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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
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OR:
ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 27 February 2009

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

Case No. ICTR-99-50-T

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**DECISION ON JÉRÔME-CLÉMENT BICAMUMPAKA'S MOTION
SEEKING PERMANENT STAY OF PROCEEDINGS**

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Mr. Michel Croteau and Mr. Philippe Larochelle for **Jérôme-Clément Bicamumpaka**
Mr. Tom Moran and Ms. Cynthia Cline for **Prosper Mugiraneza**

INTRODUCTION

1. On 12 June 2008, the evidence phase of this trial was closed, subject to decision by the Chamber on a number of witness-related issues pending before it. As of that date, the Trial Chamber had sat for some 400 trial days, having heard the testimony of 57 Prosecution witnesses, and a total of 114 Defence witnesses for the four co-Accused in this case. The Parties filed closing briefs between 1 October and 24 November 2008, and presented their closing arguments before the Chamber on 1 to 5 December 2008.

2. On 22 November 2008, the Defence for Jérôme-Clément Bicomupaka filed its Closing Brief. Attached to that brief was a Motion requesting the Chamber to immediately and permanently stay these proceedings, prior to rendering a final judgement in this case. The Motion is based on a number of allegations that the Accused's right to fair trial has been violated.¹

3. The Prosecutor opposes the Motion.² The Prosecutor submits that a motion for stay of proceedings is a preliminary matter which must, as a matter of law, be brought prior to the commencement of trial.³ The Prosecutor further submits that the Defence Motion is frivolous, vexatious and an abuse of process.⁴

DISCUSSION

Preliminary Matter

4. The Chamber is not persuaded by the argument that a request for a stay of proceedings is a preliminary matter which must be raised prior to the commencement of the opening statements in a case pursuant to Rule 72.⁵

5. Rule 72 (A) (ii) provides:

Preliminary motions, being motions which:

- (i) challenge jurisdiction;
- (ii) allege defects in the form of the Indictment;
- (iii) seek the severance of counts joined in one indictment under Rule 49 or seek separate trials under Rule 82 (B); or
- (iv) raise objections based on the refusal of a request for assignment of counsel made under Rule 45 (c)

shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the Defence of all material and statements referred to in Rule 66

¹ *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-50-T, "(Confidential) Jérôme Bicomupaka's Final Brief & Motion For Stay Of Proceedings", dated 21 November 2008 and filed by the Defence for Bicomupaka on 22 November 2008 (the "Motion"). The Defence raises ten (10) arguments as to why a permanent stay in these proceedings is warranted.

² *Bizimungu et al.*, "Prosecutor's Response to J.C. Bicomupaka's Confidential Motion for Stay of Proceedings", filed by the Prosecutor on 26 November 2008 (the "Prosecutor's Response").

³ Prosecutor's Response, para. 3.

⁴ Prosecutor's Response, para. 11.

⁵ Prosecutor's Response, para. 3.



(A) (i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84.

6. The Chamber notes that Rule 72 does not mention requests for a stay of proceedings. Moreover, a stay of proceedings is merely the relief sought by the Defence for a series of what it submits are violations of the rights of the Accused to a fair trial.

7. Two of the claimed violations of the rights of the Accused raised in the Motion fall within the category of preliminary motions under Rule 72, namely alleged defects in the Indictment, and the refusal of request for assignment of counsel. However, the remaining eight issues raised by the Defence do not. Moreover, the Defence submissions regarding alleged defects in the Indictment and the refusal of request for assignment of counsel relate to the Accused's right to a fair trial under Article 20 (4) (a) and (d) of the Statute.⁶ The Chamber recalls that it has an inherent power to ensure that these rights are respected.⁷ Therefore, the Chamber considers that, notwithstanding the fact that elements of the Motion are *prima facie* preliminary matters, it has an inherent power to examine them at this stage in the proceedings.

1) Length of Detention

8. Article 20 (4) (c) of the Statute, provides, "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: [...] to be tried without undue delay".

9. The Appeals Chamber has 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:⁸

- (i) The length of the delay;
- (ii) 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;
- (iii) The conduct of the parties;

⁶ Article 20 4 (a) and (d) provide: "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:

- (a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
- (d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;"

⁷ *Prosecutor v. Vidoje Blagojević*, Case No. IT – 02-60—AR73.4, Public and Redacted Reason for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003, para.7; See also, *Prosecutor v. Léonidas Nshogoza.*, Case No. ICTR-2007-91-PT, Order to Assign Counsel, 24 July 2008, paras. 13-14.

⁸ *Prosecutor v. Bizimungu et al.*, 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, page. 3.

- (iv) The conduct of the relevant authorities; and
- (v) The prejudice to the accused, if any.

10. 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.⁹ Furthermore, a finding of undue delay will depend on the circumstances of the case.¹⁰

11. The Chamber recalls that applying these criteria it has recently denied motions alleging undue delay filed by the Defence for two co-accused, namely, Justin Mugenzi and Prosper Mugiraneza.¹¹

12. In this Motion the Defence claims that Bicamumpaka has been incarcerated for an excessive period of time. It submits that responsibility for this falls on the Prosecutor because it adduced evidence, including Maxwell Nkole's testimony, which it did not refer to in its Closing Brief. The Defence claims that as this evidence was not referred to in the Prosecutor's Closing Brief, it is irrelevant and has been abandoned by the Prosecutor.¹² According to the Defence, any time spent adducing this evidence was unnecessary, and therefore resulted in undue delay.

13. The Chamber will now turn to consider the Defence submissions in light of the Accused's right under Article 20 (4) (c) and the five factors set out by the Appeals Chamber.

⁹ *Bizimungu et al.*, Decision on Prosper Mugiraneza's Third Motion to Dismiss Indictment for Violation of his Right to a Trial Without Undue Delay, 10 February 2009, (the "Mugiraneza Third Undue Delay Decision"), para. 12, citing *Prosecutor v. Bizimungu et al.*, Case no. ICTR-99-50-T, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of His Right to Trial Without Undue Delay, 29 May 2007 (the "Mugiraneza 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.

¹⁰ Mugiraneza Third Undue Delay Decision, para. 12, citing Mugiraneza 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 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].

¹¹ Mugiraneza Third Undue Delay Decision; *Prosecutor v. Bizimungu et al.*, Case no. ICTR-99-50-T, Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance, 14 June 2007 (the "Mugenzi Decision"); Mugiraneza Second Undue Delay Decision.

¹² Motion, paras. 1062-1065.

(i) Length of delay

14. The Chamber notes that Bicamumpaka 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.¹³

(ii) Complexity of the proceedings

15. This Chamber has already noted the complexity of these proceedings in previous Decisions.¹⁴ The Defence presents no new arguments on this issue.

(iii) Conduct of the Parties

16. The Defence submits that the Prosecutor caused delay by calling witnesses and tendering exhibits that it did not refer to in its Closing Brief, thereby deeming them irrelevant.¹⁵ The Chamber considers the Defence submission to be without merit. Pursuant to Rule 89 (C), the Chamber may admit any relevant evidence which it deems to have probative value. Evidence admitted in this case has been deemed by the Chamber to have probative value. The mere fact that some evidence is not included in the Prosecutor's Closing Brief does not alter the Chamber's determination of *prima facie* relevance and probative value. Additionally, the purpose of a closing brief is to allow the parties the opportunity to summarise their cases, not all the evidence adduced at trial. In this respect, the Chamber recalls that it "does not consider lengthy summaries of witness testimony or exhibits to be necessary or useful. Nor is it necessary to recite the applicable law in detail. In both cases, recitation should give way to citation, whether to relevant

¹³ Mugiraneza Third Undue Delay Decision, para. 15; Mugenzi Decision, para 15; Mugiraneza 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."

¹⁴ Mugiraneza Third Undue Delay Decision, para. 16; Mugenzi Decision para. 16; Mugiraneza Second Undue Delay Decision, para. 30.

¹⁵ Motion, paras. 1062-1065.

transcript pages and exhibits or legal authorities, wherever possible.”¹⁶ Accordingly, the Chamber does not find that the Prosecutor’s conduct caused delay in the proceedings.¹⁷

(iv) Conduct of the relevant authorities

17. The Chamber has previously held that the conduct of the relevant authorities has not caused undue delay in these proceedings.¹⁸ The Defence presents no new arguments that the conduct of the relevant authorities caused delay.

(v) Prejudice to the Accused, if any

18. The Defence presents no arguments that Bicamumpaka has been prejudiced.

Conclusion

19. Having considered the submissions of the Parties in the light of the totality of the criteria laid down by the Appeals Chamber, the Chamber is of the view that the Defence has failed to show a violation of the Accused’s right to be tried without undue delay. Therefore, a stay of proceedings on this basis is denied.

II) Right to Counsel

20. The Defence submits that the Registry denied Bicamumpaka the services of counsel for nearly a year. In its Closing Brief, the Defence states that Counsel was appointed on 27 February 2000.¹⁹ It argues that this unacceptable delay further supports its request for a stay of proceedings.²⁰

21. The Prosecutor submits that duty counsel was appointed to him by the Registrar on 14 August 1999.²¹

22. The Chamber is currently considering materials it has received from the Registrar pursuant to an Order it issued under Rule 33 (B) in relation to this complex issue.²² As the Chamber does not consider a stay of proceedings to be the appropriate remedy should

¹⁶ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Justin Mugenzi’s Composite Motion Concerning Page Limits on Closing Briefs, 2 September 2008, para. 17.

¹⁷ See also, Mugiraneza Third Undue Delay Decision, para. 17; Mugenzi Decision, para. 18 and Mugiraneza Second Undue Delay Decision, paras. 33 – 34 in which the Chamber found no delay attributable to the Prosecutor.

¹⁸ Mugiraneza Third Undue Delay Decision, paras. 18-19; Mugenzi Decision, para. 20; Mugiraneza Second Undue Delay Decision, para. 36.

¹⁹ *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-50-T, (Confidential) Jérôme Bicamumpaka’s Final Brief and Motion for Stay of Proceedings, dated 21 November 2008, filed 22 November 2008, para. 14.

²⁰ Motion, para. 1066.

²¹ Prosecutor’s Response, paras. 8-10.

²² *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Registrar’s Submission on the Initial Assignment of Counsel to Jérôme-Clément Bikamumpaka, 16 February 2009; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Order for the Registrar’s Submissions on Initial Assignment of Counsel to Jérôme-Clément Bicamumpaka, 6 February 2009.



any violation of this right be found, it will reserve its decision on this issue and any appropriate remedy to the judgement.

III) The Accused's Right to be Informed of the Case Against Him

23. The Defence submits that it is impossible to give Bicamumpaka a fair trial because to date, he has never received notice of the charges against him.²³

24. The Chamber recalls the Appeals Chamber jurisprudence that "charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused".²⁴ If defects in an indictment come to light in the course of the trial, the Trial Chamber is required to consider whether a fair trial requires an amendment of the indictment, an adjournment of proceedings, or the exclusion of evidence outside the scope of the indictment.²⁵ The Chamber recalls that the trial of the Accused was completed prior to the filing of this Motion. Under these circumstances, the Chamber does not consider a stay of proceedings to be the appropriate remedy. Rather, as a Trial Chamber can only convict an accused of crimes that are charged in the indictment,²⁶ the issue of notice will be considered in the judgement.

IV) Prosecutor's Disclosure Obligation and V) Objectivity

25. The Defence submits that the Prosecutor has consistently failed to fulfil his disclosure obligations. First, the Defence claims that this was due to the ever changing nature of the Prosecutor's case against Bicamumpaka. Secondly, the Defence alleges "a culture of ambush" and refusal to disclose material that appeared during the trial.²⁷ Thirdly, the Defence submits that the Prosecutor has deliberately withheld material suggesting the innocence of the Accused in order to focus solely on the material which supports his views on the responsibility of the Interim Government. In support, the Defence states that it can find no other explanation for the fact that the Prosecutor decided to withdraw Ignace Karuhije and Basile Nsabumugisha as witnesses, and add

²³ Motion, paras. 1067-1068.

²⁴ *The Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-A, Judgement, 29 August 2008, ("Muvunyi Appeal Judgement"), para. 18 citing *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Judgement, 12 March 2008, paras. 27, 100; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Judgement, 27 November 2007, para. 63; *Mikaëli Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Judgement, 21 May 2007, paras. 76, 167, 195; *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgement, 7 July 2006, para. 49; *Emmanuel Ndinabahizi v. The Prosecutor*, Case No. ICTR-01-71-A, Judgement, 16 January 2007, para. 16.

²⁵ *Muvunyi Appeal Judgement*, para. 18 citing *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement, 7 July 2006, para. 27. See also *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("Kvočka et al. Appeal Judgement"), para. 31; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004, para. 194; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001, para. 92.

²⁶ *Muvunyi Appeal Judgement*, para. 18 citing *Ferdinand Nahimana et al v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, para. 326; *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement, 7 July 2006, para. 28; *Kvočka et al. Appeal Judgement*, para. 33.

²⁷ Motion, paras. 1069-1072.

Witnesses GFA and GAP. The Defence further alleges that the Prosecutor attempted to "stitch back the important inconsistencies in the various statements of GFA".²⁸

26. The Chamber notes that if the Defence is attempting, under these two grounds, to allege that the Prosecutor has violated its disclosure obligations it must make a specific request pursuant to Rules 66 or 68.²⁹ The Defence has failed to do this. In addition, the Chamber notes that any submissions by the Defence as to the reasons why the Prosecutor withdrew particular witnesses are purely speculative.

27. The Chamber recalls that during the course of this trial, where it has been alleged that the Prosecutor has failed to discharge his disclosure obligations, the Chamber has ruled on the issue.³⁰ This has been an effective and appropriate way of dealing with any alleged violation of disclosure obligations. Accordingly, the Chamber does not consider a stay of proceedings on these grounds to be warranted.

VI) Alleged Abuse of the Prosecutor's Discretion

28. The Chamber recalls that pursuant to Article 15 (2) of the Statute, the Prosecutor shall act independently as a separate organ of the Tribunal. Article 17 and Rule 47 (B) provide that the Prosecutor has discretion in preparing an indictment. If satisfied during an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal the Prosecutor shall prepare an indictment for confirmation.

29. The Chamber further recalls the jurisprudence of the Tribunal that the Prosecutor has "broad discretion in relation to the [. . .] preparation of indictments."³¹ The Chamber observes that the "breadth of discretion of the Prosecutor, and the fact of [his] statutory independence, imply a presumption that the prosecutorial functions [. . .] are exercised regularly."³² It is to be noted that this prosecutorial discretion is not absolute but "is subject to the principle of equality before the law and to this requirement of non-

²⁸ Motion, paras. 1073-1074.

²⁹ Rules 66 and 68 provide for the disclosure of exculpatory and other relevant material.

³⁰ See for example, *Prosecutor v. Bizimungu et al.*, Case no. ICTR-99-50-T, Decision on Justin Mugenzi's Second Motion for Formal Disclosure and for Leave to Reopen his Defence, 3 November 2008; *Prosecutor v. Bizimungu et al.*, Case no. ICTR-99-50-T, Decision on Jérôme-Clément Bicamumpaka's Motion Requesting Recall of Prosecution Witness GFA; Disclosure of Exculpatory Material; and to Meet with Witness GFA, 21 April 2008.

³¹ *Prosecutor v. Ndindiliyimana*, Case No. ICTR-2000-56-I, Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council, 26 March 2004, para. 22 citing *Prosecutor v. Akayesu*, Case No. ICTR-96-4, 1 June 2001, ("Akayesu Appeal Judgement"), para. 94 (citing *Prosecutor v. Delalic et al.*, Case No. IT-96-21-A, 20 February 2001, para. 602 ("the "Celebici Appeal Judgement").

³² *Prosecutor v. Ndindiliyimana*, Case No. ICTR-2000-56-I, Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council, 26 March 2004, para. 22 citing Celebici Appeal Judgement, para. 611.

discrimination.”³³ The Defence has the burden of rebutting the presumption of prosecutorial discretion by:

- [. . .](i) establishing an unlawful or improper (including discriminatory) motive for the prosecution; and
- (ii) establishing that other similarly situated persons were not prosecuted.³⁴

30. Accordingly, in order for a claim of abuse of discretion to succeed, an accused must show that the Prosecutor’s decision to prosecute him, or to continue his prosecution, was based on impermissible motives, such as ethnicity or political affiliation, and that he failed to prosecute similarly situated suspects of different ethnicity or political affiliation. The Defence submits that it is fundamentally unfair that other Ministers, such as Ntagerura and Rwamakuba, have not been tried in the same manner as Bicomumpaka. Specifically, the Defence claims that neither Minister, unlike Bicomumpaka, was charged with being a party to a Joint Criminal Enterprise as a result of being a member of the Interim Government. Moreover, the Defence claims that despite being mentioned as co-conspirators and belonging to the same criminal enterprise as Bicomumpaka, these other Ministers have not been charged with the same crimes as Bicomumpaka. In addition the Defence argues that the Prosecutor did not file an indictment against Witness GFA despite there being sufficient evidence to warrant an indictment for perjury.³⁵

31. The Defence further submits that the Prosecutor is in violation of the United Nations Guidelines on the Role of Prosecutors, specifically his lack of objectivity and failure to pay attention to all circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect.³⁶

32. The Chamber considers that the Defence has failed to adduce any evidence to establish that the Prosecutor had a discriminatory or otherwise unlawful or improper motive in indicting or continuing to prosecute the Accused. Accordingly, the Chamber does not find it necessary to consider the additional question of whether other Interim Government Ministers such as Ntagerura and Rwamakuba were prosecuted for the same crimes.³⁷

33. In respect of Witness GFA, the Chamber notes that the Defence has failed to show how the Prosecutor’s failure to seek an indictment for contempt is discriminatory. Nor has it made any attempt to show how Witness GFA was similarly situated to the Accused.

³³ *Prosecutor v Ndindiliyimana*, Case No. ICTR-2000-56-I, Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council, 26 March 2004, para. 23 citing Celebici Appeal Judgement, para. 605.

³⁴ *Prosecutor v Ndindiliyimana*, Case No. ICTR-2000-56-I, Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council, 26 March 2004, para. 25 citing Celebici Appeal Judgement, para. 611.

³⁵ Motion, paras. 1075-1077.

³⁶ Motion, paras. 1078-1080.

³⁷ See *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Cases No. ICTR-96-10-T & ICTR-96-17-T, 21 February 2001, Judgement, para. 871.

34. Further, the Chamber notes that both the *Karemera et al.* Chamber, and this Chamber, have ordered the Registrar to appoint an independent *amicus curiae* to conduct investigations into Witness GFA's possible false testimony.³⁸ Any discussion of whether this witness should be indicted is therefore premature pending the outcome of those investigations.

35. The Defence has not shown that the Prosecutor lacks objectivity; nor has it shown that the Prosecutor has breached the UN Guidelines on the Role of Prosecutors. The Chamber therefore cannot find that the Prosecutor has so acted.

36. Accordingly, the Chamber finds that the Prosecutor has not abused his discretion and declines to stay proceedings on this ground.

VII) Alleged Fabrication of Evidence and Witness Tampering

37. The Defence submits that there are numerous examples of witness interference and tampering, which raise a reasonable doubt on the Prosecutor's entire case and warrant an immediate stay of proceedings. Specifically the Defence submits that Witness GFA has revealed a system of fabrication of evidence. The Defence further alleges that recent material concerning Witness GAP, withheld by the Prosecutor, confirms the existence of a deliberate policy to implicate many of the accused before this Tribunal. The Defence submits that Witnesses GLP, Uwizeye, GKJ, Benda Lema, and many others provided firsthand accounts of episodes of such a policy in Rwandan jails. The Defence argues that as a deliberate policy to obtain Bicomumpaka's conviction has been demonstrated and proven with the material relating to Witness GFA's recantation, it is not possible to safely rely on any of the Prosecutor's incriminating evidence.³⁹

38. The Defence observes that the evidence that the allegations were fabricated was denied by Witnesses GKB and GAP. However, the Defence dismisses their denial, arguing that there are no other explanations for the fact that both witnesses allege that Bicomumpaka was in Ruhengeri in mid-May, when he was in fact in New York.⁴⁰

39. The Chamber makes no finding on the Defence submissions regarding the fabrication of evidence at this stage as it will deal with this matter in the final judgement. As a result, the Chamber does not find it appropriate to order a stay of proceedings on this ground at this moment.

³⁸ See *Bizimungu et al.*, Decision on Defence Motion Seeking the Appointment of *Amicus Curiae* to Investigate Possible False Testimony by Witnesses GFA, GAP and GKB (TC), 23 July 2008; see also *Karemera et al.*, Decision on Prosecutor's Confidential Motion to Investigate BTH for False Testimony (TC), 14 May 2008.

³⁹ Motion, paras. 1081-1082.

⁴⁰ Motion, para. 1083.



VIII) No Credible Case to Answer

40. The Defence alleges that an analysis of the Prosecutor's Closing Brief and the evidence demonstrate that there is no case to answer, and that proceedings should therefore be stayed.⁴¹

41. Pursuant to Rule 98 *bis*, seven days after the close of the Prosecutor's case in chief, an accused may file a motion requesting judgement of acquittal in respect of counts in the indictment for which the evidence is insufficient to sustain a conviction.

42. The Chamber recalls that the Prosecutor closed his case on 23 June 2005. All four Defence teams subsequently filed Motions for acquittal, pursuant to Rule 98 *bis* of the Rules. On 22 November 2005 this Chamber issued its written decision on these Defence Motions entering a judgement of acquittal on some of the counts in the Indictment.⁴² As a result, the Chamber finds that the time to argue that there is no credible case to answer and that there should be a judgement of acquittal has passed, and a Decision has been rendered by the Chamber in this regard. There is no provision in the Statute or the Rules allowing this to happen a second time when the Closing Briefs are filed. Accordingly, pursuant to the doctrine of *res judicata*, the Defence is estopped from submitting that there is no case to answer. The Chamber therefore denies a stay of proceedings on this basis.

IX) Positive Evidence Demonstrating the Innocence of Bicomumpaka

43. The Defence submits that Witness D⁴³ testified that Bicomumpaka is considered to be an innocent man by the Rwandan community. In support they point to Defence Exhibit 3D7 tendered during Witness D's testimony.⁴⁴ The Defence further submits that Ignace Karuhije, the *prefet* of Ruhengeri between October 1994 and 1997, also testified in favour of Bicomumpaka, confirming that Bicomumpaka's name never surfaced during the investigations into the genocide in Ruhengeri.

44. That some witnesses have testified in favour of Bicomumpaka does not provide a basis for a permanent stay of proceedings. This evidence and all exhibits will be evaluated by the Chamber during its judicial deliberations. The Chamber therefore denies a stay of proceedings on this basis.

X) Further Detention in an Arusha Safe House Following Acquittal.

45. The Defence submits that a further reason to stay the proceedings against Bicomumpaka is the inability of the Tribunal to eventually relocate him in the event he is

⁴¹ Motion, paras. 1085–1087.

⁴² *Prosecutor v. Bizimungu et al.*, Case no. ICTR-99-50-AR73, Decision on Defence Motions Pursuant to Rule 98 *bis*, 22 November 2005.

⁴³ The Chamber notes that the Motion states 'Mister D' but has assumed that this is a typographical error.

⁴⁴ Witness D testified that Exhibit 3D 7 is a statement he made to investigators, T. 17 June 2004, pp. 25-26.


acquitted. The Defence points to the recent Appeals Chamber Decision in *Ntagerura* to support its position.⁴⁵


46. The Chamber rejects this reason as one that merits a stay of proceedings as it is based on pure speculation. In *Ntagerura*, the Appeals Chamber held that, despite clear words to that effect in the Statute, "there is no legal duty under Article 28 of the Statute for States to cooperate in the relocation of acquitted persons."⁴⁶ However, this does not mean that the Tribunal will not be able to relocate Bicomumpaka in the event of an acquittal. Moreover, there is no basis in the Rules or Statute to stay proceedings permanently because of potential problems in relocating an accused who may be found not guilty. Accordingly the Chamber denies the request for a stay of proceedings on this ground.

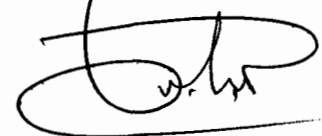
FOR THESE REASONS, the Chamber

DENIES the Defence Motion.

Arusha, 27 February 2009


Khalida Rachid Khan
Presiding Judge


Lee Gacuiga Muthoga
Judge


Emile Francis Short
Judge



⁴⁵ Motion, paras. 1090 – 1098.

⁴⁶ *In re André Ntagerura*, Case No. ICTR-99-46-A28, Decision on Motion to Appeal the President's Decision of 31 March 2008 and the Decision of Trial Chamber III of 15 May 2008 (AC), 18 November 2008, para. 15.