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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: 24 May 2010

**The PROSECUTOR**

v.

**Augustin NGIRABATWARE**

Case No. ICTR-99-54-T

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**DECISION ON PROSECUTION MOTION TO VACATE  
THE TRIAL DATE**

**Office of the Prosecutor**

Mr. Wallace Kapaya  
Mr. Bill Egbe  
Mr. Patrick Gabaake  
Mr. Iskandar Ismail  
Ms. Faria Rekkas

**Defence Counsel**

Mr. Peter Herbert  
Ms. Mylène Dimitri  
Mr. Deogratias Sebureze  
Ms. Anne-Gaëlle Denier  
Ms. Chloé Gaden-Gistucci

**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 Vacate the Scheduled Trial Date and Extend the Date for Commencement of Third Phase of Prosecution Case [made pursuant to Rules 73*bis* (A) and 54 of the Rules of Procedure and Evidence, and the Inherent Criminal Jurisdiction of the Tribunal]”, filed confidentially on 10 May 2010 (the “Motion”);

**CONSIDERING:**

- (a) The “Defence Response to the Prosecutor’s Extremely Urgent Motion for Leave to Vacate the Scheduled Trial Date and Extend the Date for Commencement of Third Phase of Prosecution Case”, filed confidentially on 14 May 2010 (the “Response”); and
- (b) Prosecutor’s Rejoinder to Defence Response to the Prosecutor’s Extremely Urgent Motion for Leave to Vacate the Scheduled Trial Date and Extend the Date for Commencement of Third Phase of Prosecution Case [made pursuant to Rules 73*bis* (A) and 54 of the Rules of Procedure and Evidence, and the Inherent Criminal Jurisdiction of the Tribunal], filed confidentially on 18 May 2010 (the “Rejoinder”);

**CONSIDERING** also the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

**NOW DECIDES** the Motion pursuant to Articles 19 (1) and 20 of the Statute and Rules 54, 73, and 73 *bis* (E) of the Rules.

### INTRODUCTION

1. On 19 March 2009, the Prosecution submitted its Pre-Trial Brief, which included a list of 16 witnesses it intended to call. Among them was Witness ANAC, whose anticipated testimony pertained to the Ministry of Planning’s alleged misuse of foreign funds.<sup>1</sup>
2. On 25 May 2009, the Prosecution filed an amended Pre-Trial Brief. The list of witnesses contained the same 16 persons, and added an Investigator.<sup>2</sup>
3. In a letter dated 25 August 2009, the Prosecution sought to add Witness ANAQ to its witness list. The Chamber took note of this addition on 7 September 2009.<sup>3</sup>

<sup>1</sup> The Prosecutor’s Pre-Trial Brief (Filed pursuant to Rule 73 (B) (i) *bis* of the Rules of Procedure and Evidence), 19 March 2009, para. 206, Annex I.

<sup>2</sup> The Prosecutor’s Revised Pre-Trial Brief (Filed pursuant to Court Order dated 19 May 2009 and Rule 73 (B) (i) *bis* of the Rules of Procedure and Evidence), 25 May 2009, para. 206, Annex 1.

4. On 23 September 2009, the Defence provided notice of its alibi that the Accused “was in Kigali town from 6<sup>th</sup> to 12<sup>th</sup> April 1994.”<sup>4</sup>
5. Between 23 September and 22 October 2009, the Chamber heard six Prosecution witnesses. On 22 October 2009, the case was adjourned until 25 January 2010 for the resumption of the Prosecution’s case.<sup>5</sup>
6. On 11 January 2010, the Defence “inform[ed] the Prosecutor that the Accused was specifically at the Presidential Guard Camp and at the French Embassy in Kigali on April 7<sup>th</sup> and April 8<sup>th</sup> 1994.”<sup>6</sup>
7. On 28 January 2010, the Chamber granted the Prosecution motion for leave to vary its witness list filed on 22 December 2009, and ordered that Witnesses ANAB, ANAI, and ANAQ be dropped from the Prosecution list and Witnesses AFS, ANAR, ANAS, ANAT, and ANAU be added to it.<sup>7</sup>
8. In the first two sessions of the case, running from 23 September 2009 to 22 October 2009 and from 25 January 2010 through 18 March 2010, the Chamber heard 17 Prosecution witnesses. These were all of the Prosecution witnesses except Witness ANAA, who was dropped from the list,<sup>8</sup> and Witness ANAC, whose appearance remained uncertain at the time of adjournment on 18 March 2010.<sup>9</sup>
9. On 16 February 2010, the Chamber directed the Defence to disclose “as soon as reasonably practicable” the names and addresses of witnesses and any other evidence upon which it intended to rely to establish the alibi.<sup>10</sup>
10. On 18 March 2010, the Prosecution stated that, despite its efforts to contact Witness ANAC over the previous 10 days, it had received no response. In light of this,

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<sup>3</sup> Letter from Mr. Wallace Kapaya, Senior Appeals Counsel, to Mr. Roger-Noel Kouambo, Coordinator, Trial Chamber II, Court Management Section, dated 25 August 2009; T. 7 September 2009 p. 11.

<sup>4</sup> Notice of Alibi Pursuant to Rule 67 (A) (ii) (“Notice of Alibi”). According to the transcript of 23 September 2009, the proceedings started at 9.15 a.m. Shortly thereafter, and before the Prosecution’s opening statement, the Defence stated that it had filed its Notice of Alibi and a separate motion earlier that morning. T. 23 September 2009 pp. 1, 7-8. The Chamber notes that the Notice of Alibi bears a time stamp of 9.58 a.m., but considers the reason to be that the Court Management System did not stamp this document immediately upon receipt. Similarly, the Chamber notes that the Defence motion filed the same day was stamped at 11.52 a.m. See Defence Motion for Certification to Appeal the Trial Chamber Decision Dated 17 September 2009, p. 1. As such, the Chamber considers that the Defence filed its Notice of Alibi prior to the Prosecution’s opening statement and the commencement of the trial.

<sup>5</sup> See Decision on Prosecution Motion for Leave to Vary Its Witness List (TC), 28 January 2010 (“Decision of 28 January 2010”), para. 2.

<sup>6</sup> Defence Response to Prosecutor’s Motion for an Order to Compel the Accused to Disclose Particulars of His Alibi, filed 11 January 2010, para. 22.

<sup>7</sup> Decision of 28 January 2010, p. 15.

<sup>8</sup> T. 1 February 2010, pp. 69-70.

<sup>9</sup> See T. 18 March 2010, pp. 81-84.

<sup>10</sup> Decision on Prosecution Motion for an Order to Compel the Accused to Disclose Particulars of His Alibi (TC), 16 February 2010 (“Decision of 16 February 2010”), p. 9.



the Chamber adjourned the proceedings until 21 June 2010, when it planned to commence the evidence of Witness ANAC, if he was available.<sup>11</sup>

11. On 22 March 2010, the Defence filed its Additional Alibi Notice, which did not provide further information on the dates and locations of the Accused's alibi.<sup>12</sup> On 15 April 2010, the Trial Chamber issued a Scheduling Order in which it required the Prosecution to state, not later than 30 April 2010, whether Witness ANAC would be available to testify at the next trial session scheduled to commence on 21 June 2010. If the Witness remained unavailable, the Chamber ordered that the Defence case would be scheduled to commence at the next trial session.<sup>13</sup>

12. On 16 April 2010, the Chamber directed the Defence to disclose "immediately" the names and addresses of witnesses and any other evidence upon which it intended to rely to establish the alibi. It also reminded the Defence that failure to make the appropriate disclosures may be taken into account in the deliberation regarding the alibi.<sup>14</sup>

13. On 29 April 2010, the Prosecution stated that Witness ANAC would be unavailable to testify starting on 21 June 2010. The Prosecution also moved the Chamber for leave to drop Witness ANAC from its list and to add Witnesses ANAV, AHJ and DBN to rebut the anticipated alibi.<sup>15</sup>

14. In a letter dated 3 May 2010, the Defence stated that the Accused was at the Presidential Guard Camp and at the French Embassy in Kigali from 6 through 12 April 1994. It also disclosed the names and addresses of 15 potential alibi witnesses. The Defence corrected, on 7 May 2010, the spelling of one of these potential witness's names.<sup>16</sup>

15. The Prosecution filed the present Motion on 10 May 2010.

16. On 18 May 2010, the Prosecution confirmed the withdrawal of Witness ANAC.<sup>17</sup>

<sup>11</sup> Scheduling Order Pursuant to Rule 54 of the Rules of Procedure and Evidence (TC), 15 April 2010 ("Scheduling Order of 15 April 2010"), paras. 8-9, citing T. 18 March 2010, pp. 2-3, 77, 81-84.

<sup>12</sup> Additional Alibi Notice, 22 March 2010.

<sup>13</sup> Scheduling Order of 15 April 2010, p. 3.

<sup>14</sup> Decision on Prosecutor's Supplementary Motion to Compel the Accused to Disclose Particulars of His Alibi (TC), 16 April 2010 ("Decision of 16 April 2010"), p. 7.

<sup>15</sup> Prosecutor's Extremely Urgent Motion for Leave to Vary the List of Witnesses To Be Called and Extension of Witness Protection Orders [made pursuant to Rules 73bis (E), 54, 69, 75 of the Rules of Procedure and Evidence, Article 21 of the Statute of the Tribunal and the Inherent Criminal Jurisdiction of the Tribunal], filed confidentially on 29 April 2010, paras. 1, 9, 57.

<sup>16</sup> Second Additional Notice of Alibi, dated 3 May 2010, paras. 6-7; Corrigendum to the Second Additional Notice of Alibi, dated 7 May 2010.

<sup>17</sup> Prosecutor's Response to Defence Urgent Motion Requesting the Trial Chamber to Withdraw Immediately the Allegation of Diversion of Funds (Article 20 of the statute Rule 54 of the RPE), filed confidentially on 18 May 2010, paras. 17, 45; Rejoinder, para. 9.

## SUBMISSIONS OF THE PARTIES

### *Prosecution Motion*

17. The Prosecution requests the Chamber to vacate the scheduled trial date of 21 June 2010, to reschedule it to 14 July 2010, and to permit the Prosecution to call up to three as-yet-unidentified witnesses to rebut anticipated Defence alibi evidence. It also seeks Defence disclosure of any statements from its 15 potential alibi witnesses, and an interview with these witnesses. Finally, the Prosecution requests leave to withdraw its motions of 24 March 2010<sup>18</sup> and 29 April 2010, and reiterates that Witness ANAC will be unavailable to testify starting on 21 June 2010.<sup>19</sup>

18. The Prosecution argues that it must be permitted to rebut the alibi's feasibility during its case-in-chief. But because of the Defence's failure to timely disclose the places and dates covered by the alibi, the names and addresses of witnesses to support it, and any other information it might rely upon to establish the alibi, the Prosecution requires additional time to investigate and prepare for this rebuttal.<sup>20</sup>

19. Finally, the Prosecution avers that its previous motion to add Witnesses ANAV, AHJ and DBN has become unnecessary in light of the Defence's identification of 15 potential alibi witnesses. The Prosecution needs additional time to identify rebuttal witnesses in their place, as well as to investigate the Defence's newly identified witnesses. It therefore requests the postponement of the Prosecution case until 14 July 2010.<sup>21</sup>

### *Defence Response*

20. The Defence disputes that it failed to give proper notice of its alibi and disclose relevant information. Moreover, the Prosecution received notice of the alibi before the case commenced, and cannot use it as a basis to request more time for preparation. The additional information disclosed on 3 May 2010 does not change this.<sup>22</sup>

21. The Defence submits that the Prosecution's desire to replace Witnesses ANAV, AHJ and DBN with three unidentified persons is meant to introduce other witnesses who will testify on matters beyond the scope of alibi rebuttal. It would also be prejudicial for

<sup>18</sup> Prosecutor's Motion to Admit Evidence in Lieu of Oral Testimony and Ancillary Reliefs (made pursuant to Rules 89(C), 92bis, 67(A)(ii)(a), 54 and the Inherent Criminal Jurisdiction of the Tribunal), filed confidentially on 24 March 2010.

<sup>19</sup> Motion, paras. 1-2, 6-7, 49.

<sup>20</sup> *Id.*, paras. 12-22, 25, 28-39, 39, citing *Siméon Nchamihigo v. The Prosecutor*, Case No. ICTR-2001-63-A, Judgement (AC), 18 March 2010, paras. 112, 350-355, 377; *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Judgement (AC), 16 November 2009 ("*Zigiranyirazo Appeals Judgement*"), paras. 50, 72.

<sup>21</sup> Motion, paras. 40-49. The Chamber notes that, at one point, the Prosecution asks that the trial recommence on "Wednesday 15 July 2010", but requests an extension until "14 July 2010" in both the introduction and the prayer. *Id.* paras. 1, 47 and 49. The Chamber also takes note of the fact that 14 July 2010 is a Wednesday. Due to this, the Chamber considers that the Prosecution motion seeks postponement until 14 July 2010.

<sup>22</sup> Response, paras. 31-78, 82-85, 91-96.

the Accused to remain unaware of the witnesses scheduled to testify against him, and for them to be added with insufficient time to prepare for their testimony.<sup>23</sup>

22. As to the Prosecution's request for disclosure of statements by potential alibi witnesses, the Defence asserts that it has no such statements and that the Prosecution fails to identify on what basis the statements should be disclosed before the filing of the pre-defence brief.<sup>24</sup>

23. If the Prosecution wants to meet with potential Defence alibi witnesses, it should communicate with the Defence, which "has absolutely no objection" to such a meeting, so long as the Defence is present.<sup>25</sup>

24. The Defence also expresses concern that the Prosecution may be attempting to avoid the Scheduling Order's deadline in the hopes that Witness ANAC will become available later. It prays that the Chamber confirm that the Prosecution has lost its opportunity to secure Witness ANAC's evidence.<sup>26</sup>

25. The Defence also asks that the Chamber declare the Prosecution's motion as frivolous and vexatious. The motion of 29 April 2010 was meant to delay the proceedings, and it prejudiced the Defence, which devoted significant resources to the proposed witnesses. Further delaying the trial until 14 July 2010 would violate the Accused's right to be tried without undue delay.<sup>27</sup>

#### ***Prosecution Rejoinder***

26. The Prosecution replies that any delay is due to the Defence's failure to comply with its disclosure obligations under Rule 67 (A)(ii)(a), which can be only remedied by providing additional time for the Prosecution to investigate new witnesses to rebut the alibi. The Prosecution will limit their testimony to the alibi.<sup>28</sup>

27. The Prosecution clarifies that it seeks statements of the Defence's potential alibi witnesses based on Rules 67 (A)(ii)(b) and 73ter (B)(ii)(b), as well as the practice of the Tribunal.<sup>29</sup>

28. As to Witness ANAC, the Prosecution reaffirms that he will not testify because of his unavailability and that he has been dropped as a witness.<sup>30</sup>

<sup>23</sup> *Id.*, paras. 99-106, 109-118.

<sup>24</sup> *Id.*, paras. 79-81.

<sup>25</sup> *Id.*, paras. 86-88.

<sup>26</sup> *Id.*, paras. 119-136.

<sup>27</sup> *Id.*, paras. 137-45. See also Ngirabatware Defence's Confidential and Extremely Urgent Motion Requesting an Order Directed to the Kingdom of Belgium Regarding Witness ANAV, filed confidentially on 3 May 2010; Extremely Urgent Motion of Dr. Augustin Ngirabatware for Disclosure of Closed Session Testimony and Exhibits Under Seal of Prosecution Witness DBN in *Bagosora et al.* (case No. ICTR-98-41-T), filed confidentially on 5 May 2010.

<sup>28</sup> Rejoinder, paras. 4-5, 8.

<sup>29</sup> *Id.*, paras. 6-7.

<sup>30</sup> *Id.*, para. 9.

## DELIBERATIONS

29. As a preliminary matter, the Chamber notes that the Prosecution seeks to withdraw its motions of 24 March and 29 April 2010. Furthermore, the Chamber notes that Witness ANAC remains unavailable to testify and that the Prosecution has dropped him from its witness list. Accordingly, and pursuant to Rule 73*bis* (E), the Chamber grants the variation of the Prosecution's witness list by dropping Witness ANAC.<sup>31</sup>

30. Rule 67 (A)(ii) of the Rules provides that:

As early as reasonably practicable and in any event prior to the commencement of the trial . . . [t]he Defence shall notify the Prosecutor of its intent to enter . . . [t]he defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to establish the alibi.

31. According to the Appeals Chamber, "the requirements of Rule 67 (A)(ii) are satisfied when the Defence has notified the Prosecution of the required particulars of the alibi."<sup>32</sup> The Chamber recalls the *Rutaganda* Appeals Judgement that a timely notice of alibi that meets the Rule 67 (A)(ii) requirements helps "[t]o ensure a good administration of justice and efficient judicial proceedings."<sup>33</sup> Failure to provide such notice, however, shall not limit the Accused's right to rely upon an alibi defence, pursuant to Rule 67 (B). The Chamber also recalls that where an alibi is properly raised, the Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true.<sup>34</sup>

32. The Chamber recalls that on 23 September 2009, the Defence provided notice that the Accused was in Kigali town from 6 to 12 April 1994. On 11 January 2010, the Defence specified that he was at the Presidential Guard Camp and the French Embassy on 7 and 8 April 1994. In this regard, the Chamber also recalls its Decision of 16 February 2010, which directed the Defence to disclose "as soon as reasonably practicable" the names and addresses of witnesses and any other evidence upon which it intended to rely to establish the alibi.<sup>35</sup> The Additional Notice of Alibi on 22 March 2010 did not discuss the Accused's whereabouts. On 16 April 2010, the Chamber directed that the Defence disclose this information "immediately".<sup>36</sup> In a letter dated 3 May 2010, the Defence announced that the Accused was at the Presidential Guard Camp and the French Embassy from 6 through 12 April 1994 and provided the particulars of 15 potential alibi witnesses.

<sup>31</sup> See generally T. 1 February 2010, pp. 69-70.

<sup>32</sup> *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003, para. 242.

<sup>33</sup> *Id.*, para. 243.

<sup>34</sup> *Zigiranyirazo* Appeals Judgement, para. 18.

<sup>35</sup> Decision of 16 February 2010, p. 9.

<sup>36</sup> Decision of 16 April 2010, p. 7.



33. The Chamber notes that the information on alibi appears to have been disclosed in a piecemeal fashion that has not been specific and consistent. Contrary to the requirements of Rule 67 (A)(ii)(a), the Prosecution received no notice, until about the end of its case-in-chief, that the Accused claims to have been in the Presidential Guard Camp and the French Embassy during this time span.

34. Furthermore, the Defence disclosed the particulars of 15 potential alibi witnesses for the first time on 3 May 2010. Rule 67(A)(ii)(a) requires disclosure of "the names and address of witnesses", not of potential witnesses. In the Chamber's view, this apparent lack of clarity and specificity may have denied the Prosecution the opportunity to investigate effectively the Defence alibi.

35. The Chamber recalls that it has discretion in the scheduling of proceedings before it. This discretion, however, is not unlimited. Article 19 of the Statute requires that the Chamber ensure a fair and expeditious trial, and Article 20 (4)(b)-(c) guarantees that the Accused shall enjoy adequate time to prepare his defence and shall be tried without undue delay.<sup>37</sup>

36. Under the circumstances, the Chamber considers that the Prosecution request to be given an opportunity to present additional witnesses during its case-in-chief in order to rebut the alibi is warranted. The Chamber thereby orders that if the Prosecution intends to take steps to vary its witness list in this regard, it should file an appropriate motion by 24 June 2010. In the event the variation is granted, the Chamber will schedule the hearing of such witnesses from 23 August through 10 September 2010.

37. The Chamber further orders that if the Prosecution fails to move to vary its witness list by 24 June 2010, then its case-in-chief will be deemed closed.

38. The Chamber schedules the Defence case to commence on 15 November 2010. It will be expected to continue through 17 December 2010, and from 17 January through 11 February 2011.

39. As for the Prosecution's request for immediate disclosure of statements from the 15 potential alibi witnesses, the Chamber notes that there is no basis for this request. Accordingly, it is denied.

40. The Chamber considers that the Prosecution request to meet with these witnesses is a matter for the Parties to discuss and resolve amongst themselves taking into account the Chamber's Decision of 9 February 2010.<sup>38</sup>

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<sup>37</sup> See Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date (AC), 12 May 2009, para. 22.

<sup>38</sup> See Decision on Defence Urgent Motion for Witness Protective Measures (TC), 9 February 2010, pp. 8-9.





**FOR THE ABOVE REASONS, THE CHAMBER**

**GRANTS** the Motion in part;

**VACATES** the previously scheduled trial date of 21 June 2010;

**NOTES** and **GRANTS** the withdrawal of the “Prosecutor’s Motion to Admit Evidence in Lieu of Oral Testimony and Ancillary Reliefs [made pursuant to Rules 89(C), 92*bis*, 67(A)(ii)(a), 54 and the Inherent Criminal Jurisdiction of the Tribunal]”, filed confidentially on 24 March 2010;

**NOTES** and **GRANTS** the withdrawal of the “Prosecutor’s Extremely Urgent Motion for Leave to Vary the List of Witnesses To Be Called and Extension of Witness Protection Orders [made pursuant to Rules 73*bis* (E), 54, 69, 75 of the Rules of Procedure and Evidence, Article 21 of the Statute of the Tribunal and the Inherent Criminal Jurisdiction of the Tribunal]”, filed confidentially on 29 April 2010;

**GRANTS** the variation of the Prosecution’s witness list by dropping Witness ANAC from it;

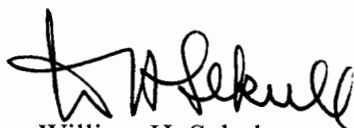
**ORDERS** that if the Prosecution intends to take steps to vary its witness list in order to rebut the alibi, it should file an appropriate motion by 24 June 2010;

**ORDERS** that, if the Prosecution fails to move to vary its witness list by 24 June 2010, then its case-in-chief will be deemed closed;

**ORDERS** that the Defence case be scheduled to commence on 15 November 2010; and

**DENIES** the Motion in all other respects.

Arusha, 24 May 2010



William H. Sekule  
Presiding Judge



Solomy Balungi Bossa  
Judge



Mparany Rajohnson  
Judge

[Seal of the Tribunal]