International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

IN THE APPEALS CHAMBER

Before:
Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Adama Dieng

Decision of: 20 November 2003

Elizaphan and Gérard NTAKIRUTIMANA
v.
THE PROSECUTOR

Cases Nos. ICTR-96-10-A and ICTR-96-17-A

DECISION ON EXTREMELY URGENT PROSECUTION APPLICATION FOR AN ADJOURNMENT OF THE ORAL HEARING

Counsel for the Prosecution
Ms. Melanie Werrett

Counsel for the Defence
Mr. Ramsey Clark
Mr. David Jacobs
Mr. David Paciocco

1. The Appeals Chamber of the International Criminal Tribunal for Rwanda ("Appeals Chamber" and "International Tribunal" respectively) hereby decides the "Extremely Urgent Prosecution Application Pursuant to Article 36 of the Directive for the Registry of the Tribunal for an Adjournment of the Oral Hearing in this Matter," filed by the Prosecutor on 7 November 2003 ("Application").

2. In this case, the Appeals Chamber is seised of three appeals from the Judgement and Sentence of Trial Chamber I dated 21 February 2003: one appeal by the Prosecution and one appeal by each of the two Defendants, Elizaphan and Gérard Ntakirutimana ("Appeals" and "Defendants" respectively). The briefing of the Appeals ended on 13 October 2003. Ten days later, in a Scheduling Order for the Hearing on Appeal dated 23 October 2003 ("Scheduling Order"), the Appeals Chamber ordered that oral argument in the Appeals would take place from 1 December to 4 December 2003 in Arusha.

3. The Prosecution now seeks, through the Application, to adjourn that hearing until, at the earliest, 1 March 2004. The basis of the Application is the United Nations Security Council's decision to amend Article 15 of the Statute of the International Tribunal to create the new position of Prosecutor of the International Tribunal, separate from the holder of the office of the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia, and to appoint a new Prosecutor of the International Tribunal effective 15 September 2003.[1] The Application submits that the Office of the Prosecutor for the International Tribunal currently has no full-time appeals staff and is in the process of recruiting lawyers for an appeals unit. The only appeals lawyer currently hired is a senior appeals counsel who will take up his duties on 8 February 2004.

4. The Prosecution submits that it is not in a position to argue the Appeals or to assist the Appeals Chamber in any matters to be raised during the scheduled hearing in December. The Prosecution therefore requests an adjournment pending further recruitment and the arrival of new appeals counsel. The Prosecution contends that it will suffer prejudice, both in this case and in other cases on which the issues in the Appeals may have an effect, if the hearing goes forward as scheduled.

5. Counsel for the Defendants, who filed responses to the Application on an expedited basis, state that they would prefer to go forward with the hearing as scheduled because the two Defendants are currently incarcerated. The Defendants do not take any position on the merits of the Application, since they had operated on the assumption that new appeals counsel in the Office of the Prosecutor had been working on the Appeals. The Defendants state that they would not oppose the request if the Appeals Chamber considers an adjournment to be in the interests of justice.

6. The Appeals Chamber expresses its disappointment that the Prosecution has not been able to make arrangements for it to be adequately represented in this case notwithstanding that it had time to do so. The Prosecution has been aware of the complex and substantial nature of these Appeals since at least the end of July, when the Appellants' Briefs were filed, and has known of the division of the two Prosecutors' Offices since the Security Council's resolutions were adopted on 28 August and 4 September 2003. The Prosecution accordingly had two months to assign attorneys already present in the Arusha Office of the Prosecutor to cover the Appeals and to begin work on them even before they were formally transferred from the appeals section of the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia.

7. The Appeals Chamber does not understand why the Prosecution did not seek this adjournment immediately upon receiving the Scheduling Order, when changes could have been made without disrupting the schedule of the Appeals Chamber or of counsel for the Defendants. The Appeals Chamber notes that the Prosecution previously moved for an extension of time in which to file the Appeal Book and Book of Authorities required under Rule 117*bis* of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), and that this request was based on substantially the same grounds as the Application.[2] Yet that motion, dated 31 October and filed on 3 November 2003, made no mention of the more serious problem that is the subject of the Application.

8. The Appeals Chamber is therefore faced with a tardy request for an adjournment based on one party's inability to go forward at a scheduled hearing. The Application is all the more problematic because it seeks a lengthy delay of three months in order to permit the Prosecution's new senior appeals counsel to assume his duties and familiarize himself with the case.

9. The Appeals Chamber normally expects counsel to be prepared to proceed with each case in a prompt and timely manner. Requests for brief extensions and adjournments may be granted for good cause, as provided under Rule 116 of the Rules. While this Application arises under a different provision, namely Article 36 of the Directive for the Registry of the International Tribunal,[3] the requirement of good cause is similar, particularly when the adjournment sought is as lengthy as in this case.

10. The question of good cause is very close in this situation. The creation of the new Office of the Prosecutor has been a known factor for some time, as has the pendency of these Appeals. One cannot say that the Prosecution was taken by surprise when the Appeals Chamber scheduled the hearing once the briefing of the Appeals was completed, as provided by Rule 114 of the Rules, or when the hearing was fixed for early December, the chosen date being over five weeks after the issuance of the Scheduling Order.

11. The Appeals Chamber must also consider the likelihood of prejudice to the Defendants as well as the undesirable delay in the proceedings of the International Tribunal. In this case, the Defendants do not oppose the Application, although they correctly point out that an adjournment would prolong the incarceration of the Defendants prior to the hearing. The adjournment would also mean that the Appeals Chamber's judgement in this matter would not issue until after the spring of 2004, over one year after the issuance of the Trial Chamber's Judgement and Sentence.

12. Despite the regrettable posture of the matter, there is a significant factor weighing in the Application's favour. The Appeals Chamber relies on the ability of counsel at the oral hearing to answer questions pertaining to the issues on appeal, particularly in a case containing several complex disputes of law and fact. The Appeals Chamber's ability to decide the many issues presented will depend in part on the Prosecution's ability to make a coherent presentation of its case and to answer the arguments of the Defendants and the questions of the bench. It is not in the interests of justice, of the Defendants, or of the

Tribunal for the oral argument to proceed when one party is unable to make a meaningful contribution.

13. Although the issue is very close, the Appeals Chamber is persuaded that, in light of the complexity of the Appeals and the likelihood of substantial questioning from the bench, the interests of justice narrowly support an adjournment in the present circumstances. In reaching this decision, the Appeals Chamber has been particularly influenced by the willingness of the Defendants to accommodate such an outcome, albeit reluctantly so. The Appeals Chamber is grateful to counsel for the Defendants for communicating their responses to the Application so promptly.

14. The Appeals Chamber must next determine an appropriate date for the rescheduling of the oral argument of the Appeals. The Appeals Chamber must take into account the availability of counsel for the Defendants, who have relied on the Scheduling Order in arranging their professional obligations. The Appeals Chamber takes particular note of the submission of counsel for Gérard Ntakirutimana that it would be impossible for them to attend a hearing scheduled between 1 March and 12 April 2004. The Appeals Chamber has explored the possibility of certain dates in February, but it appears that counsel for Gérard Ntakirutimana is unavailable during that month as well.

15. In order to accommodate the needs of the Prosecution and the schedules of counsel for the Defendants, the Appeals Chamber sees no option but to postpone the hearing until the middle of April. The hearing shall therefore take place on Monday 19 April, Tuesday 20 April, Wednesday 21 April, and Thursday 22 April 2004. The Appeals Chamber expects all parties to be prepared to proceed and to provide full oral submissions on those dates, so as to ensure no undue delay in the rendering of the Appeals Chamber's judgement.

16. The Application also seeks a further postponement of the filing of the Prosecutor's Appeal Book and Book of Authorities. The adjournment of the hearing makes this request moot. As provided by Rule 117*bis* of the Rules, the Appeal Books and Books of Authorities are due four weeks before the hearing, thus on 15 March 2004.

17. Following consultation with the Office of the Prosecutor, the Appeals Chamber is satisfied that the documents pertaining to this matter need not be treated as confidential.

Disposition

18. Pursuant to Article 36 of the Directive for the Registry of the International Tribunal, the Appeals Chamber:

(1) **GRANTS** the Application in part;

(2) **ORDERS** that the hearing scheduled in the Scheduling Order is adjourned to Monday 19 April, Tuesday 20 April, Wednesday 21 April, and Thursday 22 April 2004;

(3) **INFORMS** the Parties that a timetable for the hearing will be established in a subsequent scheduling order; and

(4) **DIRECTS** the Registrar to treat all filed documents pertaining to the Application as non-confidential.

Done in English and French, the English text being authoritative.

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Judge Theodor Meron
Presiding

Done this 20th day of November 2003,
At The Hague,
The Netherlands.

Judge Schomburg appends a dissenting opinion to this decision.

[Seal of the Tribunal]

Dissenting Opinion of Judge Schomburg

1. I appreciate the content and language of the decision as such. However, I do not agree with its conclusions.

2. The Appeals Chamber is seized of the "Extremely Urgent Prosecution Application Pursuant to Article 36 of the Directive for the Registry of the Tribunal for an Adjournment of the Oral Hearing in this Matter" filed by the Prosecutor on 7 November 2003 ("Application").

3. Both Accused are "presumed innocent until proved guilty according to law" (see *inter alia* Article 6 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950). They therefore enjoy the right "to be tried without undue delay" (see *inter alia* Art. 14 (3) lit. c of the Covenant on Civil and Political Rights of 19 December 1966). These rights are inalienable fundamental principles of criminal procedure on a global level. It is axiomatic that an International Tribunal must fully respect these internationally recognized standards, expressed explicitly in Article 20 (3), (4 c) of the Statute of the ICTR.

4. Only absolutely extraordinary circumstances may justify a postponement at very short notice. Additionally this would only for the purpose of an extremely short postponement of an appeals hearing scheduled by the court. This is especially true of an international tribunal established for the protection of human rights.

5. The Prosecution has known for months about the Scheduling Order in this case setting the commencement of the appeals hearing for 1 December 2003. All documents for the preparation of the appeals hearing were filed in good time. There was and is no obstacle to starting the appeals hearing. There was and is no justification for a postponement of finally nearly five months, caused by the Application.

6. It is not my intention to comment on the additional arguments put forward by the Prosecution. The one and only remaining point to make is that in the framework of the reorganization of the OTP at the ICTR, an additional counsel for the Prosecution will arrive only on 8 February 2004. This, however, cannot justify an infringement of the fundamental rights of the Accused. Defence Counsel were kind enough to respond decently, this being in the interests of their clients. It was and is therefore for the Appeals Chamber to give an appropriate answer.

7. I wonder what the reaction of the Appeals Chamber would have been if the Defence had argued that their office had to be re-organized and that, for this reason, they were not prepared to participate in the appeals hearing. Furthermore, this is not even a decisive argument. It is the Prosecution that requested the deprivation of liberty of the two Accused, still presumed innocent. It is not a question of the equality of arms. It is a question of justifying a continued deprivation of liberty, a responsibility that lies without doubt with the Prosecution.

8. The re-arrangement of the OTP in Arusha was decided upon by the Security Council months ago. There was time enough to prepare the hearing. Even if there would have been a real staffing problem, no doubt the Prosecutor of the ICTY would have assisted in the transition period.

9. The Prosecution, representing the international community, must always be ready and able to proceed without delay, when so ordered by the court.

10. This case should never and cannot ever serve as a precedent for any other case in the future.

11. It is in the interests of justice, in the interests of the Accused, waiting for the final outcome of their trial, and in the interests of the witnesses and victims of the alleged crimes, desperately seeking final clarification of the fate of their relatives and loved ones and of the responsibility for this fate, that the application must be rejected.

12. Bearing in mind the fundamental rights at stake, the Appeals Chamber should have rejected this Application immediately as manifestly ill-founded.

Done in English and French, the English text being authoritative.

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Judge Wolfgang Schomburg

Dated this 20th day of November 2003,
At The Hague,
The Netherlands.

[1] S/Res/1503, adopted 28 August 2003; S/Res/1505, adopted 4 September 2003.

[2] Urgent Prosecution Motion Pursuant to Rule 116 of the Rules of Procedure and Evidence, filed 3 November 2003.

[3] Paragraph 1 of Article 36 of the Directive for the Registry provides: “Either party requesting an adjournment must do so by filing a written motion accompanied by a draft order to postpone the scheduled hearing.”