



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

ICTR-99-54-T  
27-01-10  
(4681-4675)

4681  
PM

OR: ENG

**TRIAL CHAMBER II**

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

Registrar: Mr. Adama Dieng

Date: 27 January 2010

**The PROSECUTOR**

v.

**Augustin NGIRABATWARE**

Case No. ICTR-99-54-T

2010 JAN 27 PM 11:20  
H. J. K. 2010

**DECISION ON DEFENSE MOTION TO ADJOURN PROCEEDINGS FROM 1 to  
3 FEBRUARY 2010**

**Office of the Prosecutor**

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

**Defence Counsel**

Mr. Peter Herbert  
Ms. Mylène Dimitri

*[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 "Trial Chamber");

**BEING SEIZED** of the "Defence Extremely Urgent Motion to Adjourn Proceedings from February 1<sup>st</sup> to February 3<sup>rd</sup> 2010 in order to Implement Trial Chamber Decision on Cooperation of the Kingdom of Belgium", filed confidentially on 15 January 2010 (the "Motion");

**CONSIDERING:**

a) The "Prosecutor's Response to Defence Extremely Urgent Motion to Adjourn Proceedings from February 1<sup>st</sup> to February 3<sup>rd</sup> 2010 in Order to Implement Trial Chamber Decision on Cooperation of the Kingdom of Belgium" filed confidentially on 19 January 2010 (the "Response");

b) The "Defence Reply to Prosecutor's Response to Defence Extremely Urgent Motion to Adjourn Proceedings in Order to Implement Trial Chamber Decision on Cooperation of the Kingdom of Belgium" filed confidentially on 20 January 2010 (the "Reply").

**CONSIDERING** the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

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

**INTRODUCTION**

1. On 16 September 2009, the Chamber filed its "Decision on Defence Urgent Motion for an Order Directed at the Kingdom of Belgium Pursuant to Article 28 of the Statute" (the "Order of Cooperation Directed at Belgium") granting a Defence request for an order directed at Belgium to cooperate with the Defence.

2. On 15 January 2010, the Defence sought to adjourn the proceedings from 1 to 3 February in order to meet with two Belgian officials, in the Kingdom of Belgium.<sup>1</sup> In its reply, the Defence revised its prayer for an adjournment from 1 to 2 February 2010.

***Defence Motion***

3. The Defence requests a three days adjournment to meet with two Belgian officials who could challenge the testimony of Prosecution Witnesses ANAC and ANP as well as allegations in the statements of Witnesses ANAC and ANAB.<sup>2</sup> It contends that the hearings of the Belgian citizens is crucial to ensure the Accused's right to a proper

<sup>1</sup> Motion, para. 10.

<sup>2</sup> Motion, para. 11.

defence by providing information relevant to the cross-examination of the Prosecutor's witnesses, and to challenging the allegations of diversion of funds.<sup>3</sup>

4. The Defence argues that the persons mentioned are high-ranking Belgian officials in possession of "specific technical information" of high relevance to the case, the meeting with whom the Chamber itself had requested the Kingdom of Belgium to facilitate.<sup>4</sup>

5. The Defence submits that it has requested a postponement of the hearing from the Kingdom of Belgium but that the Belgian authorities have stated that the dates of 1 and 2 February 2010 are definitive.<sup>5</sup> Moreover, it contends that it is merely complying with the Chamber's decision requesting Belgium to facilitate the meeting with the two officials, and that the Belgian *Juge d'instruction* has requested the presence of both Counsel and Co-Counsel at the hearings of the Belgian officials.<sup>6</sup>

6. The Defence contends that both Counsel have to be present during the trial sessions, as they cannot foresee which one will be conducting the cross-examinations on the relevant dates, as the times for the cross examinations cannot be accurately predicted.<sup>7</sup> Indeed, the Prosecution's witness statements lack detail, making it necessary for the Defence to conduct detailed cross-examinations, and that the Order of Appearance of the Prosecution Witnesses<sup>8</sup> has not been respected so far, making it impossible for the Defence to anticipate when witnesses will have to be cross-examined.<sup>9</sup> The Defence therefore submits that the work of both Counsel is complementary and the presence of both Counsel in court is necessary to ensure an adequate defence of the Accused.<sup>10</sup>

7. Lastly, the Defence avers that the Accused would be prejudiced if only one Counsel could sit in court, as it is his right to have both Counsel sitting, considering especially that the Defence team is less staffed than the Prosecution.<sup>11</sup> It contends that the rights of the Accused would be affected by denying him access to full representation while the Prosecution could suffer no possible prejudice if the motion is granted. The Defence submits that the reputation of the Tribunal would be impinged upon if the Accused was denied full representation in court through no fault of his own, while complying with the Court's "Order of Cooperation Directed at Belgium" and the Belgian State.<sup>12</sup>

8. The Defence further submits that the adjournment would not prejudice the expeditiousness of the proceedings and would be consistent with the earlier decision of

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<sup>3</sup> Motion, para. 13.

<sup>4</sup> Motion, paras. 14-15.

<sup>5</sup> Motion, paras. 17.

<sup>6</sup> Motion, para. 26.

<sup>7</sup> Motion, para. 21.

<sup>8</sup> Order of Appearance of Prosecution Witnesses, 14.09.09.

<sup>9</sup> Motion, para. 21-23.

<sup>10</sup> Motion, para.25.

<sup>11</sup> Motion, para. 27.

<sup>12</sup> Motion, para. 28.

the Chamber requesting the Kingdom of Belgium's cooperation. It suggests that the time of the requested adjournment could be made up by sitting on Friday mornings.<sup>13</sup>

9. It reminds the Chamber of its own view that the schedule might need to be modified if the need arose, and proposes that this is the case in this situation.<sup>14</sup>

### ***Prosecution Response***

10. The Prosecution submits that the Defence has not shown why it is necessary for both Counsel to be present during the hearings in Belgium, and has not produced any supporting documents.<sup>15</sup>

11. The Prosecution contends that the absence of one counsel cannot be a reason for adjournment of the Trial.<sup>16</sup> It asserts that the purpose of having two Counsel is to allow for substitution where one Counsel is indisposed, to avoid unnecessary delays of the proceedings.<sup>17</sup> Both Counsel are qualified to continue the proceedings on their own, the Defence team being adequately staffed to support them in doing so.<sup>18</sup>

12. The Prosecution also contends that the Defence is exaggerating in asserting that the cross-examination schedule is entirely unpredictable, and that they would have to prepare them for every single prosecution witness.<sup>19</sup> The Defence must be able to organize in such a way as to continue the proceedings even when one Counsel is absent.<sup>20</sup>

13. The Prosecution further contends that any delays in the proceedings so far are due to lengthy cross-examinations by the Defence.<sup>21</sup>

14. The Prosecution submits that grave prejudice and irreparable inconvenience would be caused by granting the Motion.<sup>22</sup> In particular, the Prosecution affirms that the adjournment would cause immense logistical problems to the court as well as to the witnesses.<sup>23</sup>

15. The Prosecution anticipates problems with the ability of witnesses to testify should the proceedings be interrupted. In particular, it contends that Witness ANAC has a very limited time frame to testify, and might not be able to attend were the proceedings to be delayed.<sup>24</sup>

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<sup>13</sup> Motion, para. 16 and 31.

<sup>14</sup> Motion, paras. 16.

<sup>15</sup> Response, para. 7.

<sup>16</sup> Response, para. 9.

<sup>17</sup> Response, para. 11.

<sup>18</sup> Response, para. 11.

<sup>19</sup> Response, para. 12.

<sup>20</sup> Response, para. 12.

<sup>21</sup> Response, para. 13.

<sup>22</sup> Response, para. 14.

<sup>23</sup> Response, para. 15-16.

<sup>24</sup> Response, para. 17.

16. Lastly, the Prosecution asserts that two Fridays, being only half-workdays, would not be sufficient to make up for the time lost in court in the event of an adjournment for three days.<sup>25</sup>

17. The Prosecution therefore seeks the dismissal of the Motion.<sup>26</sup>

### ***Defence Reply***

18. The Defence reiterates that both Counsel need to attend the meetings in Belgium.<sup>27</sup> It argues that the adjournment is requested to fulfil the Chamber's order pursuant to Article 28 of the Statute, and not related to any internal matters of the Defence or within its responsibility.<sup>28</sup>

19. The Defence specifies that the participation of both Counsel during the hearings in Belgium is necessary. It argues that Lead Counsel Peter Herbert has the economic understanding to appreciate the diversion of funds allegation,<sup>29</sup> while Co-Counsel Mylène Dimitri, as a French-speaking attorney, will be indispensable at the meeting, which will be conducted in French.<sup>30</sup> The Defence submits that it is impossible for a person without economic background to fully appreciate the issues, while it would be inappropriate to 'repeatedly interrupt' the *Juge d'instruction* and the witnesses in order to translate statements.<sup>31</sup>

20. The Defence submits furthermore that the Belgian authorities expect both Counsel at the hearings.<sup>32</sup>

21. The Defence also notes that it can neither be held responsible for the duration of the Prosecution witnesses' testimony, nor determine in advance how long its own cross-examination will last, and that therefore it has no way of determining in advance how long a witness will testify.<sup>33</sup>

22. It submits that a two-day modification of the schedule would not be detrimental or disruptive to the life of witness ANAD.<sup>34</sup> Furthermore, it proposes to switch the order of appearance of witnesses ANAD and ANAN, in which case ANAD would not be concerned by an adjournment.<sup>35</sup> With relation to witness ANAC, the Defence submits that it is impossible to determine yet when exactly that witness will testify in the proceedings, as it is scheduled for later in the proceedings.<sup>36</sup>

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<sup>25</sup> Response, para. 18.

<sup>26</sup> Response, para. 19.

<sup>27</sup> Reply, para. 5.

<sup>28</sup> Reply, para. 7.

<sup>29</sup> Reply, para. 8-10.

<sup>30</sup> Reply, para. 11.

<sup>31</sup> Reply, para. 8-11.

<sup>32</sup> Reply, para.12.

<sup>33</sup> Reply, para. 17.

<sup>34</sup> Reply, para. 18.

<sup>35</sup> Reply, para. 19.

<sup>36</sup> Reply, para.20-21.

23. The Defence concludes that the requested adjournment will not delay the proceedings.<sup>37</sup> It reiterates the suggestion that the Chamber meet on Fridays if necessary.<sup>38</sup>

24. Finally, the Defence submits that it has changed its travel arrangements in such a way that a two-day adjournment will be sufficient to conduct the hearings in Belgium, so that proceedings could resume at 11:00 am on 3 February.<sup>39</sup>

### DELIBERATIONS

25. The Chamber recalls Articles 19 and 20 of the Statute regarding the conduct of fair trial and the rights of the Accused.

26. The Chamber recalls that the Defence requests an adjournment of the trial because both Counsel need to attend a hearing in Belgium and that both Counsel need to present during trial proceedings.

27. Concerning the requested presence of both Counsel during the hearings in Belgium, the Chamber notes that the e-mail attached to the Defence's Reply mentions the presence of the Defence Counsel in the plural ("*La Présence des avocats de la défense*"). However, this cannot be interpreted as an order for both Counsel to attend the hearings. The Defence has not demonstrated that the presence of both Counsel is necessary or mandatory. Further, the e-mail makes clear that the Defence Counsel will not be able to actively participate in the hearings ("*sans pouvoir y participer activement*"), but will be submitting their questions beforehand.<sup>40</sup>

28. While the Defence submits that the presence of Lead Counsel is indispensable because of his expert knowledge on the subject of the hearings, but also contends that the presence of Co-Counsel is necessary because she understands the French language, the Chamber does not consider that the presence of Co-Counsel is necessary for translation purposes as this function can be held by another member of the Defence Team or an official interpreter.

29. Lastly, the Chamber observes that the Defence's assertion that an adjournment is requested to fulfill the "Order of Cooperation Directed at Belgium" is not correct as it bears no relation to the question of whether both Counsel need to be present on the relevant dates.

30. Therefore, the Chamber considers that Defence has thus not substantiated its claim that the presence of both Counsel in Belgium is necessary and required.

31. With respect to the Defence's argument that both Counsel are not 'transposable entities', and are essential to ensuring a fair hearing to the Accused and further that the

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<sup>37</sup> Reply, para. 22.

<sup>38</sup> Reply, para.23.

<sup>39</sup> Reply, para.24.

<sup>40</sup> Reply, Annex, p. 4664.

Accused is entitled 'as of right' to the both Counsel being present in court,<sup>41</sup> the Chamber recalls the Appeals Chamber Decision in the *Media* case which stated that there is no right to the presence of both Counsel.<sup>42</sup> While the Accused has a fundamental right to legal assistance pursuant to Article 20(4)(d) of the Statute, Article 15 (A) of the Directive on the assignment of Defence Counsel (the "Directive") states that: "A suspect or accused shall only be entitled to have *one Counsel* assigned to him and that Counsel shall deal with *all stages of procedure* and all matters arising out of the representation of the suspect or accused or for the conduct of his Defence.[...]"<sup>43</sup> The Chamber further notes Article 15 (C) of the Directive which states that: "Whenever appropriate and at the request of the assigned Counsel, the Registrar *may*, pursuant to Article 13 above, appoint a Co-Counsel to assist the assigned Counsel.[...]"<sup>44</sup>

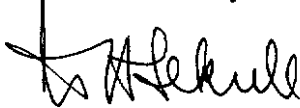
32. Therefore, while the Defence argues that both Counsel have to be present to conduct the cross-examination of the Prosecution witnesses, the Chamber notes that Defence Counsel are each competent in the client's case, and have to organize their work in such a way as to facilitate and enable the progress of the case and the work of the Court at all times.

33. Accordingly, the Chamber denies the Motion in all respects.

**FOR THE ABOVE REASONS, THE TRIBUNAL**

**DENIES** the Motion.

Arusha, 27 January 2010



William H. Sekule  
Presiding Judge



Solomy Balungi Bossa  
Judge



Mparany Rajohnson  
Judge

[Seal of the Tribunal]



<sup>41</sup> Defence Motion, para.27.

<sup>42</sup> *Ferdinand Nahimana et al. v. The Prosecutor, Case No. ICTR-99-52-A: Decision on the Appellant Hassan Ngeze's Motion Requesting a Postponement of the Appeal Hearing*, 15 January 2007.

<sup>43</sup> Emphasis added; see *Ferdinand Nahimana et al. v. The Prosecutor, Case No. ICTR-99-52-A: Decision on the Appellant Hassan Ngeze's Motion Requesting a Postponement of the Appeal Hearing*, 15 January 2007.

<sup>44</sup> Emphasis added; *Nahimana et al*, *ibid*.