



ICTR-98-42-T
(26-11-2008
13059-13046)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

13059
memp

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr. Adama Dieng

Date: 26 November 2008

The PROSECUTOR

v.

Arsène Shalom NTAHOBALI

Case No. ICTR-97-21-T

Joint Case No. ICTR-98-42-T

2008 NOV 26
14:30
JUDICIAL RECORDS/ARCHIVES
RECEIVED

**DECISION ON NTAHOBALI'S MOTION FOR A STAY OF PROCEEDINGS
FOR UNDUE DELAY**

Office of the Prosecutor

Ms. Holo Makwaia
Ms. Adelaide Whest
Ms. Madeleine Schwarz
Ms. Althea Alexis Windsor
Mr. Fergal Gaynor
Mr. Tidiane Mara
Ms. Astou Mbow, *Case Manager*
Mr. Lansana Dumbuya, *Case Manager*

Counsel for Ntahobali

Mr. Normand Marquis
Mr. Bernard St. Arnaud
Counsel for Ndayambaje
Mr. Pierre Boulé
Mr. Claver Sindayigaya
Counsel for Kanyabashi
Mr. Michel Marchand
Ms. Alexandra Marcil

[Signature]

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

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Arlette Ramaroson and Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the "*Requête de Arsène Shalom Ntahobali en arrêt des procédures pour cause de délais déraisonnables*," filed on 22 August 2008 ("Ntahobali's Motion");

CONSIDERING the:

- i. "Prosecutor's Response to '*Requête de Arsène Shalom Ntahobali en arrêt des procédures pour cause de délais déraisonnables*'", filed on 26 August 2008 ("Prosecution's Response");
- ii. "*Réponse de Joseph Kanyabashi à la 'Requête de Arsène Shalom Ntahobali en arrêt des procédures pour cause de délais déraisonnables'*", filed on 26 August 2008 ("Kanyabashi's Response");
- iii. "*Réponse d'Élie Ndayambaje à la 'Requête de Arsène Shalom Ntahobali en arrêt des procédures pour cause de délais déraisonnables'*", filed on 26 August 2008 ("Ndayambaje's Response");
- iv. "*Réplique de Ntahobali à la réponse du Procureur à sa Requête en arrêt des procédures pour cause de délais déraisonnables*", filed on 1 September 2008 ("Ntahobali's Reply");
- v. "Prosecution's Corrigendum to Prosecutor's Response to '*Requête de Arsène Shalom Ntahobali en arrêt des procédures pour cause de délais déraisonnables*'", filed on 4 September 2008;
- vi. "Registrar's Submission in Response to the '*Requête d'Arsène Ntahobali en arrêt des procédures pour cause de délais déraisonnables*'", filed on 25 September 2008 following the Chamber's instruction of 22 September 2008 ("Registrar's Submission");
- vii. "*Réponse de Arsène Shalom Ntahobali aux soumissions du greffier relativement à la requête de Ntahobali en arrêt des procédures*", filed on 1 October 2008 ("Ntahobali's Response to the Registrar");
- viii. "Registrar's Further Submission Regarding the '*Réponse de Arsène Shalom Ntahobali aux soumissions du greffier relativement à la requête de Ntahobali en arrêt des procédures*'", filed on 31 October 2008 following the Chamber's further instruction of 28 October 2008 ("Registrar's Further Submission");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion pursuant to Rule 73 (A) of the Rules, on the basis of the written briefs filed by the Parties.

SUBMISSIONS OF THE PARTIES

Ntahobali's Motion

1. The Defence for Ntahobali moves the Chamber to stay Ntahobali's trial because of undue delay. In support of its Motion, the Defence submits that Ntahobali was arrested on 23 July 1997 and he is still being held in custody while waiting for his final judgement. The Defence for Ntahobali argues that such delay is unreasonable, and is caused by the ICTR's three bodies: the Registry, the Office of the Prosecutor and the Chambers.
2. Relying on the *Barayagwiza* Appeals Chamber Decision of 3 November 1999 and on several decisions issued by domestic courts and by both the European and Inter-American Courts of Human Rights, the Defence submits that these undue delays violate Ntahobali's right to a fair and expeditious trial and his presumption of innocence, and constitute an abuse of process.
3. The Defence submits that Ntahobali's trial is not complex in itself and that the majority of the delays in his trial were caused by decisions made by the Prosecution, which were ratified or assented to by the Chamber.
4. The Defence submits that due to the conduct of the Prosecution, the Registrar and the Judges, there was undue delay and a violation of Rule 62 of the Rules with respect to the scheduling and holding of Ntahobali's initial appearance. Ntahobali appeared for the first time before a Chamber on 3 September 1997, exactly 42 days after his arrest, without Counsel to represent him. As such, no plea was registered, and Ntahobali had to reappear with Counsel on 29 September 1997, that is 68 days after his arrest, to register a plea of not guilty. During this appearance, Ntahobali's trial was postponed and a status conference was scheduled for 13 February 1998, almost nine months after Ntahobali's arrest. However, the scheduled status conference was never held, without any explanation provided to Ntahobali.
5. The Defence argues that the reason for this delay stems from the Prosecution's submission of an indictment against 29 accused, including Ntahobali, on 6 March 1998. On or about 31 March 1998, Judge Khan rejected the indictment; the Prosecution's appeal of this decision was denied on 8 June 1998. On 17 August 1998, more than one year after Ntahobali's arrest, the Prosecution filed a Motion to amend the indictment against Ntahobali and Pauline Nyiramasuhuko. The same day, the Prosecution submitted amended indictments for the Accused Nsabimana, Nteziryayo, Kanyabashi and Ndayambaje, and a Motion for a Joinder of the above-mentioned Accused, which was vigorously opposed by the Defence for Ntahobali. A decision on these motions was delivered by the Chamber on 11 August 1999, more than two years after Ntahobali's arrest.
6. The Defence submits that Ntahobali should not suffer the consequences of institutional delays. For example, on or about 6 November 1999, after the *Barayagwiza* Appeals Chamber Decision, the Rwandan government stopped its collaboration with the ICTR, which furthered the delays encountered by Ntahobali by several months.
7. The Defence states that on 9 June 2000, the Prosecution assured Judge Kama that it would be ready to begin the trial in November 2000, approximately three and a half years after Ntahobali's arrest. On 20 November 2000, after an informal meeting between the Parties and Judge Kama, the Prosecution stated that it would be ready to proceed no later than two months from that date. However, it was only on 2 February 2001 that the Chamber held a status conference during which Ntahobali's trial was scheduled to begin on 14 May 2001.

Due to Judge Kama's passing, the trial did not actually begin until 11 June 2001. As such, Ntahobali's trial only began three years and 11 months after his arrest, despite the fact that the Prosecution had completed its investigations in 1995.

8. The Defence further submits that Ntahobali has suffered excessive delay because the Prosecution began the presentation of its case without first disclosing prior statements and identification material of its witnesses to the Parties. Ntahobali obtained the unredacted statements and full identities of the Prosecution witnesses on 31 January 2002, more than seven months after the actual commencement of the trial. This specific delay has caused Ntahobali substantial prejudice in that he has not been able to conduct all necessary investigations regarding Prosecution witnesses, and he was not able to find all the witnesses required to support his case.

9. The Defence submits that in July 2001, following a request by the Prosecution, Mr. Thaddée Kwitonda, Defence investigator, was compelled to cease working for the Defence because of investigations purportedly being conducted against him. However, these investigations have not led to any accusation against this investigator and have only further harmed Ntahobali's Defence. The Defence submits that it was not until 12 February 2003 that Ntahobali obtained another investigator.

10. The Defence submits that the delays have been exacerbated by the Prosecution's decision to try six Accused jointly. Had Ntahobali been tried alone, the length of the proceedings would have been shortened considerably. The Defence states that 43 witnesses have been heard in his case, and that, when this number is compared to similar trials at the ICTR, the probable duration of Ntahobali's trial, if tried alone, would have been 48 days, instead of the current 668 days it had taken at the time the Motion was filed.

11. The Defence further argues that Ntahobali should not suffer the consequences of the Tribunal's lack of resources or the fact that the United Nations refused to extend the mandate of Judge Maqutu in the present case, this last decision having lengthened the trial by eight and a half months.

12. The Defence indicates that the only remedy for these various violations is a stay of proceedings and Ntahobali's immediate release.

Prosecution's Response

13. The Prosecution submits that after a detailed review of the circumstances of Ntahobali's case, it can be shown that he has received a fair trial before the ICTR.

14. The Prosecution submits that Ntahobali was promptly informed of the charges against him, was provided with sufficient detail of the nature of the charges, and that at no time did he challenge his detention or claim that he did not know what the charges were when he was arrested.

15. The Prosecution concedes that Ntahobali's trial has been lengthy, but rejects the argument that the amount of time the trial has taken is exorbitant or unreasonable, given the complex nature of the case. Further, the Prosecution submits that the Defence for Ntahobali has not shown how this delay has prejudiced his right to a fair trial.

16. The Prosecution submits that the number of trial days for single-accused cases is not the proper benchmark for determining the reasonableness of the duration of Ntahobali's

case. The Prosecution submits that the Chamber determined that "a joint trial is proper in the case at bar"¹, and that this would not contribute to undue delay for Ntahobali or constitute an encroachment upon his right to a fair trial. As such, the Prosecution submits that the matter of joinder is now *res judicata*.

17. With regard to the full disclosure of unredacted material, the Prosecution submits that over the course of the proceedings, the Prosecution was sanctioned for failure to comply with disclosure obligations and, as such, the remedies provided by the Chamber in its decisions have balanced out any prejudice suffered by Ntahobali.

18. The Prosecution submits that cross-examinations of witnesses by many of the Accused, including Ntahobali, have been extensive. It further argues that the records reveal that Counsel for Ntahobali have carried out some of the lengthiest, most extensive examinations and cross-examinations of the trial.

19. The Prosecution further submits that even if it is likely that Ntahobali's case would not have lasted as long as it has were Ntahobali to have been tried on his own, this fact alone does not mean that he has not enjoyed a fair trial before the ICTR.

20. The Prosecution relies on the ICTY Appeals Chamber Decision in *Gotovina* to demonstrate that even if a joinder resulted in conflict amongst the accused, this does not in itself constitute a conflict of interests capable of causing serious prejudice. The Prosecution submits that the Defence for Ntahobali has not demonstrated that he has suffered actual and irreparable harm resulting from the joinder.

21. In relation to Rwanda's cooperation, the Prosecution submits that it is not clear whether Rwanda's lack of cooperation contributed to the breaks and recesses that have occurred. The Prosecution submits that if Rwanda's lack of cooperation did contribute to such breaks and recesses, given the realities of a trial before an international tribunal, some delay due to the actions of other states is to be expected.

22. The Prosecution argues that a case before an international tribunal involves, in most instances, the accused being arrested in a state other than the host state of the Tribunal, the collection of evidence from many crime scenes, contacting witnesses in different states, and cooperation between the Tribunal and several states. These factors must be taken into consideration in the instant case in assessing the length of the proceedings.

23. Finally, the Prosecution submits that the duration of the trial is not the only factor to be taken into account in considering whether an accused has received a fair and expeditious trial: the rights of the victims, witnesses and other co-accused, as well as the need to ascertain the truth about the serious charges being brought against the accused must also be weighed.

Ndayambaje's and Kanyabashi's Responses

24. The Defence for Ndayambaje and Kanyabashi support Ntahobali's Motion. The Defence for Ndayambaje submits that Ndayambaje has been detained for 13 years. The Defence for Kanyabashi submits that Kanyabashi has been detained for more than 13 years.

¹ *Prosecutor v. Nyiramasukuko et al.*, "Decision on the Prosecutor's Motion for Joinder of Trials", 5 October 1999, para. 17.

Ntahobali's Reply

25. The Defence asserts that the factors cited by the Prosecution as contributing to the length of proceedings in a case before an international tribunal are irrelevant and cannot justify the subsequent delays in the instant case because (1) Ntahobali was arrested in Kenya and transferred to the UNDF in less than three days, (2) the Prosecution's evidence was gathered before the arrest of Ntahobali, (3) 17 of the 19 Prosecution Witnesses who testified against Ntahobali were from Rwanda, and (4) Ntahobali is only implicated in six crime scenes.

26. The Defence clarifies that Ntahobali's first appearance with Counsel was actually on 17 October 1997 and not on 29 September 1997, as previously indicated. Therefore, the time period between his arrest and his initial appearance is 86 days, while the maximum allowed by the Rules is 90 days. As such, the Defence submits that Ntahobali's right to appear promptly before a Judge was not respected, and that his rights under Rule 40bis, paragraphs C, F, G, H, and J, of the Rules regarding the transfer and provisional detention of suspects were clearly violated.

27. The Defence argues that the joinder of the six Accused was not at all useful or necessary in the present case; Ntahobali is a university student being tried with administrative authorities of great importance. When the joinder was allowed by the Chamber, it was not foreseen that it would cause such lengthy delays in the proceedings.

28. The Defence alleges that the Prosecution's failure to comply with its disclosure obligations, although sanctioned by the Chamber at that time, has caused prejudice to the Defence in that it was unable to prepare its defence and conduct its investigations adequately.

29. As for the lack of cooperation from the Rwandan government, the Defence argues that the United Nations, on behalf of the ICTR, has always had the necessary means to force Rwanda's cooperation.

30. In response to the Prosecution's allegation that lengthy cross-examinations by Ntahobali may have extended the duration of the proceedings, the Defence alleges that Ntahobali is entitled to a full defence including the cross-examination of the other Parties' witnesses.

31. The Defence submits that the Appeals decision in the *Mugiraneza* case indicates that the rights of the victims, witnesses and other co-Accused should not be taken into consideration while dealing with the right of Ntahobali to be tried without undue delay.

The Registrar's Submission

32. Upon the Chamber's instructions to file a submission under Rule 33 (B) with respect to specific issues, the Registrar submits, first, that Ntahobali was arrested in Kenya, on 24 July 1997. It further submits that through a letter dated 4 August 1997, Ntahobali requested that the Registrar assign Mr. Tricaud to be his Counsel.

33. The Registrar submits that Ntahobali was scheduled to make his initial appearance on 3 September 1997. Nevertheless, Ntahobali wrote to the President of the Tribunal on 2 September 1997 seeking the postponement of the hearing on the ground that his newly assigned Counsel had not had time to adequately prepare his defence. In the absence of Mr. Tricaud, the Registrar submits that Ntahobali's initial appearance could not be held on 3

September 1997 and was postponed to 17 October 1997, when his Counsel was able to attend. The Registrar submits that it is inaccurate to suggest that Ntahobali did not have Counsel assigned to him on the day of his first scheduled initial appearance.

Ntahobali's Response to the Registrar

34. The Defence submits that, contrary to the Registrar's submissions, Ntahobali was arrested during the evening of 23 July 1997 and transported to a hotel where his photograph was taken at 00.51 on 24 July 1997.

35. The Defence further submits that even if Mr. Tricaud was officially assigned as Defence Counsel on 8 August 1997, Mr. Tricaud was not served with his nomination until 28 August 1997 and the Registrar has not filed proof of the date of notification or of Mr. Tricaud's receipt of the nomination letter. As a consequence, Mr. Tricaud, who lived in France, was unable to come to Arusha for the initial appearance, scheduled for 3 September 1997, on such short notice. It was under those circumstances that on 2 September 1997, Ntahobali addressed the Chamber and asked that his initial appearance be postponed. In addition and contrary to the Registrar's submissions, Ntahobali did appear in court on 3 September 1997 without his assigned lawyer present.

36. The Defence argues that it appears from the transcripts of the 3 September 1997 hearing that Counsel Tricaud asked for an adjournment of one week. However, Ntahobali's initial appearance took place on 17 October 1997, which is 45 days later.

37. The Defence underscores that the Registrar did not undertake the necessary steps to ensure that Ntahobali was represented by Counsel within the time limit prescribed by the Rules of Procedure and Evidence.

The Registrar's Further Submissions

38. The Registrar submits that Mr. Tricaud was notified of his assignment as Ntahobali's Counsel on 8 August 1997 by facsimile. On 21 August 1997, Mr. Tricaud wrote to the Registry requesting the postponement of his client's initial appearance because of a scheduling conflict at his law firm, which prevented him from being in Arusha before the second week of September 1997. In his letter, Mr. Tricaud indicated that his colleague, Mr. Jean-Laurent Panier, could replace him during the initial appearance scheduled for 3 September 1997. The Registrar replied that he agreed with Mr. Tricaud's suggestion in a letter of 25 August 1997.

39. The Registrar submits that in a letter dated 29 August 1997, Mr. Tricaud acknowledged receipt of the 8 August 1997 formal notification and of the 27 August 1997 notification of the scheduling of Ntahobali's initial appearance for 3 September 1997 and reiterated his unavailability to travel to Arusha before the second week of September 1997 due to his activities in France.

40. The Registrar further submits that on 3 September 1997, Mr. Tricaud requested through the Registry that Ntahobali's initial appearance be held "at least" one week later. Later that day, Mr. Tricaud indicated during a telephone conversation with a Registry representative that it was impossible for him to be present in Arusha before the middle of October 1997 due to other commitments.



41. In conclusion, the Registrar submits that Counsel for the Defence Mr. Tricaud was notified of his nomination on 8 August 1997, that Ntahobali's appearance was not held before 3 September 1997 because his Counsel had a scheduling conflict in his national jurisdiction, and that the initial appearance was not held earlier than 17 October 1997 because Counsel had indicated that he was unavailable before that date.

DELIBERATIONS

42. The Chamber observes that the Defence for Ntahobali raises various allegations of violations of Ntahobali's right to be tried without undue delay. The Chamber will address each of these issues in sequence.

Alleged Violation of Ntahobali's Right to Appear Promptly Before a Judge

43. The Chamber recalls the Defence's allegations that Ntahobali's initial appearance with Counsel only took place on 17 October 1997, 86 days following his arrest on 23 July 1997; as a result, the Defence alleges that Ntahobali's rights under Rules 40bis and 62 have been violated.

44. The Chamber underscores that when Ntahobali was arrested and transferred to the seat of the Tribunal, Ntahobali was no longer a suspect but already an accused person, his indictment having been confirmed on 29 May 1997 by Judge Ostrovsky. As such, Ntahobali's rights under Rule 40bis could not have been violated as Ntahobali was no longer a suspect.

45. The Chamber observes that Ntahobali's and his co-Accused Nyiramasuhuko's initial appearances were scheduled to take place on 3 September 1997. The Chamber considers that any delay in scheduling the initial appearance of the accused must be computed from the date of the transfer and not the date of the arrest.² Based on the 3 September 1997 transcripts, the Chamber notes that Ntahobali, who was appearing for the first time before a Judge, did not have any Counsel present with him contrary to the provisions of Article 20 of the Statute and Rule 62 of the Rules. Ntahobali did not enter a plea because he did not have legal assistance. Ntahobali's initial appearance was postponed accordingly.³ The Chamber observes that

² *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44-T, "Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused" 12 December 2000 para. 35. The Trial Chamber notes that the Accused was transferred to the Tribunal on 22 October 1998, while his initial appearance took place on 7 April 1999. Before that date, a first initial appearance, scheduled on 10 March 1999, was adjourned at the request of the Accused's Counsel along with the Counsels of other co-Accused in this case, until 7 April 1999. Any delay setting up the initial appearance of the Accused should therefore be computed from the date of the transfer of the Accused to that of the first initial appearance of 10 March 1999.

³ T. 3 September 1997 bis, pp. 3-5 (French):

Mr. President: Y a-t-il une Défense pour Mr. Ntahobali? Vous n'avez pas de Conseil présent à cette audience; nous avons l'intention de procéder à votre comparution initiale, mais le Conseil qui vous a été commis, apparemment, n'est pas présent. Il vous appartient de dire si vous plaidez coupable ou non coupable, ou entendez-vous uniquement le faire en présence du Conseil qui vous a été commis?

Ntahobali: Je préfère attendre la présence de mon Conseil.

Registry: Nous avons pris contact avec le Conseil du suspect en vue d'obtenir confirmation de la réception, par lui, du calendrier de cette audience. Il nous en a effectivement donné confirmation, mais en indiquant qu'entre la réception et la date de cette audience, le délai était trop bref pour lui permettre de faire le déplacement d'Arusha. Il nous a donc annoncé qu'il serait absent à la présente session du Tribunal. Il nous a laissé entendre, après un entretien téléphonique avec son client, qu'il aurait besoin d'une semaine au moins avant de venir ici à Arusha en vue de la comparution initiale de Mr. Ntahobali.

Mr. President: Le Tribunal va donc renvoyer la comparution initiale de l'intéressé, en demandant au Greffe, en accord avec l'Avocat et le Tribunal, de lui indiquer une date qui puisse lui permettre de pouvoir tenir cette audience, parce que nous ne connaissons pas le pays dans lequel se trouve le Conseil de Mr. Ntahobali; mais

Ntahobali's actual initial appearance took place on 17 October 1997 in the presence of his Counsel.

46. The Chamber notes Annex IV of the Registrar's Submissions, dated 2 September 1997,⁴ which is an alleged copy of Ntahobali's handwritten letter to the President. In this letter, Ntahobali indicated that his Counsel was only officially appointed on 28 August 1997 whereas the initial appearance was scheduled for 3 September 1997 and that his Counsel would not have sufficient time to prepare on such short notice. On this basis, Ntahobali requested the postponement of the initial appearance within a reasonable delay.

47. However, the Chamber also notes Appendix IV⁵ of the Registrar's Further Submission, which is a facsimile dated 29 August 1997 sent to the Registry by Mr. Tricaud. According to this facsimile, Mr. Tricaud appears to have been notified of his appointment as Ntahobali's Counsel on 8 August 1997, contrary to Ntahobali's allegation. As a result, Ntahobali's request for postponement of his initial appearance at that time, on the basis of an alleged late notification of his Counsel of his appointment was unfounded.

48. Appendix IV of the Registrar's Further Submission also indicates that Mr. Tricaud appears to have stated that he was formally notified of the scheduling of the initial appearance for 3 September 1997 for the first time on 27 August 1997 and that such a short delay would prevent him from attending the said initial appearance. Besides, Mr. Tricaud appears to assert that he could not be present in Arusha before the second week of September 1997 because of his workload in his country.

49. The Chamber observes that neither Party has produced any proof of service of the formal notification of the scheduling of Ntahobali's initial appearance, which might either contradict or confirm Mr. Tricaud's facsimile of 29 August 1997. Indeed, it appears from the facsimile to the Registry dated 21 August 1997⁶ that Mr. Tricaud was already aware of his unavailability before the second week of September 1997; Mr. Tricaud suggested that his colleague, Mr. Jean-Laurent Panier, could substitute for him in representing Ntahobali if the initial appearance was to be scheduled within this timeframe. In a facsimile dated 25 August 1997,⁷ the Registrar seems to agree with Mr. Tricaud's proposal; however, there is no evidence that Mr. Tricaud made the necessary arrangement for his colleague to be present in Arusha to represent Ntahobali on 3 September 1997. The Chamber is therefore of the view that Ntahobali's Counsel's failure to appear in Court on 3 September 1997 is attributable to him.

compte tenu de la distance, le Greffe le convoquera en temps utile pour lui permettre d'être ici. Le Greffe le fera en coordination avec la Chambre.

⁴ Annex VI of the Registrar's submissions which is Ntahobali's handwritten letter to the President of the Tribunal, dated 2 September 1997. The relevant excerpts of the said letter read: 'Maître Dominique Tricaud n'a été formellement désigné comme conseil que le 28 Août à 13.22. Il était bien évidemment impossible à Maître Tricaud de se rendre à Arusha et de préparer ma défense dans un délai aussi bref. Je considère qu'il s'agit là d'une violation essentielle des droits de ma défense dont je me réserve de tirer toutes conséquences de droit. Je vous remercie de bien vouloir ordonner le renvoi de l'audience de première comparution et d'aviser Maître Tricaud de la fixation d'une nouvelle audience dans un délai raisonnable.' Unofficial translation: 'Mr. Dominique Tricaud was not formally designated as Counsel until 28 August at 13:22. It was clearly impossible for Mr. Tricaud to get to Arusha and to prepare my defence in such a brief period of time. I consider this to be a basic violation of my right to defend myself and I reserve the right to pursue all legal outcomes that might result from it. I would be grateful if you would order an adjournment of the hearing of my initial appearance and advise Mr. Tricaud of the scheduling of a new hearing within a reasonable time period.'

⁵ Appendix IV is a facsimile dated 29 August 1997 from Mr. Tricaud to Mr. Mindua and/or Mr. Alessandro Caldarone of the Registry.

⁶ Appendix II of the Registrar's Further Submissions.

⁷ Appendix III of the Registrar's Further Submissions.

⁹ 

13250

50. The Chamber also notes Appendix V⁸ of the Registrar's Further Submission and observes that Ntahobali's actual initial appearance was set for 17 October 1997 and could not have been held earlier due to the alleged unavailability of Ntahobali's Counsel. According to Appendix V, Mr. Tricaud was not able to travel to Arusha before the middle of October 1997 and Ntahobali's actual initial appearance was set on 17 October 1997 accordingly.

51. The Chamber recalls the *Barayagwiza* Appeals Chamber Decision of 3 November 1999 which held that:

Rule 62, which is predicated on Articles 19 and 20 of the Statute, provides that an accused shall be brought before the assigned Trial Chamber and formally charged without delay upon his transfer to the seat of the Tribunal. In determining if the length of time between the appellant's transfer and his initial appearance was unduly lengthy, we note that the right of the accused to be promptly brought before a judicial authority and formally charged ensures that the accused will have the opportunity to mount an effective defence. The international instruments have not established specific time limits for the initial appearance of detainees, relying rather on a requirement that a person should 'be brought promptly before a Judge' following arrest. The U.N Human Rights Committee has interpreted 'promptly' within the context of 'more precise' standards found in the criminal procedure codes of most States. Such delays must not, however, exceed a few days. Thus, in *Kelly v. Jamaica*, the U.N Human Rights Committee held that a detention of five weeks before being brought before a judge violated Article 9(3).⁹

52. The Chamber also recalls the *Barayagwiza* Appeals Chamber Decision of 31 March 2000 which held:

The decision by the Appeals Chamber in respect of the period of detention in Arusha is based on a 96-day lapse between the Appellant's transfer and his initial appearance. The new fact relative hereto, the Defence Counsel's agreeing to a hearing being held on 3 February 1997, reduces that lapse to 20 days- from 3 to 23 February. The Chamber considers that this is still a substantial delay and that the Appellant's right have still been violated.¹⁰

53. The Chamber notes the Registrar's allegation that Ntahobali's initial appearance was not held before 3 September 1997 because his Counsel, Mr. Tricaud, had a scheduling conflict in his national jurisdiction. In the Chambers' view, the documentation did not explain why the initial appearance was not scheduled earlier than 3 September 1997 and who would be responsible for this delay. The Chamber considers that Ntahobali's initial appearance, even had it gone ahead on 3 September 1997, was not scheduled without delay as required under Rule 62 of the Rules, but that this delay has not caused serious and irreparable prejudice to the Accused¹¹ so as to warrant a stay of proceedings and his immediate release. The Chamber further considers that the delay between 3 September 1997 and the actual initial appearance on 17 October 1997 is strictly attributable to Ntahobali's Counsel.

⁸ Appendix V is a facsimile dated 4 September 1997 from the Registry to Me Tricaud, it is titled 'Scheduling of the initial appearance in the matter of the Prosecutor vs. Pauline Nyiramasuhuko and Arsène Ntahobali', Case No. ICTR-97-21-T.

⁹ *Prosecutor v. Barayagwiza*, "Decision", 3 November 1999, para. 70.

¹⁰ *Prosecutor v. Barayagwiza*, "Decision on the Prosecutor's Request Review or Reconsideration", 31 March 2000, para. 62.

¹¹ *Prosecutor v. Nyiramasuhuko et al.*, Case No. 98-42-T, "Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized", (TC), 12 October 2000, para. 20.



13049

Alleged Delay Due to the Joinder of Ntahobali's Case to the Butare Trial

54. The Chamber notes the Defence's submissions that the joinder of his case to the Butare Trial has deprived Ntahobali of his right to be tried without undue delay.

55. The Chamber recalls its Decision of 5 October 1999 in which it decided that: "a joint trial is proper in the case at bar. It is in the interest of justice that the same verdict should be rendered against all the Accused in the alleged criminal acts arising from the same transaction or series of transactions."¹² The Chamber further recalls that an appeal was lodged against this Decision but was rejected on 13 April 2000¹³ as lacking any legal basis. Therefore, the Chamber finds that relitigating the issue of joinder at this advanced stage of the proceedings is simply an abuse of process, it having already been adjudicated.

Alleged Delays Since the Commencement of the Trial

56. The Chamber notes the Defence's submissions that the date set for the start of Ntahobali's trial had been postponed on many occasions as a result of the joinder of his case to the Butare Trial and that the probable duration of Ntahobali's trial, if tried alone, would have been 48 days. The Defence also indicates that the arrest of its investigator shortly after the start of the trial, the non re-election of Judge Maqutu and the lack of cooperation of the Rwandan authorities resulted in undue delay prejudicing Ntahobali. Finally, the Defence argues that the Prosecutor's failure to comply with its disclosure obligations also resulted in undue delay in Ntahobali's trial and prevented him from conducting efficient investigations and from bringing sufficient evidence in support of his case. According to the Defence, all these undue delays constitute abuse of process.

57. At the outset, the Chamber recalls that the *Barayagwiza* Appeals Chamber Decision of 3 November 1999 defined the abuse of process doctrine as a "process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the Accused's rights would prove detrimental to the court's integrity."¹⁴ It added that:

[...] the abuse of process doctrine may be relied on in two distinct situations: (1) where delay has made a fair trial for the Accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the Accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct.¹⁵

58. The Chamber further recalls its Decision of 23 May 2000¹⁶ addressing the issue of delays of proceedings in the *Kanyabashi* case and holding that the Chamber "has to have regard, *inter alia*, to the complexity of the factual or legal issues raised by the case, to the conduct of the applicants and the competent authorities and to what was at stake for the former, in addition to complying with the 'reasonable time' requirement."¹⁷

¹² *Prosecutor v. Nyiramasuhuko et al.*, Case No. 98-42-T, "Decision on Prosecutor's Motion for Joinder of Trials", 5 October 1999, para. 17.

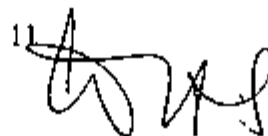
¹³ *Prosecutor v. Nyiramasuhuko et al.*, Case No. 98-42-T, "Decision" (Appeal Against Chamber II's Decision of 5 October 1999), 13 April 2000.

¹⁴ *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision (AC), 3 November 1999 at para. 74.

¹⁵ *Ibid.* para. 77.

¹⁶ *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-I, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and For Stoppage of Proceedings (TC), 23 May 2000.

¹⁷ *Ibid.* para. 68.



59. As to the alleged postponements of the commencement of the Trial because of the joinder and the probable duration of Ntahobali's trial, if tried alone, the Chamber is aware of the length of the proceedings since the arrest of the Accused on 23 July 1997. The Chamber recalls that it has been seized of several motions praying for a severance of trials in this case and it reiterates that the expeditiousness of proceedings has been a constant concern. The Chamber recalls that a joint trial might last longer than that of a single accused without necessarily encroaching upon the right to be tried without undue delay.¹⁸ The Chamber also recalls its decision that the fact that an accused's trial's duration may be shorter should severance be granted, does not *per se* render unreasonable the length of the joint proceedings. Further, the possible acceleration of proceedings by severance is not necessarily compatible with the administration of justice.¹⁹ The Chamber reiterates that the instant case raises complex issues of law and fact.²⁰ In the Chamber's view, Ntahobali's submissions relating to the probable duration of his trial, if tried alone, are hypothetical and speculative.

60. The Chamber observes that the arrest of Ntahobali's investigator shortly after the commencement of the trial, the non re-election of Judge Maqutu and the lack of cooperation of the Rwandan authorities may have contributed to the length of the proceedings. However, the Chamber is of the view that both the gravity of the charges and the complexity of the instant case do not render unreasonable the length of the proceedings.²¹

61. With respect to the Prosecution's delays in disclosing certain material, the Chamber recalls that upon the Defence's request, it issued several decisions ordering the Prosecution to disclose materials, including copies of prior statements and identifying material of its witnesses.²² The Chamber notes that it was only on 31 January 2002, more than seven months after the start of the trial that the full disclosure of the Prosecution's witnesses' identities and statements was carried out in compliance with the Decision of 13 November 2001.²³ The Chamber observes that it is not contested that the Prosecution failed to comply with its disclosure obligations and that measures were taken to remedy these failures, including and not limited to the issuance of warnings to Prosecution Counsel. In the Chamber's view, this issue was settled and does not need relitigating. Furthermore, the Chamber considers that the Defence's right to a full defence has been safeguarded throughout the proceedings through mechanisms such as the conduct of investigations and cross-examinations.

62. In conclusion, the Chamber finds that none of the grounds put forward by the Defence warrant a stay of proceedings and the immediate release of the Accused.

FOR THE ABOVE REASONS, THE TRIBUNAL

¹⁸ *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-T, "Decision on Nyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings", 7 April 2006, para. 75.

¹⁹ *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-T, "Decision on Nyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings", 7 April 2006, para. 76.

²⁰ *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-T, "Decision on Nyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings", 7 April 2006, para. 75.

²¹ *Prosecutor v. Nyiramasuhuko et al.*, "Decision on Defence Motion for a Stay of Proceedings and Abuse of Process" (TC), 20 February 2004, para. 16.

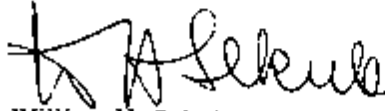
²² See for example "Décision relative à la requête de la Défense en communication de preuves", 1 November 2000; "Decision on the Full Disclosure of the Identity and Unredacted Statements of the Protected Witnesses", 8 June 2001; "Decision on Defence Motions by Nyiramasuhuko, Ndayambaje and Kanyabashi on, inter alia, Full Disclosure of Unredacted Prosecution Witness Statements", 13 November 2001.

²³ *Prosecutor v. Nyiramasuhuko*, Case No. 98-42-T, "Decision on Defence Motions by Nyiramasuhuko, Ndayambaje and Kanyabashi on, inter alia, Full Disclosure of Unredacted Prosecution Witness Statements", 13 November 2001.

DELETES the Motion in its entirety.

13047

Ari sha, 26 November 2008



William H. Sekule
Presiding Judge



Arlette Ramaroson
Judge



Solomy Balungi Bossa
Judge

[Seal of the Tribunal]