defence case-in-chief be scheduled to resume on 6 June 2011.<sup>26</sup>

25. Because the Chamber has already directed the Defence to disclose the order of appearance of its next 20 witnesses, the Chamber dismisses as moot this aspect of the Prosecution Motion.

***Immediate Disclosure of Signed Witness Statements of the Next 20 Witnesses***

26. Finally, the Prosecution prays the Chamber to order the Defence to disclose statements signed by its next 20 witnesses.<sup>27</sup> The Defence notes that the Chamber has already rendered a Decision on this matter.<sup>28</sup>

27. The Chamber recalls that the Prosecution has raised the issue of Defence witness statements on at least three separate occasions,<sup>29</sup> and that the Chamber, after noting the Defence position that it had disclosed all such statements available at that time, denied the Prosecution request for further disclosure on 16 November 2010.<sup>30</sup> The Chamber also recalls its directive that "should such statements become available, they should be disclosed immediately to the other party".<sup>31</sup>

28. The Prosecution has not demonstrated the possible existence of such documents now. Instead, the Prosecution appears to reiterate its request for disclosure of witness statements, focusing on the next 20 Defence witnesses.<sup>32</sup>

29. In the Chamber's view, the Prosecution puts forth no legal argument to support its prayer for relief. Accordingly, the Chamber denies this Prosecution request at this stage.

<sup>25</sup> Defence Response, paras. 14-15.

<sup>26</sup> Scheduling Order of 28 February 2011, p. 4.

<sup>27</sup> Prosecution Motion, paras. 18-19.

<sup>28</sup> Defence Reply, paras. 16, 18, citing T. 16 November 2010, pp. 2-5 (Oral Decision).

<sup>29</sup> Prosecution Motion of 27 October 2010, para. 16; Prosecution Motion of 10 November 2010, paras. 17, 19-20; T. 15 November 2010, p. 3.

<sup>30</sup> T. 16 November 2010, p. 4.

<sup>31</sup> *Id.*

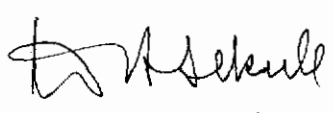
<sup>32</sup> See Prosecution Motion, paras. 16-19.

**FOR THE ABOVE REASONS, THE CHAMBER**

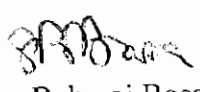
**DISMISSES** as moot the Prosecution Motion as it relates to the order of appearance of upcoming Defence witnesses; and

**DENIES** the Prosecution Motion in all other respects.

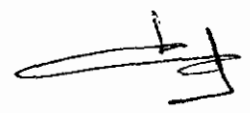
Arusha, 9 March 2011



William H. Sekule  
Presiding Judge



Solomy Balungi Bossa  
Judge



Mparany Rajohnson  
Judge

[Seal of the Tribunal]

