



**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

19793
Mwanja

TRIAL CHAMBER II

ICTR-00-56-T
19-05-2005
(19793-19788)

Case No. ICTR-2000-56-I

ENGLISH
Original: FRENCH

Before: Judge Arlette Ramaroson, presiding
Judge William H. Sekule
Judge Solomy B. Bossa

Registrar: Adama Dieng

Decision of: 20 August 2004

THE PROSECUTOR

v.

**AUGUSTIN BIZIMUNGU
AUGUSTIN NDINDILIYIMANA
PROTAIS MPIRANYA
INNOCENT SAGAHUTU
FRANÇOIS-XAVIER NZUWONEMEYE**

JUDICIAL RECORDS
ICTR
2005 MAY 19 P 4:42

**DECISION ON THE PROSECUTION MOTION FOR A SEPARATE TRIAL
(Article 20 of the Statute and Rule 82 of the Rules of Procedure and Evidence)**

Office of the Prosecutor:

Ciré Aly Bâ, Senior Trial Attorney
Ifeoma Ojemeni Okali, Trial Attorney
Alphonse Van, Legal Advisor
Moussa Sefon, Legal Advisor
Aboubacarr Tambadou, Associate Legal Officer
Faria Rekkas, Case Manager
Harriette Sabblah, Bilingual Secretary

Counsel for the Respondent:

Michel Croisier, for Augustin Bizimungu
Christopher Black, for Augustin Ndindiliyimana
André Ferran, Antoine Beraud, for François-Xavier Nzuwonemeye
Fabien Segatwa, Didier Patry, for Innocent Sagahutu

CII04-0090 (E)

1

Translation certified par LSS, ICTR

The Prosecutor v. Augustin Bizimungu, Augustin Nindiliyimana, Protais Mpiranya, Innocent Sagahutu, François-Xavier Nzuwonemeye, Case No. ICTR-2000-56-I

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the Tribunal),

SITTING as Trial Chamber II composed of Judge Arlette Ramaroson, presiding, Judge William H. Sekule and Judge Solomy B. Bossa (the Chamber);

BEING SEIZED of the "Prosecutor's Motion for a Separate Trial for Protais Mpiranya" (the Motion), filed on 16 July 2004, appended thereto an Amended Indictment dated 16 July 2004;

CONSIDERING the "*Réponse à la Requête du Procureur aux fins de disjunction de l'instance suivie contre Protais Mpiranya*" (the Reply) filed by Counsel for Augustin Bizimungu on 26 July 2004;

CONSIDERING the "*Réplique du Procureur au mémoire en réponse du Conseil d'Augustin Bizimungu*" (the Response) filed on 2 August 2004;

CONSIDERING the Indictment of 20 January 2000, confirmed on 28 January 2000 by Judge Laïty Kama (the Indictment of 20 January 2000);

CONSIDERING the Amended Indictment of 17 October 2002, as amended by Trial Chamber II Decision of 25 September 2002 (the Indictment of 17 October 2002);

CONSIDERING the Amended Indictment of 29 March 2004, as amended by Trial Chamber II Decision of 26 March 2004 (the Indictment of 29 March 2004);

CONSIDERING the Amended Indictment of 22 July 2004, duly noting the Trial Chamber II Decision of 15 July 2004 on Augustin Bizimungu's Preliminary Motion (the Amended Indictment of 22 July 2004) and the Prosecutor's Transmission Memorandum of 26 July 2004 attached to the said Indictment;

CONSIDERING the Statute of the International Criminal Tribunal for Rwanda and the Rules of Procedure and Evidence (the Rules);

HEREBY DECIDES solely on the basis of the written briefs filed by the Parties.

SUBMISSIONS BY THE PARTIES

The Prosecutor

1. The Prosecutor relies on Rule 82(B) of the Rules in requesting a separate trial for the Accused Protais Mpiranya in the instant case. The Prosecutor submits that all due diligence exercised by both the Registry and the Office of the Prosecutor to secure the arrest of Protais Mpiranya has so far been in vain. He further submits that in view of the imminent commencement of the trial on 20 September 2004 and in the interests of due process, it is important to effect a severance in order to protect the rights of Mpiranya's co-Accused, who have been in detention for three years, to be tried within a reasonable time.

2. As a consequence of the severance, the Prosecutor proposes to withdraw 15 paragraphs from the Indictment of 29 March 2004. An Amended Indictment dated 16 July 2004 incorporating the said amendments is submitted as an annexure to the Motion.

The Defence

3. In its Reply to the Prosecutor's Motion, the Defence for Augustin Bizimungu raises no objection to the proposed severance.

4. However, the Defence for Augustin Bizimungu objects to the amendment of the Indictment as proposed by the Prosecutor. It submits that Protais Mpiranya having been alleged to be a subordinate of Augustin Bizimungu, and the acts with which he is charged having been withdrawn, thus should entail withdrawal of the corresponding acts alleged against Protais Mpiranya and Augustin Bizimungu. It refers in particular to the acts mentioned in paragraphs 80, 111 and 120 of the Indictment of 29 March 2004.

5. The Defence argues further that the Prosecutor may not, in the absence of Protais Mpiranya, make reference to acts allegedly committed by him as a subordinate of Augustin Bizimungu and likely to impute responsibility to Augustin Bizimungu pursuant to Article 6(3) of the Statute. On the one hand, such acts, according to the Defence, ought not to be alluded to in the absence of Protais Mpiranya because that would be tantamount to condemning him *in absentia* on account of said acts. On the other hand, Article 6(3) responsibility of the Statute requires, according to the Defence, a prior finding of guilt on the part of the perpetrator of the alleged acts, on account of those acts.

Prosecutor's Response

6. In his Response, the Prosecutor submits that a superior may be held responsible under Article 6(3) of the Statute regardless of any finding of guilt on the part of the subordinate who carried out the alleged acts.

HAVING DELIBERATED

1. On the Motion for a separate trial for Protais Mpiranya

7. Under Rule 82(B) of the Rules, the Chamber may, in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice, order separate trials for persons accused jointly.

8. The Chamber, relying on the case-law of the ICTR as well as that of the International Criminal Tribunal for the former Yugoslavia,¹ emphasizes that Rule 82(B) is particularly aimed at protecting the right of the accused to a fair and expeditious hearing, and at the same time takes into account the interest of justice. This fundamental right is enshrined in Articles 19(1) and 20(4)(c) of the Statute.

9. The Chamber notes that the Defence does not object to the motion for severance.

¹ See in particular *The Prosecutor v. Kamuhanda*, Case No ICTR-99-54A-I, "Decision on the Defence motion for Severance and Separate Trial", 7 November 2000; *Prosecutor v. Dokmanović*, Case No. IT-95-13a, "Decision of the Trial Chamber Concerning Separation of Trials", 28 November 1997; *Prosecutor v. Vasiljevic*, Case No. IT-98-32, Order, 24 July 2001.

10. In the instant case, the Prosecutor explains that all due diligence has been exercised both by the Registry and the Office of the Prosecutor to secure the arrest of Protais Mpiranya and notify him of the Indictment. By the Prosecutor's own admission, all due diligence exercised so far has been fruitless. The Prosecutor does not provide the slightest indication as to whether Protais Mpiranya could be arrested in the near future, and, were he to be arrested now, he could not be tried together with the other Accused without the date scheduled for commencement of trial, which is 20 September 2004, being postponed. A delay of this nature cannot but be prejudicial to the rights of his four co-Accused, currently in provisional detention, to be tried without undue delay.

11. The Chamber therefore holds that the circumstances of this case constitute a showing of good cause and are relevant for ordering severance of the trial of Protais Mpiranya from that of the other Accused, Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu.

2. On the amendment of the Indictment

12. The Chamber notes that the Prosecutor requests that the Amended Indictment of 16 July 2004 appended to his Motion be notified without delay to the Accused Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu, as well as to their Counsel.

13. On a preliminary basis, and before examining the arguments of the parties on this point, the Chamber notes that, following its Decision of 15 July 2004 on Augustin Bizimungu's Preliminary Motion wherein it ordered the Prosecutor to modify the Indictment of 29 March 2004, the Prosecutor had filed on 26 July 2004 an Amended Indictment which contained not only the amendments ordered by the Chamber, but also the amendments presented in the document titled "Amended Indictment (Joinder)" of 16 July 2004 appended to the Motion for a Separate Trial. The Chamber notes that the Transmission Memorandum of the Amended Indictment of 26 July 2004 states the following: "This Indictment replaces the Indictment of 16 July 2004, which was transmitted at the same time as the Motion for a Separate Trial of 15 July 2004".

14. The Chamber emphasizes that, pursuant to Rule 50 of the Rules, an indictment may be amended after the initial appearance of the accused only with leave of the Trial Chamber granted in accordance with Rule 73. In the instant case, the Accused appeared *de novo* on 30 April 2004. Thereafter, the amendments ordered by the Trial Chamber in its Decision of 15 July 2004 on Augustin Bizimungu's Preliminary Motion should have been made on the basis of the Indictment of 29 March 2004, without *a priori* incorporating amendments resulting from a would-be severance. Similarly, the Prosecutor was not allowed to amend *proprio motu* the Amended Indictment of 29 March 2004 as a result of a would-be severance, and should have sought leave, as part of the Motion under review, to proceed with such amendment.

15. Accordingly, the Indictments filed by the Prosecutor on 16 and 22 July 2004 contain amendments which were never authorized by the Chamber pursuant to Rule 50 of the Rules, and should not be accepted in the circumstances. The Chamber therefore holds null and void the Indictments filed by the Prosecutor on 16 and 22 July 2004. Furthermore, the Chamber draws the Prosecutor's attention to the procedure to be followed under Rule 50 for amending an indictment.

16. In view of the above, the Chamber examines the amendments proposed by the Prosecutor following the severance on the basis of the Indictment of 29 March 2004, with the understanding that the amendments ordered in its Decision of 15 July 2004 are still to be incorporated. The Prosecutor proposes the withdrawal of 15 paragraphs, namely paragraphs 7 to 9, 78 to 80 and 105 to 113 from the Indictment of 29 March 2004. Protais Mpiranya is no longer mentioned under Count 1 – conspiracy to commit genocide – but the Prosecutor emphasizes that he remains party to the criminal enterprise.

17. The Chamber finds that the instance severance is motivated by the fact that the Accused Protais Mpiranya has so far not been arrested, and by the right of the other Accused to be tried without undue delay pursuant to Article 20 of the Statute. The severance does not affect the reasons that led to the preparation of a single indictment against all five co-accused, and Protais Mpiranya is still wanted for his alleged participation in the same criminal enterprise. In these circumstances and from this viewpoint, the proposal by the Prosecutor to continue to maintain Protais Mpiranya's name in the Indictment as a participant in the joint criminal enterprise is warranted.

18. Furthermore, the Chamber notes that the paragraphs objected to the Defence do not make any reference to Protais Mpiranya:

- The Prosecutor proposes to delete paragraph 80 of the Amended Indictment of 29 March 2004;
- The Prosecutor proposes to delete paragraph 111 of the Amended Indictment of 29 March 2004;
- The Prosecutor proposes to amend paragraph 120 of the Amended Indictment of 29 March 2004, which would now become paragraph 111 of the new Amended Indictment and would no longer mention Protais Mpiranya.

19. Accordingly, the Chamber holds the amendments proposed by the Prosecutor valid.

20. Moreover, the Chamber notes that the Prosecutor's list of witnesses referenced in Annex 4 of his Pre-trial Brief of 17 June 2004 comprises certain witnesses concerning the Accused Protais Mpiranya alone. In view of the severance, the Chamber draws the attention of the Prosecutor to the fact that the list of witnesses may require some amendments, in particular the withdrawal of witnesses whose testimony concerns the Accused Protais Mpiranya alone, and a review of the estimated duration of the examination-in-chief of witnesses whose testimony concerned Protais Mpiranya as well as some of his co-Accused.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Prosecutor's Motion for a Separate Trial for Protais Mpiranya;

ORDERS that the Accused Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu be tried separately from Protais Mpiranya;

HOLDS null and void the Amended Indictment of 16 July 2004 appended to the Motion under review insofar as it contains amendments not authorized by the Chamber;

The Prosecutor v. Augustin Bizimungu, Augustin Nindiliyimana, Protais Mpiranya, Innocent Sagahutu, François-Xavier Nzuwonemeye, Case No. ICTR-2000-56-I

HOLDS null and void the Amended Indictment of 22 July 2004 insofar as it contains amendments not authorized by the Chamber;

ORDERS the Prosecutor to file, within **three days**, a new Indictment amended in relation to the Indictment of 29 March 2004 in French and English: the new Amended Indictment should include not only the amendments proposed as a result of the separate trial for Protais Mpiranya, but the amendments ordered by the Chamber in its Decision of 15 July 2004 as well;

ORDERS that the new Amended Indictment be kept by the Registrar and that certified true copies thereof bearing the seal of the Tribunal be made in accordance with Rule 47(G) of the Rules;

ORDERS the Registry to notify the Accused Augustin Bizimungu, Augustin Nindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu, as well as their Counsels of the new Amended Indictment without delay;

ORDERS further that the Prosecutor file, within **fifteen days** in French and English, a separate Indictment against Protais Mpiranya alone on the basis of the Amended Indictment of 29 March 2004 and include the amendments ordered by the Chamber in its 15 July 2004 Decision on Augustin Bizimungu's Preliminary Motion;

ORDERS the Registry to assign the number ICTR-2000-56A-I to the separate Indictment mentioned above against Protais Mpiranya.

Arusha, 20 August 2004

[Signed]

Judge Arlette Ramaroson
Presiding

[Signed]

Judge William H. Sekule

[Signed]

Judge Solomy B. Bossa

[Seal of the Tribunal]
