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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Karin Hökberg
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 3 June 2005

THE PROSECUTOR

v.

André RWAMAKUBA

Case No. ICTR-98-44C-PT

JUDICIAL RECORDS/ARCHIVES
ICTR

2005 JUN - 3 P 4: 21

DECISION ON DEFENCE MOTION FOR STAY OF PROCEEDINGS

Article 20 of the Statute

Office of the Prosecutor:
Don Webster
Dior Fall
Adama Niane
Tamara Cummings-John

Defence Counsel
David Hooper
Andreas O'Shea

JUDICIAL RECORDS/ARCHIVES
ICTR

2005 JUN - 3 P 4: 21

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”),

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Karin Hökberg and Gberdao Gustave Kam (“this Chamber”);

BEING SEIZED OF the “Motion by Defence for a Stay of Proceedings on Grounds of Undue Delay” (“Motion”), filed on 13 May 2005;

CONSIDERING the Prosecution’s Response thereto filed on 18 May 2005, and the Defence’s Reply thereto filed on 20 May 2005;

CONSIDERING the “Additional Evidence in Support of Motion for Stay of Proceedings on Grounds of Undue Delay of 13 May 2005”, filed by the Defence on 2 June 2005;

HEREBY DECIDES the Motion pursuant to Rule 73 of the Rules of Procedure and Evidence (“Rules”).

INTRODUCTION

1. André Rwamakuba (“Accused”) was arrested on 2 August 1995 by the Namibian authorities, which notified the Prosecution on 21 December 1995.¹ On 22 December 1995, the Prosecution indicated to the Namibian authorities that it had instructed its office in Kigali to take urgent steps to ascertain whether it was interested in a possible prosecution of the Accused on charges within the Tribunal’s jurisdiction. The Prosecution added that it would be in a position to make a decision in this regard by the middle of January 1996.² The Prosecution concluded that “[it] would be grateful if “[the Namibian] laws permit [...], that Dr. Rwamakuba be kept in detention until that time”.³ On 18 January 1996, the Prosecution notified the Namibian authorities that it did not possess evidence which would entitle it to request detention of the Accused.⁴ Subsequently, on 8 February 1996, the Namibian authorities released him.

2. In 1998, the Prosecution filed an Indictment with the Tribunal against the Accused and seven other Co-Accused. It was confirmed by Judge Pillay on 29 August 1998.⁵ The Accused was arrested on 21 October 1998 by the Namibian authorities, in compliance with the Chamber’s Warrant of arrest and Order for transfer and detention,⁶ and transferred to the Tribunal the following day. The initial appearance of the Accused took place on 7 April 1999.

3. On 6 July 2000, the Chamber granted the motion for severance and separate trial filed by the Co-Accused Juvénal Kajelijeli.⁷ Conversely, the Chamber denied the Defence Motion seeking severance of Rwamakuba from the joint Indictment. It found that the Defence failed to show the existence of “extraordinary circumstances as to cause a conflict of interests that

¹ See Prosecution’s letter of 22 December 1995, attached to the Defence “Additional Evidence in Support of Motion for Stay of Proceedings on Grounds of Undue Delay of 13 May 2005”, filed on 1 June 2005.

² *Ibidem*.

³ *Ibidem*.

⁴ See Prosecution’s letter of 18 January 1996, attached to the Defence “Additional Evidence in Support of Motion for Stay of Proceedings on Grounds of Undue Delay of 13 May 2005”, filed on 1 June 2005.

⁵ *Prosecutor v. Augustin Bizimana, Félicien Kabuga, Juvénal Kajelijeli, Edouard Karemera, Mathieu Ndirumpaste, Callixte Nzabomimana, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44 (*Bizimana et al.* Case), Confirmation and Non-Disclosure of the Indictment, 29 August 1998, *Report 1998*, p. 950.

⁶ *Prosecutor v. André Rwamakuba*, Case ICTR-98-44-I, Warrant of Arrest and Order for Transfer and Detention (TC), 8 October 1998, *ICTR Report 1998*, p. 954.

⁷ *Bizimana et al.* Case, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Juvénal Kajelijeli (TC), 6 July 2000.

might cause prejudice to the accused” and that the joint trial served the interests of justice and would not deny the right of the Accused to be tried without undue delay.⁸

4. On 25 April 2001, the Chamber granted in part a Motion filed by the Defence for the Co-Accused Karemera on defects in the form of the Indictment, and accordingly ordered amendments to the Indictment.⁹ The Indictment amended in compliance with that Decision was filed on 21 November 2001. Later, in 2003, three other Co-Accused were severed from the Indictment at the Prosecution’s request, since all of them were still at large and the trial was ready to start.¹⁰

5. The joint trial against André Rwamakuba, Edouard Karemera, Mathieu Ngirumpaste and Joseph Nzirorera commenced on 27 November 2003. During the course of the proceedings, on 14 May 2004, the Presiding Judge withdrew from the case.¹¹ In a first Decision issued on 24 May 2004, the remaining Judges decided to continue the trial with a substitute Judge pursuant to Rule 15bis(D) of the Rules.¹² All of the Co-Accused however challenged that Decision before the Appeals Chamber which remanded the matter to the Remaining Judges for reconsideration.¹³

6. After hearing the parties on the matter, on 16 July 2004, the Chamber confirmed its previous ruling and decided to proceed with a substitute Judge.¹⁴ This Decision was successfully challenged by the Accused before the Appeals Chamber which granted the Appeals on the points of assessment of credibility in the absence of an opportunity to observe the demeanour of witnesses and appearance of bias.¹⁵ This ruling necessitated a rehearing of the case with a differently composed Bench. Subsequently, at the Prosecution’s request, the Chamber granted severance of the Accused and amendment of the Indictment against the Accused on 14 February 2005.¹⁶ The separate Indictment against the Accused was filed ten days later.¹⁷

7. During the further initial appearance of the Accused on 21 March 2005, the Chamber entered a plea of not guilty with respect to all counts on his behalf. As the result of several

⁸ *Prosecutor v. André Rwamakuba*, Case ICTR-98-44-T, Decision on André Rwamakuba’s Motion for Severance (TC), 12 December 2000, *ICTR Report 2000*, p. 795.

⁹ *Prosecutor v. Edouard Karemera*, Case No. ICTR-98-44, Decision on the Defence Motion, pursuant to Rule 72 of the Rules of Procedure and Evidence, Pertaining to, *inter alia*, Lack of Jurisdiction and Defects in the Form of the Indictment (TC), 25 April 2001.

¹⁰ *Prosecutor v. Augustin Bizimana, Félicien Kabuga, Edouard Karemera, Mathieu Ngirumpaste, Callixte Nzabomimana, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44, Decision on the Prosecutor’s Motion for severance of Félicien Kabuga’s Trial and for Leave to the Accused’s Indictment (TC), 1st September 2003; *Augustin Bizimana, Félicien Kabuga, Edouard Karemera, Mathieu Ngirumpaste, Callixte Nzabomimana, Joseph Nzirorera and André Rwamakuba*, Decision on the Prosecutor’s Motion for Separate Trials and for Leave to File an Amended Indictment (TC), 8 October 2003.

¹¹ See *Prosecutor v. Édouard Karemera, Mathieu Ngirumpaste, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-94-44-PT (*Karemera et al.*), Decision on Motions by Nzirorera and Rwamakuba for Disqualification of Judge Vaz (Bureau), 17 May 2004, para. 6.

¹² *Karemera et al.*, Decision on continuation of Trial (TC), 24 May 2004.

¹³ *Karemera et al.*, Decision in the Matter of Proceedings under Rule 15bis(D) (AC), 21 June 2004, par. 13.

¹⁴ *Karemera et al.*, Decision on Continuation of Trial (TC), 16 July 2004, par. 13.

¹⁵ *Karemera et al.*, Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera’s Motion for Leave to Consider New Material (AC), 28 September 2004; *Karemera et al.*, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera’s Motion for Leave to Consider New Material (AC), 22 October 2004.

¹⁶ *Karemera et al.*, Decision on severance of André Rwamakuba and for Leave to File Amended Indictment (TC), 14 February 2005 (*Karemera et al.* Case, Decision on Severance).

¹⁷ That Indictment has been filed on 23 February 2005 and re-filed on 9 March 2005, due to typographical errors and in accordance with the Order to Re-File the Amended Indictment (TC), 8 March 2005.

discussions with the parties and the Status Conference of 24 March 2005, an Order was made on the same day to schedule the beginning of the trial for 9 June 2005.¹⁸

8. This Chamber now addresses a Motion filed by the Defence for the Accused requesting stay of proceedings on the basis of a violation of the right of the Accused to be tried without undue delay or, in the alternative, on the basis of the doctrine of abuse of process.

ARGUMENTS OF THE PARTIES

Defence

9. The Defence contends that the right of the Accused to be tried without undue delay, enshrined in Article 20(4)(C) of the Statute of the Tribunal ("Statute"), has been violated. The Tribunal would have the inherent power, under the Statute, to guarantee the rights of the Accused by granting a remedy where there has been a violation of his fundamental rights. A stay of proceedings would be the only appropriate remedy in case of excessive delays. This would be supported by the existence of mandatory stay in some civil law jurisdictions.¹⁹ The Defence further contends that where excessive delay amounts to a clear violation of the right to be tried without undue delay, the argument that the Accused might ultimately receive a fair trial must fail. The possibility of a fair trial cannot in itself remedy the violation of undue delay.

10. Relying on criteria set out by the jurisprudence of the European Court of Human Rights ("ECHR") or the Human Rights Committee, the Defence submits that the total length of delay in the present case, would be 9 years and 9 and a half months from the moment of the first arrest of the Accused on 2 August 1995, 9 years and 4 and a half months from the date the Prosecutor wrote to the Namibian Government on 22 December 1995, or 7 years and 3 and a half months running from the time that the Accused was seen by UN investigators, or 6 and a half years from the time the Accused was transferred to the Tribunal. This exceptional length of delay would be sufficient for a finding of undue delay. In addition, it alleges the existence of unexplained and therefore clearly unjustified periods of delay including: delays between transfer to the Tribunal and date set for initial appearance, delay between the initial appearance of the Accused and the Prosecution's first Motion for joinder, delay related to the filing of the Prosecution Motion for amendment of the Indictment, delay in the Prosecution's application for severance and delay between the Appeals Chamber Decision on the continuation of the trial of 22 October 2004 and the Status Conference of 17 November 2004. These delays would be due to the Prosecution's lack of diligence as there is nothing complex in the current case that could justify such an excessive delay and that the Accused bears no responsibility for such delay.

11. The Defence submits that the Accused suffers prejudice due to the excessive delay in the proceedings of his case. Its investigations would be difficult due to the length of time that has elapsed since the alleged events took place. Some witnesses would have died and others lost interests in their testimonies. It submits that the investigation of alibis has also become more difficult. The Accused would furthermore suffer frustration and a feeling of injustice, which would have led to his decreasing interest in the case and the proceedings. The Defence asserts that, in the particular circumstances of the case, since the excessive delay there should be a presumption of prejudice for which the only remedy is a stay of proceedings.

¹⁸ A Working Session with the parties was held on 22 March 2004 and a Status Conference on 24 March 2005; see also *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-PT, Scheduling Order (TC), 24 March 2005.

¹⁹ The Defence refers to the German Criminal Procedural Code.

12. The Defence submits that the Tribunal has, in addition, the power to stay the proceedings under the doctrine of abuse of process, when it would be contrary to the interest of justice that a trial should take place.

13. Finally, the Defence contends that the forthcoming trial will not be fair. It recalls that the Accused is entitled to be tried by an independent and impartial Tribunal under Article 20(2) of the Statute and that, pursuant to Article 15(2) the Prosecution is an independent and objective organ. In the Defence's view, the appearance of bias is continuing by virtue of the participation of the Prosecution Counsel Ms. Dior Fall.

Prosecution

14. The Prosecution submits that the issue of the scheduling of the legality of the arrest and detention of the Accused by the Namibian authorities has been already ruled by both the prior Trial Chamber and the Appeals Chamber. With respect to the length of proceedings and of the detention on remand of the Accused running from the time of his transfer to the Tribunal, it contends that the Accused bears some responsibility concerning the delays in the present case.

15. The Prosecution alleges that the delay in the initial appearance of the Accused was due to different factors, including the time to assign Counsel, Counsel's availability and the judicial recess. Relying on the trial transcripts, it submits that the numerous motions filed and postponements requested by the Defence have largely contributed to the delays in the proceedings. The minutes of the proceedings would show regular hearings in the proceedings from the beginning of the trial in November 2003 until the judicial recess which took place between 17 December 2003 and 17 January 2004. The Prosecution recalls that following the withdrawal of the prior Presiding Judge in the case, a new Chamber had to be composed and various Decisions had to be rendered on numerous previously filed motions. It emphasized that the last postponement of the hearings was requested by the Defence.

16. Relying on ECHR Decisions, the Prosecution contends that the detention of the Accused is based on a reasonable suspicion that he has committed the crimes he is charged with and therefore deemed lawful. The gravity of the charges against the Accused would also justify his continued detention.

17. The Prosecution submits that the continued participation of Prosecution Counsel from the first joint trial in the forthcoming trial raises no inference of an appearance of bias. In addition, the Prosecution contends that the Defence previously withdrew its Motion on withdrawal of the Prosecution Counsel.

Defence Reply

18. The Defence reiterates that, contrary to the Prosecution's contention, the delay has to be calculated from the first arrest of the Accused in Namibia. The evidence produced in annex to its Motion would show that the Accused was arrested for the purpose of his transfer to the Tribunal. The Decision of 12 December 2000 would only rule on the legality of the arrest and detention of the Accused and would not deal with the issue of the right of the Accused to be tried without undue delay. The Defence asserts that it bears no responsibility in the delay of the proceedings. The adjournment of the initial appearance, due to the impossibility of Counsel for the Accused to be present in Arusha, could only explain 30 days of the length of the proceedings. The Defence would not have filed numerous motions and could not be held responsible for the motions filed by the Co-Accused during the joint trial, especially while the Accused sought early severance. The delay related to the withdrawal of

the prior Presiding Judge could no more be put on the door of the Defence, since it was duty bound to assert the right of the Accused to an impartial and independent Tribunal. It opposes any fault on its part about the setting of the trial. The investigations could have been conducted earlier had they not been frozen by the Registry. It submits that where there has been an inordinate delay as in this case, the Prosecution has the burden to explain such delay. Finally, the Defence refers to national case law to support its proposition that the appropriate remedy for excessive delay is a stay of proceedings.

DELIBERATIONS

On the Right to Be Tried Without Undue Delay

19. In accordance with Articles 19 and 20 of the Statute, the Chamber must ensure the fairness and expeditiousness of the trial and protect the right of the Accused to be tried without undue delay. Following the jurisprudence of the Tribunal, which reflects the jurisprudence of international bodies on human rights, the reasonableness of the length of the proceedings has to be assessed on a case by case basis, in light of several factors, including:²⁰ the gravity of the charges against the Accused; the complexity of the case; the complexity of the proceedings, including the complexity of the investigations, the joinder of Accused; the conduct of the Accused; the number of Motions filed by the parties; and the conduct of the organs of the Tribunal, including the Prosecution and the Registry. It has already been decided that the “reasonable time” begins to run as soon as a person is “charged”:

Charged, [...], may be defined as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”, a definition that also corresponds to the test whether “the situation of the [suspect] has been substantially affected.”²¹

20. In light of the above-mentioned criteria, this Chamber determines, first, the date from which the delay started running in the current proceedings to assess whether there is a breach of the right of the Accused to be tried without undue delay, second, whether there would be any undue delay in the proceedings.

Date from which the Delay Started Running in the Current Proceedings

21. The Defence submits that “the relevant period will begin at the earliest time at which a person is officially alerted to the likelihood of criminal proceedings against him”. On the basis of this principle, the Defence indicates that the time for the undue delay should commence running from the first time the Accused was arrested by the Namibian Authorities on 2 August 1995, or on other related dates, and stresses that the legality of that arrest and

²⁰ See *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Decision on the Defense Motion for the Provisional Release of the Accused (TC), 21 February 2001; *Prosecutor v. Elie Ndayambaje*, Case No. ICTR-96-42-T, Decision on the Defence Motion for Separate Trial (TC), 25 April 2001; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-I, Decision on Justin Mugenzi’s Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)) (TC), 8 November 2002; *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Decision on Defense Motion for Trial to Proceed before Trial Chamber II, composed of Judges Sekule, Maqutu and Ramaroson and for Termination of Proceedings (TC), 20 February 2004; *Prosecutor v. Mugiraneza*, Case No. ICTR-99-50-AR73, Decision on Prosper Mugiraneza’s Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief (AC), 27 February 2004; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza’s Application for a Hearing or Other Relief on His Motion for Dismissal for Violation of His Right to a Trial without Undue Delay (TC), 3 November 2004.

²¹ *Prosecutor v. Darko Mrdja*, Sentencing Judgement (TC), 31 March 2004, footnote 139. The Chamber refers to jurisprudence of the European Court of Human Rights in *Deweere v. Belgium*, 2 E.H.R.R. 439, par. 46 and in *Eckle v. Germany*, 5 E.H.R.R. 1, par. 73.

detention is not an issue in this Motion. In its Decision of 12 December 2000,²² the Chamber was seized of the issue of illegal arrest and detention of the Accused by the Namibian Authorities and by the Tribunal before his initial appearance. At that time, the Chamber did not find that "it had jurisdiction to assess the legality of the Accused's first period of detention in Namibia from 2 August 1995 to 7 February 1996".²³ The Chamber only held that there was a violation of the rights of the Accused to legal assistance during his first months of detention, namely from 22 October 1998 until 10 March 1999, and that this delay in assigning duty Counsel to the Accused further caused the delay in his initial appearance.²⁴ The Chamber did not however make any statement on any violation of the right of the Accused to be tried without undue delay.

22. This Chamber is now seized of that last issue. In the light of the jurisprudence referred to above, the criteria for determining when time begins to run for the purpose of determining undue delay in a trial is when the Accused received official notification that he has been accused of committing a criminal offence.

23. The admitted facts in this case include the fact that while the Accused was in detention in Namibia, the Prosecution wrote the Namibian Authorities on 22 December 1995 and on 18 January 1996. These letters have been exhibited and they reveal the Prosecution's declaration that it had no evidence to request that the Namibian Authorities detain the Accused. It appears from a letter by the Namibian Ministry of Home Affairs that the Accused was arrested on the basis of Security Council Resolution 978 (1995) and not from an explicit request of the Prosecution or the Tribunal. The only conclusion to be drawn is that no official notification was given of an intended prosecution at that time. The Accused was released subsequent to that correspondence. On 30 September 1997, Prosecution investigators met the Accused, but no information of that meeting has been provided which would enable a conclusion that the Accused received official notification of any charges against him.

24. In this Chamber's view, it is only when the Accused was arrested by the Namibian authorities, in compliance with the Chamber's Warrant of arrest and Order for transfer and detention,²⁵ that he received the official notification of the charges against him. This Chamber concludes that the date of the arrest of the Accused by the Namibian authorities, namely 21 October 1998, is the relevant date from which the length of proceedings started running in the case.

On the Undue Delay

25. The Defence contends that the delay until trial is so long that it is inordinate, unacceptable and constitutes a violation of the right of the Accused to be tried without undue delay.

26. As a matter of law, the Tribunal's jurisprudence has demonstrated that the reasonableness of the period of the proceedings cannot be translated into a fixed number of days, months or years.²⁶ Contrary to the Defence's contention, a period of time of more than

²² *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44-T, Decision on the Defence Motion concerning the Illegal Arrest and Illegal Detention of the Accused (TC), 12 December 2000, *ICTR Report 2000*, p. 784.

²³ *Ibid.*, *ICTR Report 2000*, p. 794, par. 45.

²⁴ *Ibidem*.

²⁵ *Prosecutor v. André Rwamakuba*, Case ICTR-98-44-I, Warrant of Arrest and Order for Transfer and Detention (TC), 8 October 1998, *ICTR Report 1998*, p. 954.

²⁶ *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-I, Decision on the Defense Extremely Urgent Motion on Habeas Corpus and For Stoppage of Proceedings (TC), 23 May 2000, par. 68; *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Decision on the Defense Motion for the Provisional Release of the Accused (TC), 21 February 2001 par. 11.

seven years does not necessarily amount to an excessive delay in the proceedings. It must be addressed on a case by case basis in light of several criteria including the complexity of the proceedings and the case, the charges against the Accused, the conduct of the Accused, and the organs of the Tribunal.

27. The Defence alleges an “unexplained and therefore clearly unjustified” period of delay between the transfer of the Accused to the Tribunal and the date set for initial appearance. In its Reply, the Defence however agrees that part of that delay results from the adjournment of the initial appearance due to the impossibility of Counsel to be present in Arusha at that time. In addition, the Chamber observes that the delay was also caused by difficulties in the assignment of Counsel for the Accused. The latter requested a period of at least three weeks in order to consult with his family to choose his Counsel. He submitted his request for assignment of Counsel on 17 February 2000 only and, once received, the Registrar assigned Mr. David Hooper, on 24 February 2000, as Lead Counsel for the Accused. While it was previously decided that the breach of the right of the Accused to legal assistance during his first months of detention delayed the initial appearance of the Accused, this Chamber is of the view that it did not have a significant impact on the expeditious hearing of the case.

28. The Defence contends that the prior joint Indictment was “over complicated” and that the Prosecution bears the responsibility of the undue delay in the case. The Defence also submits that the Prosecution evinced lack of diligence and contributed unreasonably to the delay between the initial appearance and the commencement of trial, by its policy with regard to trying the Accused in a joint trial with other Co-Accused, until it applied for and obtained an Order to sever the Accused and file an Amended Indictment.

29. The Prosecution’s case against the Accused has recently been streamlined and focused on his individual criminal responsibility regarding particular events, therefore reducing the complexity of the case. However, the Accused was previously charged in a joint Indictment with other Co-Accused, based on allegations of a Government plan for the implementation of genocide throughout the Rwandan territory through coordinated large scale events. As it has already been decided in other cases, while a joint trial may be in the interests of justice and not necessarily encroaching upon the right to be tried without undue delay, it might bring complexity to the case and the proceedings.²⁷ In the present case, there is no doubt that the joint Indictment brought complexity to the facts, to the law and to the proceedings. From the initial appearance of the Accused until the beginning of the trial, both Prosecution and Defence Counsel, acting respectively for each of the four Co-Accused, filed numerous Motions with the Chamber. Hearings before the Chamber on these Motions were also eventually held.²⁸ The organization of Status Conferences was also more complicated due, i.a., to difficulties for all Defence Counsel to be available at the same period. The length of time elapsed between the initial appearance and the beginning of the trial in November 2003 does not appear as undue in light of the complexity of the case and of the proceedings at that time.

²⁷ *Prosecutor v. Elie Ndayambaje*, Case No. ICTR-96-42-T, Decision on the Defence Motion for Separate Trial (TC), 25 April 2001, par. 18; see also *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Decision on the Defence Motion for the Provisional Release of the Accused (TC), 21 February 2001 par. 11; *Prosecutor v. Nyiramasuhuko and Ntahobali*, Case No. ICTR-97-21-T, Decision on the Motion for Separate Trials, 8 June 2001 (TC), par. 23.

²⁸ See, for instance, Hearings on 25 February 2000 regarding a Motion filed by the Accused Karemera; on 28 April 2000, two motions regarding the Accused Kajelijeli; on 7 November 2000, Motion filed by the Accused Rwamakuba seeking severance; on 19 March 2001, Motion filed by Karemera; or 21 September 2001, Motion filed by Nzirorera.

30. It is noteworthy that at various stages both the Prosecution and the Defence had different positions, sometimes favouring and sometimes opposing the separate trial of the Accused. Under Article 15 of the Statute, the Prosecutor is “responsible for the investigation and prosecution of persons responsible” for crimes within the jurisdiction of the Tribunal and acts independently. He “assess[es] the information received or obtained”, “decide[s] whether there is sufficient basis to proceed” and, upon the determination of a *prima facie* case, prepares “an Indictment containing a concise statement of the facts and the crimes with which the Accused is charged under the Statute”.²⁹

31. In addition, the issue of whether the Accused should be tried on the joint Indictment was the subject of a number of Decisions. The Chamber already exercised its judicial power, where appropriate, to ensure a fair and expeditious trial for the Accused in the interests of justice when adjudicating on Motions seeking amendment of the Indictment or severance of the Accused. The first amendment of the Indictment was ordered by the Chamber as a result of granting Defence motions on defects in the form of the Indictment.³⁰ Whereas the Prosecution’s request for leave to amend the Indictment of 29 August 2003 was in part denied by a prior Chamber on the grounds that “any further postponement in the trial date [...] would violate [the] right [of the Accused] to be tried without undue delay,³¹ the Appeals Chamber subsequently reversed that Decision. It recalled that “the requirement of trial without undue delay, [...] “must be interpreted according to the special features of each case.”³² The Appeals Chamber considered that “[t]he Trial Chamber failed to assess the overall effect that the Amended Indictment could have on the proceedings by making allegations more specific and averting potential challenges to the indictment at trial and on appeal”³³ and concluded that

Although the failure of the Prosecution to show that its motion was brought in a timely manner might warrant a dismissal in other circumstances, this factor is counterbalanced by the likelihood that proceedings under the Amended Indictment might actually be shorter.³⁴

32. This Chamber recalls that, in its Response to the Prosecution Motion seeking severance of and leave to file an amended Indictment of 11 January 2005, the Accused supported the severance in principle since it considered it in the interests of justice. When adjudicating on the same Motion, the Chamber concluded

Considering the interests of justice in the present case, the right of each Accused to be tried fairly will not be prejudiced by the severance, and it is clear that their right to be tried without undue delay will be enhanced. The proposed Amended Indictments narrow the case against each Accused and simplify their Defence.³⁵

33. In addition, the Chamber noted, and it has not been denied by the Defence, that the Prosecution experienced difficulty in the investigatory process to explain the filing of such an Amended Indictment only recently.³⁶ The Chamber considered that as far as the proposed

²⁹ Art.17 (1) and 17(4) of the Statute.

³⁰ *Prosecutor v. Edouard Karemera*, Case No. ICTR-98-44, Decision on the Defence Motion, pursuant to Rule 72 of the Rules of Procedure and Evidence, Pertaining to, *inter alia*, Lack of Jurisdiction and Defects in the Form of the Indictment (TC), 25 April 2001.

³¹ *Prosecutor v. Augustin Bizimana, Félicien Kabuga, Edouard Karemera, Mathieu Ndirumpaste, Callixte Nzabomimana, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44, Decision on the Prosecutor’s Motion for Separate Trials and for Leave to File an Amended Indictment (TC), 3 October 2003, par. 12.

³² *Karemera et al.* Case, Decision on Prosecutor’s Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment (AC), 19 December 2003, par. 13.

³³ *Ibid.*, par. 19.

³⁴ *Ibid.*, par. 29

³⁵ *Karemera et al.* Case, Decision on Severance, par. 31.

³⁶ *Ibid.*, par. 40

separate Indictment reflects the requested severance and considering the particular circumstances of the case, the Prosecution acted diligently.

34. Therefore, in light of the particular circumstances of the case and its complexity, including the complexity of investigations, this Chamber does not consider that the Prosecution has lacked diligence when submitting motions for leave to amend the Indictment or seeking severance of the Accused. In addition, the fact that the theory of the Prosecution has changed, is not a circumstance which evidences lack of diligence.

35. The Defence complains that unreasonable delays occurred from the Appeals Chamber Decision on the continuation of the trial of 22 October 2004 and the Status Conference of 17 November 2004. This Chamber considers that the said period was unavoidable to ensure a fair and expeditious rehearing of the case. After the assignment of the Presiding Judge on 1 November 2004, the parties were consulted in view to organize a Status Conference and the beginning of the trial. No undue delay can be found.

36. Finally, with respect to the responsibility of the Registry on the alleged undue delay, this Chamber does not consider that its decision not to allow investigations by Defence team before the Decision of the Chamber on the severance of the Accused and amendment of the Indictment had any impact on the length of the proceedings. At that time, the Prosecution Motion was still pending. It resulted in the Chamber's Decision of 14 February 2005, which narrowed the case against the Accused to specific events. Had the Defence started its investigations before the Chamber's Decision, it would likely have been a waste of time and financial resources.

37. Having reviewed the factual history of the proceedings, this Chamber notes that from the initial appearance of the Accused until now, the proceedings have been continuously advancing taking into account the particularities and the complexity of the case. Thus, in light of the complexity of the case and the proceedings, the serious charges against the Accused, the conduct of both parties and of the Registry, the Chamber does not consider that the right of the Accused to be tried without undue delay has been violated.

On the Abuse of process

38. This Chamber notes that the doctrine of abuse of process has been previously applied by both *ad hoc* Tribunals.³⁷ In the *Barayagwiza* Case, the Appeals Chamber found that the abuse of process doctrine may be relied on its two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct.³⁸

39. In light of the circumstances detailed above, this Chamber does not consider that, in the present case, a fair trial has become impossible, or that the continuation of proceedings would contravene the sense of justice of the Tribunal.

40. The alleged effect of the elapsed period of time on the witness testimonies is not particular to the Defence and could apply to Prosecution and other Accused before the

³⁷ *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision (AC), 3 November 1999 (*Barayagwiza* Appeals Chamber Decision of 3 November 1999); *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Consideration) (AC), 31 March 2000; *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, Decision on Defence Motion for a Stay of Proceedings and Abuse of Process, 20 February 2004 (TC); *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002; *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003.

³⁸ *Barayagwiza* Appeals Chamber Decision of 3 November 1999, par. 77.

Tribunal. Conversely, the Chamber is of the view that the guarantees of a fair trial are enhanced following the amendment of the Indictment. Since the case against the Accused now is narrower and focused on particular events, the preparation of the Defence should be facilitated.


41. The Defence's contention of an alleged appearance of bias on behalf of the Prosecution Counsel and the subsequent impossibility to have a fair trial is not supported by any evidence. Under Article 15 of the Statute, the Prosecution acts independently. The prosecutorial functions under the Statute are presumed to be exercised regularly.³⁹ In addition, following the Appeals Chamber Decisions of 28 September 2004 and 22 October 2004,⁴⁰ a new panel of Judges has been assigned in the present case. The Defence has shown neither the existence of an unlawful or improper motive for the prosecution against the Accused nor the existence of any connection between the new Bench and Prosecution Counsel.

42. The Tribunal was established to contribute to the process of reconciliation and of restoration of international peace and security in Rwanda.⁴¹ Its major role has been recognized by the international community.⁴² Ensuring a fair trial to the Accused with a more concise Indictment will contribute to the Tribunal's mission and will guarantee for the Accused and the victims that Justice is done.


FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion.

Arusha, 3 June 2005, done in English.


Dennis C. M. Byron

Presiding Judge


Karin Hökberg



Gberdao Gustave Kam

Judge

³⁹ *Prosecutor v. Delalic et al.*, Judgment (AC), 20 February 2001, par. 611; see *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-PT, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment, 14 February 2005 (TC), par. 28.

⁴⁰ *Karemera et al.*, Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 28 September 2004; *Karemera et al.*, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 22 October 2004.

⁴¹ SC Resolutions

⁴² SC resolutions