ICTR-95-1-1B

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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

05-03-2004
(1109 — 1103)

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 5 March 2004

THE PROSECUTOR

v.

Mikaeli MUHIMANA

Case No. : ICTR-1995-1B-I

DECISION ON MOTION TO POSTPONE TRIAL

The Prosecutor

Charles Adeogun-Phillips
Wallace Kapaya
Peter Tafah
Renifa Madenga

The Defence

Professor Nyabirungu Mwene Songa
Kazadi Kabimba

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

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

BEING SEIZED OF the Defence "Requête de la défense pour le report de la date du procès", filed on 27 February 2004;

CONSIDERING the Prosecution "Response" thereto, filed on 3 March 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. The present motion requests postponement of the commencement of the trial of the Accused.

2. The original Indictment against the Accused Mikaeli Muhimana, charging him jointly with seven other co-defendants, was confirmed on 28 November 1995, and subsequently amended with leave of the Trial Chamber on 6 May 1996. The Accused was arrested on 9 November 1999 in Dar Es Salam, Tanzania, and transferred to the Tribunal's detention facility in Arusha in accordance with an arrest warrant issued by Judge Navanathem Pillay. On 14 April 2003, noting that three of the co-defendants had been tried separately and that three others remained at large, Trial Chamber I granted the Prosecution motion to try the Accused separately and to file an amended Indictment against him individually. That Indictment was filed on 7 May 2003, and subsequently amended with leave of the Trial Chamber on 22 January 2004. A revised Indictment, correcting minor typographical errors, was filed on 4 February 2004.

3. Status conferences were held on 14 and 23 January 2004 to discuss the trial-readiness of the case.[1] On 30 January 2004, following the amendment of the Indictment to include additional charges, a new initial appearance of the Accused was held in accordance with Rule 50 (B). On 18 February 2004, the parties were informed that trial of the Accused would commence on 29 March 2004.

SUBMISSIONS

4. The Defence invokes the rights of the Accused enshrined in Articles 19(1), 20(2), and 20(4)(b) and (e) of the Statute in support of its request for postponement of trial. Those rights are said to be imperiled by commencing trial on 29 March 2004 for three reasons. First, the right of the Accused to adequate time and facilities for the preparation of his Defence has been violated by insufficient authorization of work programs by the Registry. Between December 2002 and February 2004, no Defence work programs were approved that would have permitted the Defence to locate witnesses to contradict new witness statements that were being disclosed by the Prosecution throughout that period. Further, co-Counsel was ordered by the Registry to cease work on 27 September 2001. Even after the Chamber's instructions at the Status Conference on 23 January to rapidly approve Defence work programs, the Registry has moved slowly, only approving the first work program on 17 February 2004. The Defence demands more prompt approvals, and claims that the necessary investigative work cannot be accomplished before 29 March 2004. Second, Lead Counsel for

[1] Contrary to the implication of paragraph 28 of the Defence motion that a stenographic record was made of only the first of these conferences, transcripts of both are available. T. 14 January 2004; T 23 January 2004.

the Defence argues that starting the trial on 29 March 2004 conflicts with his obligations as a Senator in the Parliament of the Democratic Republic of the Congo, which have not been sufficiently taken into account. Third, the Defence argues that Rule 66(A)(ii) will be violated by starting trial on 29 March 2004.[2]

5. The Prosecution refrained from making submissions on the first two issues raised by the Defence, stating that those were matters within the competence of the Registry and the Chamber, respectively. As to Rule 66(A)(ii), the Prosecution submits that between 24 November 1999 and 20 January 2004 it disclosed the statements of seventy-one potential Prosecution witnesses, redacted to protect their identities.[3] As part of its Pre-trial Brief, filed on 27 February 2004, the Prosecution listed twenty-two amongst the seventy-one witnesses whom it intends to call at trial. The Prosecution claims that its disclosure of the witness statements of the seventy-one witnesses between November 1999 and January 2004 was made pursuant to Rule 66(A)(i). Further, it argues that under Rule 66(A)(ii) "the Defence have a right to receive notice of [its] 22 witnesses including copies of their written statements, subject to any witness protection orders...at least 60 days before the start of trial". In short, the Prosecution apparently agrees with the Defence that starting trial on 29 March 2004 would violate Rule 66(a)(ii).[4]

DELIBERATIONS

6. Article 19(1) requires the Trial Chamber to "ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules..., with full respect for the rights of the accused...". Those rights include the right to "a fair and public hearing" (Article 20(2)); to have adequate time and facilities for the preparation of his or her defence (Article 20(4)(b)); and the right to "examine, or have examined, the witnesses against him or her..." (Article 20(4)(e)). Each of the arguments of the Defence will be examined on the basis of these rights.

i) No Investigations Authorized from December 2002 to January 2004

7. The Defence claims that no investigations were authorized between December 2002 and January 2004. The significance of this period of enforced inactivity must be considered in light of several factors. First, the Registry submitted that when investigations were suspended in December 2002, the Defence had already undertaken more than 15,000 hours of work, which was greatly in excess of the norm for the trial of a single Accused.[5] The extent of these investigations shows that the Defence must have had notice, and been investigating, a broad range of factual allegations prior to December 2002. Indeed, the Chamber has

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[2] The Defence also claims that there was a violation of Rule 65*bis*, which authorizes the Chamber to convene a status conference to "ensure expeditious trial proceedings", because the Chamber did not take sufficient account of the views of the parties at the status conference. The Defence did not further mention or explain this claim in its *mémoire* in support of the motion.

[3] Non-disclosure of information concerning the identity of the potential witnesses was authorized by the Decision on the Prosecutor's Motion for Orders for Protective Measures for Victims and Witnesses (TC), 9 March 2000.

[4] Shortly before the filing of the present decision, the Defence has requested a translation into French of the Prosecution response to the motion, with a view to submitting a reply. The Chamber considers it unnecessary to await the translation of the response as the Rules do not envisage a right of reply for the moving party, even though they are routinely considered. In this case, a reply is unnecessary as the Prosecution response only addresses one of the three arguments raised by the Defence and, in respect of that one argument, substantially agrees with the Defence position. The response will be communicated to the Defence when it has been translated.

[5] T. 14 January 2004, p. 15. The Registry stated that the Defence had met 690 potential witnesses and consulted with the Accused on 250 occasions.

previously found, based on its review of the witness statements disclosed by the Prosecution, that by 14 March 2000 the Defence already had notice of most of the allegations now incorporated into the amended Indictment:

> As claimed by the Prosecution, the additional facts in the amended Indictment are based on allegations in witness statements that have been disclosed to the Defence. The majority of those allegations, including those of rape, are to be found in statements taken in 1999 and disclosed to the Defence on or before 14 March 2000. A few of the additional facts are based on allegations in statements taken on different dates in 2002, and were disclosed to the Defence in three bundles, on 5 and 24 December 2002 and 6 February 2003....The new Indictment provides more precise particulars as to the location of killings and other criminal acts, specifying that they occurred in Gishyita Sector, Gishyita Commune; Mubuga Sector, Gishyita Commune; Mugonero Complex, Gishyita Commune; and in the Bisesero area, Gishyita and Gisovu Communes. Rather than changing or extending geographical scope, the effect of the proposed Indictment is to specify more precise locations within the broad area defined in the current Indictment. In that sense, the Defence cannot reasonably argue that it has had no notice that events at these locations are part of the Prosecution's case. Nor can the Defence claim that the existence of the allegations of rape as part of the Prosecution case is a surprise. Most of those allegations were disclosed as early as 14 March 2000. The law of this Tribunal, as set forth in *Akayesu* is that a charge of genocide may be proven by rape in some circumstances. Accordingly, the Defence would not have been justified in treating the allegations of rape in the witness statements as irrelevant to the Prosecution case. The introduction of the separate count of rape in the amended Indictment cannot, therefore, be considered as a complete surprise to the Defence.[6]

In summary, the extensive investigations of the Defence, combined with extensive disclosure by 14 March 2002, shows that the Defence had, by December 2002, a substantial opportunity to – and, in fact, did – investigate the material facts supporting the charges which have now been added to the Indictment. Further, it is important to recall that the focus of present investigations is effective confrontation of Prosecution witnesses. The Defence will have the opportunity to undertake further investigations before it presents its own case.

8. Undoubtedly, the Defence now has an urgent need to renew its contact with its witnesses and to find new witnesses in respect of material facts contained in statements of Prosecution witnesses disclosed after December 2002. The Chamber is aware that one work program involving sixty-one potential witnesses was submitted on 27 January 2004 and approved on 4 February 2004.[7] The Registry has also indicated that it is willing to authorize the activities of co-Counsel forthwith, and is awaiting a request to that effect. On the basis of these actions and undertakings, it is evident that the Defence is being provided with every reasonable support to accomplish its work before the start of trial.

9. Based on the extensive preparations by the Defence prior to December 2002, and the time and opportunity to renew and continue those preparations between the status conference and the start of trial, the Chamber is of the view that the Defence can be adequately prepared to commence trial on 29 March 2004.

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[6] Decision on Motion to Amend Indictment (TC), 21 January 2004, para. 9 (footnotes omitted).

[7] The Defence has complained that the "daily subsistence allowance" (DSA) was not paid until 17 February 2004, and that, therefore, his investigations have been significantly delayed. The Chamber notes that such advance payments are not compulsory for work programs of more than two weeks under Article 25(A) of the Directive on the Assignment of Defence Counsel; accordingly, the delay of the DSA is not a valid reason for delaying investigations.

ii) Conflicting Obligations of Lead Counsel

10. Lead Counsel has invoked his obligations to the parliament of his country as a reason for delaying the trial. At the Status Conference on 14 January 2003, the matter was raised not by Lead Counsel, but by the Prosecution. Lead Counsel responded that "my colleague has just raised an issue that I did not consider important enough to raise".[8] Lead Counsel then explained that the Parliament of which he was a member sits for three months twice a year, commencing on 1 April and 1 October, but that he could seek authorization to be absent for thirty days during parliamentary sessions.[9] The Presiding Judge sought further confirmation of Lead Counsel's availability:

> Mr. President: So in other words, even if the parliament is sitting, you will be able to appear before this Court. Even if you would prefer to be [in] parliament in the required period from the 1st of April to the 30th of June, it is possible for you to come to Arusha. This is how I interpreted your statement.
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> Mr. Songa: Your understanding is very correct, Mr. President.[10]

The Tribunal is entitled to rely on such assurances of availability from Counsel, in the interests of this and other Accused who are awaiting trial. Even assuming that Lead Counsel's obligations to this Tribunal may conflict to some extent with his obligations to his parliament, for which the Chamber has the utmost respect and regard, Article 28 imposes on states an obligation of cooperation with the Tribunal. The Chamber is of the view that the right of the Accused to trial without undue delay is at stake, and cannot be displaced by the individual obligations of Lead Counsel, however important they may be.

iii) Violation of Rule 66(A)(ii)

11. Rule 66 (A)(ii) provides:

> The Prosecutor shall disclose to the Defence:
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> ...
>
> ii) No later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial....

12. The Prosecution has stated that all of the statements of its potential witnesses were disclosed by 20 January 2004, that is, more than sixty days before 29 March 2004. Nevertheless, the Defence has taken the position that the Prosecution obligation under Rule 66(A)(ii) is not satisfied until a final and formal witness list, pursuant to Rule 73*bis* (B)(iv), is filed.

13. This interpretation is contrary to the plain meaning of the Rules. The timing of disclosure of witness lists is expressly governed by Rule 73*bis* (B), which states:

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[8] T. 14 January 2004, p. 21.

[9] *Id.* ("Perhaps, taking into account the fact that our country has just come out of a war situation and that the life of the judicial – or judicial provisions are very important, we should consider it appropriate. That said, every time there is need, my – the parliament of my country has never failed to allow me to carry out my duties in court".)

[10] *Id.*

> At the Pre-Trial Conference the Trial Chamber or a Judge, designated from among its members, may order the Prosecutor, within a time limit set by the Trial Chamber or the said Judge, and before the date set for trial, to file the following:
>
> (i) A pre-trial brief addressing the factual and legal issues;
> ...
> (iv) A list of witnesses the Prosecutor intends to call with:
> (a) The name or pseudonym of each witness;
> (b) A summary of the facts on which each witness will testify;
> (c) The points in the indictment on which each witness will testify; and
> (d) The estimated length of time required for each witness....

Accordingly, the timing of the filing of the witness list is to be decided by the pre-trial Chamber or Judge, subject to the requirement that it be disclosed before the start of trial.[11] Rule 66 concerns an entirely different question, as implied by its title, "Disclosure of Materials by the Prosecutor" and its location in the section of the Rules of Procedure and Evidence on "Production of Evidence".[12] Rule 66(A)(ii) requires that the statements of all witnesses whom the Prosecution intends to call be disclosed at least sixty days before trial; it does not require that *only* those statements be disclosed, or that the individuals who will figure on its witness list under Rule 73*bis* be identified. For these reasons, the Chamber agrees with the opinion of a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia that:

> ...the obligation to disclose witness statements to the Defence under Rule 66(A)(ii) is independent of and does not rely upon finalization of...the witness list and other details to be provided pursuant to Rule 73*bis* (B)(iv), which list is provided nearer to the time for trial for the information of both the Trial Chamber and the Defence.[13]

iv) The Chamber's Obligation to Ensure Expeditious Proceedings

14. Mikaeli Muhimana was arrested on 9 November 1999. The Chamber has an obligation to ensure that he waits no longer for his trial to begin than is absolutely necessary, in conformity with the rights of a fair trial in conformity with the Rules. Though the parties may wish to have a more leisurely schedule, the Chamber considers that trial as soon as possible is imperative.

15. The possibility of commencing the trial in March 2004 was discussed at length during the status conference of 23 January 2004. The Prosecution stated that it would be ready to commence the trial in March 2004.[14] The Defence did not present, and has not presented in support of this motion, any convincing reasons why it cannot be ready to proceed to trial by 29 March 2004, given the extensive investigative and preparatory work it has already done, and the time and resources that have been available to it during the interval between the status conferences and the date set for trial.

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[11] During the Status Conference the Prosecution took the view that the Chamber had discretion as to when the witness list must be disclosed before trial, and did not take the position that Rule 66(A)(ii) applied: "Mr. President: There are no statutory deadlines before the trial or pre-trial brief? Mr. Kapaya: There aren't any, Your Honour, except that under the witness protection order, we are supposed to disclose the names of our witnesses and the unredacted statements at least 21 days before the date for trial. That is the deadline that is impeding". T. 23 January 2004, p. 8.

[12] In particular, Rule 66 is found in Part V of the Rules, "Pre-Trial Proceedings", section 5 "Production of Evidence".

[13] *Kordic and Cerkez*, Order on Motion to Compel Compliance By the Prosecutor With Rules 66(A) and 68 (TC), 26 February 1999.

[14] T. 23 January 2004, p. 9 (where 15 and 22 March 2004 were accepted by the Prosecution as possible dates for the commencement of trial).

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FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 5 March 2004

Erik Møse	Jai Ram Reddy	Sergei Alekseevich Egorov
Presiding Judge	Judge	Judge

[Seal of the Tribunal]