



ICTR-05-89-I
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(468-465)

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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: Khalida Rachid Khan, Presiding
Lee Gacuiga Muthoga
Seon Ki Park

Registrar: Adama Dieng

Date: 13 December 2011

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THE PROSECUTOR
v.
Bernard MUNYAGISHARI

Case No. ICTR-2005-89-I

DECISION ON DEFENCE REQUEST TO COMMENCE PROCEEDINGS

Office of the Prosecutor
Hassan Bubacar Jallow
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INTRODUCTION

1. The Indictment against Bernard Munyagishari (the “Accused”) was confirmed 8 September 2005 and a warrant for his arrest was issued the same day.¹ On 25 May 2011, the Accused was arrested in the Democratic Republic of the Congo. He was transferred to the United Nations Detention Facility on 14 June 2011.² On 15 June 2011, the Court Management Section of the Tribunal informed the President that the Accused had been arrested and transferred to the custody of the Tribunal.³ On 20 June 2011, Munyagishari made an initial appearance pursuant to Rule 62 of the Rules of Procedure and Evidence (the “Rules”) and pleaded not guilty to all counts.⁴

2. On 9 November 2011, the Prosecution filed a request, pursuant to Rule 11 *bis* of the Rules, to transfer the case of *The Prosecutor v. Bernard Munyagishari*, ICTR Case No. 2005-89-I to the Republic of Rwanda (“11 *bis* Motion”).⁵ The 11 *bis* Motion is pending and the Defence has not filed a response. Its deadline to submit such pleadings will be 30 days after the filing of the translation of the 11 *bis* Motion and accompanying annexes into French.⁶

3. In the interim, the Defence has requested that the Chamber commence trial proceedings and set a date for a pre-trial conference pursuant to Rule 73 *bis* of the Rules (the “Motion”).⁷ Notwithstanding the Prosecution’s pending request to transfer the proceeding to Rwanda, the Defence argues that Articles 19 and 20 of the Statute of the Tribunal (the “Statute”), which ensure the right to a trial without undue delay, take precedence over the transfer law, which is only in the Rules. In the Defence’s view, the case is ready for trial and it should commence.⁸

4. The Prosecution opposes the Motion (the “Response”).⁹ It argues that ordering a pre-trial conference and commencing proceedings would defeat the purpose of Rule 11 *bis* of the Rules.¹⁰ Jurisprudence recognises that the transfer law flows from the Statute and thus is on equal footing with other articles in it, including Articles 19 and 20.¹¹ Any

¹ Decision on Confirmation of an Indictment Against Bernard Munyagishari (Confirming Judge), 8 September 2005; Warrant of Arrest and Order for Transfer and Detention of Bernard Munyagishari (Confirming Judge), 8 September 2005.

² *Requête de la défense en vue d’obtenir l’ouverture du procès de l’accusé Bernard Munyagishari en application des Articles 19 (1) et 20 (4)(c) du Statut et de l’Article 73 bis du Règlement*, 24 November 2011 (the “Motion”), para. 1; Prosecutor’s Response to “*Requête de la défense en vue d’obtenir l’ouverture du procès de l’accusé Bernard Munyagishari en application des Articles 19 (1) et 20 (4)(c) du Statut et de l’Article 73 bis du Règlement*”, 28 November 2011 (the “Response”), para. 4.

³ Order Relating to the Initial Appearance of Bernard Munyagishari (President), 16 June 2011, para. 1.

⁴ T. 20 June 2011 pp. 8-9.

⁵ Prosecutor’s Request for the Referral of the Case of Bernard Munyagishari to Rwanda pursuant to Rule 11 *bis* of the Tribunal’s Rules of Procedure and Evidence, 9 November 2011 (“11 *bis* Motion”), para. 96.

⁶ Scheduling Order for Anticipated Rule 11 *bis* Motion (TC), 26 October 2011 (“Scheduling Order”), para. 12 and p. 5.

⁷ Motion, para. 10.

⁸ Motion, paras. 7-9.

⁹ See generally Response.

¹⁰ Response, paras. 9-10.

¹¹ Response, paras. 11-12.

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delays are not attributable to the Prosecution and measures have been taken to mitigate future delays if the 11 *bis* Motion is denied.¹²

DISCUSSION

5. Pursuant to Article 20 (4)(c) of the Statute, an accused shall be guaranteed the right to be tried without undue delay and Article 19 of the Statute mandates that the Trial Chamber ensures this right. These considerations, along with the gravity of the crimes charged and the availability of Tribunal facilities are central in setting the commencement for trial.¹³ Notwithstanding, the pending determination of a referral request pursuant to Rule 11 *bis* of the Rules is also relevant and has served as a basis for postponing the commencement of trial proceedings.¹⁴

6. Indeed, although requests for transfer pursuant to Rule 11 *bis* of the Rules are not an essential feature of litigation before the Tribunal, they are supported by the Security Council as a means of ensuring the timely fulfillment of the Tribunal's mandate.¹⁵ Moreover, the Tribunal's ability to refer cases to national jurisdictions pursuant to Rule 11 *bis* of the Rules is rooted in Article 8 of the Statute.¹⁶

7. In this context, Rule 11 *bis* of the Rules contemplates the rights of the accused pursuant to Article 20 (4)(c) of the Statute. Postponements of trial resulting from the referral litigation pursuant to Rule 11 *bis* of the Rules do not necessarily result in undue delay. Indeed, ordering the commencement of proceedings *before the Tribunal* while a referral request is pending might result in the needless expenditure of judicial resources.¹⁷

8. The Defence makes no specific submissions that the pace of proceedings up to this point has violated the Accused's right to a trial without undue delay.¹⁸ Disclosures to the Defence pursuant to Rule 66 (A)(i) of the Rules have been made.¹⁹ The Prosecution confirms that it continues with pre-trial preparations in light of the uncertainty of referral and will comply with any directions from this Chamber to ensure trial readiness.²⁰

¹² Response, paras. 7-8, 14-17.

¹³ See *The Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-01-69-I, Decision on Nsengimana's Motion for the Setting of a Date for a Pre-Trial Conference, a Date for the Commencement of Trial, and for Provisional Release (TC), 11 July 2005, para. 14.

¹⁴ See *The Prosecutor v. Jean-Bosco Uwinkindi*, Decision on Defence Motion for the Setting of a Timetable for Disclosure, Pre-Trial Conference and Start of Trial (TC), 11 April 2011, para. 2; *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55-I, Decision on Defence Motion for the Continuation of Proceedings Before the Tribunal (TC), 5 November 2007 ("*Hategekimana* Decision"), para. 10.

¹⁵ See S/Res/1503 (2003); S/Res/1534 (2004).

¹⁶ See *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-AR11*bis*, Decision on Rule 11*bis* Appeal (AC), para. 16 ("The Appeals Chamber recalls that the basis of the Tribunal's authority to refer its cases to national jurisdictions flows from Article 8 of the Statute, as affirmed in Security Council resolutions. Article 8 specifies that the Tribunal has concurrent jurisdiction with national authorities to prosecute "serious violations of international humanitarian law.") (internal citations omitted).

¹⁷ *Hategekimana* Decision, para. 10.

¹⁸ See Motion, para. 9.

¹⁹ Motion, para. 3; Response, para. 17.

²⁰ Response, para. 17.

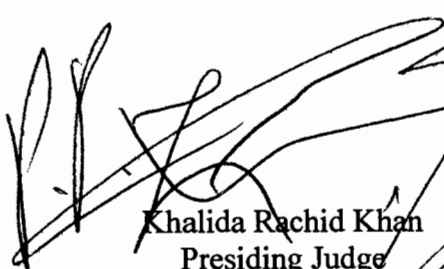
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9. Under the circumstances and in light of the relevant jurisprudence, the Chamber considers that the Defence request for the commencement of proceedings and the holding of a pre-trial conference pursuant to Rule 73 *bis* of the Rules is premature. The relief is denied on this basis.

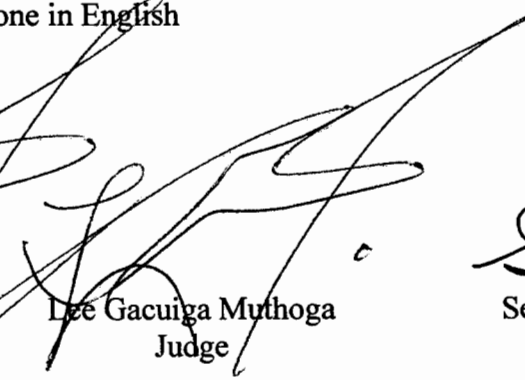
BASED ON THE FOREGOING, THE CHAMBER

DENIES the Motion in its entirety

Arusha, 13 December 2011, done in English



Khalida Rachid Khan
Presiding Judge



Lee Gacuiya Muthoga
Judge



Seon Ki Park
Judge

[Seal of the Tribunal]

