



ICTR-99-54-T
23 - 02 - 2012
(107970 - 107965)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 23 February 2012

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

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**DECISION ON PROSECUTION MOTION TO BE PROVIDED WITH
PASSPORTS THAT HAVE BEEN TENDERED INTO EVIDENCE**

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Rashid Rashid
Mr. Iskandar Ismail

Defence Counsel

Ms. Mylène Dimitri
Mr. Deogratias Sebureze
Ms. Anne-Gaëlle Denier
Mr. Gregg Shankman

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 Requesting for Provision of Augustine [sic] Ngirabatware's and His Wife's Passports Tendered in Evidence", filed confidentially on 23 January 2012 (the "Prosecution Motion");

CONSIDERING the "Defence Response to the Prosecutor's Extremely Urgent Motion Requesting for Provision of Augustin Ngirabatware's and His Wife's Passports Tendered in Evidence", filed confidentially on 26 January 2012 (the "Defence Response");

NOTING that the Prosecution did not file a Reply;

NOW DECIDES the Prosecution Motion pursuant to Rule 73 of the Rules.

INTRODUCTION

1. The Accused commenced his testimony on 16 November 2010. In the course of his testimony, the Accused raised what appeared to be new alibis for the periods of 23 April to 23 May 1994, and 23 June to 7 July 1994.¹
2. On 29 November 2010, the Chamber admitted into evidence Defence Exhibit 112, which was described as a Rwandan diplomatic passport of the Accused.²
3. On 30 November 2010, the Chamber admitted into evidence Defence Exhibits 113 and 114, which were described respectively as a Rwandan diplomatic passport of the Accused, and as a certified copy of his wife's passport. The Prosecution subsequently raised the issue of timely notice of alibi.³
4. On 6 December 2010, the Chamber found that the Defence failed to give timely notice to the Prosecution of what appears to be new alibi evidence, and granted the Prosecution request to defer its cross-examination on related matters until 17 January 2011.⁴

¹ See Decision on Prosecution Motion for Leave to Present Rebuttal Evidence (TC), 14 November 2011 ("Decision of 14 November 2011"), para. 6.

² T. 29 November 2010, pp. 69-72.

³ T. 30 November 2010, pp. 11-13, 22, 29-34, 36-41.

⁴ T. 6 December 2010, pp. 1-4. See also Decision of 14 November 2011, para. 6.

5. On 6 December 2010, and on 9, 10, 11 and 14 February 2011, the Prosecution questioned the Accused on its position that his passports, visas and stamps had been falsified.⁵
6. On 14 February 2011, the Chamber admitted into evidence Prosecution Exhibit 44, described as an ordinary passport of the Accused.⁶ The Accused completed his testimony on this day.⁷
7. On 4 October 2011, the Prosecution filed a Motion seeking eight witnesses to rebut the new alibi periods disclosed during the Accused's testimony.⁸ The Chamber granted this Motion on 11 November 2011.⁹
8. On 23 January 2012, the Prosecution filed the present Motion.

SUBMISSIONS OF THE PARTIES

Prosecution Motion

9. The Prosecution requests the Chamber to furnish it with four exhibits—Defence Exhibits 112, 113 and 114, and Prosecution Exhibit 44—so that the Prosecution may transmit them to “a forensic expert”. The Prosecution wishes for this expert to investigate “the authenticity and genuineness of some of the entries /stamps impressions in the passports”, and to then prepare a report under Rule 94bis of the Rules.¹⁰
10. The Prosecution submits that it may take “the expert” up to a month to examine the passports, once he or she receives it. The Prosecution proposes to tender the expert's findings into evidence, pursuant to Rule 94bis concerning expert testimony. The Prosecution further submits that this process will not delay the proceedings.¹¹
11. According to the Prosecution, the Defence's non-disclosure of the new alibis and the relevant passports until the Accused's testimony left the Prosecution with “no reasonable or sufficient time to investigate the genuineness and/or authenticity of the

⁵ T. 6 December 2010, p. 42; T. 9 February 2011, pp. 59-61; T. 10 February 2011, pp. 55, 57, 60, 62; T. 11 February 2011, pp. 11, 14; T. 14 February 2011, p. 10. See also Prosecution Exhibits 37A, 37B, 37C, 40A and 40B.

⁶ T. 14 February 2011, pp. 2-6. See also Prosecution Exhibit 44.

⁷ T. 14 February 2011, p. 114.

⁸ Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence Discovered in the Course of Presentation of the Defence Case, 4 October 2011 (“Prosecution Motion of 4 October 2011”), paras. 1, 43.

⁹ Decision of 14 November 2011, p. 14.

¹⁰ Prosecution Motion, paras. 1, 7, 10, 14.

¹¹ *Id.*, paras. 9-13.

passports and obtain evidence to rebut them before now".¹² Because of this timing, moreover, the Prosecution request for the passports will not prejudice the Accused.¹³

Defence Response

12. The Defence asks that the Prosecution Motion be dismissed in its entirety.¹⁴
13. The Defence submits that the Prosecution does not provide any details concerning the alleged expert, or how or where the examination would take place. In any event, the Defence considers that any examination would require that a Defence representative be present at all times, in order to ensure that the passports are not tampered with.¹⁵
14. Furthermore, the Defence submits that the Motion is untimely, as the Prosecution was aware of the alibis before the Defence case commenced. According to the Defence, the Prosecution has not shown any good cause for its negligence in failing to raise this matter until now. Any prejudice arising out of the alleged late notice of the Accused's alibi has been already redressed by the admission of Prosecution rebuttal witnesses.¹⁶
15. Finally, the Defence states that any expert report could be admitted into evidence only if an expert is added to the Prosecution rebuttal witness list. Such a process, however, requires many weeks, and would unduly delay the proceedings. Moreover, if the Prosecution Motion is granted, the Defence may wish to call its own expert witness in rejoinder evidence to counter any findings made by the Prosecution's expert.¹⁷

DELIBERATIONS

16. The Prosecution Motion seeks the passports so that it may transmit them to "a forensic expert" for examination and preparation of a report under Rule 94bis of the Rules.¹⁸ In its Response, the Defence objects to this request, in part, on the grounds that the Prosecution did not identify the alleged expert, the alleged expert's qualifications, and how and where the proposed examination would take place. The Defence also submits that any examination could only be done in the presence of a member of the Defence and of the Registry, in order to avoid any risk of tampering with the disputed documents.¹⁹ The Prosecution did not file a Reply.
17. The Chamber considers that the Prosecution has not provided sufficient information concerning the identity and qualifications of the proposed expert. The

¹² *Id.*, para. 5.

¹³ *Id.*, paras. 5-6, 8, 13.

¹⁴ Defence Response, para. 61.

¹⁵ See *id.*, paras. 50-59. The Defence also challenges the precedents relied upon by the Prosecution in its Motion. See *id.*, paras. 43-49.

¹⁶ See *id.*, paras. 21-42.

¹⁷ See *id.*, paras. 7-20, 60.

¹⁸ Prosecution Motion, paras. 8, 14.

¹⁹ See Defence Response, paras. 50-55, 59. The Chamber notes that the Defence also raised these objections in its correspondence of 16 December 2011. See Prosecution Motion, Annex B.

Prosecution Motion also lacks any specificity concerning the location to where it wishes to send the exhibits, and the precise amount of time the exhibits will be outside of the custody of the Tribunal. Moreover, although the Prosecution wishes for "some entries and stamp impressions" to be examined,²⁰ it does not particularize the ones upon which it seeks examination by the proposed expert. Nor has the Prosecution addressed how the forensic examination would be conducted or what safeguards would need to be taken during any examination.

18. Additionally, the Prosecution has waited a significant amount of time in asking for the relief it now seeks. The four exhibits to which the Prosecution seeks access have been in evidence since either November 2010²¹ or February 2011.²² The Prosecution first raised the issue of falsification in December 2010, and continued to address it during the cross-examination of the Accused on various days in February 2011.²³ Despite moving the Chamber in October 2011 for additional evidence to rebut the Accused's alibis,²⁴ the Prosecution only filed the present Motion in January 2012.²⁵

19. The Prosecution attempts to explain this delay with its statement that "[i]n the circumstances, the Prosecution had no reasonable or sufficient time to investigate the genuineness and/or authenticity of the passports and obtain evidence to rebut them before now".²⁶ In the Chamber's view, this assertion lacks both precision and merit, and does not justify the prolonged delay in this matter. The Chamber considers that this 13-month delay has been inordinate in length, especially given the late stage of the proceedings.

20. Taking into account all the above circumstances, the Chamber does not consider it appropriate to grant the Prosecution Motion at this point in time.

²⁰ Prosecution Motion, para. 4. See also *id.*, para. 10.

²¹ See Defence Exhibits 112, 113 and 114.

²² See Prosecution Exhibit 44.

²³ See, for example, T. 6 December 2010, p. 42; T. 9 February 2011, 59-61; T. 10 February 2011, pp. 55, 57, 60, 62; T. 11 February 2011, pp. 11, 14; T. 14 February 2011, p. 10. The Chamber provides these citations as examples, and does not imply that these are necessarily the only times when the Prosecution has raised the issue of falsification of the passports.

²⁴ Prosecution Motion of 4 October 2011.

²⁵ In this regard, the Chamber recalls that the *Bagosora et al.* Trial Chamber denied a motion to recall a witness to put documents to him, reasoning that "the motion came too late, as the evidentiary phase of the trial had been [nearly] completed" and that the moving party "had the possibility of making the motion earlier, immediately upon discovering or receiving the documents, and failed to do so". *Bagosora et al.*, Decision on Nsengiyumva Motion to Admit Documents as Exhibits (TC), 26 February 2007, para. 9. This position has since been upheld by the Appeals Chamber. See *Théoneste Bagosora & Anatole Nsengiyumva v. The Prosecutor*, Case No. ICTR-98-41-A, Judgement (AC), 14 December 2011, para. 71 (finding that the appellant had not demonstrated an error by the Trial Chamber on this point).

²⁶ Prosecution Motion, para. 5.

107965


FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Prosecution Motion.

Arusha, 23 February 2012



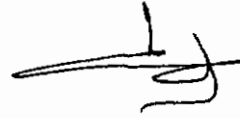
William H. Sekule
Presiding Judge



Solon Barasa Bossa



[Seal of the Tribunal]



Mparany Rajohnson
Judge