



ICTR-00-56-I  
10-4-2002  
(2492-2488)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

2492  
Rwanda

OR: ENG

TRIAL CHAMBER II

**Before:** Judge William H. Sekule, Presiding  
Judge Winston C. Matanzima Maqutu  
Judge Arlette Ramaroson

**Registrar:** Adama Dieng

**Date:** 10 April 2002

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The PROSECUTOR  
v.  
Augustin NDINDILYIMANA  
François-Xavier NZUWONEMEYE  
Innocent SAGAHUTU

Case No. ICTR-00-56-T

**DECISION ON THE DEFENCE MOTION FOR IMMEDIATE RELEASE AND STAY  
OF ALL CHARGES AGAINST THE ACCUSED NDINDILYIMANA DUE TO THE  
PROSECUTOR'S NON-COMPLIANCE WITH THE RULES**

**Office of the Prosecutor**

Richard Karegyesa  
Christine Graham

**Defence Counsel for Ndingilyimana**

Christopher Black

**Defence Counsel for Sagahutu**

Fabien Segatwa

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the "Tribunal"),

**SITTING** as Trial Chamber II composed of Judges William H. Sekule, Presiding, Winston C. Matanzima Maqutu and Arlette Ramaroson, (the "Chamber");

**BEING SEIZED** of the "Urgent Oral Motion for the Immediate Release of the Accused and Stay of All Charges Against Him Due to Material Prejudice for Non-Compliance and Compensation," filed by Counsel for Ndindiliyimana on 20 February 2002 (the "Motion");

**CONSIDERING** the "Prosecutor's Response in the Defence Urgent Oral Motion for the Immediate Release of the Accused and Stay of All Charges Against Him Due to Material Prejudice for Non-Compliance and Compensation," filed on 6 March 2002 (the "Prosecutor's Response");

**NOTING** the Indictment and the Arrest Warrant against Augustin Ndindiliyimana (the "Accused") respectively confirmed and signed by Judge L. Kama on 28 January 2000;

**CONSIDERING** the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") in particular Rules 5, 66, 68 and 73;

**NOW DECIDES** the Motion after having heard the Parties on 22 March 2002.

#### **SUBMISSION OF THE PARTIES**

##### *Defence Submissions*

1. Pursuant to Rule 73 of the Rules, the Defence alleges that the Prosecutor has not complied with the Rules, thereby causing material prejudice to the Accused, under Rule 5 of the Rules. The Defence argues that, since his arrest in 1998, the Accused has not received relevant and material evidence of the charges against him, as provided under Rules 66 and 68 of the Rules.
2. The Defence further argues that the evidence disclosed to date is neither probative nor legally admissible nor material to any of the crimes of which the Accused is charged. The Defence submits that the evidence disclosed thus far does not amount to disclosure within the meaning of Rules 66 and 68 of the Rules, and, accordingly, that the Chamber should determine that the Prosecutor has no evidence against the Accused.
3. The Defence alleges that no nexus exists between the evidence disclosed and the elements of the offences with which the Accused is charged. For example, the Defence argues that although the Accused is charged with conspiracy, thus far, the evidence disclosed does not show even one item of evidence to prove that a conspiracy in which the Accused was involved actually existed. A similar argument is advanced by the Defence with regard to the charges of crimes against humanity and violations of the Geneva Conventions. In fact the Defence argues that the Prosecution's disclosure is actually favourable to the Accused and contains only hearsay statements of opinion or allegations concerning the *gendarmarie*, who were not under the command or control of the Accused.



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4. As regards command responsibility, the Defence submits that the Prosecutor has failed to establish any facts indicating that the Accused knew of the particular acts of certain *gendarmes*, or any evidence to show that the Accused failed to take necessary and reasonable steps to prevent and punish criminal activity.
5. Finally, the Defence recalls that, after hearing evidence, the Belgium *Commission permanente de recours des réfugiés*, by its decision No.96/771/F629/cd of 28 May 1998, held that the Accused was a refugee within the meaning of the Geneva Convention of 28 July 1951 and found that the Accused had not committed any crimes against peace, war crimes, or crimes against humanity during the events of 1994 in Rwanda.
6. The Defence therefore requests that the Chamber establish the following orders:
  - i) For an immediate dismissal of all the charges contained in the Indictment and for the Accused's immediate release and safe return to Belgium;
  - ii) For compensation of USD 5,000,000 for the wrongful detention of an innocent man based on false charges insofar as the Prosecutor has demonstrated no probative or legally admissible evidence, which amounts to an abuse of process;
  - iii) For an investigation to be conducted into the reasons for the Accused's arrest, transfer and continued detention at the detention facility of the Tribunal.

#### ***Prosecutor's Response***

7. The Prosecutor recalls two Decisions rendered in this case by Trial Chamber III, specifically, the "Decision on Urgent Preliminary Motion to Stay the Indictment or in the Alternative to Cure Defects in the Indictment" (*Prosecutor v. Bagambiki et al.*, Case No. ICTR 97-36-I, 19 October 2000, the "Decision of 19 October 2000"), which denied a Defence Preliminary Motion requesting a stay of the Indictment or, alternatively, curing certain defects in the Indictment; and the "Decision on the Defence Motion for Disclosure in Respect of Samuel Imanishimwe" (*Prosecutor v. Bagambiki et al.*, Case No. ICTR 97-36-I, 24 September 2001, the "Decision of 24 September 2001"). The Prosecutor argues that, in fact, the Defence's Motion is an attempt to appeal the Decision confirming the Indictment of 28 January 2000 against the Accused. On the basis of the supporting material provided, Judge L. Kama held in this Decision that there was a *prima facie* case. Accordingly, the Prosecution recalls that this Decision is non-appealable.
8. The Prosecution further argues that this is neither the forum nor the time to discuss evidence. Pursuant to Rule 66(A) (ii) of the Rules, the Prosecution indicates that it has no obligation to disclose evidence earlier than 60 days before trial and submits that it has disclosed evidence on a continuous basis. Accordingly, the Prosecution maintains that it is not in breach of any duty pursuant to Rule 5 of the Rules.

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*Defence Reply to the Prosecutor's Response*

9. The Defence replies that the Prosecution is obliged to disclose evidence at the latest 60 days before trial, but that this obligation is continuous at the pre-trial stage and has not been completed.

**HAVING DELIBERATED**

10. The Chamber notes that the present Motion raises several similar issues addressed by Trial Chamber III in its Decision of 19 October 2000. In the aforementioned Decision, the Chamber denied the Defence Motion requesting to stay the Indictment or, alternatively, to cure defects in the Indictment. The Chamber further denied the Defence's right to raise preliminary objections, pursuant to Rule 72 of the Rules, as being untimely.
11. In the instant case, the Chamber notes that the Defence is not satisfied about the evidence that has been disclosed by the Prosecution since the initial appearance of the Accused. The Defence argues that the Prosecution has no case against the Accused and has failed to comply with the Rules.
12. With regard to the allegations of the Defence about the Prosecutor's non-compliance with the Rules on production of evidence, the Chamber recalls the ruling of Trial Chamber III of 21 September 2001: "Pursuant to Rule 66(A) (ii) the Prosecutor is obliged to disclose the statements of all witnesses whom the Prosecutor intends to call no later than 60 days before trial. The trial date has not yet been determined and therefore the Prosecutor is not in breach of Rule 66(A) (ii)" (*Prosecutor v. Bagambiki et al.*, Case No. ICTR 97-36-I, 21 September 2001). The Chamber further reaffirms the ongoing nature of the obligation for disclosure as decided by Trial Chamber II in the "Decision on the Defence Motion for Disclosure in Respect of Samuel Imanishimwe"<sup>1</sup> (*Prosecutor v. Bagambiki et al.*, Case No. ICTR 97-36-I, 21 October 1998).
13. On the basis of the Prosecution's contention of continuous disclosure, the Chamber does not find that the Defence has proved that the Prosecution has not complied with Rule 66(A) of the Rules. Accordingly, the Chamber dismisses the Defence objections pursuant to Rule 5 of the Rules.
14. As regards the Defence argument that the evidence disclosed thus far is not material to the charges against the Accused, the Chamber finds that there is no legal basis to review the Defence objection to the "wrongful detention based on false charges" against the Accused. The Chamber recalls that, pursuant to Rule 47 of the Rules, there exists a standing order of confirmation of the indictment against the Accused and notes that there does not exist any avenue of appeal against such decisions of

<sup>1</sup> "Thus, in the instant case, although the prosecution is not in violation of Rule 66 (A) (ii) of the Rules, in view of the fact that the accused made his initial appearance more than one year ago, the prosecutor should have made a concerted effort to continue and complete its disclosure obligations at the earliest opportunity". (*Prosecutor v. Bagambiki et al.*, Case No. ICTR 97-36-I, 21 October 1998).

*[Handwritten signature]*

confirmation of an indictment.<sup>2</sup> Further, the Chamber agrees with the Prosecution that discussion of the evidentiary value of the witness statements disclosed by the Prosecutor cannot be entertained at this pre-trial stage of the proceedings.

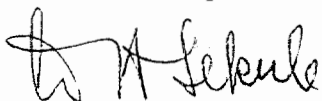
15. As regards disclosures pursuant to Rule 68 of the Rules, the Chamber notes that, pursuant to said Rule the Prosecutor shall, as soon as practicable, disclose to the Defence "the existence of evidence known to her which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence". Since the Prosecutor maintains that she does not possess exculpatory material, the Chamber does not find the Prosecutor to be in breach of the said Rule.<sup>3</sup>
16. Finally, the Chamber rules that the fact that the Accused was allegedly "found not guilty" by the Belgium *Commission permanente de recours des réfugiés* is of no relevance to these proceedings. On this point, the Chamber recalls and concurs with the reasoning of Trial Chamber III in the Decision of 19 October 2000:

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. [...] 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.

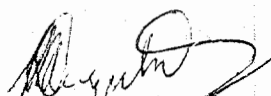
**FOR THE ABOVE REASONS, THE TRIBUNAL,**

**DENIES** the Defence Motion.


Arusha, 10 April 2002



William H. Sekule  
Presiding Judge



Winston C. Muzira  
Judge



Arlette Ramaroson  
Judge

<sup>2</sup> See "Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 Others" of 8 June 1998 - *Prosecutor v. Bagosora*, Case No. ICTR-98-37-A, in which the Appeals Chamber rejected the right to appeal a decision to dismiss an indictment taken pursuant to Rule 47 of the Rules.

<sup>3</sup> See "Decision on the Defense Motion for "Sanctions for Prosecutor's Repeated Violations of rule 68 of the Rules of Procedure and evidence", (International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Blaskic*, 29 April 1998) which analyzed the issue of disclosure and stated, at para. 14 that: "[...] the Prosecution bore the sole responsibility for disclosing to the Defense the evidence which tends to suggest the innocence or mitigate the guilt of the accused and that it did so under its own responsibility and under the supervision of the Trial Chamber which, in case of an established failure to comply, would have to draw all the consequences, particularly at trial."