



UNITED NATIONS
NATIONS UNIES

ICTR-98-44D-T
23-08-2011

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

8532

Am

8532-8327

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 23 August 2011

JUDICIAL RECORDS ARCHIVES
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THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

**DECISION ON DEFENCE MOTION FOR RECONSIDERATION OF 7 APRIL 2011
DECISION**

Rule 73(B) of the Rules of Procedure and Evidence

Office of the Prosecution:

Paul Ng'arua
Memory Maposa
Simba Mawere
Mary Diana Karanja

Defence Counsel

Vincent Courcelle-Labrousse, Lead Counsel
Philippe Larochelle, Co-Counsel

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INTRODUCTION

1. On 7 April 2011, the Trial Chamber ordered the parties to submit Closing Briefs 60 days from the close of evidence, and reminded the parties that the said Briefs should address matters relating to sentencing (“Impugned Order”).¹
2. On 6 May 2011, the Trial Chamber specifically recalled its prior instruction that the Closing Briefs should address matters pertaining to sentencing.²
3. On 23 May 2011, the Defence filed the instant Motion.³ The Motion was not circulated until 4 July 2011 due to a technical error.
4. The Prosecution filed a Response to the Motion on 7 July 2011.⁴

SUBMISSIONS OF THE PARTIES

Defence Motion

5. The Defence submits that the Impugned Decision should be reconsidered, and argues that asking the Defence to address sentencing considerations in its Closing Brief was erroneous and caused prejudice to the defendant.⁵
6. The Defence first submits that the right of an accused to be presumed innocent is sacrosanct, and that it is a right that is universally recognised by international legal instruments including the ICTR Statute itself (“Statute”).⁶ The Defence further contends that because the presumption of innocence has achieved *jus cogens* status, any provision in the Rules of Procedure and Evidence (“Rules”) that is inconsistent with Article 20(3) of the Statute is void to the extent of its inconsistency.⁷
7. The Defence submits that it is evident from the Rules, ICTR/ICTY jurisprudence, procedures observed before other international tribunals, and widespread state practice, that observations on sentencing should be made after conviction and not before.⁸ In support of its position, the Defence argues that the sequence of Rule 85 (A) shows that

¹ T. 7 April 2011 p. 11.

² T. 6 May 2011 p. 50.

³ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Motion for Reconsideration of Trial Chamber’s Decision of 7 April 2011, 23 May 2011 (“Motion”).

⁴ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutors Response to Nzabonimana’s Motion for Reconsideration of the Trial Chamber’s Decision Issued on 7 April 2011, 7 July 2011 (“Response”).

⁵ Motion, para. 6.

⁶ Motion, paras. 8-9.

⁷ Motion, para. 9.

⁸ Motion, para. 11.

evidence relevant to sentencing is only adduced after all evidence relevant to the guilt or innocence of the accused. It highlights the fact that Rule 85 (A) (vi) refers to evidence in sentencing “..if the accused is found guilty...” as proof that a conviction is required before such evidence can be adduced.⁹ The Defence cites cases from both the ICTR and the ICTY that show judgement and sentencing procedures as separate phases.¹⁰ Additionally it refers to the practice at other international tribunals and state practice.¹¹

8. The Defence reiterates that Rule 85 (A) (vi) clearly indicates that evidence to assist the Trial Chamber in determining an appropriate sentence should be presented after all other types of evidence.¹² Thus, it concludes that the Impugned Order infringes not only this Rule but Article 23(3) of the Statute.¹³
9. The Defence submits that the Impugned Order is prejudicial for three reasons. First, it requires that Defence Counsel presume their client’s guilt.¹⁴ Second, the Impugned Order provides no leeway for the Defence to call additional witnesses to address mitigating factors in sentencing.¹⁵ Third, some of the mitigating factors that Mr. Nzabonimana might wish to bring to the Chamber’s attention could prejudice his chances of being exonerated.¹⁶

Prosecution Response

10. The Prosecutor submits that Rule 86(C), and the established practice of the Tribunal, indicate that there is only one phase of argument at the ICTR, and that the parties must make submissions on sentencing in their Closing Briefs and/or Closing Arguments before an accused is convicted.¹⁷
11. The Prosecution further submits that the Appeals Chamber has held that Rule 86(C) of the Rules clearly indicates that sentencing submissions should be addressed during

⁹ Motion, paras. 12-15, citing Rule 85(A) and specific language in Rule 85(A)(vii).

¹⁰ Motion, para. 16, citing *Prosecutor v. Tadić*, Case No. IT-94-I-T, Sentencing Judgement, 11 November 1999, para 4; *Prosecutor v. Erdemović*, Case No. IT-96-22, Appeals Chamber Judgment, 7 October 1997, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Sentence, 2 October 1998.

¹¹ Motion, paras. 17-18.

¹² Motion, paras. 25-27

¹³ Motion, para 25.

¹⁴ Motion, para. 28

¹⁵ Motion, paras. 30-31.

¹⁶ Motion, paras. 29, 32-33.

¹⁷ Response, paras. 12-13.

Closing Arguments and that it is the prerogative of the accused to identify any mitigating circumstances.¹⁸

12. The Prosecution submits that the Defence did not establish that the Trial Chamber committed an error of law for two reasons.¹⁹ First, the Trial Chamber's orders adhere to paragraph 1.2 (ii) of the Practice Direction on Length and Timing of Closing Briefs and Closing Arguments ("Practice Direction").²⁰ Second, the established practice of the Tribunal is to hear evidence relating to the judgement and sentencing in one phase, and the Appeals Chamber has held that evidence relating to sentencing must be presented before the first instance judgement.²¹
13. The Prosecution is of the view that the Defence has failed to establish that the Impugned Order constituted an error of law or an abuse of discretion, or that it resulted in prejudice to the accused. In fact the order attempted to provide the accused with the opportunity to address mitigating factors for sentencing.²²
14. Finally, the Prosecution notes that the Defence Motion was not filed in an expeditious manner.²³

DELIBERATIONS

Applicable Law

15. Article 20(3) of the Statute states that "[t]he accused shall be presumed innocent until proven guilty according to the provisions of the present Statute".
16. Rule 85 (A) provides that:

Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence...

...(vi) [Finally, a]ny relevant information that may assist the Trial Chamber in determining an appropriate sentence, if the accused is found guilty on one or more of the charges in the indictment.

¹⁸ Response, para. 13 citing *Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Appeals Chamber Judgment, 2 February 2009, para. 388; *Muhimana v. The Prosecutor*, Case No. ICTR-98-44D-T, Appeals Chamber Judgment, 21 May 2007, para. 231.

¹⁹ Response, para. 15.

²⁰ Response, para. 15(i).

²¹ Response, para. 15(ii).

²² Response, para. 16.

²³ Response, para. 17.

17. Rule 86(C) states that “[t]he parties shall... address matters of sentencing in closing arguments”.
18. Section 1.2 (ii) of the relevant Practice Direction states that “[b]riefs shall include arguments on sentencing”.
19. With respect to reconsideration, the Trial Chamber recalls that Trial Chambers have the “inherent power” to reconsider their own decisions, under the following exceptional circumstances:
 - i. when a new fact has been discovered that was not known by the Trial Chamber;
 - ii. where new circumstances arise after the original decision;
 - iii. where there was an error of law or abuse of discretion by the Trial Chamber resulting in an injustice.²⁴

Analysis

Preliminary matter

20. The Trial Chamber notes that the Defence repeatedly refers to Article 23(3) in its Motion.²⁵ The Trial Chamber assumes the Defence intended to refer to Article 20(3).

Discussion

21. At the outset, the Trial Chamber notes that the Defence has not suggested that there is a new fact or set of circumstances warranting reconsideration. The Defence essentially argues that the Rules and relevant Practice Direction do not correspond to the Statute or international norms of justice, and therefore the Chamber erred causing an injustice to the accused in requiring that the Defence include submissions on sentencing in its Closing Brief. The Trial Chamber will therefore limit its deliberations to those issues.
22. Rule 86(C) clearly states that the parties shall address “matters of sentencing in closing arguments.” This Rule is reinforced by Section 1.2 (ii) of the Practice Direction, which

²⁴ See e.g. *Prosecutor v Karemera et al.*, Case No. ICTR 98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera*, Case No. ICTR-99-44-T, Decision on Reconsideration Measures for Prosecution Witnesses, 30 October 2006, para. 2; *Karemera*, Case No. ICTR-99-44-T, Decision on Reconsideration of Admission of Written Statements in lieu of Oral Testimony and Admission of the Testimony of Prosecution Witness GAY, 28 September 2007, paras. 10-11.

²⁵ Motion, paras. 25 and 34.

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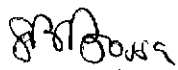
serves as an auxiliary implementing instrument with regards to respective provisions of the Rules,²⁶ and reads that closing “[b]riefs shall include arguments on sentencing.”

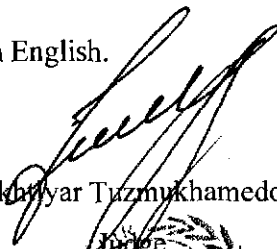
23. Turning to Rule 85, the Chamber notes that this Rule concerns the presentation of evidence. The Trial Chamber heard evidence for the Prosecution and for the Defence, in accordance with Rules 85 (A) (i) and (ii). The Chamber then granted a Prosecution Motion to hear further evidence in rebuttal, in accordance with Rule 85 (A) (iii).²⁷ The Trial Chamber also permitted the Defence to call two additional alibi witnesses pursuant to Rule 85 (v). It bears noting that the Defence did not make a request to hear evidence in rejoinder, pursuant to Rule 85 (A) (iv), nor did it make a request to present further information relating to sentencing in case of a conviction, pursuant to Rule 85 (A) (vi).
24. The Trial Chamber is not the proper instance to review challenges to the Rules insofar as their consonance with the Statute is concerned. That notwithstanding, the Trial Chamber recalls that it issued a first directive requiring that issues related to sentencing be addressed in Closing Briefs on 7 April 2011, and a second directive on the issue on 6 May 2011. Nevertheless, the Defence did not raise this issue until 23 May 2011. Without good cause for raising the issue belatedly, no reference to relevant jurisprudence and no practical suggestion for addressing sentencing in an alternate manner, the Trial Chamber cannot grant the Defence Motion.

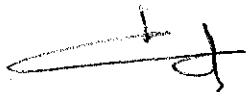
FOR THESE REASONS, THE TRIAL CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 23 August 2011, done in English.


Solomy Balungi Bossa
Presiding Judge


Balghiyar Tuzmukhamedov


Mparany Rajohnson
Judge


[Seal of the Tribunal]

²⁶ According to Rule 19 (B) of the Rules of Procedure and Evidence, Practice Directions shall address “detailed aspects of the conduct of proceedings before the Tribunal.”

²⁷ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Prosecution Motion to Call Rebuttal Evidence, 8 March 2011.