



UNITED NATIONS
NATIONS UNIES

ICTR-99-50-T
10-02-2009
(31576-31570)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 10 February 2009

THE PROSECUTOR
v.
CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

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Case No. ICTR-99-50-T

**DECISION ON PROSPER MUGIRANEZA'S THIRD MOTION TO DISMISS
INDICTMENT FOR VIOLATION OF HIS RIGHT TO A TRIAL WITHOUT UNDUE
DELAY**

Article 20(4)(c) of the Statute of the Tribunal

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INTRODUCTION

1. The Defence for Prosper Mugiraneza (“Defence”) alleges a violation of Mr. Mugiraneza’s right to trial without undue delay, guaranteed by Article 20 (4)(c) of the Tribunal’s Statute.¹ As a remedy for this alleged violation, the Defence requests the Chamber to dismiss the Indictment against Mr. Mugiraneza with prejudice.²

2. This is the third Motion of such a nature to be filed by the Defence.³ The Chamber denied both previous Motions, finding that there had not been a violation of the Accused’s right to a trial without undue delay guaranteed by Article 20(4)(c) of the Statute.⁴ The Defence incorporates, by reference, the arguments it made in its earlier submissions on this issue.⁵ Moreover, the Defence submits that Rule 5 requires him to file this third Motion to ensure that the Chamber has the ability to remedy the violation of his statutory rights.⁶

3. The Prosecution opposes the Defence Motion submitting that the issue is *res judicata* and therefore barred. In addition, the Prosecution argues that Rule 5 is inapplicable and that the Defence Motion is otiose, frivolous and an abuse of process.⁷

DELIBERATIONS

I. Preliminary matters – *Res Judicata* and Rule 5

(1) *Res Judicata*

4. The Prosecution submits that the Defence Motion is barred by virtue of the doctrine of *res judicata* based on the 27 February 2004 Decision and the Second Undue Delay Decision.⁸

¹ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, “Prosper Mugiraneza’s Third Motion to Dismiss Indictment for Violation of his Right to a Trial Without Undue Delay”, filed 10 December 2008 (“Defence Motion”).

² Defence Motion, para. 13.

³ *Bizimungu et al.*, “Prosper Mugiraneza’s Motion to Dismiss the Indictment for Violation of Article 20 (4)(C) of the Statute, Demand for Speedy Trial and for Appropriate Relief” (“First Motion”), filed on 18 July 2003; *Bizimungu et al.*, “Prosper Mugiraneza’s Second Motion to Dismiss for Deprivation of his Right to Trial Without Undue Delay” (“Second Motion”), filed on 12 December 2006.

⁴ See *Bizimungu et al.*, Decision on Prosper Mugiraneza’s Second Motion to Dismiss for Deprivation of his Right to Trial Without Undue Delay (TC), 29 May 2007, (“Second Undue Delay Decision”) generally, and particularly the findings at para. 39; *Bizimungu et al.*, Decision on Prosper Mugiraneza’s Application for a Hearing or Other Relief on his Motion for Dismissal for Violation of his Right to Trial without Undue Delay (TC), 3 November 2004, (“First Undue Delay Decision”) generally, and particularly the findings at para. 34. See also *Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza’s Motion to Dismiss the Indictment for Violation of Article 20(4)(C) of the Statute, Demand for Speedy Trial and for Appropriate Relief (TC), 2 October 2003. Note that certification to appeal the Trial Chamber’s Decision of 2 October 2003 was granted, the Appeals Chamber subsequently vacating the Trial Chamber’s Decision and remanding the matter back to the Trial Chamber for reconsideration of its decision (*Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-A73, 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 (“Appeals Chamber Undue Delay Decision”). The Trial Chamber’s subsequent reconsideration of its Decision of 2 October 2003 led to its Decision of 3 November 2004.

⁵ Defence Motion, paras. 3, 7.

⁶ Defence Motion, para. 12.

⁷ *Bizimungu et al.*, “Prosecutor’s Response to Prosper Mugiraneza’s Third Motion to Dismiss Indictment for Violation of his Right to a Trial Without Undue Delay”, filed 15 December 2008, (“Prosecution Response”) paras. 3, 5, 10.



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The Chamber is not persuaded by this argument. The doctrine of *res judicata* does not bar the Chamber from considering the merits of a third motion alleging undue delay where the third motion alleges a new basis for undue delay.⁹ Mr. Mugiraneza's First Motion was based on an allegation of undue delay during the pre-trial proceedings. The Second Motion alleged pre-trial delay, intra-trial delay and future delay in the determination of the case by the Appeals Chamber. The Defence Motion currently before the Chamber alleges undue delay to the date of the filing of the Motion. As a result, the Chamber is of the view that it is a fresh application due to the time which has lapsed since its previous determination of a similar issue in May 2007. Therefore, the Chamber determines that this issue is not barred as *res judicata*.¹⁰

(2) Rule 5

5. The Defence submits that Rule 5 requires it to file its third successive motion to ensure that the Chamber has the ability to remedy this violation of Mr. Mugiraneza's substantive rights under the Statute.¹¹ The Prosecution denies the applicability of Rule 5 in the circumstances.¹²

6. Rule 5 (A) provides:

“Where an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to that party.”

7. The Defence has failed to specify which Rule or Regulation has not been complied with. Moreover, the Chamber notes that this Motion alleges a breach of Mr. Mugiraneza's right to trial without undue delay, which is guaranteed by Article 20(4)(c) of the Tribunal's Statute, rather than any violation of its *Rules* or *Regulations*. As a result, Rule 5 is inapplicable. Nonetheless, if the Chamber finds a violation of Mr. Mugiraneza's rights under the Statute, it has an obligation to remedy this pursuant to Articles 19 and 20 of the Statute and may do so by issuing such orders it deems necessary for the conduct of the trial pursuant to Rule 54.¹³

II. Undue Delay

8. The Defence submits that Mr. Mugiraneza has been denied his right to a trial without undue delay guaranteed by Article 20(4)(c) of the Statute, which provides:

⁸ Prosecution Response, paras. 4 -5. The Chamber believes that the Prosecution erroneously referred to the 27 February 2004 Appeals Chamber Decision rather than the 3 November 2004 Trial Chamber Decision on remand from the Appeals Chamber, or First Undue Delay Decision.

⁹ *Bizimungu et al.*, Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance, 14 June 2007, (the "Mugenzi Decision") para. 6; Second Undue Delay Decision, paras. 9-10.

¹⁰ Mugenzi Decision, para. 6; Second Undue Delay Decision, paras. 9 - 10.

¹¹ Defence Motion, para. 12.

¹² Prosecution Response, para. 9.

¹³ Article 19 (1) of the Statute provides that "Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused...." Article 20 sets out the Rights of the Accused, and Rule 54 provides that a Trial Chamber may, at the request of a party or *proprio motu*, issue such orders as may be necessary for the preparation or conduct of the trial.



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In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

[...]

(c) To be tried without undue delay

9. In addition to the Statute, the Defence notes that the United Nations Human Rights Committee, charged with enforcing the International Convention on Civil and Political Rights ("ICCPR"), has never approved a delay approaching the length of that in the present case. Accordingly, it submits that while it recognises that the United Nations is not technically a state party to the ICCPR, "the Organisation charged with enforcing the guarantees of individual rights set out in the ICCPR should not ignore those same rights with impunity because it technically is not a state party to the Convention."¹⁴

10. In the Second Undue Delay Decision, the Chamber acknowledged the binding nature of generally accepted norms of human rights on the Tribunal, stating, "whilst the jurisprudence of the ... HRC may be persuasive in nature to the Tribunal, the Chamber considers that it should only have recourse to such authorities to the extent that the Tribunal's statutory instruments and jurisprudence are deficient."¹⁵ Therefore, the Chamber's Decision will focus on the jurisprudence which is binding upon it, rather than that of the Human Rights Committee, in determining whether the delay in this case – if any - is undue.

11. The Appeals Chamber has previously held that a determination of whether an accused person's right to be tried without undue delay has been violated must necessarily include a consideration of, *inter alia*, the following factors:¹⁶

- (1) The length of the delay;
- (2) The complexity of the proceedings, such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of facts and law;
- (3) The conduct of the parties;
- (4) The conduct of the relevant authorities; and
- (5) The prejudice to the accused, if any.

12. As previously outlined by this Chamber, the Appeals Chamber's jurisprudence indicates that there cannot be a determination of whether the right to trial without undue delay was violated without considering the totality of the above-mentioned five criteria.¹⁷ Furthermore, a finding of undue delay will depend on the circumstances of the case.¹⁸

¹⁴ Defence Motion, para. 8.

¹⁵ Second Undue Delay Decision, para. 20.

¹⁶ Appeals Chamber Undue Delay Decision, page. 3.

¹⁷ Second Undue Delay Decision, para 15, citing *Prosecutor v. Prosper Mugiraneza 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 Trial without Undue Delay (TC), 3 November 2004, para. 28.

¹⁸ Second Undue Delay Decision, para 15, citing *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Decision on the Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings (TC), 23 May 2000 at para. 68:

The Chamber notes that the issue of reasonable length of proceeding has been addressed by the U.N. Human Rights Committee, the European Court of Human Rights and the Inter-American Commission



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(1) *The length of the delay*

13. The Defence notes that Mr. Mugiraneza has been in custody for 9 years and 8 months. The Defence speculates that it is unlikely that a judgement will be delivered before 6 April 2009, the tenth anniversary of Mugiraneza's arrest.¹⁹

14. When making a determination as to whether there has been undue delay, the Chamber will only consider any delay up to the present. The Chamber will not speculate on whether the Accused's right to trial without undue delay might be violated at a future date.²⁰

15. The Chamber notes that Mr. Mugiraneza is in his tenth year of incarceration. When analyzing undue delay, however, this Chamber has made clear that the reasonableness of a period of delay cannot be translated into a fixed length of time and has to be assessed on a case by case basis dependant on consideration of the other factors articulated by the Appeals Chamber.²¹

(2) *The complexity of the proceedings*

16. The Chamber has previously determined that the proceedings in question are complex.²² The Defence offers no additional submissions on the complexity of these proceedings, relying instead on its previous argument that these proceedings are not complex.²³

on Human Rights. 'The reasonableness of the period cannot be translated into a fixed number of days, months or years, since it is dependent on other elements which the judge must consider'... In the opinion of the European Court of Human Rights, 'the reasonableness of the length of proceedings coming within the scope of Article 6(1) must be assessed in each case according to the particular circumstances... The Court 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. [four factors]'. [Footnotes omitted].

¹⁹ Defence Motion, para. 6.

²⁰ See Mugenzi Decision, para. 14; Second Undue Delay Decision, para 25.

²¹ Mugenzi Decision, para. 15; Second Undue Delay Decision, para 27; See also, *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, para. 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, para. 11; *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-PT, Decision of Defence Motion for Stay of Proceedings (TC), 3 June 2005, para. 26; *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, para. 31. In addition, as this Chamber has previously noted, see, Second Undue Delay Decision, para. 27: "the Strasbourg organs have deemed trials that lasted longer than 10 years to be compatible with Article 6(1) of the ECHR, on the other hand holding that undue delay has occurred in others which lasted less than one year."

²² Mugenzi Decision, para. 16; Second Undue Delay Decision, para. 30.

²³ Second Motion, paras. 56-58.



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(3) *The conduct of the parties*

17. The Defence presents no additional evidence of delay caused by the Prosecution, relying instead upon arguments made in prior submissions. The Second Motion alleged a lack of a “sense of urgency” on behalf of the Prosecution, delays in disclosure, delays due to leadership vacancies, and delays related to the request to amend the Indictment. In its Second Undue Delay Decision, the Chamber rejected these arguments and found no delay attributable to the Prosecution.²⁴ For the same reasons these arguments are rejected here.

(4) *The conduct of the relevant authorities*

18. The Defence submits that delay has been caused by: “limited amount of courtroom space”;²⁵ the fact that “when a trial is conducted in three languages, the supply of qualified simultaneous interpreters has to be limited”;²⁶ “Other factors set out in the prior pleadings adopted herein, including a year- long dispute between the Registrar and the Prosecutor over the authority to hire prosecution staff”;²⁷ and “the decision of the Prosecutor to join four accused in a single indictment and trial.”²⁸

19. The Chamber notes that none of the issues raised by the Defence – except the issue of the supply of qualified simultaneous interpreters – concerns the conduct of the Prosecution *since* the Chamber rendered its Decision of 29 May 2007 concerning undue delay. Addressing similar arguments raised by the Defence in its Decision of 29 May 2007, the Chamber noted that:

“the Defence has failed to give details concerning how the conduct of the relevant authorities has resulted in or contributed to undue delay in this case ... As regards other far-reaching allegations - such as “bureaucratic infighting”... the Defence fails to show how such issues have translated into delay in this case. The Chamber therefore cannot find that the conduct of the relevant authorities has contributed to delay – if any – in this case.”²⁹

For the same reasons these arguments are rejected here.

20. The Chamber has considered the new Defence argument concerning the lack of qualified simultaneous interpreters but notes, as with its other allegations, that the Defence has failed to show how this issue has resulted in delay in this case. The Chamber therefore cannot find that the conduct of the relevant authorities has contributed to delay in this case.

(5) *The prejudice to the Accused, if any*

21. The Defence submits that the delays have caused prejudice to the Accused’s ability to defend himself. It submits that as the last Defendant to present his case, approximately 14 years has passed between the events and his witnesses’ testimonies and that fading memories are a problem in any trial conducted long after the event.³⁰

²⁴ Second Undue Delay Decision, paras. 33 - 34.

²⁵ Defence Motion, para. 10 (a).

²⁶ Defence Motion, para. 10 (b).

²⁷ Defence Motion, para. 10 (c).

²⁸ Defence Motion, para. 10 (d).

²⁹ Second Undue Delay Decision, para. 36.

³⁰ Defence Motion, para. 9.



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22. The Defence provides the Chamber with only one example of how the length of time between events and the recounting of evidence has prejudiced the Accused. It concerns the fact that in its Closing Brief, the Prosecution urged the Chamber to reject the testimony of a particular witness in favour of another as their testimonies were contradictory in relation to one aspect of an event.³¹ The Defence argues that "If a witness's credibility or reliability can be discounted based on minor discrepancies between witnesses' recollections 14 years after the events, Mugiraneza has been prejudiced by delay in his ability to present his defence."³²

23. The Chamber is not persuaded by the Defence argument. The Defence has not provided any reasons for its belief that this alleged contradiction is due to fading memories – its argument is purely speculative. Without considering the specifics of the alleged contradictory recollections of the incident, which the Chamber reserves for the Judgement, it notes that witness testimonies can differ for a myriad of reasons not limited to fading memories. Therefore, the Chamber is of the view that the Defence has failed to show that the delay occasioned up to this time in this case has caused prejudice to the Accused.


Conclusion

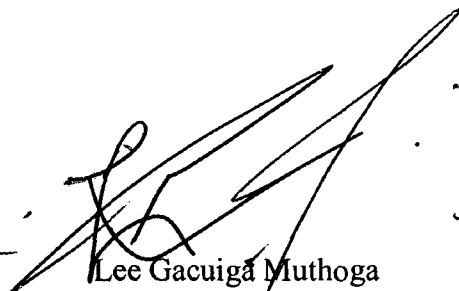
24. The Defence requests that the Chamber dismiss the Indictment against Mr. Mugiraneza with prejudice as a remedy for the undue delay suffered by the Accused. The Chamber finds that Mr. Mugiraneza has not been denied his right to a trial without undue delay. It is therefore unnecessary for the Chamber to consider whether dismissing the Indictment is the appropriate remedy.


FOR THESE REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha, 10 February 2009


Khalida Rachid Khan
Presiding Judge


Lee Gacuiğa Muthoga
Judge


With the consent
and on behalf of
Emile Francis Short
Judge



³¹ Defence Motion, para. 9. See also footnote 18, second paragraph, referring to the same paragraph of the Prosecution Closing Brief but more accurately stating that three, rather than two witnesses are discussed in this paragraph.

³² Defence Motion, para. 9 (c) (ii).