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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: 4 July 2011

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The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

**DECISION ON PROSECUTION MOTION FOR RECONSIDERATION OF THE
1 APRIL 2011 DECISION ON ADDITIONAL EXCULPATORY EVIDENCE**

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
Ms. Julie Hotte

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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 “Prosecutor’s Extremely Urgent Motion for Reconsideration of the Trial Chamber Decision dated April 1, 2011 (made under the provisions of Rules 73, 54 of the Rules of Procedure and Evidence, and the jurisprudence of the Tribunal)”, filed on 19 April 2011 (the “Prosecution Motion”);

CONSIDERING:

- (a) The “Defence Response to Prosecutor’s Extremely Urgent Motion for Reconsideration of the Trial Chamber Decision dated April 1, 2011”, filed on 26 April 2011 (the “Defence Response”); and
- (b) The “Prosecutor’s Reply to Defence Response to the Prosecutor’s Extremely Urgent Motion for Reconsideration of the Trial Chamber Decision dated April 1, 2011”, filed on 29 April 2011 (the “Prosecution 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 68(A) and 73.

INTRODUCTION

1. On 24 November 2010, the Defence proffered an Oral Motion, praying the Chamber to direct the Prosecution to disclose the audiotape of a Radio Rwanda broadcast of 4 March 1994 (“Oral Defence Motion”).¹
2. On 2 December 2010, the Defence orally requested the disclosure of additional exculpatory and other relevant material based on the legal arguments presented in the Oral Defence Motion. The Chamber directed that the Defence do so by way of written motion.² The Defence filed such a Motion on 13 December 2010, requesting the disclosure of the audio records of the Radio Rwanda broadcasts of 9, 10, 11, 16, and 17 April 1994, and of 24 May 1994 (“Written Defence Motion”).
3. On 1 April 2011, the Chamber issued a Decision granting the Written Defence Motion for Disclosure (“Impugned Decision”). In this Decision, the Chamber recalled that the Prosecution undertook to disclose the requested audio records, but noted that as of the issuance of that Decision, it appeared that no such disclosure had actually been made. The Chamber found the Prosecution to be in violation of its disclosure obligations and ordered the immediate disclosure of the said materials.³

¹ T. 24 November 2010, pp. 2-6, 8-9.

² T. 2 December 2010, pp. 22-24.

³ Decision on Defence Motion for Disclosure of Additional Exculpatory Material and Other Relevant Material pursuant to Defence Oral Motion Presented on 24 November 2010 (TC), 1 April 2011, paras. 22, 30, p. 8.



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4. The Prosecution filed the present Motion on 19 April 2011.

SUBMISSIONS OF THE PARTIES

Prosecution Motion

5. The Prosecution seeks reconsideration of the Impugned Decision on the ground that a new fact has been discovered that was not known to the Chamber at the time it issued the said Decision. The Prosecution submits that on 14 February 2011, it disclosed the audio records in question, and that Defence Co-Counsel acknowledged receipt thereof in writing. The Prosecution argues that it thus did not breach its disclosure obligations under Rule 68(A) and contends that the Chamber's discovery of the said disclosure constitutes a new fact warranting reconsideration of the Impugned Decision. The Prosecution prays that based on the said disclosure on 14 February 2011, the Chamber either reverse its earlier finding that the Prosecution had breached its disclosure obligations under Rule 68(A), or rule that the Written Defence Motion was moot.⁴

Defence Response

6. The Defence states that it informed the Chamber on 14 February 2011 that the Written Defence Motion was about to become moot in light of the Prosecution's undertaking to disclose the records before the end of the cross-examination of the Accused. As the Chamber was aware of the impending disclosure, the Defence argues that this cannot be considered a new fact warranting reconsideration.⁵

7. The Defence points out that while the Prosecution had undertaken to disclose the audio records before the end of the Accused's cross-examination, these were disclosed only in the evening of 14 February 2011, when proceedings had adjourned and the Accused's testimony had been completed. The Accused had already been prejudiced as the Defence was forced to use the transcripts of the Radio Rwanda broadcasts during re-examination.⁶

8. The Defence further argues that as the Chamber concluded that the audio records are *prima facie* exculpatory, the Prosecution was in breach of its Rule 68(A) obligations the moment it was made aware of the potentially exculpatory material in its possession. The Impugned Decision should therefore not be reconsidered.⁷

Prosecution Reply

9. The Prosecution counters that the new fact warranting reconsideration is not the Chamber's knowledge of impending disclosure by the Prosecution but of the actual disclosure, which the Chamber only discovered upon the filing of the Prosecution Motion.

⁴ Prosecution Motion, paras. 3, 9-15.

⁵ Defence Response, paras. 11-15.

⁶ *Id.*, paras. 16-18.

⁷ *Id.*, paras. 20-24.

While admitting that it should have disclosed through the Registry, the Prosecution stresses that it nevertheless disclosed the audio records.⁸

DELIBERATIONS

10. The Chamber recalls the Tribunal's jurisprudence on reconsideration:⁹

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.¹⁰

11. 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.¹¹

12. The Chamber considers that its discovery of the Prosecution's disclosure of the audio records to the Defence constitutes a new fact, and that the Prosecution has demonstrated that the present circumstances are sufficiently special. Therefore, reconsideration of the Impugned Decision is warranted.

⁸ Prosecution Reply, paras. 5-11.

⁹ See, for example, Decision on Prosecution Motion for Reconsideration or Certification to Appeal the Oral Decision Rendered on 9 February 2011 (TC), 10 May 2011 ("Decision of 10 May 2011"), para. 22, citing Decision on Defence Motion for Second Reconsideration of Witness Protective Measures (TC), 15 July 2010, para. 17 ("Decision of 15 July 2010"); 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.

¹⁰ *Bagosora et al.* Decision of 15 June 2004, para. 7.

¹¹ See, for example, Decision of 10 May 2011, para. 24, citing Decision of 15 July 2010, para. 18, Decision of 7 July 2010, para. 17; Decision of 31 March 2010, para. 22; *Karemura 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.

102738

13. Insofar as the Impugned Decision orders the Prosecution to immediately disclose the audio records of certain Radio Rwanda broadcasts, the Chamber substitutes this order with a finding that the Defence request has been rendered moot by the disclosure effected by the Prosecution on 14 February 2011 after the adjournment of proceedings.

14. The Chamber, however, maintains its ruling in the Impugned Decision that the Prosecution had breached its disclosure obligations under Rule 68(A) by not disclosing the audio records "as soon as practicable" to the Defence.

15. The Chamber reminds the Parties that any disclosure *inter partes* should be registered as soon as practicable thereafter with the Registry's Court Management System so as to ensure that the Chamber is notified thereof. Limited judicial resources should not be expended on unnecessary filings such as the present Motion.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution Motion in part, and

DECLARES MOOT the portion of its Impugned Decision as delineated in paragraph 13 above.

Arusha, 4 July 2011



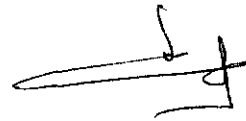
William H. Sekule
Presiding Judge



Solomy Balungi Bossa



[Seal of the Tribunal]



Mparany Rajohnson
Judge