



**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 DEFENCE MOTION FOR LEAVE
TO PRESENT REJOINDER 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
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 “Defence Motion for Leave to Call Rejoinder Witnesses and, in the Alternative, for Admission of Documentary Rejoinder Evidence, and to Recall Prosecution Witness PRWVII”, filed confidentially on 2 April 2012 (the “Defence Motion”);

CONSIDERING:

- (a) the “Prosecution Response to the Defence Motion for Leave to Call Rejoinder Witnesses and, in the Alternative, for Admission of Documentary Rejoinder Evidence and to Recall Prosecution Witness PRW VII”, filed confidentially on 13 April 2012 (the “Prosecution Response”); and
- (b) the “Defence Reply to Prosecution Response to Defence Motion for Leave to Call Rejoinder Witnesses and, in the Alternative, for Admission of Documentary Rejoinder Evidence and to Recall Prosecution Witness PRWVII”, filed confidentially on 24 April 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 Rules 73, 85 and 89 (C) of the Rules.

INTRODUCTION

1. The Prosecution commenced its case-in-rebuttal on 6 March 2012, and closed it on 2 April 2012. Over the course of 12 trial days, the Prosecution called 6 rebuttal witnesses and tendered 23 exhibits.
2. On 2 April 2012, the Defence filed the present Motion.
3. On 4 April 2012, the Chamber granted the Prosecution Motion for additional time to file any response, and granted additional time to the Defence to file any reply.¹

SUBMISSIONS OF THE PARTIES

Defence Motion

4. The Defence seeks leave to call five rejoinder witnesses, and for an order that protective measures apply to these witnesses.²

¹ Decision on Prosecutor’s Extremely Urgent Motion for Extension of Time to File Response to Defence Motion for Leave to Call Rejoinder Witnesses and in the Alternative, for Admission of Documentary Rejoinder Evidence and to Recall Prosecution Witness PRWVII (TC), 4 April 2012, p. 4.

² Defence Motion, paras. 14, 168.

5. The Defence submits that rejoinder evidence is crucial to challenge aspects of the rebuttal evidence that were unforeseeable. In particular, the Defence contends that Prosecution Witness Massamba Ndiaye unexpectedly provided his opinion on passport stamps and visas, and that it was unforeseeable that the Prosecution would challenge the lists of participants at ACP meetings and that Witness PRWVII would allege an official letter was forged. These new matters arose directly out of the rebuttal case, and the rejoinder witnesses will not touch upon any issue that has already been addressed by Defence witnesses.³

6. The Defence proposes Witness DRW I as an expert witness to address each disputed stamp and visa in the Accused's passport, and to provide his opinion about the authenticity or otherwise of these stamps and visas. He will also testify about seven exhibits,⁴ and will explain his missions to Senegal, South Africa and Swaziland and the conclusions he reached from these missions. In this way, the Defence submits that Witness DRW I will rebut the allegations of Witness Massamba Ndiaye on technical issues.⁵

7. As for Witness DRW II, the Defence submits that she will rebut the testimony of Witness Massamba Ndiaye that although the Accused was in Dakar from 30 April to 7 May 1994, he never returned. According to the Defence, Witness DRW II will testify that she accompanied the Accused to the airport twice, suggesting that the Accused came to Dakar on two different occasions during this period. She is also expected to testify about a meeting she had with the Accused and others in Dakar.⁶

8. Witness DRW III, according to the Defence, will rebut the testimony of Witnesses Massamba Ndiaye, PRWIV and PRWVII. In particular, the Defence submits that Witness DRW III will testify that he remembers meeting the Accused at ACP-related events in Swaziland between 15 and 17 May 1994, and between 18 and 19 May 1994. The witness is also expected to testify about how the ACP drew up the list of participants in these meetings, and about a relationship that existed between Witness PRWVII and the Accused.⁷

9. The Defence seeks to call Witness DRW IV to rebut both the testimony of Witness Massamba Ndiaye and Prosecution Exhibit 85(A) concerning Swaziland's use of only one type of stamp in 1994. The Defence expects Witness DRW IV to testify that he obtained a new sample of stamps used in Swaziland in 1994, and to produce an original document containing these samples.⁸

³ *Id.*, paras. 14-36. See also *id.*, para. 99.

⁴ See *id.*, para. 44, referencing Prosecution Exhibit 37; Prosecution Exhibit 40; Prosecution Exhibit 77; Prosecution Exhibit 85A; Defence Exhibits 193; Defence Exhibit 195; Defence Exhibit 205.

⁵ Defence Motion, paras. 37-49. See also *id.*, Annexes 1-2. The Defence also submits that if its application is granted, it will then apply to the Chamber to have Witness DRW I qualified as an expert and to have his preliminary report admitted. *Id.*, para. 49.

⁶ *Id.*, paras. 52-57, Annex 7(B).

⁷ *Id.*, paras. 60-68, Annex 7(C).

⁸ *Id.*, paras. 71-85, Annexes 3, 6, 7(D).

10. The Defence submits that Witness DRW V will rebut Witness PRWVII testimony insofar as Witness PRWVII denied knowing the Accused or writing a letter of recommendation on his behalf. The Defence anticipates that Witness DRW V will testify about an investigation to obtain this letter of recommendation, and will establish its chain of custody.⁹

11. The Defence further submits that the witnesses can be made available promptly to testify. The anticipated testimony-in-chief of all five witnesses will last for less than six hours, and their testimony as a whole is expected to take three trial days.¹⁰

12. In the event that the Chamber does not grant leave to hear the testimony of Witnesses DRW IV and DRW V, the Defence prays the Chamber to admit into evidence the documents contained in Annexes 3 and 5. If the Chamber denies both leave to hear Witness DRW V and the admission of the documents in Annex 5, the Defence asks for leave to recall Prosecution Witness PRWVII for further cross-examination.¹¹

Prosecution Response

13. The Prosecution submits that the proposed rejoinder witnesses could not challenge the credibility of the Prosecution rebuttal witnesses, and asks the Chamber to dismiss the Defence Motion.¹²

14. The Prosecution states that Witness Massamba Ndiaye was not called as an expert witness, but instead as an investigator to provide context and to tender documents into evidence. Moreover, the Prosecution submits that he did not bring forward any new evidence, because he testified on matters within the knowledge of the Accused.¹³

15. As for Witness DRW I, the Prosecution submits that Defence should have called him during its case-in-chief to corroborate the alibi, especially because the Defence knew as early as December 2010 that the Prosecution was questioning the authenticity of passport stamps. In any event, the Prosecution contends that the Defence should have disclosed this evidence prior to the commencement of trial, and cannot now benefit from its failure to do so.¹⁴

16. The Prosecution also objects to the calling of Witnesses DRW II, DRW III, DRW IV and DRW V for rebuttal purposes. According to the Prosecution, the Defence should have called these witnesses during its case-in-chief, and attempting to do so now is tantamount to reopening the Defence case. The Prosecution further submits that the anticipated testimony of Witnesses DRW II and DRW III, respectively, is similar to that

⁹ *Id.*, paras. 77-96, Annexes 4-5, 7(E).

¹⁰ See *id.*, paras. 50-51 (three hours for Witness DRW I), 58-59 (half an hour for Witness DRW II), 69-70 (one hour and a half for Witness DRW III), 86-87 (half an hour for Witness DRW IV), 97-98 (twenty minutes for Witness DRW V), 99.

¹¹ *Id.*, paras. 8, 100, 146, 168. See also *id.*, paras. 101-145, 147-167, Annexes 3, 5.

¹² Prosecution Response, para. 7, p. 11.

¹³ *Id.*, paras. 8-9, 25.

¹⁴ *Id.*, paras. 10-13. See also *id.*, para. 25.

of Witnesses DWAN-29 and DWAN-148, both of whom the Defence decided not to call.¹⁵

17. As for the Defence alternative prayers for relief, the Prosecution submits that they should be denied.¹⁶

Defence Reply

18. The Defence replies that the Prosecution failed to support its submissions about the Accused's testimony with precise references to the record, and the Defence asks the Chamber to disregard the affected submissions and to sanction the Prosecution accordingly.¹⁷

19. The Defence reiterates its view that Witness Ndiaye gave what amounted to expert evidence about the passport stamps. The Defence submits that it could not have anticipated this development, thus it should be allowed to rebut this evidence, including through the testimony of Witness DRW I.¹⁸

20. As for Witness DRW II's expected testimony about the Accused's presence in Dakar on 10 and 11 May 1994, this presence was not disputed during the Prosecution case-in-chief or its cross-examination of the Accused. This expected testimony also differs from that of Witness DWAN-29, whose purpose was to address the Accused's presence in Dakar between 30 April and 7 May 1994.¹⁹

21. The Defence further submits that Witnesses DRW III, DRW IV and DRW V will all rebut new elements brought during the Prosecution's rebuttal case, and that the rejoinder case is the Defence's first opportunity to address these elements. The Defence also disputes that Witness DRW III's expected testimony is similar to that of DWAN-148.²⁰

22. Finally, the Defence maintains that the Chamber should grant its alternative prayers for relief if necessary.²¹

DELIBERATIONS

Rejoinder Witnesses

23. 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. 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 for this reason that

¹⁵ *Id.*, paras. 14-25, 28-31.

¹⁶ *Id.*, paras. 27, 32-36.

¹⁷ Defence Reply, paras. 4-12, 64. See also *id.*, paras 20-21, 39, 53.

¹⁸ *Id.*, paras. 13-25.

¹⁹ *Id.*, paras. 26-30.

²⁰ *Id.*, paras. 31-48, 52-56.

²¹ *Id.*, paras. 49-51, 57-63.

the Chamber allowed the Prosecution to bring rebuttal witnesses with regard to the alibi concerning this specific period.²²

24. Under Rule 85 (A)(iv), the Defence may be allowed by the Chamber to present rejoinder evidence after the completion of the Prosecution case-in-rebuttal.

25. 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.²³ In this regard, the *Semanza* Trial Chamber has indicated that while it may be allowable to bring rejoinder to challenge the credibility of rebuttal witnesses, this should be permitted only under specific circumstances.²⁴

26. The Chamber finds that none of the proposed witnesses meet the specific requirements for rejoinder evidence. During various stages of the Defence case-in-chief, it was put on notice that the Accused's alibi would be challenged. Furthermore, the Prosecution sought rebuttal evidence in October 2011, by which time the Defence had only called 24 of its 35 witnesses.²⁵ In November 2011, the Chamber granted the Prosecution leave to call eight rebuttal witnesses in order to testify about the alibi of 23 April to 23 May 1994.²⁶

27. The Chamber is of the view that the Defence could have sought to vary its witness list to include those it now seeks to testify in rejoinder. Indeed, the Chamber recalls that the Defence varied its witness list in January 2012,²⁷ two months after the Decision granting leave for rebuttal witnesses to testify about the alibi. The proposed rejoinder witnesses appear intended to buttress the alibi of the Accused and thus falls outside the

²² See, for example, Decision on Prosecution Motion for Leave to Present Rebuttal Evidence (TC), 14 November 2011 ("Decision of 14 November 2011"), paras. 6, 39, 41-43, 53, 56.

²³ See *The Prosecutor v. Ildéphonse Nizéyimana*, 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").

²⁴ See *Semanza* Decision, para. 12, fn. 1 (listing five exceptions for which rejoinder evidence may be called to challenge the credibility of rebuttal witnesses: bias; previous criminal convictions; previous inconsistent statements where proper foundation has been laid; medical evidence indicating a diminished capacity to tell the truth; and a general reputation for untruthfulness).

²⁵ See 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; Minutes of Proceedings, 4 October 2011 (listing Defence Witness DWAN-133 as the 24th Defence witness). For the Defence list of witnesses as of October 2011, see Defence Compliance with the Trial Chamber's Order to Reduce Significantly the Witness List and Defence Extremely Urgent Motion for Reconsideration and/or Certification to Appeal the Trial Chamber's Decision of 26 August 2011, 1 September 2011, para. 37.

²⁶ See generally Decision of 14 November 2011. On 13 December 2011, the Chamber denied a Defence Motion to reconsider this Decision or to certify it for appeal. See Decision on Defence Motion for Reconsideration and/or Certification to Appeal the Trial Chamber's Decision of 14 November 2011 on Rebuttal Evidence (TC), 13 December 2011, p. 16.

²⁷ See Decision on Defence Motion for Leave to Vary the Witness List by Adding Witness DWAN-74 (TC), 25 January 2012, p. 7 (granting the Defence Motion in part and ordering that Witness DWAN-74 be added to the Defence witness list)

scope of what is permissible for rejoinder witnesses. Nevertheless, the Chamber will further address the proposed witnesses below.

Witness DRW I

28. The Chamber notes that Witness Massamba Ndiaye did not testify as an expert witness, nor will his evidence be treated as that of an expert. Some aspects within his testimony cannot be taken in isolation to support the argument that the content of the testimony was unforeseeable. Moreover, the Chamber considers that during the Accused's cross-examination in February 2011, the Defence was put on notice that the authenticity of the stamps in Ngirabatware's passports would be challenged.²⁸ These are matters that should have been addressed, if at all, during the Defence case-in-chief. The Chamber therefore denies the Defence Motion insofar as it seeks to call Witness DRW I to testify in rejoinder.

Witness DRW II

29. The Chamber notes that the Defence specifically "reiterates that DRWII should testify in rejoinder to prove the alibi of the Accused, notably on the 10 and 11 May 1994" that he was in Dakar, Senegal on those dates.²⁹ The Chamber considers that the purpose of Witness DRW II's anticipated testimony is to "prove the alibi of the Accused", rather than to rebut unforeseen evidence arising from the rebuttal case. These are matters that should have been addressed, if at all, during the Defence case-in-chief. The Chamber therefore denies the Defence Motion insofar as it seeks to call Witness DRW II to testify in rejoinder.

Witness DRW III

30. The Chamber notes that the issue of the ACP meetings had been a contested issue since February 2011, when the Prosecution disputed the Accused's alleged presence in Swaziland between 15 and 17 May 1994 and 18 to 19 May 1994.³⁰ Thus this is not a new matter arising from the rebuttal case and the Defence cannot therefore bring more evidence in rejoinder in an attempt to prove the Accused's alibi on this point. These are matters that should have been addressed, if at all, during the Defence case-in-chief. The Chamber accordingly denies the Defence Motion insofar as it seeks to call Witness DRW III to testify in rejoinder.

²⁸ T. 9 February 2011 (Ngirabatware), pp. 59-63, 65-73; T. 10 February 2011 (Ngirabatware), pp. 4-5, 9-12, 55-60, 62; Prosecution Exhibit 37 (two letters from the Senegalese authority: "... After scrutiny of the passport annexed to the request, it appears that you have the stamps with all the characteristics of the special police station of the stamps enforced in 1994, but nothing hereby enables us to say that these stamps are authentic"); Defence Exhibit 112A; T. 10 February 2011 (Ngirabatware), pp. 7-8, 14-18; T. 11 February 2011 (Ngirabatware), pp.10-11, 13-24; Prosecution Exhibit 43.

²⁹ Defence Motion, para. 30.

³⁰ T. 11 February 2011 (Ngirabatware), pp. 6-7, 10-11, 13-20; Prosecution Exhibit 43 (the email as well as the ACP document). The Chamber stated that the issue in contention appeared to be whether the witness attended the meeting in Swaziland during the period that has been specified and also whether during the alleged entry he required a visa. These are the issues that relate and touch on the elements in contention. See Prosecution Exhibit 43- ("Visa requirement: Delegates from countries other than those listed below (ACP/EU countries) will be issued with visas on arrival in Swaziland."); T. 11 February 2011, pp. 20-24.

Witness DRW IV

31. The Chamber recalls that the Accused was cross-examined extensively on his trip to Swaziland, and that the Prosecution alleged that the stamps were forged.³¹ Therefore, from this point the Defence would have been put on notice that the authenticity of the stamps were in question, and ought to have altered its witness list during its case-in-chief accordingly if it so wished. Further notice was provided to the Defence when the Prosecution was granted rebuttal witnesses to address this specific point. These are matters that should have been addressed, if at all, during the Defence case-in-chief. The Chamber therefore denies the Defence Motion insofar as it seeks to call Witness DRW IV to testify in rejoinder.

Witness DRW V

32. The Chamber recalls that the Accused testified that, among others, he met Witness PRWVII in Dakar in May 1994.³² The Chamber further recalls that during the cross-examination of Witness PRWVII the Defence used the letter of recommendation dated October 1994 and purportedly authored by Witness PRWVII to challenge his assertion that he did not recall knowing the Accused.³³

33. Although the issue of this letter arose during cross-examination of Witness PRWVII the Chamber is of the view that this relates to a collateral issue of whether Witness PRWVII knew the Accused, rather than to the Accused's presence in Senegal during the time of the alleged crimes. For these reasons, the Chamber denies the Defence Motion insofar as it seeks to call Witness DRW V to testify in rejoinder.

Alternative Prayers for Relief

34. The Defence asks that, should the Chamber not grant leave to hear Witnesses DRW IV and DRW V, the Chamber alternatively admit into evidence the documents contained in Annexes 3 and 5 of the Defence Motion. If the Chamber denies both leave to hear Witness DRW V and the admission of the documents in Annex 5, the Defence asks for leave to recall Prosecution Witness PRWVII for further cross-examination.³⁴

Admission of Documents

35. Under Rule 89 (C) the Chamber may admit any relevant evidence it deems to have probative value. To establish the probative value of the evidence, the applicant must show that the evidence tends to prove or disprove an issue.³⁵ It is sufficient for the

³¹ T. 11 February 2011 (Ngirabatware), pp. 6-9, 22-23.

³² See, for example, T. 9 February 2011 (Ngirabatware), p. 9; T. 10 February 2011 (Ngirabatware), p. 12.

³³ T. 20 March 2012 (Witness PRW VII), pp. 50-54 (CS).

³⁴ Defence Motion, paras. 8, 100, 146, 168. See also *id.*, paras. 101-145, 147-167, Annexes 3, 5.

³⁵ *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44, Decision on the Prosecution Motion for Admission Into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ndirumapfse (TC), 2 November 2007, para. 2.

moving party to establish the *prima facie* relevance and probative value of the evidence for admission under Rule 89(C).³⁶

36. According to the Defence, Annex 3 is a document from the Royal Swaziland Police Headquarter, explaining the various stamps that existed in 1994. The Defence submits that this document is relevant and probative as it confirms the Accused's alibi and disproves the Prosecution's allegation that the Accused never went to Swaziland.³⁷

37. In the Chamber's view, this document should have been tendered for possible admission into evidence, if at all, during the Defence case-in-chief. The Chamber therefore denies admission of this document into evidence for this reason.

38. As for Annex 5, the Defence identifies it as a document obtained from the Town Hall of Dakar relating to the letter of recommendation admitted into evidence as Defence Exhibit 207. The Defence submits that Annex 5 is relevant and probative as it contradicts the testimony of Witness PRWVII.³⁸

39. The Chamber considers that the issue for which the Defence seeks this document's admission is collateral, for the reasons explained above. The Chamber further observes that the document contained in Annex 5 is lacking the same indicia of reliability, such as stamps, letterhead and a signature, as those found in Defence Exhibit 207.

40. The Chamber therefore does not find Annex 5 to have sufficient relevance and probative value, and accordingly denies its admission into evidence.

Recall Witness PRWVII

41. The Chamber notes that in the Defence's alternative prayer for relief, the purpose of further cross-examining Witness PRWVII is "to put to him [] new elements amounting to obvious contradictions between his previous testimony", Defence Exhibit 207 and Annex 5.³⁹ The Chamber considers that this relates to a collateral issue of whether Witness PRWVII knew the Accused, rather than to the Accused's presence in Senegal during the time of the alleged crimes. Moreover, the Chamber recalls that Witness PRWVII has already been extensively cross-examined with respect to his knowledge of the Accused with reference to Defence Exhibit 207. The probative value of such anticipated evidence does not warrant the recall of a witness for further cross-examination, and the Chamber therefore denies the request to recall Witness PRWVII.

³⁶ *The Prosecutor v. Théoneste Bagosora et al.*, Case No. 98-41-T, Decision on Bagosora Motion to Exclude Photocopies of Agenda (TC), 11 April 2007, para. 4.

³⁷ Defence Motion, paras. 119-132, Annex 3. The Chamber notes that the Defence also identifies other possible purposes for this document.

³⁸ *Id.*, paras. 133-140, Annex 5.

³⁹ *Id.*, para. 153.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha, 18 May 2012

William H. Sekule
Presiding Judge

Solomy Balungi Bossa
Judge

Mparany Rajohnson
Judge

[Seal of the Tribunal]