



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: 11 April 2011

**The PROSECUTOR**

v.

**Augustin NGIRABATWARE**

Case No. ICTR-99-54-T

**DECISION ON DEFENCE MOTION FOR RECONSIDERATION OF THE  
DECISION RENDERED ON 7 JULY 2010**

**Office of the Prosecutor**

Mr. Wallace Kapaya  
Ms. Veronic Wright  
Mr. Patrick Gabaake  
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

*twf*

**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 Decision Rendered on 7 July 2010", filed on 20 October 2010 (the "Motion");

**CONSIDERING:**

- (a) The "Prosecutor's Response to the Defence Motion for Reconsideration of the Trial Chamber's Decision rendered on 07 July 2010", filed on 26 October 2010 (the "Response"); and
- (b) The "Defence Reply to the Prosecutor's Response to the Defence Motion for Reconsideration of the Trial Chamber's Decision Rendered on July 7, 2010", filed confidentially on 29 October 2010; and

**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, testified before this Chamber. During the course of his examination-in-chief, the Chamber admitted, over Defence objections, several documents into evidence. These documents included Prosecution Exhibits 2, 3, 4 and 5.<sup>1</sup>
2. In a Decision on 7 July 2010 (the "Impugned Decision"), the Chamber denied a Defence Motion that requested the Chamber to reconsider the admission, and order the withdrawal, of Prosecution Exhibits 2, 3, 4 and 5.<sup>2</sup>
3. On 24 August 2010, the Chamber denied a Defence Motion for certification to appeal the Impugned Decision.<sup>3</sup>

<sup>1</sup> T. 23 September 2009, pp. 20, 24-28, 30, 33, 36-37, 40-41, 44, 46, 51; Prosecution Exhibit 1 (Curriculum Vitae of André Delvaux).

<sup>2</sup> Decision on Defence Motion for Reconsideration of the Trial Chamber's Oral Decisions Rendered on 23 September 2009 (TC), 7 July 2010 ("Impugned Decision"), para. 7, p. 6.

<sup>3</sup> Decision on Defence Motion for Certification to Appeal the Decision on Reconsideration of Oral Decisions Rendered on 23 September 2009 (TC), 24 August 2010, paras. 5-6, p. 7.



4. On 14 October 2010, the Chamber rendered its Decision on Defence Motion for Judgement of Acquittal (the "Decision of 14 October 2010"), in which the Chamber granted the Prosecution request to withdraw various paragraphs of the Indictment, including two paragraphs identified by the Prosecution as relating to the alleged diversion of funds for the purchase of weapons.<sup>4</sup>

## SUBMISSIONS OF THE PARTIES

### *Defence Motion*

5. The Defence requests that the Chamber reconsider the Impugned Decision, and order the withdrawal of Prosecution Exhibits 2, 3, 4 and 5.<sup>5</sup>

6. The Defence submits that the withdrawal of the paragraphs alleging diversion of funds is both a newly discovered fact and a material change in circumstances warranting reconsideration. These allegations were the sole basis for the admission of the Exhibits, and now that the Prosecution has withdrawn the allegations, the Exhibits are no longer relevant.<sup>6</sup>

### *Prosecution Response*

7. The Prosecution disputes that the Decision of 14 October 2010 constitutes a new fact or a change of circumstances warranting reconsideration, as a Decision does not qualify as a "fact". The Prosecution asks that the Chamber dismiss the Defence Motion.<sup>7</sup>

8. The Prosecution submits that the Chamber need not entertain a motion for reconsideration, and that the Chamber must reject such a motion if it raises no new arguments or analysis.<sup>8</sup>

9. According to the Prosecution, it will reference Prosecution Exhibits 2, 3, 4 and 5 in its closing brief and arguments to establish that Prosecution Witness Delvaux is a reliable investigator and credible witness.<sup>9</sup>

### *Defence Reply*

10. The Defence submits that the Decision of 14 October 2010 can qualify as a new "fact". In any event, the Prosecution does not challenge that this Decision is also a

<sup>4</sup> Decision on Defence Motion for Judgement of Acquittal (TC), 14 October 2010, para. 9, p. 12.

<sup>5</sup> Defence Motion, paras. 27, 52.

<sup>6</sup> *Id.*, paras. 26-52. The Chamber notes that the Defence Motion contains a section entitled "Erroneous Decision Warranting Reconsideration of the Trial Chamber's Decision". This section, however, does not appear to present an argument or a prayer for reconsideration under such grounds. Instead, the section ends by requesting reconsideration "on the following grounds", which do not include a reason to believe that the original decision was erroneous. *Id.*, p. 6. Accordingly, the Chamber does not consider that the Defence requests reconsideration on the grounds that the Impugned Decision was erroneous.

<sup>7</sup> Prosecution Response, paras. 5-7, 10.

<sup>8</sup> *Id.*, paras. 3-4.

<sup>9</sup> *Id.*, para. 8.

material change in circumstances, and the Chamber should order the withdrawal of the Exhibits to ensure the Accused is not prejudiced by their continued presence in the record.<sup>10</sup>

### DELIBERATIONS

11. The Chamber recalls the Tribunal's jurisprudence on reconsideration:<sup>11</sup>

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.<sup>12</sup>

12. 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.<sup>13</sup>

13. 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.<sup>14</sup>

<sup>10</sup> Defence Reply, paras. 4-12, 15-24.

<sup>11</sup> 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 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.

<sup>12</sup> *Bagosora et al.* Decision of 15 June 2004, para. 7.

<sup>13</sup> 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.

<sup>14</sup> Impugned Decision, para. 18, citing T. 23 September 2009, pp. 23-24, 28-30, 33, 36-37, 40-41, 43-44, 46, 50-51.

14. The Prosecution has stated that, in its closing brief and arguments, it will refer to these Exhibits in order to establish the credibility and reliability of André Delvaux.<sup>15</sup> The Chamber considers that this may be an appropriate, and relevant, use of the Exhibits.

15. Because these Exhibits were entered into evidence based on a link with Witness Delvaux, the subsequent withdrawal of certain Indictment paragraphs 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.

16. The Chamber, again, recalls the Appeals Chamber's affirmation that "[a] decision to admit a document has no bearing on the weight the Trial Chamber will ultimately accord it."<sup>16</sup>

17. Finally, the Chamber reminds the Parties that they must strictly observe the protective measures in place for potential witnesses, even if the witnesses will no longer be called to testify.<sup>17</sup>

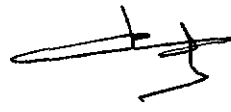
**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIES** the Motion.

Arusha, 11 April 2011



William H. Sekule  
Presiding Judge

Mparany Rajohnson  
Judge

<sup>15</sup> See Prosecution Response, para. 8.

<sup>16</sup> Impugned Decision, para. 21, quoting *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Judgement (AC), 19 May 2010, para. 196.

<sup>17</sup> Decision on Prosecution Motion Requesting a Cooperation Order Directed to France (TC), 30 March 2011, para. 18. See also *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-2007-91-A, Judgement (AC), 15 March 2010, para. 67 ("Potential witnesses who did not eventually testify may face similar risks as those who did, for instance by virtue of their cooperation with either party.").