



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

111577
USA

OR: ENG

TRIAL CHAMBER II

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

ICTR-99-54-T
23-07-2012
(111577-111540)

Registrar: Mr. Adama Dieng

Date: 23 July 2012

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

2012 JUL 23 P 1:49
ICTR

DECISION ON THE SECOND DEFENCE MOTION FOR LEAVE TO CALL
REJOINDER WITNESSES

Office of the Prosecutor

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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 “Defence Extremely Urgent Motion for Leave to Call Rejoinder Witnesses”, filed confidentially on 6 July 2012 (the “Defence Motion”);

CONSIDERING:

- (a) The “Prosecutor’s Reply to Defence Extremely Urgent Motion for Leave to Call Rejoinder Witnesses”, filed confidentially on 11 July 2012 (the “Prosecution Response”); and
- (b) The “Defence Reply to Prosecution Response to Defence Extremely Urgent Motion for Leave to Call Rejoinder Witnesses”, filed confidentially on 13 July 2012 (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 85 of the Rules.

INTRODUCTION

1. The Prosecution commenced its case-in-rebuttal on 6 March 2012 and closed it on 2 April 2012. The Prosecution indicated that it would file a motion to re-open its case if either of the two remaining witnesses, Witnesses PRWIII or PRWVI, became available to testify.¹
2. On 18 May 2012, the Chamber rendered a Decision granting the Prosecution request to reopen its case-in-rebuttal in order to hear the testimony of Witness PRWIII.²
3. In the Oral Decision of 7 June 2012, the Chamber ruled that the Defence would be given until 2 July 2012 to conduct further investigations on the recently disclosed stamps tendered into evidence during Witness PRWIII’s testimony.³ The Defence would then have the opportunity to conduct a supplementary cross-examination of this witness on the particular aspect of these stamps.
4. The Defence’s supplementary cross-examination of Witness PRWIII commenced on 3 July 2012. Witness PRWIII completed his testimony on this day, and the Prosecution case-in-rebuttal was closed.
5. On 6 July 2012, the Defence filed the present motion.

¹ T. 2 April 2012, pp. 3-8.

² Decision on Prosecution Motion for Leave to Reopen Prosecution Rebuttal Case (TC), 18 May 2012, p. 7.

³ T. 7 June 2012, pp. 4-5.

SUBMISSIONS OF THE PARTIES

Defence Motion

6. The Defence Motion seeks to call two witnesses in rejoinder to refute allegedly new evidence arising from the testimony of Witness PRWIII.⁴

DRWI

7. The Defence asserts that it received late notice that Witness PRWIII would bring in court and testify about the stamps in use from 2000 to 2005, that the witness would say that the stamp in the Accused's passport was from this period, and the fact that the witness would compare those stamps with the one in the Accused passport. The Defence maintains that it did not receive disclosure of the stamps and stamp impressions until after the close of its case-in-chief, and clarification is required concerning Witness PRWIII's testimony about the stamp impressions in Exhibit D209.⁵ The Defence furthermore claims that a number of completely new issues arose from the Prosecution's case-in-rebuttal, including: the use of visa stickers and the Nigerian directive standardizing their use across diplomatic missions; the exemption of visas requirements for Senegalese citizens as members of ECOWAS; the special waiver for non-residents of Senegal; and the procedure for obtaining diplomatic and courtesy visas.⁶ The Defence also takes issue with the fact that Witness PRWIII was allowed to provide his opinions about passport stamps and visas, despite being a lay witness and not an expert.⁷

8. DRWI, who is identified as a qualified expert in documentary and passport fraud, is sought by the Defence to provide an expert opinion that will contradict the assertions made by Witness PRWIII. If called, he will testify about the characteristics and features of the disputed Nigerian visa in the Accused's passport in comparison with the visa stamp samples admitted during Witness PRWIII's testimony. DRWI will use advanced forensic equipment and techniques and provide a professional opinion as to whether these stamps are genuine or post-dated.⁸ The Defence anticipates that the examination-in-chief of DRWI will last two hours, notes his prompt availability for live testimony, and submits that the expert's investigation can be concluded and a written report submitted within 15 days.⁹

DRWII

9. The Defence Motion identifies several instances in Witness PRWIII's written statement, examination-in-chief, cross-examination, and supplementary cross-examination where he testified that he met with Defence Lead Counsel. The Defence also identifies several occasions where the witness alleged that fraud or espionage were used by a member of the Defence team purporting to be Lead Counsel.¹⁰ In the Defence's opinion, the allegations about

⁴ Defence Motion, paras. 19-20, p. 26.

⁵ *Id.*, paras. 21-25, 36-42, 44-49.

⁶ *Id.*, paras. 53-63.

⁷ *Id.*, paras. 32-35.

⁸ *Id.*, paras. 68-72.

⁹ *Id.*, paras. 73, 77-78.

¹⁰ *Id.*, paras. 79-86, 88-92.

the Defence visit to the embassy arising from Witness PRVIII's testimony were unforeseeable and constitute a new matter that could not have been reasonably anticipated.¹¹

10. DRVII is sought by the Defence to refute allegations by Witness PRVIII concerning the Defence team's visits to the Nigerian Embassy on 15 and 16 March 2011. The Defence submits that DRVII's testimony will not only contradict the allegations made by Witness PRVIII and address some of the accusations of fraud, but will also challenge the overall credibility of this witness.¹²

Prosecution Response

11. The Prosecution notes, as a preliminary matter, that the law on rejoinder does not allow the presentation of evidence in rejoinder to address collateral issues, and thus the scope of allowable rejoinder testimony is circumscribed.¹³

DRWI

12. The Prosecution argues that the calling of DRWI is *res judicata*, as the Chamber already rejected his testimony in rejoinder because the Defence ought to have addressed all questions concerning the authenticity of stamps appearing in the Accused's passports during its case-in-chief.¹⁴

13. Nevertheless, the Prosecution submits that the contentious issues concerning the validity of the Accused's passport were raised over 18 months ago, citing the cross-examination of the Accused in February 2011 and thereby contradicting the complaints of the Defence concerning notice.¹⁵

14. The Prosecution also argues that the Chamber does not require expert testimony to determine whether the stamps appearing in the Accused's passport are those that were in use by the Nigerian Embassy in Dakar in 1994. The Prosecution further submits that DRWI's credentials do not indicate any specialized knowledge of the administrative practices used by Nigerian missions in 1994, and that since the proposed rejoinder witness has not yet conducted any investigations, the Defence's assertions about the expected testimony are speculative. In the alternative, the Prosecution argues that the Defence should not be allowed to call DRWI because the procedures for calling expert witnesses set out in Rule 94(A)*bis* have been contravened.¹⁶

DRVII

15. With respect to DRVII, the Prosecution submits that the anticipated testimony of this proposed witness is collateral because it concerns the members of the Defence team visiting the Nigerian Embassy rather than the Accused's alibi. Additionally, the Prosecution asserts that

¹¹ *Id.*, paras. 93-94, 96.

¹² *Id.*, paras. 101-102, 104, 107.

¹³ *Id.*, paras. 3-6.

¹⁴ Prosecution Response, paras. 7-9.

¹⁵ *Id.*, paras. 12-17.

¹⁶ *Id.*, paras. 20-24.

the proposed testimony of DRWII does not fall within the confines of what is allowable in challenging the credibility of a rebuttal witness.¹⁷

16. Finally, the Prosecution is of the opinion that, even if the proposed testimony is deemed sufficiently important to warrant rejoinder testimony, the Chamber possesses enough information to make an assessment concerning the identity of persons visiting the embassy, any fraud that may have occurred in the visitor's register, and the process by which visitors clear security at the Nigerian Embassy.¹⁸

17. The Prosecution accordingly seeks that the Defence Motion be dismissed in its entirety. Should the Defence Motion be granted, the Prosecution prays that the Defence be ordered to comply with Rule 94*bis* concerning the calling of DRWI, and that Prosecution be given time to investigate the movements of the Defence.¹⁹

Defence Reply

18. The Defence first objects to the Prosecutor's contention about the law on rejoinder evidence, arguing that the 'collateral issue' standard is not required by Rule 85 or the jurisprudence of the *ad hoc* Tribunals. Nevertheless, the Defence argues that the rejoinder evidence proposed is not collateral. The Defence similarly rejects the argument that rejoinder evidence is limited to the issue of alibi.²⁰

DRWI

19. The Defence contends that the scope of DRWI's testimony is restricted to the new and unforeseeable issues raised by Witness PRVIII, and thus is not *res judicata*.²¹

20. The Defence further reiterates its arguments concerning notice with respect to the stamp comparison conducted by Witness PRVIII, and the failure of the Prosecution to disclose the stamps and stamp samples to enable a scientific examination.²²

21. In reply to the Prosecution's suggestion that the issue of the stamps was raised in February 2011, the Defence maintains that these were broad and unsubstantiated allegations of forgery. The Defence insists upon its diligence in conducting investigations as it received information about the nature of the Prosecution's allegations of visa stamp irregularities.²³

22. The Defence further contends that DRWI maintains the requisite expertise to conduct a scientific examination on the stamps and stamp impressions to determine their date of use and authenticity. In the opinion of the Defence, the fact that the proposed witness has not yet

¹⁷ *Id.*, paras. 28-30.

¹⁸ *Id.*, paras. 31-32.

¹⁹ *Id.*, para. 33.

²⁰ Defence Reply, paras. 4, 25.

²¹ *Id.*, paras. 6-9, 19.

²² *Id.*, paras. 10-13.

²³ *Id.*, paras. 14-19.

reached any conclusions does not militate against his testimony, but rather complies precisely with the role of an expert witness.²⁴

23. Finally, the Defence notes that the Prosecution failed to make any arguments on the other new and unforeseeable issues raised in the Defence Motion, and similarly fails to explain how the procedures set out in Rule 94(a)*bis* have been violated.²⁵

DRWII

24. The Defence reiterates that the anticipated testimony of DRWII is crucial to assessing the credibility of Witness PRVIII, and that even if the Defence had the opportunity to address the issue of credibility upon cross-examination, it should nonetheless be afforded an opportunity to bring evidence to challenge the new and unforeseeable issues for the record.²⁶

DELIBERATIONS

The Law on Rejoinder Evidence

25. Rule 85 indicates the sequence by which evidence is to be presented by the Parties during trial, unless otherwise directed by the Chamber in the interests of justice. Under certain circumstances the Defence may be allowed by the Chamber to present rejoinder evidence after the completion of the Prosecution case-in-rebuttal.

26. The purpose of rejoinder evidence is to afford the Defence an opportunity to refute evidence of a new matter arising directly out of the Prosecution's rebuttal case, where that new matter is important to the case and could not have been reasonably anticipated by the Defence.²⁷

27. The Chamber considers that collateral issues fall outside the scope of what is permissible for rejoinder evidence. By definition, collateral issues do not meet the threshold of "importance to the case" that is evident in the Tribunal's practice. Moreover, as was stated unequivocally by the *Semanza* Trial Chamber, "[r]ebuttal is not permitted to merely confirm or reinforce the Prosecutor's case, or to deal with collateral issues", and that the "circumstances in which the common law permits rejoinder are even more limited".²⁸

28. In this context, the Chamber recalls that the alibi defence for 23 April to 23 May 1994 first arose during the Defence case-in-chief and without prior notice to the Prosecution. It is

²⁴ *Id.*, paras. 20-22.

²⁵ *Id.*, paras. 23-24.

²⁶ *Id.*, paras. 29-31.

²⁷ See *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Decision on Urgent Defence Motion for Leave to Call Evidence in Rejoinder (TC), 13 September 2011, para. 6; *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Decision on Defence Motion for Leave to Call Rejoinder Witnesses (TC), 30 April 2002 ("*Semanza* Decision").

²⁸ *Semanza Decision*, paras. 5-6 (emphasis added).

for this reason that the Chamber allowed the Prosecution to bring rebuttal witnesses with regard to the alibi concerning this specific period.²⁹

DRWI

29. The Chamber recalls that during the Accused's cross-examination in February 2011, the Defence was put on notice that the Nigerian stamp in Ngirabatware's passport would be challenged, including that this stamp only came into use after 1994.³⁰ The challenges to this stamp through rebuttal evidence therefore could have been reasonably anticipated by the Defence. As a result, the Chamber is of the view that the proposed scope of DRWI's testimony with regard to the examination of the stamp in the Accused's passport and comparison with stamps impressions admitted during Witness PRWIII's testimony does not meet the specific requirements for rejoinder evidence in this case. The Defence could have sought to alter its witness list prior to the close of its case-in-chief should a forensic expert have been necessary to support the authenticity of the Nigerian stamp appearing in the Accused's passports.³¹ Moreover, the Chamber further notes that the central issue is whether the stamp appearing in the Accused's passport was in use in 1994.

30. The Chamber further notes that the Defence Motion takes issue with a number of matters arising from Witness PRWIII's testimony, including the use of visa stickers and the Nigerian directive standardizing their use across diplomatic missions; the exemption of visas requirements for ECOWAS countries; and the procedure for obtaining diplomatic and courtesy visas. The Chamber finds, in the circumstances, that the Defence does not demonstrate why it is necessary to have the evidence of an expert concerning these policies. In any event, these matters are not central to the Accused's alibi or to the Nigerian stamp appearing in the Accused's passport.

31. Accordingly, the Chamber denies the Defence Motion insofar as it seeks to call DRWI to testify in rejoinder.

DRWII

32. The Chamber finds that the anticipated testimony of proposed rejoinder witness DRWII to be collateral to the issues raised in the Prosecution's case-in-rebuttal; namely, the Accused's alibi defence for the period of 23 April to 23 May 1994. The Chamber further notes that this matter was extensively addressed during the cross-examination of Witness PRWIII. Therefore, the Chamber does not consider it in the interests of justice to permit rejoinder evidence to refute this particular aspect of Witness PRWIII's testimony.

²⁹ See, for example, Decision on Prosecution Motion for Leave to Present Rebuttal Evidence (TC), 14 November 2011, paras. 6, 39, 41-43, 53, 56.

³⁰ T. 10 February 2011 (Ngirabatware), pp. 54-62; Prosecution Exhibit 40 (letter from the Nigerian authorities stating: "...the Visa in the Passport bears a post-dated stamp as opposed to what was obtainable in the year 1994...[and] [i]n view of the above the Embassy strongly believes that it did not receive a request, nor grant the said Visa to Mr NGIRABATWARE's (sic) in 1994.").

³¹ See, for example, Decision on Defence Motion for Leave to Present Rejoinder Evidence (TC), 18 May 2012, paras. 26-28.

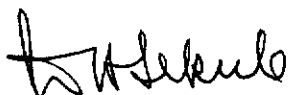
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33. Accordingly, the Chamber denies the Defence Motion insofar as it seeks to call DRWII to testify in rejoinder.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion in its entirety.

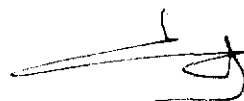
Arusha, 23 July 2012



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

