



UNITED NATIONS
NATIONS UNIES

ICTR-2000-56-I
20-10-2000
(1460-1455)
International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

1460
Hm

TRIAL CHAMBER III

ORIG: Eng.

Before: Judge Lloyd George Williams, Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registrar: Dr. Agwu Ukiwe Okali

Decision of : 19 October 2000

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ICTR

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THE PROSECUTOR
versus
AUGUSTIN NDINDILYIMANA

Case No. ICTR-2000-56-I

DECISION ON URGENT PRELIMINARY MOTION TO STAY THE
INDICTMENT OR IN THE ALTERNATIVE TO CURE DEFECTS IN THE
INDICTMENT

Counsel for the Accused:
Mr. Christopher Black

Counsel for the Prosecutor:
Mr. Chile-Eboe Osuji
Mr. Frederic Ossogo
Mr. Honore Tougouri
Ms. Patricia Wildermuth

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”)

SITTING as Trial Chamber III composed of Judge Lloyd George Williams, presiding, Judge Yakov Ostrovsky, and Judge Pavel Dolenc (the “Chamber”);

NOTING the indictment against Augustin Ndindiliyimana (the “Accused”), confirmed on 28 January 2000 (the “Indictment”);

RECALLING the order for non-disclosure to the accused and their counsel of the names and identifying information of the co-accused until the Indictment is served to all accused, made on 28 January 2000;

BEING SEIZED of the Urgent Preliminary Motion to Stay the Indictment or in the Alternative to Cure Defects in the Indictment, filed by the Accused on 16 August 2000 (the “Motion”);

CONSIDERING the Prosecutor’s response to the Motion, filed on 21 August 2000 (the “Prosecutor’s Response”);

HAVING HEARD the submissions of the parties on 5 October 2000;

NOW CONSIDERS the matter.

PLEADINGS BY THE PARTIES

Defence Submissions

1. The Defence argues that the Tribunal lacks jurisdiction over the Accused. The Belgian Commission Permanente De Recours Des Refugies (the “Commission”) already examined the same issues as are raised in the Indictment and, consequently, proceeding against the Accused before the Tribunal would violate the prohibition of double jeopardy set out in Article 9(2) of the Statute of the Tribunal (the “Statute”). Moreover, the Defence posits, the principle of *res judicata* precludes the re-litigation of issues fundamental to the Commission’s decision in order to prevent inconsistent findings.
2. The Defence points out certain defects in the Indictment and requests that the Indictment either be stayed or that the defects be cured by the provision of particulars.
3. Finally, the Defence posits that the non-disclosure of the identities of all the persons named in the Indictment materially prejudices the Accused. This is because the Accused cannot know the case he has to meet and therefore is unable to determine his defence strategy. The non-disclosure violates the Accused’s right to be informed promptly and in detail of the nature of the charges against him and the principle of equality of all parties before the law. As the Defence pointed out in its oral submissions, the non-disclosure also amounts to a defect in the form of the Indictment. In any event, the non-disclosure is no longer necessary since the Tribunal has revealed to the Accused the

identity of another person named in the Indictment as a co-accused.

4. For these reasons the Accused, moving pursuant to Rules 5, 47(C), 66(A)(i), and 72 of the Rules of Procedure and Evidence of the Tribunal (the "Rules"), requests an order declaring that the Tribunal has no jurisdiction over him, an order that the Indictment be stayed, and an order that he be released and returned to Belgium. In the alternative, the Accused requests an order that the Prosecutor provide particulars of the offences with which he is charged, an order that the Prosecutor amend the Indictment to restore the redacted portions, and an order that the running of all time limits be suspended until 30 days after the Accused has received from the Prosecutor the particulars and the unredacted Indictment.
5. The Accused also prays the Chamber to extend the time for the filing of the present Motion pursuant to Rule 72 since Defence Counsel was unable to attend to this matter immediately upon receipt of the supporting materials on 22 June 2000 due to his work on other cases. Consequently, the Accused requests that the Tribunal grant him relief from any waiver of his rights that may be found as a result of the delay in filing the Motion.

Prosecutor's Response

6. The Prosecutor does not oppose the Defence request for an extension of time to permit the filing of the Motion.
7. At the same time, the Prosecutor contends that the Defence objection to the jurisdiction of the Tribunal is inadmissible under Rule 72. The Defence objection does not fall within any of the four categories prescribed in Rule 72(H) for objections based on lack of jurisdiction. The Prosecutor allows, however, that the Motion may be considered under Rule 73.
8. In any event, the Prosecutor argues, the jurisdictional objection lacks merit in as much as it based on the argument that the process before the Tribunal would expose the Accused to double jeopardy. In this case there is no double jeopardy within the meaning of Article 9(2) of the Statute since there was no trial of the Accused in Belgium, any proceeding in Belgium against the Accused was not criminal in nature, there was no process against the Accused raising the same charges upon which he is now being prosecuted, the "trial" in Belgium was not before a national court with a competent jurisdiction, and the case was not diligently prosecuted.
9. Moreover, in the Prosecutor's view, the Defence failed to establish any of the elements of the doctrine of *res judicata* which requires identical parties, identical issues, and a final determination of those issues in the previous decision by a court competent to decide them.
10. The Prosecutor submits that the indictment sufficiently sets forth the facts upon which

the charges against the Accused are based. Additionally, contradictions of facts, if any, are matters properly to be addressed at trial.

11. The form of the Indictment against the Accused is not defective for failure to name the co-conspirators, the Prosecutor posits. The names of the co-conspirators were redacted pursuant to the Tribunal's order. However, the Prosecutor submits that the names of the co-accused who have been brought into the custody of the Tribunal need not continue to be sealed pending the arrest and transfer of every co-defendant on the Indictment.
12. In view of the foregoing, the Prosecutor urges the Chamber to dismiss the Motion on all other grounds.

DELIBERATIONS

Time Limits

13. The Defence designated the Motion as a "preliminary motion" and accordingly brought it pursuant to Rule 72. The Motion raises three issues, lack of jurisdiction due to the prohibition against double jeopardy, defects in the Indictment, and violations of the Accused's right to be informed promptly and in detail of charges against him and of the principle of equality of all parties before the law stemming from the non-disclosure of the identities of all the persons named in the Indictment. The Defence seeks to have its Motion admitted outside the time limit prescribed in Rule 72 and requests relief from the automatic waiver of the right to bring preliminary motions (Rule 72(F)) on ground that Defence Counsel was occupied with other pending trial matters. The Chamber does not consider the exigencies of the Counsel's workload to constitute "good cause" within the meaning of Rule 72(F). The Chamber expects that when a Counsel undertakes to represent a person in proceedings before the Tribunal, the Counsel will carry out that representation diligently and in full compliance with the Rules. A Counsel cannot glance over a matter as clearly set out in the Rules as the thirty day time limit for filing preliminary motions and then seek to excuse non-compliance with that Rule by pointing to his or her work on other matters. The Chamber therefore denies the Defence request to extend the time limit for the filing of the Motion.
14. Consequently, pursuant to Rule 72(F), the Chamber considers that the Accused waived his right to file preliminary motions under Rule 72. Thus, the Chamber will not address any of the issues raised in the Motion under Rule 72, but, where appropriate, it will treat them as issues raised under Rule 73.

Lack of Jurisdiction

15. The Defence first argues that the Tribunal lacks jurisdiction over the Accused because prosecuting him would place him in double jeopardy in violation of Article 9(2) of the Statute, given the earlier asylum proceedings before the Commission in Belgium. It is clear that this objection does not fall within any of the categories prescribed in Rule

72(H) as objections based on lack of jurisdiction. Contrary to the characterization given to this issue by the Defence, that it is an objection made under Rule 72, the Chamber will deal with this matter pursuant to Rule 73.

16. Article 9(2) of the Statute provides that “[a] person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the Tribunal only if” certain conditions are met. A simple test of double jeopardy recalled by the Prosecutor is whether the accused could have been convicted at the first trial of the offence with which he is now charged. *See* Prosecutor’s Response, para. 46. The answer to this query in the present case is plainly negative. The Accused was not charged with any crime in the proceedings before the Commission and the Commission could not have convicted him of any crime, much less of any or all of the crimes with which he is charged before the Tribunal. Therefore, because the Accused was not tried before a court for acts constituting serious violations of international humanitarian law, the Tribunal may try him without offending Article 9(2) of the Statute.
17. Moreover, the Accused’s prosecution before the Tribunal will not engage the doctrine of *res judicata* which requires the identity of parties, identity of issues, and the final determination of those issues in the previous decision by a court competent to decide them. To see this, one only needs to consider the first element of the doctrine, the identity of parties. It is obvious that the parties before the Commission and the Tribunal in this case are not identical.

Defects in the Indictment

18. As to the defects in the Indictment that the Defence points out in the Motion, the Chamber holds that to the extent they are defects in the form of the Indictment their consideration is time-barred, as explained above. To the extent that some of the alleged defects are not defects in the form, but rather defects in the Indictment, the Chamber finds that the Defence may properly raise them at trial.

Non-Disclosure of the Identities of All Persons Named in the Indictment

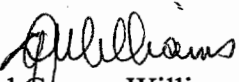
19. Finally, the Chamber turns to the issue of redactions in the Indictment. The Defence has argued this to be a defect in the form of the Indictment. *See* Transcript at 4. For the reasons given above, the Chamber cannot consider the matter from that point of view. However, the Defence has also presented this issue as one of the right to be informed promptly and in detail of charges and also as a matter of equality of arms, that is as issues that may be brought under Rule 73.
20. In considering this matter, the Chamber takes into account the 28 January 2000 order of the Tribunal granting the Prosecutor’s request for non-disclosure to the accused and their counsel of the names and identifying information of the co-accused until the Indictment is served to all accused. Given the order, the non-disclosure to the Accused of the names and identifying information of all the persons charged with him in the Indictment is


proper. Moreover, non-disclosure of the names of the co-accused under the present circumstances cannot be equated with the failure to inform the Accused of the charges against him. It is to be noted, however, that the Prosecutor submits that the names of the co-accused who have been brought into the custody of the Tribunal need not continue to be sealed pending the arrest and transfer to the Tribunal of every other co-accused. The Prosecutor, in the spirit of co-operation, may now wish to give effect to her present position on this matter as well as in the future when additional co-accused will be brought into the custody of the Tribunal.

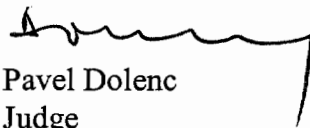
FOR THESE REASONS, THE TRIBUNAL

21. **DENIES** the Motion.

Arusha, 19 October 2000.


Lloyd George Williams
Judge, Presiding


Yakov Ostrovsky
Judge


Pavel Dolenc
Judge

[Seal of the Tribunal]