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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: 5 March 2012

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL RECORDS ARCHIVES
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**DECISION ON DEFENCE MOTION TO POSTPONE THE HEARING OF
REBUTTAL EVIDENCE**

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Rashid Rashid
Mr. Iskandar Ismail
Ms. Faria Rekkas

Defence Counsel

Ms. Mylène Dimitri
Mr. Claver Sindayigaya
Ms. Anne-Gaëlle Denier
Mr. Deogratias Sebureze
Mr. Gregg Shankmann

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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 “Defence Extremely Urgent Motion for Leave to Postpone the Hearing of Rebuttal Evidence”, filed confidentially on 24 February 2012 (the “Defence Motion”);

CONSIDERING:

- (a) the “Prosecution Response to Defence Extremely Urgent Motion for Leave to Postpone the Hearing of Rebuttal Evidence”, filed on 28 February 2012 (the “Prosecution Response”); and
- (b) the “Defence Reply to Prosecution’s Response to Defence Extremely Urgent Motion for Leave to Postpone the Hearing of Rebuttal Evidence”, filed confidentially on 1 March 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 Articles 19 and 20 of the Statute, and Rules 54 and 66 of the Rules.

INTRODUCTION

1. On 4 October 2011, the Prosecution moved for leave to present eight rebuttal witnesses, who it designated as Witnesses PRWI, PRWII, PRWIII, PRWIV, PRWV, PRWVI, PRWVII and PRWVIII. Attached to this motion were statements that appeared to originate from the first six of these witnesses, including Witnesses PRWI and PRWIII.¹
2. On 14 November 2011, the Chamber granted the Prosecution leave to present the eight identified rebuttal witnesses immediately after the close of the Defence case.²
3. On 14 December 2011, and on 2 and 10 February 2012, the Prosecution disclosed the identifying information and statements of these rebuttal witnesses, except for

¹ 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”), para. 43, Annex (Documents 1, 2, 5, 7, 8, 10, and 12 concerning Witnesses PRWI, PRWII, PRWIII, PRWIV, PRWV and PRWVI).

² Decision on Prosecution Motion for Leave to Present Rebuttal Evidence (TC), 14 November 2011 (“Decision of 14 November 2011”), p. 14.



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Witnesses PRWI and PRWIII.³ On 20 February 2012, the Defence received further disclosure pertaining to Witness PRWI.⁴

4. The Defence closed its case on 22 February 2012.⁵ On 24 February 2012, the Chamber ordered, without prejudice to the present Defence Motion and unless otherwise directed, that the Prosecution rebuttal evidence commence on 5 March 2012.⁶

5. On 28 February 2012, the Prosecution disclosed what it referred to as documents obtained by Witness PRWI.⁷

SUBMISSIONS

Defence Motion

5. The Defence seeks an order for immediate disclosure of certain documents by the Prosecution, a postponement of the rebuttal evidence until at least 60 days after the Prosecution has disclosed all statements of its rebuttal witnesses, and for the Chamber to hear the rebuttal evidence in a single trial session.⁸

6. The Defence submits that the Prosecution has breached Rule 66(A)(ii) by failing to disclose identifying information and statements of the eight rebuttal witnesses. This has prevented the Defence from preparing effectively for cross-examination, and has thereby prejudiced the Accused. In the Defence's view, Rule 66(A)(ii) should be read to require 60 days between disclosure of these statements and the testimony of the rebuttal witnesses.⁹

7. According to the Defence, it has not received any written statement nor any particulars from the Prosecution about Witness PRWIII. As for documents pertaining to Witness PRWI, the Defence submits that they are voluminous and should have been

³ Identification of Prosecution Rebuttal Witnesses: Filing of two (2) Rebuttal Witnesses' Particulars, 14 December 2011 (providing identification particulars of Witnesses PRWI and PRWII); Partial Disclosure of Prosecution Rebuttal Witnesses, 2 February 2012 (providing identification particulars of Witnesses PRWI, PRWII, PRWV and PRWVI, and statements of Witnesses PRWII, PRWV and PRWVI); Disclosure of Prosecution Rebuttal Witnesses (Continued), 10 February 2012 (providing identification particulars of Witnesses PRWIV, PRWVII and PRWVIII, and statements of Witnesses PRWIV, PRWVII and PRWVIII).

⁴ Disclosure pertaining to PRWI [redacted], 17 February 2012 ("Prosecution Disclosure received on 20 February 2012"). Because the Prosecution filed its final disclosure after working hours on Friday, 17 February 2012, the Defence received this disclosure on Monday, 20 February 2012.

⁵ T. 22 February 2012, pp. 28-29.

⁶ T. 24 February 2012, p. 8.

⁷ Response to Defence request for documents obtained by witness PRWI during his mission abroad, 28 February 2012.

⁸ Defence Motion, para. 82. In the alternative, the Defence seeks the postponement of the rebuttal witnesses testimony, in whole or in part, for specific periods of time. See *id.*, paras. 76, 82.

⁹ *Id.*, paras. 32, 37-47, 49-53, 75. See also *id.*, paras. 33-36, 48-49, discussing *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004 ("*Niyitegeka Appeals Judgement*"); *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Decision on Extremely Urgent Motion for Reconsideration of Trial Chamber 7 June 2011 Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence (TC), 15 June 2011 ("*Nizeyimana Trial Decision*").

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disclosed sooner. Similarly, the Defence needs to investigate newly disclosed documents, which will be a time-consuming endeavour.¹⁰

8. The Defence also asks, in relation to the documents listed in its previous correspondence with the Prosecution, that the Chamber order the Prosecution to disclose these documents.¹¹

9. Finally, the Defence asks that the Chamber hear all the rebuttal witnesses at the same time, for the sake of judicial economy and conservation of resources.¹²

Prosecution Response

10. The Prosecution acknowledges that it filed its Response late, but submits that hearing the Prosecution's view on the Defence Motion would be in the interest of justice. The Prosecution also asks the Chamber to dismiss the Defence Motion.¹³

11. The Prosecution submits that the calling of rebuttal witnesses is an exceptional circumstance, and that it should not be confined strictly to the 60-day rule provided for in Rule 66 (A)(ii). Instead, the *important* consideration is whether the Defence has sufficient time to prepare itself. In this regard, the Prosecution contends that the Defence has enjoyed enough time for adequate preparation.¹⁴

12. The Prosecution confirms that Witnesses PRWI and PRWVIII are ready to testify, and that Witnesses PRWIII and PRWIV's testimony depends on the necessary arrangements being made by WVSS. As for the Defence's arguments on timing, the Prosecution implies that some have become moot, and further states that the Chamber is best placed to determine matters relating to scheduling of the case.¹⁵

Defence Reply

13. The Defence asks the Chamber to disregard the Prosecution Response due to its late filing which is not supported with *good cause*, and which has *prejudiced* the Defence by forcing it to reply early so that the matter is resolved in time.¹⁶

14. The Defence also submits that the present circumstances, in which the Prosecution has failed to provide any update on the status of Witnesses PRWIII and

¹⁰ Defence Motion, paras. 37, 55-74; Decision on Prosecution Motion of 24 June 2010 for Leave to Vary Its Witness List (TC), 15 July 2010 ("Decision of 15 July 2010").

¹¹ See *id.*, paras. 59 (asking that the Chamber "urge" this disclosure), 82 (asking the Chamber to "order" this disclosure), referring to Request of Disclosure of documents obtained by witness PRWI during his missions in Brussels and Dakar pursuant to Rules 66(A)(ii), 67(D), and 68, dated 22 February 2012, filed on 23 February 2012. See also Defence Motion, paras. 55-58.

¹² See Defence Motion, paras. 23-31, 54, 78-79, 81. See also *id.*, paras. 77, 80.

¹³ Prosecution Response, paras. 1-8, 26.

¹⁴ *Id.*, paras. 19-20, 22-24, 25 (pp. 10-11), 25 (p. 11). See also *id.*, paras. 14-18, 21.

¹⁵ *Id.*, paras. 9-13.

¹⁶ Defence Reply, paras. 5-17, 82-83. See also *id.*, para. 18. The Defence also asks that the Defence Motion be granted, and requests an order staying the start of rebuttal evidence until the final determination of this Motion. *Id.*, paras. 80-83.

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PRWIV, should lead the Chamber to postpone the current trial session. It would be impractical to hear their testimony separately from other rebuttal witnesses. In the Defence's view, a piecemeal presentation of rebuttal evidence in three different trial sessions would not be in the interests of justice.¹⁷

15. In any event, the scheduling of the case is a separate matter from the minimum requirements of Rule 66 (A)(ii), which should be understood to require 60 days. The Prosecution has breached this Rule by failing to disclose identifying particulars and statements of the rebuttal witnesses, and continues to violate this Rule's provisions. Moreover, the Prosecution has flooded the Defence with last minute and voluminous disclosures. The only way to remedy these issues is by postponing the start of rebuttal evidence. Indeed, in the Defence's submission, permitting a rebuttal witness to testify without prior disclosure of his or her witness statement would be a clear breach of the Accused's fair trial rights.¹⁸

DELIBERATIONS

16. As a preliminary matter, the Chamber notes that the Prosecution filed its Response late. Although the Prosecution explains its late filing by claiming confusion,¹⁹ the Chamber considers that this position lacks merit, and the Chamber directs the Prosecution to pay closer attention to the time frames in the future.²⁰ Nonetheless, the Chamber considers it to be in the interests of justice to take into account the Prosecution Response, as well as the subsequent Defence Reply.

17. Pursuant to Rule 54, the Chamber "may issue such orders ... as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial".

18. Rule 66 (A)(ii) provides that:

The Prosecutor shall disclose to the Defence ... [n]o later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the Defence within a prescribed time.

19. Rule 66 (A)(ii) does not provide a clear definition of the term "statement". While certain types of documents qualify as a "statement" under this Rule, the Prosecution is obliged to make a witness statement available to the Defence in whatever form it has

¹⁷ *Id.*, paras. 19-30. See also *id.*, para. 32.

¹⁸ *Id.*, paras. 31-57, 59-79. See also *id.*, para. 58.

¹⁹ See Prosecution Response, paras. 1-8.

²⁰ See also Decision on Defence Motion for Disclosure of Additional Exculpatory and Other Relevant Material Pursuant to Defence Oral Motion Presented on 24 November 2010 (TC), 1 April 2011, para. 19 (the Prosecution filed its Response three days late); Decision on Defence Motion to Exclude Evidence Falling Outside the Temporal Jurisdiction of the Tribunal (TC), 3 February 2011, para. 13 (the Prosecution filed its Response one day late); Decision on Defence Motion for an Order Directed at the Kingdom of Belgium Regarding Witness ANAV (TC), 28 May 2010, para. 11 (the Prosecution filed its Response two days late).

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been recorded. Nevertheless, the Prosecution cannot disclose something which is not in its possession or accessible to it.²¹

20. The Defence asks the Chamber to order the Prosecution for immediate disclosure of certain documents.²² In this regard, the Chamber recalls that it has already ordered the Prosecution to immediately disclose any notes and/or recordings taken of interviews that PRWI may have conducted with the other rebuttal witnesses. Similarly, the Chamber has already directed the Prosecution to disclose statements of the final seven rebuttal witnesses, and responses to “requests for information”, as soon as they are available.²³ To the extent that the Defence seeks an order for disclosure of documents that fall into these categories, the Chamber dismisses the Defence request as moot. If the Defence seeks an order for disclosure of other categories of documents, the Chamber notes that the basis upon which the Defence seeks disclosure is both vague and unsubstantiated. Accordingly, the Chamber denies this aspect of the Defence Motion.

21. The Defence also submits that the 60-day period mentioned in Rule 66 (A)(ii) should be applicable to rebuttal witnesses, and thus asks for their testimony to commence 60 days after disclosure has been effected.²⁴

22. The Chamber considers that Rule 66 (A)(ii) applies generally to the disclosure of statements of Prosecution rebuttal witnesses, but that it does not require 60 days between disclosure of these statements and the testimony of a Prosecution rebuttal witness. The Chamber notes that this period of 60 days only explicitly applies “before the date set for trial”. More importantly, however, the Rule itself confirms that “upon good cause shown a Trial Chamber may order that copies of the *statements of additional prosecution witnesses be made available to the Defence within a prescribed time*”.²⁵ Even were this not the case, Rule 54 provides that the Chamber may issue necessary orders for the preparation or conduct of the trial.

23. The Chamber considers, therefore, that Rule 66 (A)(ii)’s 60-day requirement does not apply to the present situation. Two Trial Chambers have provided a 60-day period after the date set for trial; however, the provision of 60 days was not mandated by Rule 66.²⁶

24. Nevertheless, the Chamber notes that Articles 19 and 20 of Statute require, in part, that the Chamber ensure the trial is fair and expeditious, and that the Accused has adequate time and facilities for the preparation of his defence.

²¹ See *Niyitegeka* Appeals Judgement, paras. 30, 33-35.

²² See Defence Motion, para. 82. But see *id.*, para. 59 (requesting the Chamber “to urge” disclosure of these documents).

²³ Decision of 14 November 2011, para. 61, p. 14.

²⁴ See, for example, Defence Motion, para. 82.

²⁵ Emphasis added.

²⁶ See *Nizeyimana* Trial Decision, paras. 35-36 (linking its rescheduling of Prosecution rebuttal testimony to Article 20 (4) of the Statute, not to Rule 66 (A)(ii) of the Rules); Decision of 15 July 2010, paras. 41-42 (exercising the Trial Chamber’s discretion by postponing witness testimony by one day, and scheduling that extra day instead to address any pending trial issues, including the admission of exhibits into evidence).

25. In the present case,²⁷ the Chamber notes that the Prosecution disclosed statements by Witnesses PRWII, PRWIV, PRWV and PRWVI in October 2011 and on 2 February 2012, and identifying information for these witnesses on 2 February 2012.²⁸ As for Witnesses PRWVII and PRWVIII, the Chamber notes that the Prosecution also disclosed statements and identifying information for them on 2 February 2012. Thus, 31 days have elapsed since this most recent disclosure.

26. With regard to Witness PRWIII, the Chamber notes that, contrary to the Defence submissions,²⁹ the Prosecution disclosed a statement originating from this witness in October 2011. This statement identified Witness PRWIII's place of work, as well as the address of his work.³⁰ The Prosecution also identified him by name, and provided his title where he works.³¹ In the Chamber's view, this information—provided five months ago—allowed the Defence to initiate its investigation and adequately prepare for this witness's anticipated testimony. Nonetheless, and in addition to the information already provided, the Chamber directs the Prosecution to disclose immediately the requested information of Witness PRWIII, if available.

27. As for Witness PRWI, the Chamber notes that the Prosecution disclosed his statement five months ago in October 2011, and his identifying information in December 2011 and February 2012. The Prosecution also disclosed, on 20 February 2012, approximately 425 pages of documents that appear to pertain to Witness PRWI. A *prima facie* review of these documents reveals that they include Witness PRWI's statement that was previously disclosed in October 2011,³² and various other documents including newspaper articles from Senegal³³ and papers authored by the witness.³⁴ On 28 February 2012, the Prosecution further disclosed approximately 350 pages, which it identified as documents that Witness PRWI obtained during his mission abroad.³⁵ Given the time of disclosure and the information contained within these documents, the Chamber concludes these disclosures allowed the Defence to initiate its investigation and adequately prepare for Witness PRWI's anticipated testimony.

28. As discussed above, the Chamber does not accept the Defence's contention that Rule 66 (A)(ii)'s 60-day rule applies to the current circumstances. Accordingly, the Chamber finds that the Defence's submissions—which are ultimately linked to this

²⁷ See paragraphs 1, 3 and 5, and the corresponding footnotes, above.

²⁸ The Prosecution also disclosed identifying information of Witness PRWII in December 2011.

²⁹ See Defence Motion, para. 37 (“Indeed, the Defence has not received any disclosure with any written statement nor any particulars regarding Prosecution rebuttal witness PRWIII ...”).

³⁰ See Prosecution Motion of 4 October 2011, Annex p. 4 (Document 2). See also *id.*, Annex p. 1 (listing him by name as Witness PRWIII and listing him by name again, eight lines below, as the author of Document 2).

³¹ See *id.*, Annex p. 1.

³² Compare *id.*, Annex pp. 10-14 (Document 7), with Prosecution Disclosure received on 20 February 2012, pp. 130-134 (Registry numbers 107190-107186).

³³ See, for example, Prosecution Disclosure received on 20 February 2012, pp. 135-290 (Registry numbers 107185-107030).

³⁴ See, for example, *id.*, pp. 3-89 (Registry numbers 107317-107231), 291-424 (Registry numbers 107029-107016-106896).

³⁵ See generally Response to Defence request for documents obtained by witness PRWI during his mission abroad, 28 February 2012.

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contention³⁶—do not substantiate its blanket request for a 60-day interlude between disclosure and the testimony of rebuttal witnesses. Nor has it been demonstrated that these disclosures are all relevant and could have probative value in the context of the specified, limited scope of these rebuttal witnesses. Further, issues relating to the time-frame for cross-examination could be raised on a case-by-case- basis, if at all, for a specific witness.

29. Taking into account the disclosures made by the Prosecution concerning all eight rebuttal witnesses, and the relatively limited scope of their anticipated testimony,³⁷ the Chamber considers that the Defence has not substantiated that the testimonies of these witnesses should be postponed. Accordingly, the Chamber directs that the Prosecution rebuttal witnesses commence their testimony today, as previously scheduled.

30. Regarding the Defence's submissions about hearing the witnesses during a single trial session, the Chamber considers that this falls within its discretion and expects that all the rebuttal witnesses will be heard in the course of this session during this month.

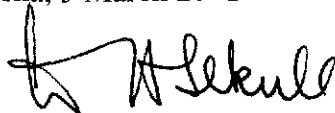
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion;

DIRECTS that the Prosecution rebuttal witnesses commence their testimony today, 5 March 2012, as previously scheduled; and

DIRECTS the Prosecution to disclose immediately the requested information of Witness PRVIII, if available.

Arusha, 5 March 2012



William H. Sekule
Presiding Judge



Mparany Rajohnson
Judge

³⁶ See, for example, Defence Reply, para. 79 (“Therefore, the Defence considers that it has established good cause for the requested postponement and reiterates its request that the Prosecution’s Rebuttal case shall not commence until at least 60 days following the disclosure of all the necessary statements and documents.”).

³⁷ See, for example, Decision of 14 November 2011, paras. 52 (“The Defence highlights that the proposed rebuttal witnesses [PRVII to PRVIII] focus only on one alibi period, that of 23 April to 23 May 1994. Moreover, six of the eight proposed rebuttal witnesses will testify solely on the absence of the Accused in Senegal during this period, while one will make reference to the Accused’s alleged visit to Swaziland.”), 56 (“The Chamber considers that PRVI may be able to provide context to the investigations he carried out into the Accused’s alibis, and may establish the chain of custody over the documents obtained in the course of his investigations.”).