ICTR-98-41-T

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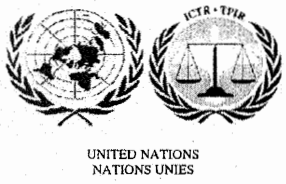

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

(13611 - 13606)

11-06-2003

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 11 June 2003

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON CONTINUATION OR COMMENCEMENT *DE NOVO* OF TRIAL

The Office of the Prosecutor
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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"),

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Jam Reddy, and Judge Sergei Alekseevich Egorov;

HAVING RECEIVED the Prosecution "Motion for an Indication as to When the Trial Will Continue or Start Again" ("the motion"), filed on 26 March 2003;

CONSIDERING the oral submissions of Prosecution and Defence Counsel at an informal status conference on 6 June 2003 ("the informal status conference"); the oral submissions of Prosecution and Defence Counsel at a formal status conference on 9 June 2003 ("the formal status conference"); and the Prosecution "Brief on the questions of a) basis for the authority of Trial Chamber I to proceed with the trial either by way of a rehearing or continuation; b) rehearing of the trial; and c) continuation of the trial", dated 9 June 2003;

TAKING NOTE of the need to clarify the status of the trial hearings originally scheduled to resume on 9 June 2003 before Trial Chamber III;

RENDERS ITS DECISION.

INTRODUCTION

Théoneste Bagosora was arrested in Cameroon on 9 March 1996, transferred to the United Nations Detention Facility in Arusha (UNDF) on 23 January 1997, and made his initial appearance before the Tribunal on 20 February 1997. Gratien Kabiligi was arrested in Kenya on 18 July 1997, transferred to the UNDF on that same date, and made his initial appearance on 17 February 1998. Anatole Nsengiyumva was arrested on 27 March 1996, transferred to the UNDF on 23 January 1997, and made his initial appearance on 19 February 1997. Aloys Ntabakuze was arrested in Kenya on 18 July 1997, transferred to the UNDF that same date, and made his initial appearance on 24 October 1997.

Individual trials of several of the Accused were scheduled to commence in 1998, but were delayed by the filing of a joint indictment by the Prosecution on 8 March 1998. This indictment was subsequently dismissed by Judge Khan on 31 March 1998. An appeal of this decision was ruled non receivable by the Appeals Chamber on 8 June 1998.[1] Thereafter, a motion for joinder of the four Accused was filed on 31 July 1998, and granted by Trial Chamber III on 29 June 2000.[2]

Trial hearings in this case commenced before Trial Chamber III on 2 April 2002, composed of Judge Williams, presiding, Judge Dolenc, and Judge Vaz. After thirty-two days of trial hearings, on 5 December 2002, the case was adjourned *sine die* to give the Trial Chamber time to complete two other trials. During the trial in the present case, the Prosecution made its opening statement and presented two of its witnesses, expert witness Dr. Alison Des Forges and Witness ZF, who were fully cross-examined by Defence Counsel. Fifty-three Prosecution and forty-one Defence exhibits were tendered into evidence during the testimony

[1] *Prosecutor v. Théoneste Bagosora and 28 Others*, Dismissal of Indictment, Decision of 31 March 1998 (TC); *Prosecutor v. Théoneste Bagosora and 28 Others*, Decision of 8 June 1998 on the Admissibility of the Prosecutor's Appeal From the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 Others (AC).

[2] *Prosecutor v. Théoneste Bagosora, Anatole Nsengiyumva, Gratien Kabiligi, and Aloys Ntabakuze*, Decision of 29 June 2000 on the Prosecutor's Motion for Joinder.

of Dr. Des Forges; one Prosecution and seven Defence exhibits were entered in relation to the testimony of Witness ZF.

On 31 January 2003, the General Assembly elected permanent judges to take office from 25 May 2003. Judge Dolenc was not re-elected. The Prosecution filed a motion on 26 March 2003, requesting an indication as to when the trial would continue or start again. By memoranda of 30 April and 2 May 2003, the Registry informed the parties that hearings would resume on 9 June 2003 and that, depending on the circumstances, the parties should be prepared either to resume the trial from the point at which it had adjourned, or to recommence the trial *de novo*. On 7 May 2003, the parties were informed by the Registry that Judge Williams had withdrawn from the trial for personal reasons.

The President of the Tribunal re-assigned this case to Trial Chamber I on 4 June 2003. An informal status conference with Counsel from all parties was held on 6 June 2003, followed by a formal status conference on 9 June 2003. All four of the Accused were present at the formal status conference. The purpose of these conferences was to solicit the parties' views on the proper manner of proceeding with the trial and, in particular, whether the trial should commence *de novo* or could resume from the point at which it had adjourned.

SUBMISSIONS OF THE PARTIES

All parties offered oral submissions at the informal status conference and the formal status conference. In addition, the Prosecution submitted a written brief which was filed on 9 June 2003.

i) Transfer of Proceedings to Trial Chamber I

All Parties agreed that the President had the power to reassign the case to Trial Chamber I, and to re-compose that Chamber for the purpose of hearing the case. The Prosecution noted that this decision was a discretionary power whose only constraint was that it not be exercised arbitrarily or capriciously. Given the "challenging conditions" of this case, the Prosecution submitted that such a decision could not be so characterized. All Defence Counsel agreed during the formal status conference that the transfer was legal and proper, and explicitly waived their right to lodge an appeal against the decision.[3]

ii) Trial *de novo* or Continuation

In its written submission, the Prosecution expressed its preference for a rehearing *de novo* before Trial Chamber I, suggesting that the replacement of all three Trial Chamber judges is not contemplated by Rule 15*bis* (C) of the Rules of Procedure and Evidence ("the Rules"), and that national jurisdictions favour a rehearing. Further, the testimony of Witness ZF was only recorded stenographically, which would impair the Chamber's ability to assess credibility. The Prosecution conceded, however, that Rule 92*bis* exceptionally permits admission of transcripts of testimony in lieu of live testimony, as long as the testimony does not relate to the acts and conduct of the Accused. Should the Chamber decide to continue the trial, the Prosecution proposed a series of undertakings for the Defence that would demonstrate a complete waiver of rights, including any right of appeal. At the formal status conference, the Prosecution stated that it had no preference for continuation or commencement *de novo*, and stressed the need to look at what was least prejudicial to the Accused.[4]

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[3] Transcripts of 9 June 2003, pp. 20, 23.
[4] Ibid., p. 18.

All Defence Counsel expressed virtually identical positions, and subscribed to one another's submissions. Citing the lengthy detention of their clients, all Defence Counsel expressed their strong preference for, and consent to, resumption of the trial from the point of adjournment.[5] Though neither the Statute nor the Rules directly address the issue at hand, continuation would be in the interests of the Accused, of justice, and of judicial economy.[6] Moreover, Rules 15*bis* (C), though not directly applicable, permits continuation of the trial with the consent of the Accused.[7] Defence Counsel expressed concern at the uncertainty that would arise if the trial were to re-start *de novo*, including whether past procedural matters would be re-litigated, occasioning yet further delay.[8]

In response to questions from the bench, Defence counsel explicitly waived any rights they might have to lodge an appeal against the continuation of the trial before three new judges.[9] Defence counsel insisted upon the legal validity of such a waiver and affirmed, in the presence of the Accused, that their clients were fully informed of the nature of the consent and waiver.[10]

iii) Certification of Familiarity with Prior Proceedings

The Prosecution submitted that the new Judges should be required to certify their familiarity with the existing record of the trial, either before the trial re-commenced or, alternatively, no later than the end of the Prosecution case.

Though one Defence counsel was willing to permit the judges to certify their familiarity with the existing trial record at their discretion, counsel for Accused Kabiligi and Ntabakuze asserted that the trial should not proceed until such certification is given.[11]

DELIBERATIONS

The issue before the Trial Chamber is whether the trial may continue from the point at which it was adjourned *sine die* on 5 December 2002, or whether it must begin *de novo*. Defence Counsel, in the presence of the Accused, unequivocally declared their strong preference for, and their consent to, continuation of trial proceedings. In particular, they stressed the need for the trial to move forward in view of the time they have spent in detention. Indeed, Defence counsel unanimously purported to waive their right to challenge the continuation of proceedings by subsequent appeal. Under these circumstances, the crucial question is whether the Defence may, by consent, agree to a continuation which, though not prohibited by the Rules, is not expressly authorized in the circumstances of this case.

At the outset, the Chamber agrees with the submissions of the parties that no provision of the Rules directly governs the present situation. Even assuming that more than one judge may be substituted under Rule 15*bis* (C), the President of the Tribunal has not, in this case, assigned new judges to Trial Chamber III. Nor does Rule 15*bis* (D), providing for the substitution of a

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[5] Ibid., pp. 5, 12, 14, 16.

[6] Ibid., pp. 8-9, 12. According to the estimates of one Counsel, the commencement *de novo* of the trial would mean to "throw through the window" almost 200.000 USD because of fees paid in connection with trial hearings to Counsel, co-Counsel, and Defence assistants (p. 8).

[7] Ibid., pp. 5-6, 14.

[8] Ibid., pp. 9, 11-12, 17.

[9] Ibid., pp. 18, 19, 23.

[10] Ibid., pp. 15-16, 21, 23.

[11] Ibid., pp. 13, 17.

13607

single new judge without the consent of the accused, govern the facts of this case.[12] The present situation, arising from the inability of two judges to proceed with a part-heard case, is exceptional, if not entirely unprecedented.

Rules 15*bis* (C) and (D) are, nevertheless, highly relevant as instances in which trial judges may be replaced. Rule 15*bis* (C) permits a judge, who is unable to continue, to be replaced, subject to the condition that once opening statements have been given, or the presentation of evidence has begun, the consent of the accused is required. Rule 15*bis* (D) permits substitution of a single judge in the absence of consent where both remaining judges agree that it would be in the interests of justice, and provided that the new judge certifies familiarity with the existing trial record before joining the bench. No express certification is required under Rule 15*bis* (C), suggesting the great weight attached to consent as a means of determining and safeguarding the rights of the accused to a fair hearing. Rule 15*bis* (C) implies that consent to substitution of a new judge may itself, without further conditions, fully protect the right of the accused to a fair hearing. The Chamber notes that Prosecution and Defence Counsel alike submitted that the number of substitutions permitted under Rule 15*bis* (C), unlike 15*bis* (D), were not numerically limited. Rule 15*bis* (C) is inapplicable in the present case because substitution has resulted from a re-composition of a new Trial Chamber, rather than a replacement of judges within the Trial Chamber. The value of consent in the one case is no less than in the other.

Substantial interests and important rights subscribe the consent of the Accused here. The reason for consent, stated by Defence Counsel in open court, is the desire – indeed the right – of the Accused to be tried without undue delay.[13] Two of the Accused have been in the Tribunal's custody since the beginning of 1997, some six and a half years. A decision that the rights of the Accused to a fair trial require a trial *de novo*, notwithstanding the preference of the Accused for a continuation, would impair their right to be tried without undue delay. Defence counsel insisted that their clients would suffer no prejudice from a continuation of proceedings. They argued forcefully that further delay would prejudice the rights of the Accused.[14]

The Chamber observes that no unfairness will arise given the nature of the existing trial record. Only two witnesses have been heard. The testimony of the expert witness, Dr. Allison Des Forges, was video-recorded. It is, in principle, admissible in transcript form under Rule 92*bis*. More difficult issues arise in relation to Witness ZF, whose testimony was not video-recorded and may purport to implicate the Accused in criminal conduct. Defence Counsel stated that they were satisfied that credibility would be evident from the transcript, and that visual assessment was unnecessary.[15] In its written brief, the Prosecution cited the need for live testimony of Witness ZF as a reason for commencing the hearings *de novo*, but did not reply to the position of Defence Counsel. The Chamber accepts the view of the Defence at the present stage and notes that Witness ZF may be recalled later if it is considered necessary by the Chamber.

Even if it does not follow explicitly from Rule 15*bis* (C), the Chamber considers that the judges must certify their familiarization with the record. In light of the situation described above, the Chamber considers the nature of the existing record to present no significant obstacle to complete familiarization. As to the timing of such a certification, at least two Defence Counsel expressly conditioned their consent on such familiarization prior to the

[12] Rule 15*bis* (D) was amended during the 13. Plenary Session which took place on 26 and 27 May 2003.
[13] Transcripts of 9 June 2003, pp. 8, 16.
[14] Ibid., pp. 8, 15.
[15] Ibid., pp. 19, 20.

continuation of proceedings.[16] The Chamber is in agreement with this view. The parties will be informed of the date on which the Judges have familiarized themselves with the record.

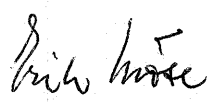
The interests of judicial economy and simplicity strongly favour continuation of the trial in the circumstances before the Chamber. Attempting to commence the trial *de novo* would raise a host of procedural issues that have already been the subject of many rounds of argument, deliberation and decision. Trial Chamber III issued at least thirty-two written decisions in preparation for trial, none of which would necessarily be immune from challenge upon a trial *de novo*. Judicial economy would not be served by forcing the Parties back into the position of zealously revisiting the very same procedural issues to which significant resources have already been devoted. Neither the rights of the Accused nor the interests of justice are in any way impaired by continuing the trial on the basis of these decisions.

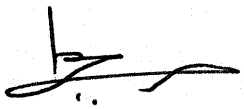
Finally, a waiver of the right to lodge any subsequent appeal may validly be made by the Accused provided that it is based on full and informed consent and is appropriately limited. The consent of the Accused in this case must be considered full and informed. The legal situation facing the Chamber, and the consequences for the Accused, were discussed at length at the formal status conference in the presence of the Accused. Defence Counsel represented that they had consulted with their clients after the informal status conference, advised them of the situation, and were authorized to consent to a continuation. The jurisprudence of municipal and international legal systems confirms that important rights may be waived, provided that there is full and informed consent.[17] The present case does not fall within the range of procedural guarantees whose requirements are so inflexible that no waiver is possible.[18] Recognition of a waiver of the right to lodge an appeal is particularly appropriate where such a waiver enhances the protection of another fundamental right, namely, to be tried without undue delay. The waiver in this case is limited to the right to appeal based on the continuation itself.

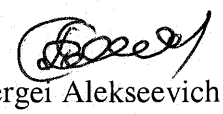
FOR THE ABOVE REASONS, THE CHAMBER

DECIDES that the trial will continue, on a date to be communicated to the parties, on the basis of the existing trial record and decisions in the case.

Arusha, 11 June 2003


Erik Møse
Presiding Judge


Jai Ram Reddy
Judge


Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

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[16] Ibid., pp. 13, 17.

[17] *R. v. Bartle* [1994] 3 S.C.R. 173, p. 192 (waiver of right to assistance of counsel); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 89 S.Ct. 1709 (waiver of right to trial by jury); *Pfeifer and Plankl v. Austria*, A 227 (1992), E. Ct. HR, para. 38 (waiver of disqualification of judge ineffective because of absence of sufficient procedural safeguards, including assistance of counsel).

[18] *R. v. Tran* [1994] 2 S.C.R. 951, p. 996 (the provision of translation to the Accused during trial).