

ICTR-98-44-PT

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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
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 14 September 2005

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[Signature]

THE PROSECUTOR

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-PT

DECISION ON THE CONTINUANCE OF TRIAL

Articles 19 and 20 of the Statute

Office of the Prosecutor:
Don Webster
Gregory Lombardi
Iain Morley
Gilles Lahaie
Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Mathieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera
Peter Robinson

[Signature]

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

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Emile Francis Short, and Gberdao Gustave Kam ("Chamber");

BEING SEIZED of "Motion for Continuance of Trial" filed by the Defence for Nzirorera on 14 July 2005 ("Motion"), and Mathieu Ngirumpatse's Joinder, filed on 8 August 2005 ("Joinder");

CONSIDERING the Prosecution's Response to the Motion filed on 27 July 2005 ("First Response"); Joseph Nzirorera's Reply thereto, filed on 28 July 2005; the Prosecution's Response to the Joinder ("Second Response"), filed on 16 August 2005; and Joseph Nzirorera's "Supplemental Filing in Support of Motion for Continuance of Trial" ("Supplemental Filing"), filed on 23 August 2005;

CONSIDERING the additional arguments presented orally by the Defence for Nzirorera, Defence for Karemera, Defence for Ngirumpatse and by the Prosecution on 5 September 2005;

DECIDES as follows pursuant to Rule 73(A) of the Rules of Procedure and Evidence ("Rules").

INTRODUCTION

1. The present trial is scheduled to begin during the course of September 2005. In the instant Motion, the Defence for Nzirorera, joined by the Defence for Karemera and Ngirumpatse, argues that its right to adequate time and facilities for its preparation of trial as expressed in Article 20(4)(b) of the Statute will be violated if the trial continues as scheduled. It requests that the Chamber order the postponement of the trial for an unspecified period of time due to the following reasons:

- a. The Indictment against the Accused is not yet settled since the Chamber still has to deliver its rulings on decisions regarding the Indictment;
- b. The Prosecution only recently revealed its intention to rely on the evidence of 143 witnesses who are victims of sexual assault;
- c. Disclosure under Rule 66(A)(ii) and 68 of the Rules remains incomplete;
- d. Nzirorera's investigator was unable to complete its investigations in Rwanda and the Lead Counsel is therefore not in a position to cross-examine some of the Prosecution witnesses scheduled to testify in the first trial session.
- e. The Chamber should first rule on all the pending motions before starting the trial.

2. While the Prosecution initially opposed any postponement of the trial, it expresses, both in written and during presentation of its oral arguments, concerns about the ability to start the trial on 12 September 2005, as scheduled for the moment. As a preliminary matter, the Prosecution claims that the Accused have been charged with rape and sexual assault in the Amended Indictment and that it has satisfied the notice requirement for disclosure on this issue. It contends that it disclosed all the documents in its possession in compliance with its obligations under the Rules. In addition, concerning the rape witnesses, it claims that the Defence will have sufficient time to prepare itself since these witnesses are scheduled to be called at the end of the Prosecution's case, at least seven months from now. Should the Chamber accept the Defence submissions on insufficiency of pleadings in the Amended

Indictment or completion of disclosure requirements under Rule 66 of the Rules, the Prosecution suggests that the interests of justice weigh in favour of according the Defence additional time to prepare their case. The Prosecution also shares the concerns expressed by the Defence on the uncertainty of the final version of the Amended Indictment and the outstanding motions before the Chamber. It furthermore emphasizes the necessity for the Chamber to deliver its Decision on the special protective measures requested for two Prosecution witnesses and the practical impact that such measures could have on the organization of the trial. It adds that it has not received reasonable assurances from the Witness and Victim Support Section ("WVSS") that the witnesses for the first trial session will arrive in sufficient time to ensure adequate preparation. Finally, the possibility that the *Rwamakuba* trial may continue beyond its scheduled time could also interfere with the start of this trial. It suggests that the Chamber should take into account the resolution of these technical impediments in determining the commencement date of the trial.

DISCUSSION

3. Pursuant to Article 19(1) of the Tribunal's Statute ("Statute"), the Chamber must ensure that a trial is fair and expeditious while respecting the rights of the Accused. In a Decision concerning the preparation and presentation of the Defence case, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia found that the Trial Chamber must "balance the need for the accused to have adequate time for the preparation of his case and the need for an expeditious trial."¹ In arriving at its decision regarding the scheduling of trial, the Chamber must consider all the relevant factors, appropriate concerns, and then use its discretion.² In this regard, the Chamber must decide whether the Accused are disadvantaged when presenting their case.³

4. In the present case, both the Defence and the Prosecution claim that the content of the applicable Indictment is still uncertain. Since then, in its Decisions on the various motions filed by the Defence both under Rules 72 and 73 of the Rules, the Chamber has ruled on the proposed Amended Indictment filed by the Prosecution and on its compliance with the Chamber's order. This matter is therefore now settled and should not impede the commencement of the trial at the earliest date.

5. The Defence claims that it had no prior notice of the Prosecution's intention to call or rely on 143 victims of sexual assault as witnesses. To prepare a coherent defence, it would have to review all the documents and conduct investigations before the beginning of the trial. The Defence furthermore contends that such investigations must be conducted by properly trained personnel in such a sensitive matter.

6. The Chamber is of the view that the Amended Indictment of 24 August 2005 gives sufficient notice of the Prosecution's intention to rely on rape as a natural and foreseeable consequence of the object of the alleged joint criminal enterprise of the Accused to destroy the Tutsi as a group. The Prosecution's theory of its case was also explained in its Pre-Trial Brief. The Defence has had adequate information to prepare its defence plan. In addition, the Prosecution has indicated that none of the witnesses testifying to rape and sexual violence are scheduled to appear in court for the first trial session. As a result, the Defence will have more

¹ *The Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-AP73, Decision on Interlocutory Appeal by the *Amici Curiae* against the Trial chamber Order Concerning the Presentation and Preparation of the Defence Case (AC), 20 January 2004, par 8.

² *Idem* par. 16-17.

³ *The Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Case No. IT-98-34-PT, Decision on the Accused Naletilic's Motion to Continue Trial Date (TC), 31 August 2001, par. 7.

time throughout the progress of the case for its investigators to proceed as they would with any other witness called by the Prosecution. While the Chamber appreciates the Defence's approach to get a trained investigator in sexual assault, this is a matter that should be addressed with the Defence Court Management Section ("DCDMS") and does not justify a delay in the commencement of the trial.

7. The Defence contends that the Prosecution has not complied with its disclosure obligations pursuant to Rules 66 and 68 of the Rules. Specifically, in the Defence's view, the Prosecution has failed to disclose the testimonies in prior trials and Rwandan judicial proceedings of the 143 rape witnesses, that it has failed to disclose all the Rwandan statements concerning the factual Prosecution witnesses including Witness HH, that it has not complied with Rule 68 obligations, and it has failed to disclose the Expert Reports.

8. The Chamber notes that most of the contentious disclosure issues have been addressed by the recent Chamber Decisions. The Expert Reports are scheduled to be disclosed within the next two months, and will not prejudice the rights of the Accused since none of these experts are scheduled to be heard before next year and the Defence has an overall knowledge of prior reports from the same experts. With respect to Rule 68 material, the Chamber recalls that the Prosecution has an ongoing duty to make disclosure as the need arises. There is no evidence before the Chamber to show that the Prosecution has failed to comply with this Rule. In its prior Decisions, the Chamber did not find that the Prosecution breached its obligations under Rules 66(A)(ii) of the Rules, but that in the interests of justice, it should assist the Defence in obtaining specific documents. In addition, the Chamber does not consider that the sole remedy for a violation of the Prosecution's disclosure obligation is the postponement of the trial, taking into account the right of the Accused to be tried without undue delay.

9. The Chamber is no more convinced that the difficulties encountered by the investigator for Nzirorera may justify an indefinite postponement of the trial. Further, regarding the attached communication from the Deputy Prosecutor, it appears that the Defence has not been prevented from meeting with prisoners, except the contentious investigators. The Defence has other investigators and has discretion to use its resources accordingly. This cannot be a sufficient reason to delay the start of trial at this time.

10. Finally, the Chamber notes that most of the pending motions have now been addressed. There is no reason to postpone the trial while the remaining pending motions do not affect its commencement.

11. With respect to the Prosecution's additional concerns, the Chamber notes that its recent ruling on special protective measures for two Prosecution witnesses will allow sufficient time for the Prosecution to make all the necessary arrangements for scheduling their testimonies. No delay is therefore warranted.

12. The argument that the WVSS has not assured the Prosecution that witnesses for the first trial session will be brought to Arusha in time for adequate preparation is speculative. WVSS has been successfully managing the transfer of witnesses to Arusha for many years in coordination with the Prosecution's needs, and the Chamber has not been given any reason to believe that a similar procedure will not be followed in this case. Also speculative is the Prosecution's argument that the *Rwamakuba* case will not finish in its allotted time. The Chamber will deal with this issue if and when it arises to accommodate all parties involved.


13. The Chamber notes that this is the second time that this case is being heard before a Trial Chamber. The Defence and the Prosecution have already investigated and prepared for most of the issues in the case before the beginning of the first trial in November 2003. The Defence cannot therefore be disadvantaged, nor can their rights be infringed if the case proceeds as planned.

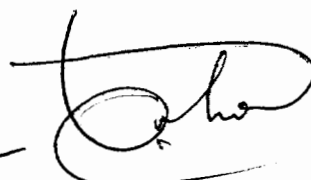
14. The Chamber has given serious consideration to the concerns expressed by both parties. Some of those concerns have been addressed by the recent Decisions delivered in the instant case. The Chamber is therefore of the view that no postponement of the commencement of the trial is warranted at this stage.

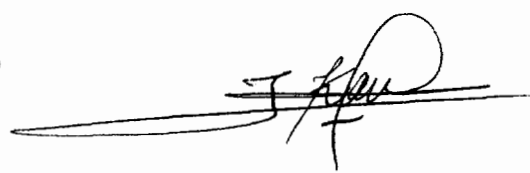
FOR THE ABOVE MENTIONED REASONS, THE CHAMBER

DENIES the Motion.

Arusha, 14 September 2005, done in English.


Dennis C. M. Byron
Presiding


Emile Francis Short
Judge


Gberdao Gustave Kam
Judge

