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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 12 June 2009

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL RECORDS ARCHIVE
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DECISION ON TRIAL DATE

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Brian Wallace
Mr. Iskandar Ismail

Defence Counsel

Mr. David C. Thomas
Ms. Mylene Dimitri

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

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa, and Mparany Rajohnson (the “Trial Chamber”);

RECALLING the “Decision on Augustin Ngirabatware’s Appeal of Decisions Denying Motions to Vary Trial Date” of 12 May 2009 (the “Appeals Chamber Decision”), which “remands the determination of a trial date consistent with this decision to the Trial Chamber”;¹

RECALLING the “Decision on Defence Motion to Vacate Trial Date of 4 May 2009” of 25 February 2009 and the “Decision on Defence Motion to Vary Trial Date” of 25 March 2009 denying variation of the Trial date (the “Impugned Decisions”);

RECALLING the “Scheduling Order” of 12 May 2009;²

BEING SEIZED OF:

- a) “Dr. Ngirabatware’s Submission Regarding an Appropriate Trial Date Pursuant to the Trial Chamber Scheduling Order”, filed on 18 May 2009 (the “Defence Submission”);
- b) The “*Observations du Procureur sur ‘Dr. Ngirabatware’s Submission Regarding an Appropriate Trial Date Pursuant to the Trial Chamber’s Scheduling Order dated 12 May 2009’*”, filed on 19 May 2009 (the “Response”); and
- c) The “Defence Reply to the Prosecutor’s Observations on Dr. Ngirabatware’s Submission Regarding an Appropriate Trial Date”, filed on 25 May 2009 (the “Reply”);

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

NOW DECIDES pursuant to Rule 73 of the Rules:

INTRODUCTION

1. On 25 February 2009, the Chamber rendered the Decision on Defence Motion to Vacate Trial Date of 4 May 2009, denied the Motion, and ordered that the trial shall commence on 18 May 2009.
2. On 25 March 2009, the Chamber issued its Decision on Defence Motion to Vary Trial Date, in which it denied the Motion and ordered the trial to commence on 18 May 2009.

¹ Appeals Chamber Decision, para. 33.

² Scheduling Order, 12 May 2009.



3. On 15 April 2009, in its Decision on Defence Motion for Certification to Appeal the Trial Chamber's Decision of 25 March 2009 on Defence Motion to Vary Trial Date, the Chamber granted the Motion and stayed the commencement of trial, pending a determination of the appeal.

4. On 12 May 2009, the Appeals Chamber granted Ngirabatware's Appeal of the Chamber's Decisions denying the motions to vary trial date of 18 May 2009 and remanded the determination of a trial date to the Trial Chamber, consistent with the Appeals Chamber Decision.³

5. On 13 May 2009, the Trial Chamber issued a Scheduling Order instructing the Parties to file written submissions addressing the issues raised in the Appeals Chamber Decision, to propose an appropriate date for the commencement of trial, and to specify the reasons for proposing this date.

SUBMISSIONS OF THE PARTIES

Defence Submission

6. The Defence submits that this case is very complex because the Amended Indictment⁴ adds numerous new allegations; refers to numerous events which allegedly took place between January and July 1994; refers to sites located throughout Rwanda, all of which need to be visited; and refers to the participation of 51 alleged accomplices, all of whom need to be investigated.⁵ The Defence also submits that the complexity of the case is increased by the charge of diversion of funds, which is a "technical and complex matter, involving many documents and witnesses".⁶

7. The Defence emphasises that each crime with which the Accused is charged "carries a life sentence" and is of the gravest nature. It further underlines that the Prosecution alleges every mode of responsibility provided for in the Statute and many different incidents.⁷

8. According to the Defence, its ability to conduct investigations is seriously hindered by the Prosecution's failure to comply with its disclosure obligations. It submits that the following documents should be disclosed, pursuant, to Rule 66 :

- The statement of Witness ANAB;

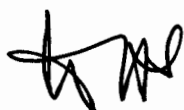
³ The complete procedural history prior to the Appeals Chamber Decision is set out in the Appeals Chamber Decision at paragraphs 2-7.

⁴ Amended Indictment, filed on 14 April 2009 ("Amended Indictment").

⁵ Defence Submission, paras. 4-5.

⁶ Defence Submission, para. 6.

⁷ Defence Submission, paras. 7-9.



- All of the documents referred to in Witness ANAC's statement because Annexes I, II and III of the 15 May 2009 disclosure are "confusing tables" and do not provide any information regarding the contents of the tables;
- The documents supporting the Report by Witnesses ANAB and ANAC and the documents produced by the "SAP Follow-up Committee" mentioned in ANAC's statement;
- The full identifying information of Witnesses ANAB, ANAC and ANAP;
- The French translation of Witness ANAL's second statement, disclosed on 8 May 2009;
- The previous statements of Witnesses ANAA, ANAI, and ANAN;
- The names of the "foreigners" who were working in the Ministry of Planning and who were alleged accomplices in the diversion of funds.⁸

9. Further, the Defence contends that it should receive the criminal histories of all the Prosecution witnesses, including their *Gacaca* records, pursuant, to Rule 68.⁹

10. The Defence reiterates the submissions in its Motion in objection to the Prosecutor's Pre-Trial Brief with respect to the alleged flaws contained in the Prosecution Pre-Trial Brief and in the attached list of witnesses.¹⁰

11. The Defence contends it has not yet received the list of exhibits with the required information, or the exhibits themselves.

12. The Defence submits that a lengthy and complex statement by Witness ANAN was disclosed for the first time on 8 May 2009, which it requires additional time to analyse because it contains numerous new allegations.¹¹

13. In the 15 May 2009 disclosure many documents are provided only in French or only in Kinyarwanda; the Defence requests their translation.¹²

14. Regarding the status of its investigation, the Defence submits that witness investigation and analysis of documents will involve at least five to six months of work.¹³ It further submits that it started its investigation in mid-February and was burdened by the filing of an Amended Indictment on 13 April 2009, which added more witnesses to the case.¹⁴ The Defence further submits that its investigative work is also hindered by the erroneous connection of Prosecution witnesses to paragraphs of the Amended Indictment

⁸ Defence Submission, para. 10.

⁹ Defence Submission, para. 11.

¹⁰ Defence Submission, para. 12.

¹¹ Defence Submission, para. 14.

¹² Defence Submission, paras. 15, 23.

¹³ Defence Submission, para. 24.

¹⁴ Defence Submission, para. 16, 17.

and the vague and imprecise nature of the dates and locations contained in the Amended Indictment.¹⁵

15. The Defence reiterates that the charge of diversion of funds is complex and involves the analysis of substantial documentary evidence, including more than 150 documents received.¹⁶

16. The Defence submits that its witnesses are located all over the world and it has only conducted initial interviews of about one fourth of its potential witnesses. In addition, it has not yet been able to undertake a mission to Rwanda to interview potential witnesses there, nor has it interviewed potential witnesses in the United States or Canada.¹⁷

17. Regarding staffing matters, the Defence informs the Trial Chamber that it is now fully staffed with two investigators and two legal assistants.¹⁸

18. Lastly, the Defence submits that the estimated length of the trial is short and that the more time the Defence is provided for preparation, the more focused and brief its case will be. The Accused is in custody and therefore has no interest in delaying the trial unnecessarily. The Defence states that setting a trial date only a few months from now would not be consistent with the Appeals Chamber Decision and that the Accused could probably be ready by December 2009. The Defence suggests January 2010 for the start of the trial.¹⁹

Prosecution Response

19. The Prosecution submits that the Defence Submission should be dismissed as unfounded.²⁰ It argues that the allegations of the case have been reduced to the minimum and clearly set out. Its Pre-Trial Brief was filed on 30 March 2009 and it intends to call less than 20 witnesses. Therefore, the Prosecution rejects the argument of the complexity of the case made by the Defence in support of its Submission.²¹

20. Regarding disclosure issues, the Prosecution contends that it has fully discharged its obligations pursuant to Rule 66 (A) (i) and (ii):

- The statement of Witness ANAB was disclosed on 13 March 2009;
- The annexes to the Report are unambiguous and were disclosed on 15 May 2009;

¹⁵ Defence Submission, paras. 20, 19, referring to the Defence Objections to the Prosecutor's Pre-Trial Brief, 16 April 2009, paras. 37-49 and Defence Reply to the Prosecutor's Response to the Defence Objections to the Prosecutor's Pre-Trial Brief, 27 April 2009.

¹⁶ Defence Submission, para. 18.

¹⁷ Defence Submission, paras. 21-22.

¹⁸ Defence Submission, paras. 25-26.

¹⁹ Defence Submission, paras. 27-33.

²⁰ Response, para. 10.

²¹ Response, para. 3.



- The Prosecutor does not have “the document” in its possession;
- The full identities of Witnesses ANAB, ANAC and ANAP were disclosed on 22 April and 15 May 2009;
- The Prosecution has discharged its duty by disclosing the Witness ANAL’s statement in English on 8 May 2009;
- The statements of Witnesses ANAA, ANAI and ANAN were disclosed on 13 March 2009;
- The Prosecution has never mentioned any foreigners working at the Ministry of Planning at the time who were accomplices to the diversion of funds charge and requests the Defence to clarify this matter.²²

21. The Prosecution submits it has disclosed the report of Witnesses ANAB and ANAC on 13 March 2009, as well as sketches and photographs of locations on 15 May 2009.²³

22. The Prosecution further submits that the statement of Witness ANAN disclosed on 8 May 2009 does not contain new allegations.²⁴

23. The Prosecution claims that it has disclosed the documents referred to in paragraph 15 of the Defence Submission as “the new batch of disclosure sent to the Defence on May 15”. Some were in French, which is an official language of the Tribunal, and some were in Kinyarwanda, which is the language of the Accused, and the Kinyarwanda documents have been sent for translation.²⁵

24. Furthermore, the Prosecution avers that the Amended Indictment does not add new witnesses.²⁶

25. Regarding the connection of witnesses to paragraphs of the Amended Indictment, the Prosecution submits that this was amended and revised and that, in any case, this is a matter pertaining to evidence to be discussed at trial.²⁷

26. With regard to Rule 68, the Prosecution underlines that the disclosure obligation is ongoing and is limited to documents it has in its possession. The Prosecution states that not all its witnesses are convicted criminals and that the criminal records of Witnesses ANAA, ANAD, ANAI and the *Gacaca* documents of Witnesses ANAO and ANAH were disclosed on 15 May 2009. The Prosecution avers that it will continue to discharge its Rule 68 disclosure obligations.²⁸

²² Response, para. 4 a).

²³ Response, para. 4 b).

²⁴ Response, para. 4 c).

²⁵ Response, para. 4 d).

²⁶ Response, para. 4 e).

²⁷ Response, para. 4 f).

²⁸ Response, para. 5.

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27. The Prosecution submits that the large amount of documents disclosed before January 2009 should have enabled the Defence to start its investigations at that time.²⁹ According to the Prosecution, the Defence does not need more than 90 days to complete its investigations. However, should the Defence need more time, additional investigations could be conducted at the end of the Prosecution's case.³⁰ The Prosecution states that it is ready to start the trial at any time but that should the Chamber estimate that more time is needed for the Defence, July 2009 is an appropriate time. It strongly opposes the Defence's proposed date of January 2010.³¹

Defence Reply

28. The Defence notes that the Prosecution failed to show that it would be prejudiced by the trial date proposed by the Defence, and that there is, therefore, no reason not to set the trial date in accordance with the Defence Submission. The Defence reiterates that the Accused, who is in custody, has no interest in causing undue delay to his trial.³²

29. Further, the Defence notes that the Prosecution does not make any observations regarding the number of counts and charges and their gravity. It also notes that the Prosecution contests the description of the case as a complex one, though it asserts that the description has been endorsed by the Appeals Chamber. The Defence provides as an example that the Prosecution fails to address the fact that diversion of funds is a technical charge involving many documents and witnesses, and the Prosecution does not contest that there are over 51 alleged accomplices named in the Amended Indictment and/or in the Pre-Trial Brief.³³

30. With regard to disclosure, the Defence submits that it has not yet received the CD-ROMs disclosed on 15 May 2009, and notes that although the Prosecutor has continually represented that he has complied with his disclosure obligations additional disclosures have been made on an almost daily basis.³⁴ It therefore concludes that had the trial started on 18 May 2009 this voluminous disclosure would have been received during the trial. The Defence deems the Prosecution's representations regarding his disclosure compliance as simply not credible.³⁵

31. The Defence submits that the Prosecution's disclosure has been consistently tardy and deficient, and many issues remain to be resolved.³⁶ It lists the outstanding disclosure as follows:

²⁹ Response, para. 6.

³⁰ Response, para. 7.

³¹ Response, paras. 8-10.

³² Reply, paras. 5-7.

³³ Reply, paras. 8-12.

³⁴ Reply, paras. 13-14. The Defence states that it received disclosures on 13, 15, 18 and 21 May 2009 and that the 18 May 2009 disclosure consists of 88 pages, while the 21 May 2009 disclosure consists of 86 pages.

³⁵ Reply, para. 14.

³⁶ Reply, para. 16.



- The identification material for Witnesses ANAB and ANAC do not comply with the general requirements regarding identifying data for the Prosecution witnesses and do not enable the Defence to know essential confidential data concerning those witnesses. Witness ANAP's identifying information was disclosed on 18 May 2009, after the Defence Submission.³⁷
- The document disclosed by the Prosecution on 13 March 2009 is a report, not a statement. Witness ANAB's statement needs to be disclosed as was done for Witness ANAC.³⁸
- The Defence refers the Prosecution to Witness ANAC's statement dated 27 February 2008 in which an office for a "foreigner" at the Ministry of Planning is mentioned. It reasserts that these "foreigners" mentioned appear to be accomplices in the diversion of funds and that their names must be disclosed to the Defence.³⁹
- The Defence contends that the Prosecution has failed to address its submission regarding the annexes to the Report and has made no indication regarding the origin, author, date or source of such documents, and that furthermore these materials bear no indicia of reliability.⁴⁰ Additionally, it asserts that it is the Prosecution's duty to find the documents which allegedly directly support the information contained in the Report and that, without them, the Report bears no indicia of reliability or authenticity.⁴¹
- The Defence reaffirms that the statement of Witness ANAN disclosed on 8 May 2009 contains numerous allegations, which are not contained in either the Amended Indictment or the Pre-Trial Brief.⁴²
- The Defence reiterates that it has not received the French translation of Witness ANAL's statement.⁴³
- According to Witness ANAA's statements disclosed on 13 March 2009 and 15 May 2009, ANAA met with the Prosecutor several previous times and made statements in other cases before the Tribunal. The Defence requests to be served with those other statements.⁴⁴

32. With regard to the status of its investigations, the Defence repeats its arguments made in its 18 May 2009 Submission. It further submits that the 14 April 2009 Amended

³⁷ Reply, para. 15 a).

³⁸ Reply, para. 15 b).

³⁹ Reply, para. 15 c).

⁴⁰ Reply, para. 15 d).

⁴¹ Reply, paras. 15 d) and e).

⁴² Reply, para. 15 f).

⁴³ Reply, para. 15 g).

⁴⁴ Reply, para. 15 h).



Indictment modified paragraphs 37 and 60 of the Indictment and added many names of new alleged accomplices, which requires substantial additional investigation time.⁴⁵

33. The Defence adds that it appears that one Prosecution investigator, whose *curriculum vitae* has been disclosed, is now going to testify regarding sketches and pictures taken in Gisenyi though the Prosecutor may not add new witnesses without having sought leave to vary his witness list, which he failed to do.⁴⁶

34. The Defence contends that the Prosecution wrongly submits that the erroneous connection of Prosecution witnesses to the paragraphs of the Amended Indictment has been addressed. The Defence submits that it is the right of an accused to know with precision, as soon as the witness statements are disclosed, to what paragraph of the indictment the factual allegations refer. The Defence claims it is compelled to speculate on the links between each allegation, the Indictment, and the Pre-Trial Brief, due to numerous flaws that remain.⁴⁷

35. According to the Defence, the Prosecution has no knowledge with respect to the nature and scope of the Defence investigation and no factual basis for asserting that the Defence needs no more than 90 days to be trial ready.⁴⁸ The Defence claims it must undertake investigative missions to Rwanda to verify the accuracy of the sketches and photographs recently disclosed in order to be able to ascertain their authenticity. The Defence still has about 50 potential witnesses to contact to determine whether or not they will be called, following which a second round of interviews should be conducted in order to prepare the witnesses to testify. This process should require at least five to six months.⁴⁹ The Defence contends that the Prosecution is seeking to place the Accused at a disadvantage by suggesting a trial date of July 2009.⁵⁰

DELIBERATIONS

36. The Chamber recalls the Appeals Chamber Decision, granting Ngirabatware's Appeal to vary the trial date and remanding the determination of a new trial date to the Trial Chamber, consistent with the Appeals Chamber Decision. The Chamber further recalls the Appeals Chamber finding that the Trial Chamber failed to address the factors relevant to its making a fully informed and reasoned decision on the trial date, in light of the Accused's right to a fair trial, in particular his right to have adequate time to prepare his defence.⁵¹ The Appeals Chamber referred to, among others, six factors a Chamber must consider in determining whether an accused has adequate time to prepare a defence: the complexity of the case, the number of counts and charges, the gravity of the crimes

⁴⁵ Reply, para. 17.

⁴⁶ Reply, para. 18, referring to disclosure of the CV on 15 May 2009 and the Order of Appearance of witnesses, disclosed on 22 May 2009.

⁴⁷ Reply, para. 19.

⁴⁸ Reply, para. 20.

⁴⁹ Reply, para. 22.

⁵⁰ Reply, paras. 23-24.

⁵¹ Appeals Chamber Decision, para. 27.



charged, the individual circumstances of the accused, the status and scale of the Prosecution's disclosure, and the staffing of the Defence team.⁵²

37. More specifically, the Appeals Chamber noted that Lead Counsel for the Defence was assigned on 2 December 2008,⁵³ while a legal assistant and investigator were assigned in January and February 2009 respectively, and that no co-counsel had yet been assigned on 5 May 2009. It further noted that the Indictment was amended significantly on 5 February 2009, and further amended on 14 April 2009; that the amendments added "a considerable number of new allegations"; that the Accused is charged with six different counts relating to six different offences and a large number of different incidents; that the Accused is charged under two different sections of the Statute, Articles 6 (1) and 6 (3); and that pre-trial matters were still pending at the time of decision.⁵⁴ The Appeals Chamber concluded that, while none of these factors would individually have justified intrusion in the Chamber's discretion in the determination of the appropriate date for the commencement of trial, considered together, the factors led the Appeals Chamber to conclude, in light of the particular circumstances of this case, that the Defence was not allowed enough time to prepare for trial.⁵⁵

38. The Chamber recalls its Scheduling Order of 13 May 2009, in which it instructed the Parties to file written submissions regarding the commencement of the trial, addressing the issues raised in the Appeals Chamber Decision. The Chamber notes that the Defence has submitted additional issues which had not been raised in the Appeals Chamber Decision.⁵⁶ The Chamber will consider the matters raised in the motions leading to the Impugned Decisions, the Parties' submissions before the Appeals Chamber,⁵⁷ as well as any additional submissions which may be relevant to the determination of an appropriate trial date.

Staffing of the Defence Team

39. Regarding the staffing of the Defence team, the Chamber recalls that Lead Counsel was appointed on 2nd December 2008, a legal assistant was appointed 15 January 2009, an investigator was appointed on 6 February 2009, a second legal assistant was appointed on 15 February 2009,⁵⁸ a second investigator was appointed on 2 May 2009, and a Co-Counsel was appointed on 1 June 2009, which makes the Defence team fully staffed as of

⁵² Appeal Decision, para. 28 recalling *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR-73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004 ("*Milošević* Decision"), paras. 8-19.

⁵³ The letter of appointment of Lead Counsel, dated 25 November 2008, was sent to Mr. Thomas on 1 December 2008 by fax and the Statement of Availability received from Mr. Thomas was transmitted to the Tribunal by fax on 2 December 2008.

⁵⁴ Appeal Decision, para. 29.

⁵⁵ Appeal Decision, para. 30.

⁵⁶ Particular issues of disclosure and specific points relating to the state of the Defence investigation were not raised in the Parties submissions before the Appeals Chamber.

⁵⁷ See Appeals Chamber Decision, para. 14.

⁵⁸ Defence Motion to Continue 18 May 2009 Trial Date, paras. 1, 3, 9 and 11.

this date.⁵⁹ The Chamber recalls that the issue of the staffing of the Defence team was first addressed by the Chamber on 9 February 2009 during a status conference. In March, the Defence was reminded of the issue in the Decision on Defence Motion to Vary Trial Date.⁶⁰ On 4 May 2009, the Chamber observed that “intervention by Lead Counsel was necessary before a Co-Counsel could be appointed” and it expected “that the staffing position of the Defence team will be addressed and completed in a timely manner.”⁶¹ On 19 May 2009, the Chamber instructed the Registrar to make submissions regarding the issue of appointment of Co-Counsel pursuant to Rule 33(B) of the Rules.⁶² On 20 May 2009, the Registrar submitted that Lead Counsel had presented requests for assignments of Co-Counsel who could not be appointed as they were already assigned to other cases.⁶³ The Chamber notes that even if the Defence team was not fully staffed at the time of the Impugned Decisions, the investigation should have started from the appointment of the Defence investigator on 6 February 2009. Indeed, the Defence submits that its investigation started mid-February 2009.⁶⁴ Consequently, the Chamber considers that the Defence investigation has now been ongoing for about four months.

Amendment of the Indictment and Other Submissions Related to the Nature of the Case⁶⁵

40. With respect to the fact that the Accused is charged with six different counts relating to six different offences and a large number of different incidents, under Articles 6 (1) and 6 (3) of the Statute,⁶⁶ the Chamber notes that the present case is a single accused case, that the number of Prosecution witnesses may be limited to 16, and that the Prosecution has indicated that it would need ten days to complete its case in chief.⁶⁷ The Chamber considers that the timing of the Amended Indictment and the nature of the charges against the Accused may be relevant considerations in the scheduling of the appropriate trial date.

41. The Chamber notes the Appeals Chamber observation that the indictment was amended significantly on 5 February 2009, and further amended on 14 April 2009 and that the amendments added “a considerable number of new allegations. The Chamber recalls the Decision on Prosecution Motion for Leave to Amend the Indictment of 29 January 2009, which granted amendments on the grounds that they would “narrow down the indictment, [...] increase the fairness and efficiency of the proceedings, [...]”

⁵⁹ See letter from the Chief Defence Counsel and Detention Management Section to Mrs. Mylene Dimitri, titled “Your Assignment as Co-counsel to Represent the Accused Augustin Ngirabatware”, dated 28 May 2009.

⁶⁰ Decision on Defence Motion to Vary Trial Date, 25 March 2009.

⁶¹ Decision on Defence Motion to Vacate Trial Date of 4 May 2009, para. 11, *citing* Status Conference, Daily Case Minutes, 9 February 2009, para. 1 (d).

⁶² Status Conference, T. 19 May 2009, p. 13.

⁶³ Registrar’s Submissions under Rule 33 (B) of the Rules of Procedure and Evidence Regarding the Status of the Composition of the Defence Team and the Assignment of Co-Counsel to the Accused Ngirabatware of 20 May 2009.

⁶⁴ Defence Submission, para. 16.

⁶⁵ See *supra*, para. 36, (i) the complexity of the case, (ii) the number of counts and charges, and (iii) the nature of the charges.

⁶⁶ Appeals Chamber Decision, para. 29.

⁶⁷ Order of Appearance of witnesses, disclosed on 22 May 2009.

contribute to the specificity and accuracy of the indictment,” as well as “result in a more expeditious trial,” “thus protecting the accused person’s rights to a fair trial.”⁶⁸ It further held that “while most of the proposed amendments contain new factual allegations, they concretise broad and vague allegations made in the original indictment in support of the Counts by listing particular acts or omissions by the Accused” and held that “these additional factual allegations are described with sufficient specificity to permit focused investigations by the Defence.”⁶⁹ The Chamber further notes that the 14 April 2009 Amended Indictment did not render the case more complex but rather clarified it after the Chamber partially granted a Defence Preliminary Motion.⁷⁰ More specifically, the Defence alleged that paragraphs 37 and 60 of the 14 April 2009 Amended Indictment added many names of new alleged accomplices. The Chamber notes that the modifications of these two paragraphs provided the names of *Interahamwe* militia members from Gisenyi prefecture and thus should, as a result, have facilitated the Defence investigation. Otherwise, the Chamber considers that the nature of the case against the Accused has been substantially known since 5 February 2009, when the Amended Indictment was issued, more than four months ago and more than three months before the initial trial date of 18 May 2009.

Pre-Trial Matters

42. With respect to the issue of pending motions which had been raised by the Parties prior to the Impugned Decisions, the Chamber notes that there are only two pending motions at this stage of the proceedings. The first one, filed on 10 June 2009, objects to certain aspects of the Prosecution Revised Pre-Trial Brief.⁷¹ The other concerns the transfer of detained witnesses. The latter motion is contingent upon the setting of a trial date.⁷² These two motions have no impact on the scheduling of the trial date.

43. The Chamber notes that disclosure issues were not discussed in as much detail in the Parties’ submissions prior to the Appeals Chamber Decision.⁷³ However, Rule 66 (A) disclosures will be considered by the Chamber, as they may be relevant to the scheduling of the trial. With respect to disclosure under Rule 66 (B), the Chamber reminds the Parties that requests for inspection differ from disclosure obligations under Rule 66 (A) (i) and (ii), insofar as inspection under this Rule is triggered by a request from the Defence. It could be an ongoing process which may not necessarily impact on the scheduling of the trial date.

⁶⁸ Decision on Prosecution Motion for Leave to Amend the Indictment, 29 January 2009, paras. 24-25.

⁶⁹ Decision on Prosecution Motion for Leave to Amend the Indictment, 29 January 2009, para. 27.

⁷⁰ See Decision on Defence Motion to Dismiss Based upon Defects in the Amended Indictment, 8 April 2009, para. 37 in which the Chamber stated “[h]owever, the Chamber considers that the general reference to information “referred to herein above” appears vague. The Chamber directs the Prosecution to specify the paragraphs of the Amended Indictment the Prosecution is referring to when using this formulation.”

⁷¹ Defence Objections to the Prosecution’s Revised Pre-Trial Brief, 10 June 2009.

⁷² Prosecution Request for an Order Transferring Detained Witnesses Pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence, 28 April 2009.

⁷³ See “Dr. Ngirabatware’s Consolidated Reply to Prosecutor’s Responses Filed on March 13, 2009”, para. 4 (j) and (k), The Defence had argued that Rule 66 (A) disclosures were not complete and that the latest disclosures made on 13 March 2009 at the time, did not affect the Defence submission that it needed time to investigate Defence and Prosecution witnesses, as well as gather documentary evidence.

44. Having considered the Parties' submissions regarding the alleged lack of a statement by Witness ANAB, who is now expected to testify as a factual witness, the Chamber takes note of the Prosecution's submission that the Report prepared by Witnesses ANAB and ANAC also constitutes the statement of Witness ANAB.⁷⁴ The Defence asserts that a Report cannot constitute a statement, but does not substantiate this assertion. Thus, the Chamber denies this submission.

45. Concerning the Defence request for previous statements by Witness ANAA,⁷⁵ the Chamber considers that this issue pertains to Rule 66 (A) (ii) disclosure, and notes that Witness ANAA's statements appear to have mentioned three previous meetings with the Prosecution in two separate statements.⁷⁶ The Chamber notes that the Prosecution has not responded to this specific submission, whether or not statements were made from these alleged meetings, and it instructs the Prosecution to clarify its position. If additional statements were taken from Witness ANAA, the Chamber instructs the Prosecution to disclose them within five days.

46. The remaining disclosure issues raised by the Parties following the Chamber's 13 May 2009 Scheduling Order were not considered by the Appeals Chamber and are therefore outside the scope of its Decision. However, since the status and scale of the Prosecution's disclosure are relevant to the determination of the trial date, the Chamber will consider them.

47. With regard to the Defence request for the documents which Witness ANAC stated were used to establish the Report drafted jointly by Witnesses ANAB and ANAC, the Chamber considers that this is a matter for inspection under Rule 66(B), according to which the Defence should request for inspection of the alleged documents from the Prosecution. Moreover, as already noted, Rule 66(B) may not impact as such the scheduling of the Trial.

48. Concerning the identifying information for Witnesses ANAB, ANAC and ANAP, which the Defence claims does not comply with the general requirements regarding identifying data for Prosecution witnesses,⁷⁷ the Chamber recalls that Rule 69 (C) only provides for disclosure of the identity of the victim or witness. The Chamber notes that the Prosecution's 15 May 2009 disclosure contains a *curriculum vitae* of Witness ANAP, as well as biographical information on Witnesses ANAB and ANAC: full names, dates and places of birth, previous and current occupations, contact details, organisation membership for Witness ANAC and current occupation, and organisation membership, publications, and interviews for Witness ANAB.⁷⁸ The Prosecution's 22 April 2009 disclosure further contains identifying information for all three witnesses, *i.e.* full names

⁷⁴ Prosecutor's Response to the Defence Motion for Disclosure Pursuant to Rule 66(A)(ii) of the Rules of Procedure and Evidence, 13 March 2009, para. 3 a).

⁷⁵ The Defence initially asked for Witnesses ANAA, ANAI and ANAN's statements, the Defence limited its request to Witness ANAA's previous statements in its Reply.

⁷⁶ See statement dated 12 September 2003, disclosed on 15 May 2009, and statement dated 16 April 2003, disclosed on 13 March 2009, in which the witness says that he has met with the Prosecution before and given "testimonies."

⁷⁷ Reply, para. 15 a).

⁷⁸ Interoffice Memorandum, "More Disclosure to Ngirabatware, Augustin", 15 May 2009.

and contact details.⁷⁹ The Defence has not substantiated its allegation that this information is insufficient. Accordingly, this submission is denied.

49. With respect to Witness ANAC's alleged reference to the presence of "foreigners" at the Ministry of Planning in his statement, and to the allegation that Witness ANAN's statement contains new allegations, the Chamber considers that these matters are best left for the cross-examination of Witness ANAC.

50. Regarding the Defence submission that it has not received the CD-ROMs disclosed on 15 May 2009 by the Prosecution, the Chamber notes that the Defence has since been given a copy of the CD-ROMs by the Registry.⁸⁰

51. With respect to the exhibits and the exhibit list, the Chamber notes that after the filing of the Reply, and upon the Chamber's instructions of 18 May 2009⁸¹ and 2 June 2009,⁸² the Prosecution filed an exhibit list and exhibits in Annex II to its revised Pre-Trial Brief,⁸³ as well as clarifications,⁸⁴ and considers that this issue is now moot.

52. As to the missing French translation of Witness ANAL's statement, the Chamber notes that Witness ANAL's statement was filed in English on 8 May 2009. With respect to the documents disclosed on 15 May 2009 and submitted either in French or in Kinyarwanda, the Chamber notes that the Prosecution indicated that the Kinyarwanda documents are being translated. The Chamber recalls Article 31 of the Statute and Rule 3 (A) of the Rules providing that the working languages of the Tribunal are English and French. Thus, the Chamber considers that the Defence should be able to carry out its investigations on the basis of documents filed in one of the working languages of the Tribunal as it is composed of a bilingual team and that members of its team are also able to understand Kinyarwanda. However, the Chamber urges the Registry to complete translations of the documents requested as soon as possible.

53. Concerning Rule 68 disclosure obligation, the Chamber notes that this obligation is continuous on the part of the Prosecution and may also be triggered when the Defence makes a *prima facie* showing that the Prosecution possesses exculpatory material.⁸⁵ The Chamber reminds the Prosecution to continue to fulfil this obligation as and when such documents are discovered.

54. Regarding the Defence submission on the alleged deficiencies in the Prosecution witness list, the Chamber recalls that it rejected this submission as general, and lacking

⁷⁹ Confidential Annex C for Prosecutor's Response to the Defence Objections, Pursuant to Rule 73 *bis*, to the Prosecution's Pre-Trial Brief, 22 April 2009.

⁸⁰ See Proof of Service signed by Lead Counsel David Thomas, 2 June 2009.

⁸¹ Chamber's Inter-office Memorandum to the Parties, dated 18 May 2009.

⁸² Decision on Defence Motion Objecting to Prosecution's Pre-Trial Brief, 2 June 2009.

⁸³ The Prosecutor's Revised Pre-Trial Brief, 25 May 2009 with annexes I to III, respectively the List of Intended Prosecution witnesses, the List of Exhibits and Exhibits, the Notice to Admit Facts; *See also* Decision on Defence Motion Objecting to the Prosecution's Pre-Trial Brief, 2 June 2009, para. 29.

⁸⁴ Prosecution's Clarifications to Revised Pre-Trial Brief Made Pursuant to Court Order Dated 2 June 2009 and Rule [73 *bis* (B)] of the Rules of Procedure and Evidence, 8 June 2009.

⁸⁵ See Decision on Ngirabatware's Motion for Disclosure Pursuant to Rule 68, 25 March 2009, para. 4.

specificity, in its decision of 2 June 2009.⁸⁶ The issue remains unsubstantiated and the submission is rejected.

55. Lastly, with respect to the Defence allegation that the Prosecution added a witness to its proposed witness list without seeking leave to vary its witness list, the Chamber reminds the Defence that Rule 73 *bis* (E) requires the Prosecutor to seek leave to amend its witness list from the Chamber after the start of trial, not before.

56. The Chamber has fully considered the totality of the issues raised in the Parties' submissions, including submissions made before the Impugned Decisions were rendered and before the Appeals Chamber. The Chamber has borne in mind the balance between a fair and speedy trial, and the rights of the accused person to prepare for trial, and considers that none of the reasons advanced by the Defence would justify delaying the start of trial until December 2009, as the Defence requests. The Chamber notes that besides translation issues that should not prevent the conduct of investigations only the disclosure of any additional statements by Witness ANAA, if they exist, and the Defence's newly filed Objections to the Prosecution's Pre-Trial Brief are pending issues. The Chamber does not consider that the current pending pre-trial matters are of such a nature as to delay the start of the case for an additional six months. The Chamber also recalls that in certifying the Decision to appeal, it underscored "that pre-trial matters should continue to be addressed pending the outcome of the appeal in order to have the case ready for trial."⁸⁷ The Chamber further notes that, according to the Defence, its investigations started mid-February,⁸⁸ almost four months ago, and that the Defence team was fully constituted on 1 June 2009. In addition, the Chamber reminds the Defence that the investigations regarding the Defence case need not be fully completed by the start of trial. Moreover, it will allow for a break not exceeding two months between the Prosecution case and the Defence case, during which the Defence investigations may continue.

57. Taking into account all of the above, the Chamber has considered and determined that the date of 3 August 2009 will afford the Defence objectively adequate time to prepare for the presentation of the Prosecution's case in a manner consistent with the rights of the Accused. Two months and two weeks will have been added to the initial scheduled date of 18 May 2009, and the Defence will have had between five and six months from the start of its investigation to investigate and prepare for trial.⁸⁹

FOR THE ABOVE REASONS, THE TRIBUNAL

ORDERS the trial to start on 3 August 2009;

⁸⁶ Decision on Defence Motion Objecting to the Prosecution's Pre-Trial Brief, 2 June 2009, para. 74.


⁸⁷ Decision on Defence Motion for Certification to Appeal the Trial Chamber's Decision of 25 March 2009 on Defence Motion to Vary Trial Date, 15 April 2009, para. 21.


⁸⁸ Defence Submission, para. 16.

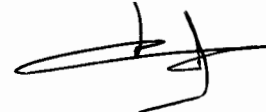
⁸⁹ See Defence Submission, paras. 16, 17.



Arusha, 12 June 2009


William H. Sekule
Presiding Judge


Solomy Balungi Bossa
Judge


Mparany Rajohnson
Judge

[Seal of the Tribunal], TPIR

