



ICTR-00-56-T
24-09-2004
(8928-8920)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

8928
Mwanja

OR: ENG

TRIAL CHAMBER II

Before: Judge Joseph Asoka de Silva
Judge Taghreed Hikmat
Judge Seon Ki Park

Registrar: Mr. Adama Dieng

Date: 24 September 2004

THE PROSECUTOR

v.

Augustin Bizimungu
Augustin Ndindiliyimana
François-Xavier Nzuwonemeye
Innocent Sagahutu

Case No. ICTR-2000-56-T

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**Decision on Defence Motions for Stay of Proceedings and for Adjournment of the Trial,
including Reasons in Support of the Chamber's Oral Ruling delivered on Monday 20
September 2004.**

Office of the Prosecutor:

C. A. Bâ
M. Sefon
I. Ojemeni
A. Van
A. Tambahou

Counsel for the Defence

C. Black
A. Ferran
A. Béraud
F. Segatwa
D. Patry
M. Croisier

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”);

SITTING as Trial Chamber II, composed of Judge Joseph Asoka de Silva, presiding, Judge Taghreed Hikmat, and Judge Seon Ki Park;

NOTING Nindiliyimana’s “Motion for the transfer of Applicant’s trial to the courts of a national jurisdiction on the basis that a fair trial cannot be obtained before the Tribunal”, filed on 20 September 2004;

NOTING the “*Mémoire en réponse du Procureur à la requête aux fins de transfert déposée par le Conseil d’Augustin Nindiliyimana sur le fondement de l’article 11 bis du Règlement de procédure et de preuve*”, filed on 23 September 2004

NOTING the “*Requête en extrême urgence de la défense de Monsieur Augustin Bizimungu pour les manquements du procureur dans la communication de la preuve relativement à la déposition des premiers témoins*”, filed on 20 September 2004

NOTING the “*Mémoire en réponse du Procureur à la requête en extrême urgence du Conseil d’Augustin Bizimungu sollicitant le rejet des 21 premiers témoins de l’accusation, pour absence de communication de pièces*”, filed on 23 September 2004

NOTING Bizimungu’s “*Requête urgente en arrêt des procédures pour procédure discriminatoire et dilatoire et remise en liberté immédiate*”, filed on 20 September 2004

HAVING HEARD the oral submissions made to the Chamber on 20 September 2004 by Mr. Ferran, counsel for François-Xavier Nzuwonemeye for postponement of the trial, by Mr. Croisier, counsel for Augustin Bizimungu for a stay of proceedings and for the unconditional release of the accused Bizimungu, and Mr. Black, counsel for Augustin Nindiliyimana for a transfer of his client’s case to a national jurisdiction where he can receive a fair trial;

HAVING HEARD the submissions in reply of the Prosecutor and Mr. Bâ for the prosecution;

HAVING fully considered that both the oral and written arguments of the Parties relate to the same issues;

CONSIDERING THAT THE CHAMBER delivered an oral ruling on 20 September 2004 dismissing the application for postponement of trial, and for a stay of proceedings and indicated that it would deliver written reasons on Friday 24 September 2004;

HEREBY RENDERS its decision in respect of the above motions and the reasons in support of its oral ruling:

SUBMISSIONS

The Defence

Michel Croisier, Counsel for Bizimungu

- (1) Mr. Croisier argues that the prosecution has failed to fulfil its disclosure obligations under Rule 66 of the Rules in that the 26,000 pages of documents handed to the Defence in August and the further 3000-4000 handed to them on 17 September 2004, have not been made available to their clients. He submits that as a result of this non-compliance, the Defence has not had adequate time to prepare their case.
- (2) The Defence argues that the manner in which the Chamber has been seised of this case shows a selective and discriminatory exercise of Prosecutorial discretion. They argue that other persons similarly situated with the four accused persons, and who might have committed crimes in Rwanda in 1994, have not been brought for trial.
- (3) For the foregoing reasons, Mr. Croisier prayed that the Chamber order the Prosecutor to properly exercise his discretion and bring to trial other persons who might have participated in the crimes in Rwanda in 1994; secondly, that the Chamber stay all proceedings against accused Bizimungu pending the commencement of proceedings by the Prosecutor against other alleged perpetrators; and thirdly, to promptly and unconditionally release Augustin Bizimungu on the basis of the presumption of innocence and to safeguard the accused's right to be tried without undue delay.

Mr. Ferran, Counsel for Nzuwonemeye

- (4) Mr. Ferran similarly argues that the prosecution has not met its disclosure obligations. He submits that the CD-roms containing 26,000 pages were delivered to his Defence team in August. They were on vacation at the time, and did not have sufficient time to study the documents. Counsel further argues that a box containing 3000-4000 pages of documents was handed to the Defence on 17 September 2004 and that his team would need time to effectively study these documents and prepare their Defence.
- (5) Mr. Ferran further submits that the Prosecutor has failed to properly exercise his Prosecutorial discretion and that his selection of persons to be brought for trial was both bias and discriminatory.
- (6) Counsel Ferran finally submits that there is an inequality of arms between the prosecution and Defence teams and that he is constrained in the preparation of his client's Defence by the circumstances under which he is compelled to work at the Tribunal.
- (7) Counsel therefore urged the Chamber to adjourn the commencement of trial for 45 days so as to allow him sufficient time to study the documents and prepare his Defence.

Mr. Christopher Black for Nindiliyimana

- (8) Mr. Black informed the court that he had instructions from his client to file a written motion explaining the reasons for his absence from the trial. He further argued that it was his client's instruction to read the body of the motion in open court before filing it.
- (9) Mr. Black argued that his motion was brought pursuant to Rules 11 *bis* (B) and 73 of the Rules. He argued that the structure of the tribunal, its rules of evidence and procedure, as well as its lack of independence, make it impossible for his client to receive a fair trial.
- (10) Counsel also argued that the prosecutor has been selective and discriminatory in bringing accused persons for trial before the tribunal and that there is inequality of arms between the prosecution and defence teams.
- (11) Counsel Black therefore prayed that the Chamber exercise the discretion conferred on it under Rule 11 *bis* (B) and transfer, *proprio motu*, the case of Augustin Nindiliyimana to a national jurisdiction where he can receive a fair trial.

The Prosecution

- (12) In his reply, the Prosecutor submitted that the arguments of the Defence are without merit and urged the Chamber to dismiss them. On the issue of lack of independence of the tribunal and the alleged interference by some states in the work of the tribunal and the prosecutor's office, Mr. Jallow reiterated his absolute faith in the independence and impartiality of the tribunal and stated his full confidence that the chamber has the ability to decide all the issues before it in accordance with the law and the evidence given before it.
- (13) On the issue of alleged selective and discriminatory prosecutorial policy, Mr. Jallow argued that the very nature of the exercise of the prosecutorial discretion implies that there must be a selective process. In light of the finite resources at the disposal of the Tribunal and its limited life span, a choice must be made between the thousands of potential cases that could be brought for prosecution. He however denied that the prosecutor has been bias or discriminatory in the exercise of this selective discretion.
- (14) Mr. Jallow further argued that the defence had on previous occasions canvassed the selective prosecution argument before various chambers of the tribunal, and that on each of those occasions, the argument was dismissed. He argued that the common denominator in these cases is that in order for the judicial branch to interfere with the exercise of prosecutorial discretion on the basis of discrimination or bias, the applicant must satisfy two requirements: first, they must show that those being prosecuted were being prosecuted for improper or impermissible motives; secondly, the applicants must show that there are other persons who are similarly situated and are not being prosecuted. Mr. Jallow argued that the mere assertion of bias or discrimination, without proof of the

above two elements, is insufficient for the Chamber to intervene in the exercise of the prosecutor's discretion.

- (15) With respect to the absence of the accused persons before the Tribunal, the Prosecutor recalled that Article 20 (4) (c) of the Statute guarantees to every accused person the right to be tried in his or her presence. He however argued that that right is not infringed where the accused is available in detention and chooses to stay away from the proceedings. He submitted that under those circumstances, the Court has a duty to proceed with the case so that justice could be done.
- (16) On the issue of the Prosecutor's alleged failure to meet his disclosure obligations under Rule 66, C.A. Bâ, Senior Trial Attorney, argued on behalf of the Prosecution that they are in full compliance with the Rules. He argued that in March 2004, the Prosecution made full disclosure of all the material it intends to rely upon at the trial. He conceded that while parts of these documents were redacted, this was necessary to protect the identity of witnesses under Article 21 of the Statute and Rule 75 of the Rules. Counsel also argued that the prosecution's disclosure obligation under Rule 66 is subject to the overriding need to protect the identity of witnesses under Rule 69.¹
- (17) Mr. Bâ argued that the 26,000 pages on CD-rom given to the Defence in August, were given pursuant to the Defence's request and that the Prosecutor did not wish to rely on any of this material at trial. He therefore submitted that the Defence cannot be heard to argue that this amounted to a failure to meet the Prosecutor's disclosure obligation under Rule 66.
- (18) With respect to the 3000-4000 pages handed to the Defence on 17 September 2004, prosecution counsel argued that these documents were tendered pursuant to Rule 41(B) rather than Rule 66. In addition, the documents were meant solely for restitution to accused Nindiliyimana, and were submitted to the other Defence teams based on an error on the part of the registry.

DELIBERATIONS

Postponement of Trial due to Inadequate Disclosure by the Prosecution

- (19) The Chamber notes that under Rule 66(A) (ii), the Prosecutor must disclose to the Defence copies of the statements of all witnesses it intends to call to testify at trial not less than 60 days before the date set for trial. This disclosure obligation is however not unlimited. It is subject *inter alia*, to the provisions of Rule 69 which relates to the protection of victims and witnesses.² Under that Rule, the

¹ The learned authors, May and Wierda in their book, *International Criminal Evidence* (2002) p2821'2' wrote the following commentary on the equivalent provision under the ICTY statute: "The statute ... provide[s] that the right to a public trial is subject to the Tribunal's duty to provide protective measures for victims and witnesses, including protecting the identity of witnesses."

² Sub-rule (A) provides that: "In exceptional circumstances, either of the parties may apply to a Trial Chamber to order non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise." Sub-rule (C) provides: "Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by [the] Trial Chamber to allow adequate time for the preparation of the prosecution and the Defence."

Chamber can order non-disclosure of the identity of witnesses and victims until such time that such non-disclosure may affect the ability of the prosecution or Defence to prepare their cases. The Chamber further notes that in an earlier Decision, the Chamber ruled that the Prosecutor is under an obligation to disclose witness statements to the Defence within 21 days prior to the date the witness is scheduled to testify.³

- (20) Based on the submissions of Counsel, the Chamber is convinced that the Prosecutor has disclosed the unredacted statements of the first 21 witnesses it intends to call during this trial session within the required timeframe. The Chamber is satisfied that this disclosure meets the requirements of the 19 March 2004 Decision.
- (21) With respect to the 26,000 pages of documents on CD-Rom referred to in the Defence submissions, the Chamber recalls that Mr. Ferran has himself conceded that the CD-rom has been available to him since August, but that his team could not study the documents because they were on vacation at the time. It is the Chamber's considered view that the failure by the Defence team to study the documents in a timely manner cannot be interpreted as a lack of adequate disclosure by the Prosecutor.
- (22) The Chamber is equally convinced that the 3000-4000 pages of documents contained in a box that was handed to the Defence teams on 17 September 2004 were tendered pursuant to Rule 41 of the Rules as a matter of restitution to the Accused Nindiliyimana. The fact that the Defence received these documents 3 days before the commencement of trial has no bearing on the Prosecutor's obligation to disclose under Rule 66.
- (23) The Chamber finds that the Prosecutor has fulfilled his disclosure obligation under the Rules and therefore it is for the above reasons that on 20 September 2004 the Chamber refused the Defence's application for postponement.

Stay of Proceedings Against Accused Bizimungu

- (24) The Chamber recalls its finding that the Prosecutor has fulfilled his disclosure obligation and therefore this cannot provide the basis for a stay of proceedings against Bizimungu or any other accused.
- (25) On the issue of selective and discriminatory exercise of prosecutorial discretion, the Chamber notes that under article 15 of the Statute, the prosecutor is the sole authority entrusted by the Security Council with responsibility to investigate and prosecute persons responsible for serious violations of international criminal law in the territory of Rwanda and Rwandan citizens responsible for such violation committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994. In carrying out this responsibility, the prosecutor acts as an independent organ of the tribunal and does not receive instructions from any government or other source.
- (26) The Chamber notes that the issue of the proper exercise of prosecutorial discretion raised by Counsel for Bizimungu and Nindiliyimana has been the

³ See *Décision sur la Requête du Procureur aux Fins de Modification et d'Extension des Mesures des Victimes et des Témoins*, Affaire No. ICTR-2000-56-I, 19 March 2004.

subject of several decisions in this Tribunal and the International Criminal Tribunal for the Former Yugoslavia.⁴ In the view of the Chamber, the golden thread that runs through these decisions is that in order for judges of this tribunal to interfere with the exercise of prosecutorial discretion, the defence must prove that the prosecutor exercised his discretion improperly or for impermissible motives.⁵ Secondly, the defence must show that in prosecuting the persons that he did, the prosecutor left out persons similarly situated.⁶ In the Chamber's considered opinion, the mere assertion, without proof, that the prosecutor was bias in his selection of persons to bring to trial, is insufficient to ground judicial interference with the power conferred on the prosecutor by the Security Council in all its wisdom. The Chamber notes that the examples provided by Mr. Croisier and the arguments of Black to back up their assertions of selective prosecution are insufficient to substantiate any charge so grave against the Prosecutor. In light of this failure by the defence to discharge the burden cast on them by law, and in observance of the maxim that 'he who asserts must prove', the Chamber rejects the allegation of improper exercise of prosecutorial discretion. Accordingly, the Chamber also denies the application for stay of proceedings based on the unproved allegation of prosecutorial bias.

The Chamber's Decision to Proceed in the Absence of the Accused

- (27) The Chamber notes that three of the accused namely Ndindiliyimana, Bizimungu, and Sagahutu chose to stay away from the proceedings in protest against the possibility of transfer of cases to Rwanda.
- (28) The Chamber wishes to note that under article 8 of the Statute, the Tribunal and the national courts have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in Rwanda in 1994. The statute further provides that the Tribunal shall have primary jurisdiction over such crimes. The Chamber is convinced that under the Rules, it is the Prosecutor who has responsibility for determining which cases will be prosecuted at this Tribunal and which ones will be prosecuted by national jurisdictions.⁷
- (29) It is the Chamber's considered view that there are provisions under the Statute and the Rules allowing transfer of cases to national jurisdiction, including Rwanda. If the accused persons decide to absent themselves from court based on the potential transfer of other detainees and suspects to Rwanda for trial, the Chamber finds that this does not provide grounds upon which the Chamber could grant an adjournment or a stay of proceedings. On the contrary, the Chamber has

⁴ See *Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council*, Case No. ICTR-2000-56-I, 26 March 2004; *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10, "Judgement", 21 February 2003, para. 870-871; *Prosecutor v. Akeyesu*, Case No. ICTR-96-4, "Appeals Chamber Judgement", 1 June 2001, para 94; *Prosecutor v. Delacic et al.*, Case No. IT-96-21-A, Appeals Chamber Judgement", 20 February 2001, para. 602 ("the "Celebici Appeals Judgment").

⁵ *Celebici Appeals Judgement*, para. 611.

⁶ *Ibid.*

⁷ V. Morris & M. P. Scharf, *The International Criminal Tribunal for Rwanda* (1998) at p319: "It is for the Prosecutor to determine in the first instance whether the Rwanda Tribunal should investigate or prosecute a case rather than the national authorities of the State concerned."

concluded, after careful consideration of the submissions of the parties and the law, that there is sufficient basis to proceed in the absence of the accused under Rule 82 *bis* of the Rules.⁸

Ndindiliyimana's Application to be Transferred for Trial to a National Jurisdiction

- (30) The Chamber has carefully considered the submissions of Mr. Black on this issue, and the response of the prosecutor. The Chamber recalls that the Security Council has conferred this tribunal with competence to prosecute persons for serious violations of international humanitarian law committed in Rwanda in 1994.⁹ The Judges of the tribunal are elected by Members States of the United Nations and are required to be persons of high moral character, impartiality and integrity. They must be persons qualified to hold the highest judicial office in their respective countries.¹⁰
- (31) It is the Chamber's considered view that the defence has not put forward any cogent argument or evidence to prove that the integrity or independence of this Chamber, or the tribunal or any of its judges has been compromised. In addition, the defence has not given any convincing reason to support its assertion that Ndindiliyimana will not receive a fair trial before this tribunal.
- (32) For all these reasons, the Chamber denies the application for transfer of Ndindiliyimana to national jurisdiction. This Chamber is properly seised of his matter and will try him based solely on the evidence that will be tendered before this Chamber.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motions for:

- (i) A Stay of Proceedings against any of the accused persons;
- (ii) Postponement of the trial;
- (iii) Transfer of any of the accused persons for trial at national jurisdiction.

⁸ Rule 82 *bis*: If an accused refuses to appear before the Trial Chamber for trial, the Chamber may order that the trial proceed in the absence of the accused for so long as his refusal persists, provided that the Trial Chamber is satisfied that:

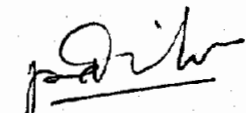
- (i) the accused has made his initial appearance under Rule 62;
- (ii) the Registrar has duly notified the accused that he is required to be present at trial;
- (iii) the interests of the accused are represented by counsel.

⁹ Statute of the ICTR, Article 1.

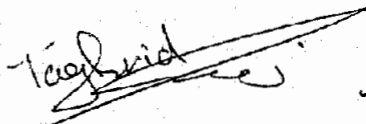
¹⁰ Statute of the ICTR, Article 12.



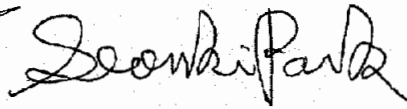
Arusha, this 24th day of September, 2004.



Joseph Asoka de Silva
Presiding Judge



Taghreed Hikmat
Judge



Seon Ki Park
Judge

