



UNITED NATIONS  
NATIONS UNIES

ICTR-98-44D-T  
08-042010  
(3759-354)

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LWAH

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Solomy Balungi Bossa, Presiding  
Bakhtiyar Tuzmukhamedov  
Mparany Rajohnson

**Registrar:** Adama Dieng

**Date:** 8 April 2010

**THE PROSECUTOR**

v.

**Callixte NZABONIMANA**

*Case No. ICTR-98-44D-T*

JUDICIAL RECORDS ARCHIVES  
2010 APR - 8 1 P 20  
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**DECISION ON NZABONIMANA'S EXTREMELY URGENT MOTION FOR  
POSTPONEMENT OF THE COMMENCEMENT OF THE DEFENCE  
*Rules 54 & 73 (A) of the Rules of Procedure and Evidence***

**Office of the Prosecution**

Paul Ng'arua  
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## INTRODUCTION

1. On 30 March 2010, the Defence filed a Motion requesting that the Trial Chamber postpone the commencement of its case for two months so that it can complete its investigations on the basis of the information disclosed by the Government of France ("France") relating to the alibi of the Accused.<sup>1</sup>
2. On 31 March 2010, the Prosecution filed its Response.<sup>2</sup>
3. On 6 April 2010, the Defence filed its Reply.<sup>3</sup>
4. The Trial Chamber now decides the Motion pursuant to Rule 73 (A) of the Rules, on the basis of the written briefs filed by the Parties.

### *Submissions of the Parties*

5. The Defence requests the postponement of the start of its case on the basis of the information it received from France on 16 March 2010 which the Defence claims is highly relevant to Nzabonimana's alibi for the period between 6 and 12 April 1994.<sup>4</sup> The Defence seeks to expand its investigations on the basis of this information, interview persons named in the documents, and possibly obtain the attendance in court of some of these persons in support of Nzabonimana's alibi.<sup>5</sup>
6. The Defence contends that the evidence obtained from France may dramatically reduce the length of the Defence case with regards to the alibi.<sup>6</sup> In refuting Prosecution evidence about this period, the Defence argues it will be able to streamline the Defence case overall.<sup>7</sup>

<sup>1</sup> *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Extremely Urgent Motion for Postponement of the Commencement of the Defence ("Motion"), 30 March 2010.

<sup>2</sup> *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Extremely Urgent Motion for Postponement of the Commencement of the Defence ("Response"), dated 31 March 2010.

<sup>3</sup> *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Reply to Prosecutor's Response to Nzabonimana's Extremely Urgent Motion for Postponement of the Commencement of the Defence ("Reply"), 6 April 2010.

<sup>4</sup> Motion, para. 7.

<sup>5</sup> Motion, paras. 5 & 8.

<sup>6</sup> Motion, para. 11.

<sup>7</sup> Motion, para. 13.

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7. In its response, the Prosecution submits that the Defence is requesting an extreme remedy which is not warranted. It stresses that the Defence presumes that the burden is on it to prove Nzabonimana's alibi beyond a reasonable doubt, when in fact the burden is on the Prosecution to prove that a Defence alibi cannot be true,<sup>8</sup> The Prosecution cites the Appeal Judgement in *Zigiranyirazo* in support of its position.<sup>9</sup>
8. The Prosecution also submits the Accused is presumed to know his alibi and whereabouts on the relevant dates and therefore the new documentation provided by France does not warrant the type of postponement requested by the Defence.<sup>10</sup>
9. Moreover the Prosecution submits that more suitable and appropriate remedies are available to the defence.<sup>11</sup> The Defence has not demonstrated why its investigations cannot proceed at the same time that the testimonies of witnesses on other issues are being heard.<sup>12</sup>
10. The Prosecution notes that when this same issue was raised by the Defence at the Pre-Defence Conference held on 5 March 2010 the Trial Chamber reminded the Defence that pursuant to Rule 73 *ter* (E) "*as and when the information became available [the Defence] can always apply to the Chamber to vary its witness list*"<sup>13</sup>
11. Finally, the Prosecution raises no objection to the postponement of the testimonies of the alibi witnesses such as T9, T5, and T7 who are currently scheduled to testify on day 3. The Prosecution states that the order of appearance may be modified to accommodate the Defence, by allowing the alibi witnesses to testify at a later date.<sup>14</sup> The Prosecution recalls that the Trial Chamber has previously allowed the postponement of the testimony of certain Prosecution witnesses when the Defence has shown good cause.<sup>15</sup>

<sup>8</sup> Response, paras. 9-12.

<sup>9</sup> Response, para. 6. In the *Zigiranyirazo* Appeals Judgement, the Appeals Chamber held that [...] *An Accused does not bear the burden of proving his alibi beyond reasonable doubt. Rather "[h]e must simply produce the evidence tending to show that he was not present at the time of the alleged crime" or, otherwise stated, present evidence "likely to raise reasonable doubt in the Prosecution case"*... *Zigiranyirazo* Appeals Judgement, para. 17

<sup>10</sup> Response, paras. 13,16.

<sup>11</sup> Response, para. 17.

<sup>12</sup> Response, para. 18.

<sup>13</sup> Responses, paras 19-21, *see also* Transcript of 5 March 2010, [Open Session], p. 20.

<sup>14</sup> Response, para. 22.

<sup>15</sup> Response, para. 23, *see also* *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Nzabonimana's Motion for Stay of Proceedings; Reconsideration and/or Certification of Decision Rendered on 29 October 2009; and Reconsideration and/or Certification of the Decision Rendered on 30 October 2009.

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12. In its reply, the Defence states that the Prosecutor's submission on "onus or burden of proof in assessment of alibi" is irrelevant.<sup>16</sup> The Defence asserts that a "brief postponement" will afford it an opportunity to obtain and assess the quality and content of the new evidence as well as to confirm Nzabonimana's presence at the French Embassy in Kigali between 6 and 12 April 1994.<sup>17</sup> The Defence contends that it currently has a new lead pertaining to the investigations of certain matters of Nzabonimana's defence.<sup>18</sup>
13. The Defence notes that its case is currently scheduled to close on 4 June 2010, therefore as an alternate remedy, the Defence requests that the close of its case be postponed until after 4 June 2010 to allow it to conclude its investigations on alibi during the summer and then present its alibi evidence before the end of the summer.<sup>19</sup>

## DELIBERATIONS

### *Applicable Law*

14. Pursuant to Rule 54, at the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct to the trial.
15. Trial Chambers enjoy considerable discretion in the conduct of the proceedings, including in the scheduling of the trials.<sup>20</sup> "However, this discretion finds its limitation in the obligation imposed on Trial Chambers by Articles 19 and 20 of the Tribunal's Statute ("Statute") to ensure that a trial is fair and expeditious."<sup>21</sup>

<sup>16</sup> Reply, paras. 3 & 4.

<sup>17</sup> Reply, paras. 5, 6, 7 & 9.

<sup>18</sup> Reply, paras. 18 – 19.

<sup>19</sup> Reply, para. 24.

<sup>20</sup> *Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-A, Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009, para. 22; see also *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, 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, para. 16.

<sup>21</sup> *Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-A, Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009, para. 22.

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16. The Trial Chamber also recalls that, although a Chamber must ensure that proceedings do not suffer undue delay, it must strike a balance between ensuring that a trial is conducted in an expeditious manner and the right of the accused to a fair trial, and in particular his right to have adequate time to prepare his defence.<sup>22</sup> The Appeals Chamber in *Ngirabatware* held that “that it is not possible to set a standard of what constitutes adequate time to prepare a defence. 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 and scale of the Prosecution’s disclosure, and the staffing of the Defence team [...]”<sup>23</sup>

*Postponement of the Commencement of the defence Case*

17. The Trial Chamber recalls the Appeals Chamber finding in *Ngirabatware* that “[t]ime and resource constraints exist in all judicial institutions and it is legitimate for a Trial Chamber to ensure that proceedings do not suffer undue delays and that the trial is completed within a reasonable time.”<sup>24</sup> Thus the Trial Chamber must balance the right of the Accused to adequate time to prepare his defence with the need to ensure expeditious proceedings.

18. The Trial Chamber notes that the Defence received information from France recently, which may be relevant to an alibi Defence, and that the Defence may therefore wish to extend its investigations on the basis of this information. Yet, as the Prosecution notes in its Response and the Defence appears to concede in its Reply<sup>25</sup>, postponement of the Defence case is not the only remedy available at this stage of the proceedings. The Trial Chamber considers that in the circumstances, alternative and appropriate remedies are available to the Defence such as the rescheduling of the testimony of the alibi witnesses

<sup>22</sup> *Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-A, Decision on Augustin Ngirabatware’s Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009, para. 31: “Time and resource constraints exist in all judicial institutions and it is legitimate for a Trial Chamber to ensure that the proceedings do not suffer undue delays and that the trial is completed within a reasonable time. However, the Appeals Chamber stresses that these considerations should never impinge on the rights of the parties to a fair trial.”

<sup>23</sup> *Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-A, Decision on Augustin Ngirabatware’s Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009, para. 28.

<sup>24</sup> *Augustin Ngirabatware v. Prosecutor*, Case No. ICTR-99-54-A, Decision on Augustin Ngirabatware’s Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009, para. 31.

<sup>25</sup> In its Reply, the Defence alternatively suggests the postponement of the evidence regarding the alibi of the Accused until later in the summer.

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to the last two weeks of the Defence case. It further notes that the Defence case is not scheduled to close until 4 June 2010 which will allow the Defence adequate time to conduct its investigations. Accordingly, the Trial Chamber directs the Defence to reschedule the testimony of its alibi witnesses to the last two weeks of its case.

19. The Trial Chamber also recalls that on 14 December 2009, the Defence conveyed to this Trial Chamber that it was entirely possible to complete the Prosecution's case and transition directly into the Defence case stating that "there's no difficulty for us as far as that is concerned."<sup>26</sup>

20. In light of the alternative remedies available to the Defence, the Trial Chamber concludes that the defence has not established good cause for postponing the commencement of its case.

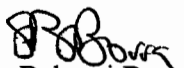
**FOR THESE REASONS, THE CHAMBER**

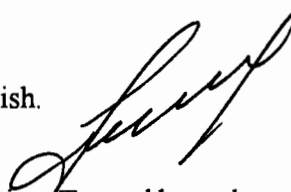
**DENIES** the Motion in its entirety.

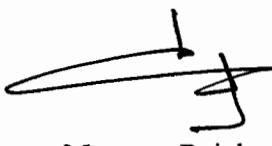
**ORDERS** the Defence to reschedule the testimony of its alibi witnesses to the last two weeks of the Defence case.

**ORDERS** the Defence to file a revised order of appearance of its witnesses by close of business on 9 April 2010.

Arusha, 8 April 2010, done in English.

  
Solomy Balungi Bossa  
Presiding Judge

  
Bakhtiyar Tuzmukhamedov  
Judge

  
Mparany Rajohnson  
Judge

[Seal of the Tribunal]



<sup>26</sup> Transcript of 14 December 2009, p. 5.