

ICTR-98-40-1
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(215-208)

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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

TRIAL CHAMBER I

OR:FR

Before: Judge Navanethem Pillay, Presiding
Judge Lennart Aspegren
Judge Laity Kama

Registry: Ms Prisca Nyambe

Decision of: 18 March 1999

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THE PROSECUTOR
versus
BERNARD NTUYAHAGA

Case No. ICTR-98-40-T

DECISION ON THE PROSECUTOR'S MOTION
TO WITHDRAW THE INDICTMENT

Office of the Prosecutor:

Mr. Mohamed Othman
Mr. James Stewart

Counsel for the Defence:

Mr. Georges Komlavi Amegadjie

Amicus Curiae:

The Government of the Kingdom of Belgium, represented by Mr. Éric David

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: *Dr. M. M. A. K. M. Antoinette*
SIGNATURE: *[Signature]* DATE: *18.03.1999*

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("THE TRIBUNAL").

SITTING as Trial Chamber I of the Tribunal, composed of Judge Navanethem Pillay, presiding, Judge Lennart Aspegren and Judge Laïty Kama;

CONSIDERING a motion dated 23 February 1999, whereby the Prosecutor, acting pursuant to Rule 51 of the Rules of Procedure and Evidence ("the Rules"), sought leave to withdraw the indictment against the accused Bernard Ntuyahaga ("the accused");

CONSIDERING the addendum to said motion, filed on 10 March 1999, whereby the Prosecutor additionally requested that the Chamber order the release of the accused Bernard Ntuyahaga from the Tribunal's custody to the authorities of the United Republic of Tanzania;

CONSIDERING the indictment dated 26 September 1998 submitted by the Prosecutor in accordance with Rule 47 of the Rules and considering the Decision on the review of said indictment rendered by Judge Yakov A. Ostrovsky on 29 September 1998 and the subsequent corrigenda filed thereon on 30 September 1998 and 2 October 1998;

CONSIDERING that by the aforementioned Decision, Judge Ostrovsky dismissed counts 1, 2 and 4 of the indictment, ordered the Prosecutor to join counts 3 and 5 and confirmed count 3;

CONSIDERING that the indictment as confirmed by Judge Ostrovsky thus comprises a single count of crime against humanity (murder), as stipulated in Article 3(a) of the Statute of the Tribunal ("the Statute"), and that it alleges that the accused is criminally responsible for the murder of Mrs. Agathe Uwilingiyimana, then Prime Minister of Rwanda, and ten Belgian soldiers United Nations Assistance Mission for Rwanda ("UNAMIR"), which murders were allegedly committed as part of a widespread or systematic attack against a civilian population on national or political grounds;

CONSIDERING that the accused pleaded not guilty to the said count during his initial appearance before this Chamber on 13 November 1998;

CONSIDERING the Defence Brief in reply and counter claims dated 12 March 1999, whereby it is argued, *inter alia*, that the motion of the Prosecutor for withdrawal of the indictment is inadmissible, that the motion is not well founded, and that the Chamber should dismiss it; further the Defence claimed that a finding should be made on the innocence of the accused, and that he should therefore be acquitted and released;

CONSIDERING that the Government of the Kingdom of Belgium requested leave of the Chamber to appear as an Amicus Curiae ("the Belgian Government") so as to make submissions on the motion of the Prosecutor to withdraw the indictment, and that by Decision of 8 March 1999, taken pursuant to Rule 74 of the Rules, the Government of the Kingdom of Belgium was granted leave to appear;

HAVING HEARD the representatives of the Prosecutor, the Defence and the Belgian Government during the public hearing held on 16 March 1999;

WHEREAS, at the commencement of the said hearing, the representative of the Prosecutor presented *in limine litis* an oral motion, on the basis of Rule 73 of the Rules, requesting the Tribunal to dismiss the Advisory brief on the motion of the Prosecutor for withdrawal of the indictment, filed by the Registrar for the attention of the Judges on 15 March 1999, on the grounds that the Registrar is not party to the proceedings and therefore cannot legally present such a brief;

WHEREAS during the said hearing the Chamber ruled that the Registrar had no *locus standi* in the present matter and the Judges therefore had not considered the Registrar's Advisory brief;

AFTER HAVING DELIBERATED,

WHEREAS the Chamber considers it appropriate to examine the question of the withdrawal of the indictment, the counter claims of the Defence, and the eventual implications of the withdrawal of an indictment;

1. On the withdrawal of the indictment:

WHEREAS in support of her motion for leave to withdraw the said indictment, the Prosecutor argued in the main as follows:

- (i) withdrawal of the indictment would promote the exercise of concurrent jurisdiction as provided for under Article 8(1) of the Statute by allowing national courts to prosecute the accused;
- (ii) the judicial proceedings instituted by the Prosecutor should be within the framework of a global policy aimed at shedding light on the events that occurred in Rwanda in 1994 and highlighting the complete landscape of the criminal acts perpetrated at the time, and that such objective would not be achieved through the prosecution of a single count indictment the factual elements of which relate solely to the murders of the former Prime Minister and ten UNAMIR Belgian soldiers;
- (iii) the Decision on review of the indictment has narrowed the scope of prosecution and deprived the Prosecutor of the opportunity to execute her strategy of prosecuting the accused for the totality of his criminal involvement;
- (iv) The Kingdom of Belgium has instituted proceedings against the persons implicated in the murder of the ten UNAMIR Belgian soldiers;



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Concerning, firstly, the submission of the Prosecutor that withdrawal of the indictment would promote the exercise of concurrent jurisdiction as provided for under Article 8(1) of the Statute by allowing national courts to prosecute the accused;

WHEREAS the Chamber notes that this submission of the Prosecutor is supported by the Belgian Government, who consider that the activities of the Tribunal and national jurisdictions are complementary and that the need to criminally punish for the atrocities perpetrated in Rwanda in 1994 implies that the Tribunal cooperates with States in proceedings against those responsible for the atrocities;

WHEREAS, according to the Belgian Government, the cooperation provided for by the Security Council of the United Nations in the Statute, whereby all States must fully cooperate with the Tribunal, implies necessarily a reciprocal cooperation of the Tribunal with States, although this is not expressly provided for in the Statute or the Rules, the Tribunal can co-operate with States and thus facilitate the due process of Justice;

WHEREAS the Chamber, although it accepts the submissions of the Prosecutor and the Belgian Government inasmuch as the Tribunal does not have exclusive jurisdiction over crimes included in its mandate and that its criminal proceedings are complementary to those of national jurisdictions, it wishes to underscore that, in its opinion, and as submitted by the Defence, the principle of concurrent jurisdiction as provided in paragraph (1) of Article 8 of the Statute, which recognizes the complementary nature of the judicial work performed by the Tribunal and national courts, must be read together with the provisions of paragraph 2 of said Article 8, which confers upon the Tribunal primacy over the national courts of all States;

WHEREAS the primacy of the Tribunal is also recognized under Article 9 of the Statute which, in accordance with the *non bis in idem* principle, provides that no person shall be tried by a national court for acts for which he has already been tried by the Tribunal, even if in the circumstances provided for under paragraph 2 of Article 9, a person who has been tried before a national court may be subsequently tried by the Tribunal;

WHEREAS, consequently, once proceedings are instituted before the Tribunal against a person, the Tribunal has primacy over any other national court;

WHEREAS, in support of its submissions, the Belgian Government quoted the provisions of Rule 11*bis* of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (the "ICTY");

WHEREAS, on this matter, the Chamber notes, on the one hand, that such provisions do not exist in the Tribunal's Rules;

WHEREAS the Chamber notes, on the other hand, that the scope of cooperation that the ICTY can give to national authorities, pursuant to said Rule 11*bis* of the ICTY Rules, is limited twofold, firstly by the fact that the ICTY only cooperates with the State in which the accused was arrested, and secondly, by the fact that sub-rule (C) of said Rule provides that:

“At any time after the making of an order under this Rule and before the accused is convicted or acquitted by a national court, the Trial Chamber may, upon the Prosecutor’s application and after affording an opportunity to the authorities of the State concerned to be heard, rescind the order and issue a formal request for deferral under Rule 10”;

WHEREAS, in any case, and without making a finding on the submission of the Belgian Government that the Tribunal’s Rules be modified, the Chamber holds that, even if the Rules of the Tribunal contained provisions akin to those of Rule 11*bis* of the Rules of Procedure and Evidence of the ICTY, these provisions would not be applicable in the present matter, as the Tribunal is not aware that the authorities of the United Republic of Tanzania, which arrested Bernard Ntuyahaga, would be willing to continue the proceedings within their own jurisdiction for crimes alleged in the indictment;

WHEREAS, finally, the Chamber is of the opinion that the primacy recognized by the Statute is clear inasmuch as the Tribunal may request any national jurisdiction to defer investigations or ongoing proceedings, whereas the reverse, namely the deferral of investigations and proceedings by the Tribunal to any national jurisdiction, is not provided for;

WHEREAS, in the present matter, an indictment having been confirmed and the initial appearance of the accused having taken place, the Chamber concludes that the question of concurrent jurisdiction cannot be invoked by the Prosecutor in support of a request for withdrawal of an indictment;

WHEREAS, that said, the Tribunal wishes to emphasize, in line with the General Assembly and the Security Council of the United Nations, that it encourages all States, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide, crimes against humanity and other grave violations of international humanitarian law;

WHEREAS thereupon, the Tribunal wishes particularly to thank the Kingdom of Belgium for the interest it has shown in the activities of the Tribunal and the support it has always given;

WHEREAS the Tribunal understands and empathises with the citizens of the Kingdom of Belgium, in particular the families of the ten UNAMIR Belgian soldiers, to see justice done;

As to the argument whereby the withdrawal of the indictment would be justified because the objective of the Prosecutor is to shed light on the events that occurred in Rwanda in 1994 and highlighting the complete landscape of the criminal acts perpetrated at the time, and that such objective would not be achieved through the prosecution of a single count indictment the factual elements of which relate solely to the murders of the former Prime Minister and ten UNAMIR Belgian soldiers;

WHEREAS the Chamber recalls that, although under Articles 17 and 18 of the Statute it is incumbent upon the Prosecutor to prepare an indictment, the reviewing Judge has unfettered discretion, and decides, on the basis of the evidence, whether to confirm or dismiss each count;

WHEREAS, furthermore, under Rule 47 (I) of the Rules, the dismissal of a count shall not preclude the Prosecutor from subsequently bringing an amended indictment based on the acts underlying the dismissed count if supported by additional evidence;

WHEREAS, in any case, the Chamber stresses that it is the sole duty of the Prosecutor to devise the prosecution strategy and therefore to decide, even before instituting any proceedings, whether such action serves the interests of her mandate as Prosecutor;

WHEREAS, moreover, the Chamber is of the opinion that it is not within its purview to consider the question as to whether or not the prosecution of a person on a single count relating to the murders of the former Prime Minister and ten Belgian soldiers enables the Prosecutor to "shed light on the events that occurred in Rwanda in 1994";

WHEREAS, before the Chamber, all accused persons are presumed innocent and are equal before the law, and no distinction or ranking may be made among them on the basis of the number of counts with which they are charged;

In fine, as to the motion of the Prosecutor

WHEREAS the Chamber recalls that the Prosecutor has sole responsibility for prosecutions and thus the decision on whether or not to proceed in any given matter rests with the Prosecutor, and that she has the right, at any stage of the proceedings, to apply for leave to withdraw an indictment in accordance with the provisions of Rule 51 (A) of the Rules, which reads as follows:

" The Prosecutor may withdraw an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance an indictment may only be withdrawn by leave granted by that Trial Chamber pursuant to Rule 73";

WHEREAS the Chamber, contrary to the submissions of the Defence, finds that the Prosecutor's motion is well founded;

2. On the requests of the Defence

WHEREAS the Defence Council submitted in the Brief in reply, dated 12 March 1999, that the Prosecutor has not respected her obligation to disclose evidentiary materials pursuant to Rule 66 of the Rules and that, according to the Defence, it is therefore obvious that the Prosecutor does not to this day have any evidence to sustain her allegations against the accused;

WHEREAS consequently, according to the Defence Counsel, it is incumbent on the Chamber to find the motion of the Prosecutor inadmissible and not well founded, and for the accused to be declared innocent, to be acquitted and released;

WHEREAS during the hearing, the Prosecutor, in answer to the Defence, replied that to present a motion to be granted leave to withdraw the indictment does not in any way signify the absence

of charges against the accused, which would lead to his acquittal;

WHEREAS, furthermore, if the need arose, the Prosecutor is ready to continue the proceedings;

WHEREAS, in any case, the Chamber reminds the Defence that, in accordance with Rule 98*bis* of the Rules, an acquittal can only be considered at the stage where the Prosecutor has presented all her evidence, and the Chamber finds that the evidence is insufficient to sustain a conviction on any one count;

The Chamber therefore finds the Defence request is premature and dismisses it;

3. As to the implications of the withdrawal of an indictment:

WHEREAS the Chamber holds that the withdrawal of an indictment is tantamount to a termination of proceedings and, consequently, entails the immediate and unconditional release of the accused;

WHEREAS thereupon, pursuant to the general principles of law, a person who is no longer under indictment may not be deprived of his or her freedom and must therefore be released immediately if he or she is not held for any other cause;

WHEREAS, however, the Prosecutor has requested the Chamber, were it to authorise the withdrawal of the indictment, to order the release of the accused Bernard Ntuyahaga from the Tribunal's custody to the authorities of the United Republic of Tanzania;

WHEREAS the said request is supported by the Belgian Government;

WHEREAS the Prosecutor argued that the Chamber has the competence to make such an order on the basis of the provisions of Rules 40*bis* and 65 of the Rules;

WHEREAS, as submitted by the Defence, the Chamber is of the opinion that the Prosecutor errs in law when she argues that the Chamber can avail itself in this matter of the provisions of Rule 40*bis* and 65 of the Rules;

WHEREAS Rule 65 of the Rules deals with provisional release, being applicable only when a person is still an accused before the Tribunal and who, consequently, will be called to appear before it, a procedure which is fundamentally different from the release of an individual who is no longer under indictment;

WHEREAS the provisions of Rule 40*bis* (H) of the Rules are not applicable in the present matter as they pertain to the release of suspects provisionally detained by the Tribunal;

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WHEREAS, in any case, the Chamber is of the opinion that, pursuant to the provisions of the Statute and the Rules, it does not have jurisdiction to order the release of a person who is no longer under indictment into the custody of any given State, including the Host State, the United Republic of Tanzania;

FOR THESE REASONS,

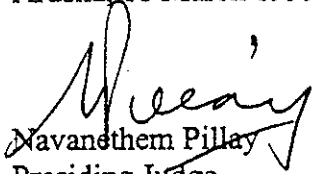
THE TRIBUNAL

GRANTS the Prosecutor leave to withdraw the indictment against Bernard Ntuyahaga;


ORDERS in the absence of any other charge against him, the immediate release of Bernard Ntuyahaga from the Tribunal's Detention Facilities;

INSTRUCTS the Registrar to take all the necessary measures to execute the present Decision, if need be with the cooperation of the authorities of the Host State, the United Republic of Tanzania.

Arusha, 18 March 1999.


Navanethem Pillay
Presiding Judge


Lennart Aspegren
Judge


Lany Kama
Judge

(Seal of the Tribunal)

