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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

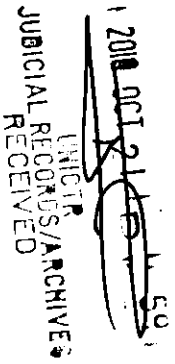
OR: ENG

TRIAL CHAMBER III

Before Judges: Florence Rita Arrey, Presiding
Bakhtiyar Tuzmukhamedov
Aydin Sefa Akay

Registrar: Adama Dieng

Date: 21 October 2010



THE PROSECUTOR
v.
GREGOIRE NDAHIMANA

Case No. ICTR-2001-68-T

DECISION ON DEFENCE MOTION TO RECONSIDER SCHEDULING ORDER

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Introduction

1. On 24 August 2010, the Defence filed a motion requesting a delay in the start of trial. [1]

2. The trial commenced, and the Prosecution opened its case, on 6 September 2010.

3. On 14 September 2010, the Trial Chamber held an informal meeting with the parties ("14 September meeting") to discuss matters related to the Trial schedule.

4. At that meeting the parties amicably agreed to a mutually satisfactory provisional Trial schedule acceptable to the Trial Chamber. Concretely, they settled that the Prosecution case would continue on 1 November 2010 and close by 12 November 2010. They additionally decided that the Defence case would start on 1 December 2010, that the first session of the Defence case would then continue until 14 December 2010, and that the Trial Chamber would schedule a further session to close the Defence case, at that time.

5. The Trial Chamber recalled this agreement when adjourning the first Trial Session on 16 September 2010. Neither party raised an objection at that time.[2]

6. On 20 September 2010, the Trial Chamber issued a Scheduling Order ("Impugned Order") reflecting the calendar agreed on.[3]

7. On 4 October 2010, the Defence filed a motion requesting that the Trial Chamber partially reconsider the Impugned Order ("Motion").[4] On 5 October 2010, the Prosecution filed a response objecting to the Defence request ("Response").[5]

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[1] *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Confidential Urgent Defence Motion for Adjournment of the Hearing of the Trial Pursuant to Article 20 (2) and (4) of the Statute of the ICTR and Request for Convening a Status Conference, 24 August 2010.
[2] T. 16 September 2010, p. 31.
[3] *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Scheduling Order, 20 September 2010.

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Submissions of the Parties

8. Citing a number of prior ICTR Trial Chamber decisions, and Articles 19 and (20) (4) (b) of the Statute, as well as Rule 73 *ter*, the Defence submits that the Chamber has the inherent power to reconsider its decisions under particular circumstances and where the interest of justice so require, particularly those involving fair trial rights.[6] The Defence requests that the Trial Chamber reconsider the Impugned Order in this case, and postpone the start of the Defence case until a date later than the one currently scheduled, 1 December 2010. According to the Defence, it is established practice at the Tribunal to allow the Defence two to four months after the close of the Prosecution case to prepare its own case. The Defence asks that it be granted "at least four months" following the close of the Prosecution case before opening its case.[7]

9. In seeking reconsideration of the Impugned Order, the Defence refers to the 14 September meeting and notes that Defence counsel assented to a 1 December 2010 start of the Defence case "in good faith."[8] However, the Defence states that it had not had an opportunity to consult with the Accused and Defence investigators prior to the 14 September meeting. Following subsequent consultations, Defence Counsel discovered that the 1 December 2010 date for the start of the Defence case was unrealistic.[9]

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[4] *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Defence Motion for Reconsideration of the Partial Decision on the Scheduling Order issued on 20 September 2010, 4 October 2010.
[5] *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Prosecutor's Response to Defence Motion for Reconsideration of the Partial Decision on the Scheduling Order issues (sic) on 20 September 2010, 5 October 2010.
[6] Motion, paras 14-16.
[7] Motion, paras 17-19, 33, 34, Prayer.
[8] Motion, para. 4.
[9] Motion, paras. 2-3, 22.

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10. More concretely, the Defence argues that Presidential elections in Rwanda impeded its investigations;[10] that the Defence cannot "effectively and thoroughly" analyse the Prosecution evidence until the Prosecution has closed its case;[11] and that the Defence was required to revise its strategy following the evidence of Prosecution witnesses during the first session of the Trial.[12] The Defence also submits that the current schedule does not allow sufficient time for the filing of Rule 98 *bis* motion;[13] and that it cannot properly fulfil its obligations under Rule 73 *ter* until it has received a Decision from the Trial Chamber on its Rule 98 *bis* Motion.[14] The Defence further observes that the Witness and Victims Support Section ("WVSS") requires 8 weeks notice of the witnesses the Defence intends to call at trial.[15]

11. The Defence also points to the principle of equality of arms and submits that it should be granted a period of time for the preparation of its case comparable to the one accorded to the Prosecution.[16]

12. While the Prosecution, in its Response, accepts that a Trial Chamber may reconsider its decisions,[17] it argues that the Defence has failed to make a case that reconsideration is warranted in these circumstances.[18] In particular, it dismisses the Defence contention that it can only assess the Prosecution evidence once the Prosecution has closed its case noting that Prosecution disclosure including the Indictment, Pre-Trial

[10] Motion, para. 22.
[11] Motion, para. 17.
[12] Motion, para. 28.
[13] Motion, para. 17.
[14] Motion, paras. 30-31.
[15] Motion, para. 33.
[16] Motion, paras. 19, 25.
[17] Response, paras. 2-3.
[18] Response, para. 4.

Brief, and prior witness statements has served to put the Defence on notice of the Prosecution's case against the Accused.[19]

13. The Prosecution submits that Defence counsel should have sought direction from the Accused before making the commitments it made at the 14 September meeting, and that the Defence was aware of the exigencies of Rules 98 *bis* and 73 *ter* at the time it agreed to the 1 December 2010 start date for the Defence case.[20]

14. The Prosecution concludes that the Defence has failed to meet the standards for reconsideration, that the Prosecution is ready to proceed on 1 December 2010 as currently scheduled, and that it will be ready to proceed at any date decided upon by the Trial Chamber.[21]

Applicable law

Reconsideration

15. As this Tribunal has acknowledged in *Karemera*, it is the established jurisprudence of the Tribunal that Trial Chambers have the "inherent power" to reconsider their own decisions, under the following "exceptional" circumstances:

> a. when a new fact has been discovered that was not known by the Trial Chamber at the time it made its original decision;
> b. where there has been a material change in circumstances since it made its original decision;
> c. where there is reason to believe that its original decision was erroneous, or constituted an abuse of power that resulted in an injustice.[22]

[19] Response, paras. 5-6.
[20] Response, paras. 9, 11-12.
[21] Response, paras 13-14.
[22] See e.g., *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera*, Decision on Reconsideration of Protective Measures for Prosecution Witnesses, 30 October 2006, para. 2; *Karemera*, Decision on Reconsideration of Admission of Written Statements in lieu of Oral Testimony and

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Statute

16. Article 20 (4) states: In the determination of any charges against the accused [...] 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. [...]

Rules

17. Rule 98 *bis* states as follows:

> If after the close of the case for the prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment, the Trial Chamber, on motion of an accused filed within seven days after the close of the Prosecutor's case-in-chief, unless the Chamber orders otherwise, or *proprio motu*, shall order the entry of judgement of acquittal in respect of those counts.

18. Rule 73 *ter* reads:

> (B) At [a Pre-Defence] Conference, the Trial Chamber or a Judge, designated from among its members, may order that the Defence, before the commencement of its case but after the close of the case for the prosecution, file the following:
>
> i) Admissions by the parties and a statement of other matters which are not in dispute;
>
> ii) A statement of contested matters of fact and law;
>
> iii) A list of witnesses the Defence intends to call. (...)
>
> (iv) A list of exhibits the Defence intends to offer in its case, stating where possible whether or not the Prosecutor has any objection as to authenticity.
>
> The Trial Chamber or the Judge may order the Defence to provide the Trial Chamber and the Prosecutor with copies of the written statements of each witness whom the Defence intends to call to testify. [...]

Admission of the Testimony of Prosecution Witness GAY, 28 September 2007, paras. 10-11; *Karemera*, Decision on Motion for Partial Reconsideration of the Decision on Joseph Nzirorera's Tenth Notice of Rule 68 Violation, 16 April 2008, para. 5.

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Deliberations

19. At the outset, the Trial Chamber deems unacceptable the argument of Defence Counsel that it had not consulted with the Accused and its investigators prior to making commitments regarding the trial schedule at the 14 September meeting. The Trial Chamber observes that while the initial undertaking regarding the trial calendar may have taken place in the context of an informal meeting, the Presiding Judge set out the agreement for the record on 16 September 2010,[23] and that the Defence did not object at that time. If Defence Counsel did not consult with the Accused and investigators before addressing proposals regarding the trial calendar, they should have done so. The Trial Chamber recalls the following relevant provisions of the Code of Professional Conduct for Defence Counsel:

> Article 6:Diligence
>
> Counsel must represent a client diligently in order to protect the client's best interests [...]
>
> Article 7: Communication
>
> Counsel must keep a client informed about the status of a matter before the Tribunal in which the client is an interested party [...].[24]

20. The failure to abide strictly by these provisions, whether deliberate or negligent, delays the proceedings and cannot constitute a new fact or circumstance giving rise to a Trial Chamber's reconsideration of a prior decision. Consequently, the Trial Chamber finds that the Defence has not approached the threshold, as set out above, for reconsideration of the Impugned Order.

[23] T. 16 September 2010, p. 31.
[24] ICTR, 8 June 1998.

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21. With respect to the Defence contention that the principle of equality of arms has been violated because it has not had been accorded the same period of time to prepare its case as the Prosecution, the Trial Chamber recalls that the Appeals Chamber addressed this same argument in *Ngirabatware* and found that it was:

> ... ill-founded; the issue is not whether the parties had the same amount of time to prepare their respective cases, but rather if either party, and in particular the accused, is put at a disadvantage when presenting its case.[25] The principle of equality of arms [...] should not be interpreted to mean that the Defence is entitled to the exact same means as the Prosecution.[26]

22. In the Trial Chamber's opinion the Defence has merely referred to disparity in the amount of time the Prosecution had to prepare its case as the basis for the conclusion that the Defence had not had the benefit of equality-of-arms, but failed to show how it was prejudiced.

23. The Trial Chamber reminds the Defence that it should take seriously the word of caution that this Chamber uttered in para. 5 of the Scheduling Order of 20 September 2010.

24. However, the Defence Counsel lack of diligence notwithstanding, the Trial Chamber itself is bound by the imperatives of Article 20 of the Tribunal's Statute. The Trial Chamber notes that in the discussion regarding the proposed trial calendar, the

[25] *Karemera et al.* Decision of 30 January 2009, para. 29; *The Prosecutor v. Elie Ndayambaje et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March 2007 Concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007, para. 18; *Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005 ("*Oric"}* Decision"), para. 7, citing *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 48. *See also Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-PT, Decision on the Accused Naletilić's Motion to Continue Trial Date, 31 August 2001, para. 7.

[26] *Prosecutor v. Ngirabatware*, ICTR-99-54-A, Decision on Agustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date,12 May 2009, para. 28.

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Defence did not refer to the possibility of filing a motion for Judgement of Acquittal, and that the Prosecution did not raise the issue of Defence obligations pursuant to Rule 73 *ter*.

25. However, these oversights cannot cancel the rights and obligations of the parties, and the current schedule would not permit the Defence to file a Motion pursuant to Rule 98 *bis* should it wish to do so, or allow it to fulfil potential obligations under Rule 73 *ter*. The Trial Chamber further notes that discussions regarding the trial schedule in this case took place while the Prosecution case was in full swing rather than towards its close. Taking these factors together the Chamber concludes it ought to, in the interests of justice, amend the previously approved schedule.

26. In determining whether to grant the Defence request for an adjournment of at least four months following the close of the Prosecution case, the Trial Chamber considers the following factors:

a) that the case involves a single accused;
b) that while the accused faces grave charges, and approximately 20 factual allegations, the allegations are straightforward, in some instances overlap, and cover a period of just eight days;
c) that the Defence intends to introduce alibis for those eight days;
d) that the Defence team is fully staffed;
e) that the individual circumstances of the accused are not such as to require a particular delay;
f) that while the elections campaign in Rwanda may have impeded defence investigations to a certain degree, the Defence has not substantiated its claims on this issue, and the elections are now over;
g) that the Defence has not challenged the notice of particulars provided by the Prosecution in its foundational documents;

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h) that the Defence has not alleged that Prosecution disclosure was untimely.[27]

27. Having taken these factors, as well as the Judicial Calendar, into account, the Trial Chamber concludes that a two month adjournment following the close of the Prosecution case will be granted to ensure that the rights of the Accused, pursuant to Article 20 (4) (b), are given proper effect by the Trial Chamber.

ACCORDINGLY, THE CHAMBER

GRANTS the Defence Motion in part; a precise date for the opening of the Defence case will be provided before the close of the Prosecution case.

Arusha, 21 October 2010, done in English.

Florence Rita Arrey	Bakhtiyar Tuzmukhamedov	Aydin Sefa Akay
Presiding Judge	Judge	Judge (Absent at the time of signature)

[Seal of the Tribunal]

[27] For guidance on the type of factors to be considered by a Trial Chamber in determining what constitutes adequate time for preparation of the defence case, see *Prosecutor v. Ngirabatware*, ICTR-99-54-A, Decision on Agustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date,12 May 2009, para. 28.

Separate Opinion of Judge Florence Rita Arrey

1. While I concur with the substance of the majority decision, I object to the tendentious tone adopted by my distinguished colleagues in drafting this decision. We do not have to remind the Defence about the Caution we gave them in a previous Decision, thus I particularly oppose the inclusion of paragraph 23.

2. I recall that the Trial began on 6 September 2010 and that the informal meeting was held one week later, meaning that the Trial was still in its initial stages. At that meeting, both parties supported an adjournment, and neither party referred to Rules 98 *bis* or 73 *ter*. The Defence is entitled to file a 98 *bis* motion should it wish to do so. Moreover, experience has shown that proper preparation of Rule 73 *ter* filings is beneficial not only to the Prosecution but also to the Trial Chamber. In conclusion while it is unfortunate that the Defence was not adequately prepared for the Informal Meeting, this does not warrant the strong language used by the majority.

Arusha, 21 October 2010, done in English.

Florence Rita Arrey
Presiding Judge

[Seal of the Tribunal]