

ICTR-98-44F-R71bis
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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: Judge Dennis C.M. Byron, Presiding
Judge Gberdao Gustave Kam
Judge Vagn Joensen

Registrar: Mr. Adama Dieng

Date: 5 May 2011

THE PROSECUTOR
v.
AUGUSTIN BIZIMANA

Case No. ICTR-98-44F-R71bis

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05-05-2011
Dennis C.M. Byron

**DECISION ON THE PROSECUTOR'S REQUEST FOR PRESERVATION OF
EVIDENCE BY SPECIAL DEPOSITION FOR A FUTURE TRIAL
(Pursuant to Rule 71bis)**

Office of the Prosecutor:

Mr. Hassan B. Jallow
Mr. Richard Karegyesa
Mr. Paul Ng'arua
Mr. Elvis Bazawule
Mr. Didace Nyirinkwaya

For the Accused:

Ms. Yitiha M. Z. Simbeye (Duty Counsel)

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INTRODUCTION

1. On 14 February 2011, the Prosecution filed a motion for the preservation of evidence by special deposition for a future trial, pursuant to Rule 71*bis* of the Rules of Procedure and Evidence.¹ The following day, the President of the Tribunal referred the matter to this Trial Chamber and instructed the Registrar to immediately appoint a Duty Counsel to represent the interests of the Accused.² On 18 February 2011, the Chamber decided to hear the Parties in writing and ordered them to file their submissions within 14 days of the appointment of a Duty Counsel, and to file any responses within three days of the filing of the submissions.³ On the same date, 18 February 2011, the Chamber granted a Prosecution request for Annex "A" of the Motion, which contains the names and pseudonyms of the proposed Prosecution witnesses, to be placed under seal.⁴

2. The Registrar appointed a Duty Counsel on 16 March 2011⁵ and the Chamber granted the Duty Counsel an extension until 6 April 2011 to file her submissions.⁶ The Prosecution filed its Further Submissions on 4 March 2011 and a response to the Duty Counsel's Submissions on 11 April 2011.⁷ Having heard the Parties, the Chamber now decides the Motion.

DELIBERATIONS

3. Pursuant to Rule 71*bis* (A), if within a reasonable time, a warrant for the arrest of an accused person has not been executed, the Prosecutor may submit a request to the President that evidence relating to the indictment be preserved for a future trial by special deposition

¹ *The Prosecutor v. Augustin Bizimana*, Case No. ICTR-98-44F-71*bis*, The Prosecutor's Request for Preservation of Evidence by Special Deposition for Future Trial (Pursuant to Rule 71 *bis*), dated 5 February 2011, filed on 14 February 2011 (the "Motion").

² *The Prosecutor v. Augustin Bizimana*, Case No. ICTR-98-44F-71*bis*, Designation of a Trial Chamber to Consider the Prosecutor's Request for Preservation of Evidence by Special Deposition for a Future Trial (Rule 71*bis* of the Rules of Procedure and Evidence), 15 February 2011.

³ *The Prosecutor v. Augustin Bizimana*, Case No. ICTR-98-44F-71*bis*, Order for Submissions, 18 February 2011 ("Order for Submissions").

⁴ *The Prosecutor v. Augustin Bizimana*, Case No. ICTR-98-44F-71*bis*, Decision on the Prosecutor's Request for an Order to Place Under Seal Annexure "A" of his Motion for Preservation of Evidence by Special Deposition for Future Trial (pursuant to Rule 71*bis*), 18 February 2011.

⁵ See *Summons to a Duty Counsel for purposes of representing the interests of Mr. Augustin Bizimana before the International Criminal Tribunal for Rwanda*, Ref. ICTR-JUD-11-5-2-11-339-mk, 16 March 2011.

⁶ *The Prosecutor v. Augustin Bizimana*, Case No. ICTR-98-44F-71*bis*, Decision on Duty Counsel's Motion for Extension of Time for Filing of Submissions, 28 March 2011; Defence Counsel's Submission as per Order of Trial Chamber III in Response to the Prosecutor's Request for the Preservation of Evidence by Special Deposition for Future Trials under Rule 71*bis*, 6 April 2011 ("Duty Counsel's Submissions").

⁷ *The Prosecutor v. Augustin Bizimana*, Case No. ICTR-98-44F-71*bis*, Prosecutor's Submissions Pursuant to Rule 71*bis* (D) of the Rules of Procedure and Evidence, 4 March 2011 ("Prosecution's Further Submissions"); and Prosecutor's Response to Defence Submissions pursuant to Rule 71*bis* (D) Filed on 6 April 2011, 11 April 2011 ("Prosecution Response").

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recorded in a proceeding conducted by a single Judge. Rule 71bis (E) provides that the Chamber may grant the Prosecutor's request if the Chamber is satisfied that:

- (i) Reasonable efforts have been made to execute the warrant of arrest;
- (ii) The execution of the warrant of arrest is not likely to take place within a reasonable time; and
- (iii) It is in the interests of justice to grant the request.

The Chamber will now assess the Parties' submissions on the basis of these criteria.⁸

Have reasonable efforts been made to execute the warrant of arrest?

4. The Prosecution submits that despite reasonable efforts made since 8 November 2001, when the Tribunal issued the first warrant for the arrest of the Accused, the warrant remains unexecuted.⁹ According to the Prosecution, Investigators from the Office of the Prosecutor (OTP), in collaboration with the International Police Organisation (INTERPOL), have "conducted intensive investigations in the search for Augustin Bizimana in several African countries" but have not yet succeeded in arresting him.¹⁰ At one point, OTP received "credible information" about Bizimana's presence in the Congo, but efforts to arrest him proved unsuccessful.¹¹ The Prosecution also submits that, despite the offer by the United States government of a reward of up to US\$ 5,000,000 for information leading to the arrest of Bizimana and other fugitives, and despite the publication of this information in various Member States of the United Nations, the warrant remains unexecuted.¹²

5. The Duty Counsel challenges the Prosecution's assertion that reasonable efforts have been made to execute the search warrant against Bizimana. She questions the bases on which specific countries were selected for the investigations; asks what investigations were actually conducted; wonders about the period of publication of the advertised reward; questions the sufficiency of the publication efforts; and submits that "efforts to apprehend the accused were not comprehensive enough."¹³ She suggests, for instance, that the Prosecution should have acted pursuant to Rule 61 (D) to invoke provisional measures to freeze Bizimana's assets.¹⁴

6. The Duty Counsel also submits that the definition of the term "reasonable efforts" need not be limited to the actual execution of the arrest warrant, but must also include the

⁸ See *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-98-44B-R71bis, Decision on the Prosecutor's Request for Preservation of Evidence by Special Deposition for a Future Trial (Pursuant to Rule 71bis), 15 March 2011.

⁹ The Motion, paras. 3-5.

¹⁰ The Motion, paras. 9-10.

¹¹ The Motion, para. 11.

¹² The Motion, para. 11.

¹³ Duty Counsel's Submissions, paras. 7-9.

¹⁴ Duty Counsel's Submissions, paras. 12-13.

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time it took to prepare the indictment as well as the events leading up to the issuance of the arrest warrant.¹⁵ She contends that the three-year gap between the confirmation of the Indictment in August 1998 and the issuance of the arrest warrant in November 2001 “is not a reasonable time” and concludes that had the arrest warrant been issued soon after the indictment, the “apprehension of the accused may have occurred.”¹⁶

7. In the Chamber's view, the Duty Counsel seems to be conflating the concepts of “reasonable time” and “reasonable efforts.” The failure to issue the arrest warrant in a timely manner does not necessarily mean that the Prosecution has not since made reasonable efforts to execute the warrant. Furthermore, even if the confirmation of the Indictment and the issuance of the arrest warrant had occurred simultaneously, there is no guarantee that this would have led to Bizimana's arrest.

8. The Chamber has considered the Prosecution's submissions and, in particular, the various steps taken by the OTP Investigators and INTERPOL to apprehend Bizimana.¹⁷ The Chamber is satisfied that these constitute reasonable efforts within the meaning of Rule 71bis (E)(i) and that, despite these reasonable efforts, the warrant of arrest issued against Bizimana remains unexecuted.

Is the execution of the warrant likely to take place within a reasonable time?

9. On the basis of “all the legal and diplomatic efforts that have so far been made,” the Prosecution concludes that “there is no reasonable expectation that the execution of the pending arrest warrant against Augustin Bizimana will take place within a reasonable time.”¹⁸

10. The Duty Counsel disputes this assertion and contends that “the arrest and surrender of the accused can occur in a reasonable time” if the Prosecution were to make “further efforts,” including the freezing of Bizimana's assets.¹⁹

11. The Chamber is not aware of any information pointing to Bizimana's whereabouts or to the location of any of his assets that could be frozen, within the meaning of Rule 62 (D), as suggested by the Duty Counsel. Under the circumstances, the Chamber is satisfied that the Prosecution has shown reasonable diligence in its search for Bizimana, but notes that an arrest can only be made by national authorities. The Chamber therefore finds that the

¹⁵ Duty Counsel's Submissions, para. 10.

¹⁶ Duty Counsel's Submissions, paras. 2, 11. [In the Prosecution's Further Submissions of 4 March 2011, at para. 3, it is stated that Judge Lennart Aspegren confirmed the initial Indictment against Bizimana 26 November 1997, but this appears not to be the case.]

¹⁷ The Parties' submissions were filed under confidential cover and cannot be fully discussed in this public Decision.

¹⁸ The Motion, para. 12.

¹⁹ Duty Counsel's Submissions, paras. 14-15.



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execution of the warrant of arrest against Bizimana is not likely to take place within a reasonable time.

Is it in the interests of justice to grant the Motion?

12. In support of its contention that it is in the interests of justice to grant its request, the Prosecution lists a number of factors that should be taken into consideration. These include the fact that Bizimana, as a former Minister of Defence in the Interim Government of Rwanda in 1994, is a high-profile fugitive whose apprehension and trial would be important to the many victims of his alleged crimes, for the legacy of this Tribunal, and for national reconciliation in Rwanda.²⁰ The Prosecution also argues that, as Bizimana continues to evade arrest and trial, crucial evidence may be lost or may deteriorate due to the passage of time, or due to the death, incapacity or unavailability of Prosecution witnesses later on.²¹ It asserts that some of the witnesses have died since the confirmation of the initial Indictment in 1998; that others are currently under medical supervision; and that the further decline in the condition of more witnesses over time would result in the further loss of evidence establishing Bizimana's criminal responsibility for the acts alleged in the Indictment.²²

13. The Duty Counsel submits that, since Rule 71*bis* itself is new and "the specific procedure for preserving evidence has not been defined, it is questionable just what the special deposition will entail."²³ She argues that the process will be tantamount to a trial in *absentia* and that it will violate the Accused's right to a fair trial in several respects, including his right to choose and instruct his own lawyer and his right to confront the witnesses against him.²⁴ She also submits that if the special deposition procedure is allowed to proceed, "states will consider the issue of fair trial and the rights of a defendant in deciding whether or not to surrender the accused."²⁵

14. The Chamber notes the Duty Counsel's reservations and reiterates that the Rule 71*bis* procedure does not amount to a trial in *absentia*. The objective of the Rule is to ensure that evidence relating to the indictment can be preserved for a future trial. The Rule also seeks to prevent fugitive accused from avoiding effective prosecution and obstructing the proper administration of justice. Furthermore, the single Judge presiding over these proceedings is not empowered to enter a verdict of guilt or innocence, and cannot make decisions regarding

²⁰ The Motion, paras 13-18.

²¹ The Motion, paras. 19-20.

²² The Motion, paras. 21-22.

²³ Duty Counsel's Submissions, para. 16.

²⁴ Duty Counsel's Submissions, paras. 16-20.

²⁵ Duty Counsel's Submissions, para. 21

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the admissibility or the weight of the deposition evidence.²⁶ A future Trial Chamber, acting within the confines of Rule 71*bis* (O), will have the task of assessing the relevance and probative value of the preserved evidence, taking into consideration the rights of the Accused and the fact that the Duty Counsel cross-examining the witnesses during the special depositions was not the Counsel of the Accused's choice and did not receive instructions from him.²⁷ Furthermore, any limitations placed on Bizimana's rights by the Rule 71*bis* proceedings are in service of a sufficiently important objective and do not impair his rights any more than is necessary to accomplish the objective.²⁸

15. Finally, the Chamber has considered Bizimana's position as a high-profile fugitive and the importance of his apprehension and trial to the many victims of his alleged crimes. The Chamber is also aware of the increased risk of deterioration of the evidence with the passage of time, as well as the possibility of the further loss of evidence resulting from the death or unavailability of Prosecution witnesses. In light of these circumstances, the Chamber concludes that it is in the interests of justice that evidence relating to the Indictment be preserved for a future trial by special deposition.

Further submissions

16. The Chamber also recalls that the Prosecution, in its Further Submissions of 4 March 2011,²⁹ requests a variation of the Confirming Judge's Order dated 26 November 1997 (*sic*).³⁰ The Chamber agrees that, in view of the Rule 71*bis* proceedings, it is necessary to vary the Order. Furthermore, the Chamber finds that it is necessary to authorise the immediate disclosure of Prosecution witness statements in non-redacted form.

²⁶ *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-98-44B-71*bis*, Decision on the Prosecutor's Request for Preservation of Evidence by Special Deposition for a Future Trial (Pursuant to Rule 71*bis*), 15 March 2011, para. 15.

²⁷ See the Report of the ICTR Rules Committee on Proposed Rule 71*bis* (May 2009).

²⁸ See *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, para. 14; *Slobodan Milosevic v. The Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, para. 13.

²⁹ *The Prosecutor v. Augustin Bizimana*, Case No. ICTR-98-44F-71*bis*, Prosecutor's Submissions Pursuant to Rule 71*bis* (D) of the Rules of Procedure and Evidence, 4 March 2011 ("Prosecution's Further Submissions").

³⁰ *The Prosecutor v. Augustin Bizimana*, Case No. ICTR-98-44-I, Decision Confirming and Non-Disclosure of the Indictment, 29 August 1998. [The Prosecution suggests, at para. 3 of its Further Submissions, that Judge Lennart Aspegren confirmed the Indictment against Bizimana on 26 November 1997. The record seems to indicate instead that Judge Aspegren confirmed the Indictment against Félicien Kabuga on that date and that it was Judge Nevanthem Pillay who confirmed the Indictment against Bizimana on 29 August 1998.]

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FOR THE FOREGOING REASONS, THE CHAMBER

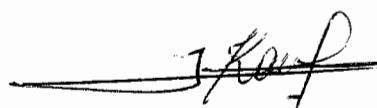
- I. **GRANTS** the Motion;
- II. **ORDERS** the taking of the evidence of the Prosecution witnesses via special deposition pursuant to Rule 71bis;
- III. **ORDERS** that all the proceedings shall be held *in camera*;
- IV. **REQUESTS** the Registrar, pursuant to Rule 71bis (G)(i), to issue a public notice of the present Decision and the arrest warrant against the Accused;
- V. **REQUESTS** the Registrar, pursuant to Rule 71bis (G)(ii), to assign to the Counsel representing the interests of the Accused such staff as the Registrar deems necessary.
- VI. **VARIES** the Order of the Confirming Judge, pursuant to Rules 53 (B) and (C), dated 29 August 1998;
and *proprio motu*
- VII. **ORDERS** the immediate disclosure of all non-redacted statements of potential Prosecution witnesses as listed in Annex "A" to the Prosecutor's Request for Preservation of Evidence by Special Deposition for Future Trial, filed on 14 February 2011, as well as any subsequent potential Prosecution witnesses notified in writing to the Duty Counsel, subject to the following protections which will remain in effect until further notice:
 - (a) The pseudonyms given to the witnesses by the Prosecution shall be used whenever referring to such protected witnesses in ICTR proceedings, communications and discussions, both between the Parties and with the public.
 - (b) The names, addresses, whereabouts, and other information that might identify or assist in identifying any protected witness (hereinafter "Identifying Information") must be sealed by the Registry and not be included in public or non-confidential ICTR records;
 - (c) To the extent that any Identifying Information is contained in existing records of the Tribunal, such Identifying Information must be expunged from the public record of the Tribunal and placed under seal;
 - (d) Identifying Information shall not be disclosed to the public or the media;

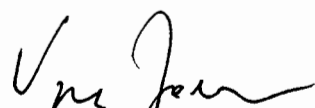
- (e) No member of the Duty Counsel's team shall attempt, or encourage or otherwise aid any person in an attempt to make any independent determination of the identity of any protected witness;
- (f) No member of the Duty Counsel's team shall make any contact with a protected witness, unless the consent of the person concerned has first been confirmed. A member of the Duty Counsel's team shall contact the Prosecution and the WVSS, who shall determine whether such consent exists. In the even that such consent exists, the WVSS shall facilitate the interview;
- (g) The Duty Counsel's team shall keep confidential to itself any Identifying Information, and shall not expose, share, discuss or reveal, directly or indirectly, any such information to any other person or entity; and
- (h) The Duty Counsel's team shall provide, in writing, to the WVSS and the Prosecution, a designation of all officially authorised persons working on the Duty Counsel's team who will have access to any Identifying Information. The Duty Counsel's team shall notify the WVSS and the Prosecution, in writing, of any such person leaving the Duty Counsel's team, and confirm that such person has remitted all materials containing Identifying Information; and

VIII. ORDERS that these protections will remain in effect until any further Order of the Single Judge or a future Trial Chamber.

Arusha, 5 May 2011, done in English.


Dennis C.M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


Vagn Joensen
Judge

[Seal of the Tribunal]

