



**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: 18 May 2012

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

**DECISION ON PROSECUTION MOTION FOR LEAVE TO REOPEN
PROSECUTION REBUTTAL CASE**

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

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 Leave to Re-Open Prosecution Rebuttal Case to Take the Evidence of PRWIII,” filed confidentially on 11 April 2012 (the “Prosecution Motion”);

CONSIDERING:

- (a) The “Defence Response to the Prosecutor’s Extremely Urgent Motion for Leave to Re-Open Prosecution Rebuttal Case to Take the Evidence of PRWIII”, filed on 16 April 2012 (the “Defence Response”); and
- (b) The “Prosecutor’s Reply to Defence Response to the Prosecutor’s Extremely Urgent Motion for Leave to Re-Open Prosecution Rebuttal Case to Take the Evidence of PRWIII”, filed confidentially on 19 April 2012 (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 Rules 54 and 85 of the Rules.

INTRODUCTION

1. On 4 October 2011, the Prosecution filed a motion for leave to present evidence in rebuttal to the Accused’s alibi, requesting to call eight rebuttal witnesses including Witness PRWIII.¹
2. On 14 November 2011, the Chamber granted the Prosecution Motion for rebuttal witnesses and allowed the Prosecution to call these witnesses, including Witness PRWIII, “immediately after the close of the Defence case”.²
3. On 22 February 2012, the Defence closed its case-in-chief.
4. On 6 March 2012, the Prosecution opened its case-in-rebuttal.³

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.

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

³ T. 6 March 2012, pp. 1-2.

5. On 8 March 2012, the Chamber reaffirmed that the last week envisaged for rebuttal evidence was the week starting 19 March 2012, and that all efforts needed to be made to meet this time span.⁴

6. On 19 March 2012, the Chamber noted that it needed to be informed about the status of Witness PRVIII, who had not been mentioned in court. The Chamber then adjourned proceedings because the Prosecution did not have a witness to present.⁵

7. On 2 April 2012, after having presented six rebuttal witnesses, the Prosecution closed its rebuttal case. The Prosecution indicated that it would file a motion to re-open its case if either of the two remaining witnesses, Witnesses PRVIII and PRWVI, became available to testify.⁶

8. On 11 April 2012, the Prosecution filed the present Motion.

9. On 7 May 2012, after the submissions on the present Motion had been completed, the Prosecution disclosed a witness statement of Witness PRVIII,⁷ and made a further disclosure on 14 May 2012.⁸

SUBMISSIONS OF THE PARTIES

Prosecution Motion

10. The Prosecution requests that its rebuttal case be re-opened to take the evidence of Witness PRVIII and that the Chamber set a date for his testimony.⁹

11. The Prosecution submits that it did all it could to secure presence of Witness PRVIII during its rebuttal case. But because Witness PRVIII's government had not provided the necessary clearance, Witness PRVIII was unavailable through no fault of the Prosecution. On 10 April 2012, however, the Nigerian government informed the Prosecution that it would release Witness PRVIII to testify.¹⁰

12. According to the Prosecution, the anticipated testimony of Witness PRVIII will refute the Accused's claim that he obtained a Nigerian visa in Senegal in 1994. This testimony will also demonstrate that the Accused's passport bears an erroneous Zambian stamp over the alleged Nigerian visa.¹¹

13. The Prosecution submits that the probative value of the anticipated testimony far outweighs any potential delay. The Accused would not be prejudiced, as he will have an

⁴ T. 8 March 2012, p. 23.

⁵ T. 19 March 2011, pp. 2, 6-7.

⁶ T. 2 April 2012, pp. 3-8.

⁷ Disclosure to Ngirabatware, Augustin of Prosecution Rebuttal Witness, PRVIII, 7 May 2012.

⁸ Disclosure of a Signed Statement from PRVIII (Follow Up), 14 May 2012.

⁹ Prosecution Motion, para. 35.

¹⁰ *Id.* paras. 13-26, Appendices A-L. The Nigerian government also stated that this release "does not mean a waiver of [Witness PRVIII's] immunity". *Id.*, Appendix A.

¹¹ *Id.*, paras. 27-30.

opportunity to cross-examine Witness PRVIII and possibly call witnesses in rejoinder. The Prosecution indicates that Witness PRVIII is willing and ready to testify on any day the Chamber is disposed to set. The anticipated testimony is also short and focused, and will be concluded in the course of a day.¹²

Defence Response

14. The Defence submits that the Prosecution Motion should be dismissed. In support of this position, the Defence lists three distinct grounds, any of which should lead to dismissal.¹³

15. First, according to the Defence, the Prosecution could have presented the evidence of Witness PRVIII during the rebuttal case if it had acted with diligence. For instance, the witness notified the Prosecution in January 2011 that he would require clearance from his government to testify. It was manifest that the Nigerian government was reluctant to cooperate as early as November 2011 and the Prosecution waited more than three months before sending a reminder to the authorities. The Prosecution also could have requested a cooperation order from the Chamber in a timely manner. In the Defence's view, the Prosecution's lack of diligence precludes the Prosecution Motion.¹⁴

16. Second, the Defence submits that Witness PRVIII's testimony does not meet the high threshold of probative value that the evidence must meet to re-open the case. The Defence argues that Witness PRVIII's testimony is not expected to directly involve the criminal responsibility of Ngirabatware, but rather concerns a Nigerian visa in his passport.¹⁵ The Defence moreover asserts that because Witness PRVIII's diplomatic immunity has not been waived, the Chamber cannot rely on his testimony as it would not be a meaningful solemn declaration, rendering the probative value of the testimony void.¹⁶

17. Finally, the Defence maintains that the evidence of Witness PRVIII will unduly delay the proceedings. Witness PRVIII's statement and particulars have not yet been disclosed to the Defence, and thus an additional period of time will be required to allow proper preparation for cross-examination. After Witness PRVIII's testimony, the Defence will have to conduct further investigations to consider new rejoinder witnesses to rebut Witness PRVIII's testimony. Moreover, accepting Witness PRVIII will set a dangerous precedent if Witness PRWVI eventually becomes available.¹⁷

¹² *Id.*, paras. 12, 31-34.

¹³ Defence Response, paras. 14, 38, 57, 72.

¹⁴ *Id.*, paras. 17-38.

¹⁵ *Id.*, para. 40.

¹⁶ *Id.*, paras. 39-56.

¹⁷ *Id.*, paras. 58-71.

Prosecution Reply

18. The Prosecution responds that it performed the necessary due diligence, having taken all necessary steps to procure the attendance of Witness PRVIII to testify before the closure of the Prosecution rebuttal case.¹⁸

19. The Prosecution further submits that there is no link between the probative value of Witness PRVIII's anticipated testimony and the waiver of immunity. Given that the Republic of Nigeria has permitted Witness PRVIII to give evidence in the present case, the Prosecution does not see how the non-waiver of immunity will affect his ability to testify or the quality of his evidence.¹⁹

20. The Prosecution also replies that there is no undue delay, since Witness PRVIII will be available to testify on any date or period deemed reasonable by the Chamber. The Prosecution also requests that Witness PRVIII be called to testify before the filing of Closing Briefs.²⁰

DELIBERATIONS

21. As a preliminary matter, the Chamber notes that the Prosecution filed its Reply confidentially, although it does not contain confidential information. Filing such submissions publicly, when appropriate, helps to guarantee the transparency of these proceedings.²¹ Accordingly, the Chamber directs the Registry to lift the confidentiality of the Prosecution Reply.

22. The Appeals Chamber has confirmed that:

[W]hen considering an application for reopening a case to allow for the admission of fresh evidence, a Trial Chamber should first determine whether the evidence could, with reasonable diligence, have been identified and presented in the [case] of the party making the application. If not, the Trial Chamber has the discretion to admit it, and should consider whether its probative value is substantially outweighed by the need to ensure a fair trial. When making this determination, the Trial Chamber should consider the stage in the trial at which the evidence is sought to be adduced and the potential delay that would be caused to the trial.²²

¹⁸ Prosecution Reply, para. 5.

¹⁹ *Id.*, paras. 6-8.

²⁰ *Id.*, paras. 9-11.]

²¹ See Decision on Defence Motion for an Order to the Prosecution to Provide Explanations and References for Each Location of the Site Visit (TC), 14 May 2012, para. 14; Decision on Prosecution Motion for Testimony via Video-Link of Prosecution Rebuttal Witnesses II, V, VI and VII (TC), 5 March 2012, para. 20; Decision on Defence Motion for Admission of Documentary Evidence (TC), 25 November 2010, para. 10, citing *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-2000-61-T, Decision on Defence Motion to Strike Portions of the Prosecution Closing Brief (TC), 30 September 2010, para. 3.

²² *Prosecutor v. Ante Gotovina et al.* ("*Gotovina et al.*"), Case No. IT-06-90-AR73.6, Decision on Ivan Čermak and Mladen Markač Interlocutory Appeals Against Trial Chamber's Decision to Reopen the Prosecution Case (AC), 1 July 2010 ("*Gotovina et al.* Appeal Decision"), paras. 23-24, quoting with approval *Gotovina et al.*, Case No. IT-06-90-T, Decision on Prosecution's Motion to Reopen Its Case (TC),

23. “Fresh evidence” can include evidence that is newly obtained by a Party, or evidence that is already in the Party’s possession but which becomes significant only in light of other fresh evidence.²³ This list is not exhaustive, however, and the Appeals Chamber has stated that “an evaluation of what constitutes fresh evidence and whether the Prosecution has met its obligation on reasonable diligence is highly contextual, depending on the factual circumstances of each case. Thus, any assessment in this respect should be carried out on a case-by-case basis”.²⁴

24. With regard to reasonable diligence, there is a general expectation that counsel on both sides act diligently in carrying out their duties. As to the scope of this obligation, the jurisprudence provides that “the duty to act with reasonable diligence includes making ‘appropriate use of all mechanisms of ... compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of [a Party] before the Trial Chamber.’”²⁵ The moving party bears the burden of proving that reasonable diligence was exercised in obtaining the evidence.²⁶

25. Turning to the circumstances of this case, the Chamber notes from the correspondence attached to the Prosecution Motion that the Prosecutor carried out several communications with the Nigerian government in order to get an authorisation for Witness PRVIII to come and testify in Arusha. The Chamber notes that on 18 October 2011, the Nigerian government expressed its desire to cooperate with the Prosecution in securing the appearance of Witness PRVIII to testify in this case.²⁷ The Prosecution has provided numerous correspondences made between October 2011 and April 2012 with the Nigerian government to secure the appearance of the witness to testify. Despite these efforts the Nigerian government did not formally release Witness PRVIII until 10 April 2012. The Chamber is thus satisfied that the Prosecution acted with reasonable diligence in order to secure Witness PRVIII’s testimony.²⁸

21 April 2010, para. 10. See also *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.5, Decision on Vujadin Popović’s Interlocutory Appeal Against the Decision on the Prosecution’s Motion to Reopen Its Case-in-Chief (AC), 24 September 2008 (“*Popović et al.* Appeal Decision”), paras. 10-11, 19, 27; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement (AC), 20 February 2001 (“*Delalić et al.* Appeal Judgement”), paras. 269-293; *The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T (“*Kanyabashi*”), Decision on Kanyabashi’s Motions for Reconsideration of the 2 July 2008 Decision, Requesting that Witnesses D-2-23-C and D-11-AB Be Called to Testify, and for Special Protective Measures for Witnesses D-2-23-C and D-11-AB (TC), 19 January 2009, para.40; *Kanyabashi*, Decision on Kanyabashi’s Motion to Re-Open His Case and to Recall Prosecution Witness QA (TC), 2 July 2008, para. 23.

²³ See *Popović et al.* Appeal Decision, para. 11; *Delalić* Appeal Judgement, para. 276.

²⁴ *Gotovina et al.* Appeal Decision, para. 24. See also *Popović et al.* Appeal Decision, paras. 10-11, 19.

²⁵ *Prosecutor v. Zoran Kupreškić*, Case No. IT-95-16-A, Appeal Judgement (AC), 23 October 2001, para. 50, quoting *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of Additional Evidence (AC), 15 October 1998 (“*Duško Tadić* Appeal Decision”), para. 47.

²⁶ See *Delalić et al.* Appeal Judgement, para. 286.

²⁷ *Id.*, Appendices C.

²⁸ *Id.* paras. 13-26, Appendices A-L.

26. The Chamber further recalls that it had already determined that Witness PRVIII's evidence was relevant and had probative value as it deals with the Accused's alibi.²⁹ As to the Defence arguments that the non-waiver of Witness PRVIII's diplomatic immunity would prevent him from testifying at the ICTR in Arusha the Chamber considers that this concern is unsubstantiated and appears to be premature. The Chamber further considers that the evidence if presented will not in any way prejudice the Accused because the Defence was put on notice as far back as 12 November 2011 regarding the substance of the witness's testimony. The Chamber notes that the Prosecution only disclosed Witness PRVIII's witness statements on 7 May 2012 and 14 May 2012, but the substance of these statements is not different from what was contained in the Prosecution Motion filed on 4 October 2011.

27. The Chamber also notes that the anticipated testimony of Witness PRVIII is short and could be completed without causing any undue delays in the proceedings. The Chamber therefore considers that the probative value of Witness PRVIII's evidence is not substantially outweighed by any fair trial concerns. Nevertheless, considering the timeframes in place for this case the Chamber orders that Witness PRVIII should be heard as soon as possible.

28. Accordingly, the Chamber finds that the criteria for reopening the Prosecution case-in-rebuttal has been established and that it would also be in the interest of justice to hear Witness PRVIII.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution Motion;

ORDERS that Prosecution Witness PRVIII should appear and testify as soon as possible and in any event no later than 6 June 2012; and

DIRECTS the Registry to lift the confidentiality of the Prosecution Reply.

Arusha, 18 May 2012

William H. Sekule
Presiding Judge

Solomy Balungi Bossa
Judge

Mparany Rajohnson
Judge

[Seal of the Tribunal]

²⁹ Decision on Prosecution Motion for Leave to Present Rebuttal Evidence (TC), 14 November 2011 ("Decision of 14 November 2011"), p. 14.

