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UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Mr. Adama Dieng

Date: 31 July 2009

THE PROSECUTOR
v.
DOMINIQUE NTAWUKULILYAYO

Case No. ICTR-05-82-T

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**DECISION ON URGENT DEFENCE MOTION FOR POSTPONEMENT OF
DEADLINES FOR FILING OF PRE- DEFENCE BRIEF AND THE OPENING OF
THE DEFENCE CASE**

Rule 54 of the Rules of Procedure and Evidence

Office of the Prosecutor:

Charles Adeogun-Phillips
Ibukunolu Alao Babajide
Thembile Segoete
Ndeye Marie Ka

Counsel for the Defence:

Maroufa Diabira
Dorothee Le Fraper du Hellen

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INTRODUCTION

1. On 12 May 2009, following a Status Conference on 4 May 2009, the Chamber ordered that the Defence case should commence on 14 September 2009. The Chamber noted the Defence oral submission that the earliest possible date it could commence its case was 1 September 2009.¹

2. On 26 May 2009, following a Pre-Defence Conference held pursuant to Rule 73 *ter* of the Rules of Procedure and Evidence ("Rules"), the Chamber ordered, the Defence to file, by 7 August 2009:

- (i) a pre-Defence brief including a list of witnesses the Defence intends to call to testify with the name or pseudonym of each witness, a summary of facts upon which each witness will testify, the points in the indictment as to which each witness will testify and the estimated length of time required for each witness;
- (ii) admissions of facts not in dispute;
- (iii) a list of exhibits the Defence intends to offer; and
- (iv) copies of witness statements of each witness whom it intends to call.

The Chamber further ordered the Defence to file, by 24 August 2009, any motions for the admission of written statements in *lieu* of oral testimony under Rule 92 *bis* or for the transfer of detained witnesses under Rule 90 *bis*.²

3. On 21 July 2009, the Defence filed a motion requesting the postponement of the aforementioned deadlines set by the Chamber during the Pre-Defence Conference. In addition, the Defence requests that commencement of the Defence case be delayed.³ The Defence does not specify which dates it considers the deadlines should be postponed to.

4. On 27 July 2009, the Prosecution filed its response submitting that the Defence claims regarding the basis for the scheduling of the Defence case in September are unsupported by the facts. The Prosecution acknowledges that notwithstanding this, it is within the Chamber's discretion to decide how a case is conducted and urges the Chamber to issue a scheduling order that is just.⁴

¹ *Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Scheduling Order Regarding Preparation For and Commencement of the Defence Case, 12 May 2009 ("Scheduling Order"). See also, *Ntawukulilyayo*, T. 4 May 2009, pp. 3, 5-6.

² *Ntawukulilyayo*, T. 26 May 2009, pp. 1-4.

³ *Ntawukulilyayo*, Case No. ICTR-05-82-T, "Requete en urgence de la Defense aux fins de report des delais fixes pour le depot du memoire prealable au process de la Defense et le debut de la presentation de la prevue de la Defense", 21 July 2009 ("Motion").

⁴ *Ntawukulilyayo*, Prosecution's Response to Requete en urgence de la Defense aux fins de report des delais fixes pour le depot du memoire prealable au process de la Defense et le debut de la presentation de la prevue de la Defense, 27 July 2009 ("Prosecution Response").

DISCUSSION

5. A Trial Chamber has considerable discretion with respect to the conduct of proceedings before them, including in the scheduling of trials.⁵ This discretion however must be exercised in accordance with the obligation imposed on Trial Chambers by Articles 19 and 20 of the Tribunal's Statute to ensure that a trial is fair and expeditious.⁶ In particular, Article 20 (4) (b) of the Statute provides the accused with the right to adequate time and facilities for the preparation of his or her defence. As held by the Appeals Chamber, it is not possible to set a standard of what constitutes adequate time to prepare a defence.⁷ The length of the preparation period depends on a number of factors specific to each case, such as, for example, the complexity of the case, the number of counts and charges, the gravity of the crimes charged, the individual circumstances of the accused, the status of the Prosecution's disclosure, and the staffing of the Defence team. A comparison with other cases is therefore of very limited, if any, assistance.⁸

6. The Defence submits that the current deadlines ordered by the Chamber are not compatible with the rights of the Accused as guaranteed by Articles 19 (1) and 20 (1), (2) and (4) (b) of the Statute.⁹ It submits that if the Chamber retains its 7 August 2009 deadlines for the filing of various documents and if the Defence case commences on 14 September 2009, the rights of the Accused could be seriously compromised.¹⁰

7. The Defence further submits that the short time frame of this trial was dictated by the completion strategy of the Tribunal "previously set by the United Nations Security Council at 31 December 2009" and "budgetary considerations strictly foreign to the rights of the Accused."¹¹

8. In addition, the Defence submits that the interval between the Prosecution and Defence case, being three and a half months, is far less than that of other recent single Accused cases before the Tribunal.¹² In addition, the Defence submits it is unable to establish its final list of witnesses and collect statements from them because despite its constant efforts, it has not been able to complete its overseas missions. The Defence submits that the organization of

⁵ See for example, *Augustin Ndirabatware v. The Prosecutor*, Case No. ICTR-99-54-A, Decision on Augustin Ndirabatware's Appeal of Decisions Denying Motions to Vary Trial Date (AC), 12 May 2009 ("*Ndirabatware Decision*") paras. 8, 22.

⁶ Article 19 (1) of the Statute provides that "Trial Chambers shall ensure 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 and due regard for the protection of victims and witnesses." Article 20 sets out the rights of the accused.

⁷ *Ndirabatware Decision*, para. 28

⁸ *Ibid.*

⁹ Motion, paras. 2-5, 22, 25. Article 20 (1) of the Statute provides that "All persons shall be equal before the International Tribunal for Rwanda."; Article 20 (2) provides that "In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute."; Article 20 (4) (b) 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: (b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;".

¹⁰ Motion, para. 21.

¹¹ Motion, paras. 6, 9.

¹² Motion, paras. 12-17.

these missions involves factors beyond its control such as the frequency and availability of transport and witnesses.¹³ The Defence further states that it has been limited by the system of fee capping for Defence counsel.¹⁴

9. First, while the Chamber notes the Defence submissions regarding the method of payment of Defence Counsel, that it has been unable to complete certain missions and that the current deadlines are incompatible with the rights of the Accused, the Defence has not specifically demonstrated precisely how these factors compromise his fair trial rights. Moreover, the Chamber does not consider that these factors have in fact compromised the fair trial rights of the Accused.

10. Second, the Defence submission that the Tribunal's Completion Strategy played any part in the determination of the judicial timetable for this case is unsubstantiated by the facts and rejected by the Chamber. In exercising its discretion to schedule the commencement of the Defence case for 14 September 2009, the Chamber took into consideration the Defence submissions that due to late disclosures by the Prosecution, the replacement of Lead Defence Counsel, and the time required to meet with and arrange for the transfer of witnesses, the earliest possible date it could commence its case would be on 1 September 2009.¹⁵ The Chamber further recalled its obligation to ensure a fair and expeditious trial pursuant to Articles 19 and 20 of the Statute.

11. Third, with regard to the Defence submission that the interval between the Prosecution and Defence case in this trial may have been shorter than that for other recent single Accused cases, the Chamber recalls that there is no provision in the Statute or the Rules requiring the interval between all single Accused cases to be identical. Indeed, each scheduling order should be based on the circumstances of the case and the accused's fair trial rights, rather than on a comparison with other cases.¹⁶ Accordingly, taking into consideration the fact that: (i) this is a single accused case with only three counts, of which one is pleaded in the alternative;¹⁷ (ii) the Prosecution called 12 witnesses over 12 trial days; and (iii) the Defence team is staffed with four lawyers,¹⁸ the Chamber considers that an interval of three and a half months between the Prosecution and Defence case is consistent with the Accused's fair trial rights, in particular, his right to adequate time to prepare his defence.

¹³ Motion, paras. 18-20.

¹⁴ Motion, paras. 23-24.

¹⁵ Scheduling Order, and *Ntawukulilyayo*, T. 4 May 2009, pp. 2-4, 6.

¹⁶ See *supra* para. 5.

¹⁷ The Accused is charged with Genocide (Count 1), or in the alternative, Complicity to Commit Genocide (Count 2), and Direct and Public Incitement to Commit Genocide (Count 3).

¹⁸ In addition to Lead and Co-Counsel, the Defence team includes two lawyers who are Legal Assistants.

12. In light of the above, the Chamber finds that the Defence has failed to establish that the current judicial timetable causes the Accused material prejudice.

FOR THESE REASONS, the Chamber

DENIES the Defence Motion in its entirety.

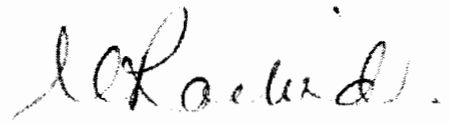
31 July 2009



Khalida Rachid Khan
Presiding Judge



For and on behalf of
Lee Gacuiga Muthoga
Judge



For and on behalf of
Aydin Sefa Akay
Judge

