780) SCSL-03-01-T (25199-25220) 25199

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

TRIAL CHAMBER II

Before: Justice Richard Lussick, Presiding
Justice Teresa Doherty
Justice Julia Sebutinde
Justice El Hadji Malick Sow, Alternate Judge

Registrar: Mr. Herman von Hebel

Date filed: 20 May 2009

THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-T

PUBLIC

PROSECUTION RESPONSE TO "PUBLIC WITH ANNEX A DEFENCE APPLICATION FOR LEAVE TO APPEAL THE 4 MAY 2009 ORAL DECISION REQUIRING THE DEFENCE TO COMMENCE ITS CASE ON 29 JUNE 2009"

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Kathryn Howarth

Counsel for the Accused:
Mr. Courtenay Griffiths Q.C.
Mr. Andrew Cayley
Mr. Terry Munyard
Mr. Morris Anyah

I. INTRODUCTION

1. The Prosecution files this Response to the *"Public with Annex A Defence Application for Leave to Appeal the 4 May Oral Decision Requiring the Defence to Commence its Case on 29 June 2009"*("Application").[1]

2. The Defence fails to justify granting leave to appeal the majority decision to set the start date of the Defence case for 29 June 2009. This decision falls squarely within the legitimate ambit of the Trial Chamber's discretion in the exercise of its case management function. The Defence has failed to demonstrate either an error of law, mixed law and fact or application of the law or an abuse of discretion giving rise to "exceptional circumstances" or "irreparable prejudice". The Application for leave to appeal should be denied.

II. BACKGROUND

3. The issue of the start date for the Defence case was initially raised before the Trial Chamber on 9 February 2009.[2] On 26 March 2009 lead Defence Counsel sent a letter to the Registry, Trial Chamber and Prosecution addressing the issue. On 9 April 2009, the Trial Chamber indicated that, if appropriate, it would decide upon the start date for the Defence case on 4 May 2009 after delivering its Rule 98 Decision.[3] On 15 April 2009, the Principal Trial Attorney for the Prosecution responded to the letter of 26 March 2009. On 4 May 2009, following the oral Rule 98 Decision, upon the invitation of the Presiding Judge, both parties made submissions in relation to the issue of fixing a date for the commencement of the Defence case.[4] The Presiding Judge specifically informed the parties, prior to hearing their submissions, that the Trial Chamber had seen the letters of 26 March and 15 April.[5] Having initially stated that 15 July would be a suitable date for the start of the Defence case, lead Defence Counsel then asserted that the Defence would require until at least the middle of August.[6] Having heard

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[1] *Prosecutor v. Taylor,* SCSL-03-01-T-777, "Public with Annexes Defence Application for Leave to Appeal the Oral Decision Requiring the Defence to Commence its Case on 29 June 2009", 11 May 2009 ("**Application**").
[2] Prosecutor v. Taylor Trial Transcript ("T") 9 February 2009, pp. 24048 – 24049.
[3] T, 4 May 2009, 24191.
[4] T, 4 May 2009, p. 24211.
[5] T, 4 May 2009, p. 24212.
[6] T, 4 May 2009, pp. 24213 - 24214.

submissions from both parties and deliberated, the Trial Chamber pronounced the majority decision that the defence case would start on 29 June 2009. At the outset of the ruling the Presiding Judge specifically noted that the Trial Chamber had considered the letters of 26 March and 15 April and the arguments of both parties.[7]

III. APPLICABLE LAW

Standard of Review – Errors of Law/ Errors in the Application of Law/ Errors of Mixed Fact and Law

4. A Trial Chamber has discretion with respect to the scheduling of a trial.[8] As such an Appeals Chamber will accord deference to the discretionary decision of the Trial Chamber.[9] The Trial Chamber's exercise of discretion will only be reversed by an Appeals Chamber if it is demonstrated that the Trial Chamber made a discernable error because its decision was made on an incorrect interpretation of governing law, was based on a patently incorrect conclusion of fact, or was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[10]

5. A Trial Chamber has an obligation to provide reasons for its decision. However, a Trial Chamber is not required to articulate its reasoning in detail, and the fact that a Trial Chamber does not mention a particular fact in its order does not by itself establish that the Chamber has not taken that fact or circumstance into consideration. Indeed, in the *Milosevic* case, the Appeals Chamber of the ICTY relied not only upon the Trial Chamber's decision but also submissions made in the context of a status conference, in concluding that there was no discernable error of law in relation to the Trial Chamber's

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[7] T, 4 May 2009, p. 24220.

[8] *Prosecutor v. Taylor*, SCSL-03-01-PT-182, "Decision on Defence Application for Leave to Appeal "Joint Decision on Defence Motions on Adequate Facilities and Adequate Time For the Preparation of Mr. Taylor's Defence" dated 23 January 2007", 15 February 2007, ("**Taylor Leave to Appeal on Adequate Time & Facilities**") para. 12; and *Augustin Ngirabatware v. The Prosecutor*, ICTR-99-54-A, "Decision on Augustin Ngirabatware's Appeal of Decision Denying Motions to Vary Trial Date", 12 May 2009, ("**Ngirabatware Appeal Decision**") para. 8.; *The Prosecutor v Elie Ndayambaje et al*, "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, ("**Ndayambaje Appeal**") para. 10. *The Prosecutor v Ildephonse Hatgekimana*, ICTR-00-55B-T, "Decision on Defence Motion to Reconsider Trial Date", 4 May 2009, para. 4

[9] Ndayambaje Appeal, para. 10, where the Appeals Chamber explains that "this deference is based on the Appeal Chamber's recognition of the Trial Chamber's familiarity with the day-to-day conduct of the parties and practical demands of the case".

[10] Ndayambaje Appeal, para. 10; and Ngirabatware Appeal Decision, para. 8. Emphasis added.

decision regarding the start date for the Defence phase of that case.[11]

IV. ARGUMENTS

Failure to establish an Error and/or an Abuse of Discretion giving rise to Exceptional Circumstances:

6. The Defence has failed to show the majority committed an error of law, error of mixed fact and law or error in the application of the law to the facts. Nor has the Defence shown that the majority's exercise of its considerable discretion in deciding this trial management matter was so unreasonable or so unfair as to constitute an abuse of its discretion. The Defence has not shown any such error or abuse to give rise to exceptional circumstances.

7. The Accused's right to a fair trial does not translate into giving the Accused as much time as he requests; the Defence have not established in any way that the majority decision deprives the Accused of any right under Article 17 giving rise to exceptional circumstances.

8. The Defence argument that the majority failed to address or failed to adequately address the four factors listed at paragraph 6 of the Application, does not withstand scrutiny.[12] The Trial Chamber considered all of the factors raised by the Defence. These factors were addressed in the Defence letter of 26th March,[13] and/or the Prosecution letter of 15th April;[14] which the Presiding Judge specifically stated had been considered in reaching the decision, and/or the submissions of the parties[15] immediately prior to

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[11] *The Prosecutor v Slobodan Milosevic*, 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, ("**Milosevic Appeal**"), para. 7, in so concluding the Appeals chamber relied upon the verbal commentary by the Presiding Judge which accompanied the ruling, as well as representations made by the parties including the *amicus curiae* at the status conference as "relevant to the question of whether the Trial Chamber gave the issues involved due consideration".

[12] Application, para. 6 refers to the alleged failure consider and/or give due weight to: (1) the rights of the Accused and the need for adequate time to prepare the Defence case; (2) the logistical circumstances pertaining to the Defence case; (3) the time limits ordered in other cases before the Special Court; (4) the need for an expeditious trial & that an expeditious trial necessitates that the Defence prepare its case as thoroughly as possible.

[13] Defence Letter of 26 March 2009, at p.2 referred to the Article 17 rights of the Accused and to the logistical circumstances pertaining to the Defence case, and at p. 3 to the time limits ordered in the other cases at the Special Court, and at p. 1 to the need for an expeditious trial.

[14] Prosecution Letter of 15 April 2009, at p.1 referred to the rights of the Accused.

[15] T, 4 May 2009, at p.24212 – 24213, lead Defence Counsel specifically addressed the Trial Chamber about the logistical issues relating to the preparation of the Defence case, and at p.24213, lead Defence Counsel specifically

the decision, which the Presiding Judge also specifically stated had been considered in reaching that decision. Given that these matters were plainly within the contemplation of the Trial Chamber it cannot be said that the Trial Chamber failed to consider them in reaching the majority decision.

9. The argument that the majority failed to accord sufficient weight to those factors is in essence an attempt to re-litigate the merits of the majority decision. The Trial Chamber considered the arguments raised by the parties but the majority ultimately took a different view than that advocated by the Defence.

10. The Defence argues that it is "best placed to understand how much time it needs to prepare adequately"[16] and therefore the Trial Chamber should adopt as the start date the date requested by the Defence. This argument fails to give credence to the fact that it is the responsibility of the Trial Chamber and not the parties to set the trial schedule. Rule 26*bis* specifically entrusts both the Trial and Appeals Chambers with the responsibility to ensure a trial is both fair and expeditious. Although the parties are certainly entitled to make submissions to the Trial Chamber, it would not be appropriate for the Trial Chamber simply to defer to the start date proposed by lead Defence Counsel.[17] It is the Trial Chamber, not a party, which has the responsibility and authority to set dates for various stages of a proceeding, and it is plainly within the remit of Trial Chamber's discretion to determine that a date different than that proposed by a party is the appropriate date to commence the Defence case. The fact that the Defence take a different view as to the appropriate start date for trial does not give rise to exceptional circumstances.[18]

11. The Defence arguments relating to the unfortunate death of its international investigator

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submitted to the Trial Chamber that "time allowed at this stage will guarantee savings down the line", and T, 4 May 2009, p.24216, referring to Rule 26 bis (which provides that: "The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and dues regard for the protection of victims and witnesses"); and p.24217, referring specifically to the Trial Chamber's obligation to ensure that the Defence have sufficient time to adequately and fairly prepare the Defence case and to prepare Mr Taylor for his testimony; and at p. 24218, referring to the rights of both parties to a fair and expeditious trial; and p. 24217, referring to the logistical issues pertaining to the preparation of the Defence case.

[16] Application, para. 9.

[17] Indeed to do so would entail the Trial Chamber impermissibly fettering its discretion, which would certainly amount to an error of law.

[18] Taylor Leave to Appeal on Adequate Time & Facilities, para. 12; and see also citations in footnote 8.

and the time needed to analyse and synthesise the Defence case following the completion of its field work are unpersuasive. [19] The arguments again simply seek to relitigate the merits of the issue and do not establish exceptional circumstances. Regarding the investigator, for most of the three year period that the Defence has had to investigate the case, they had the benefit of both national and international investigators. In an international tribunal, it is not unusual to have regular turnover of personnel and all parties must deal with this reality. Moreover, during the period where the Defence had to find a replacement investigator, the defence team still had the benefit of other investigators, at least eight lawyers, interns and a case manager and other resources.[20] As regards synthesizing and analyzing the Defence case, this is something that an experienced and diligent Defence team, such as that representing Mr. Taylor, has no doubt been doing since the Accused was transferred to the Special Court.

12. The arguments ignore the significant amount of time the Defence have had to investigate and prepare, before, during and after the Prosecution case in chief, including the efforts of the Defence team which preceded this team - a team which included some members of the current team.[21] Indeed, the ruling of the Presiding Judge noted that "Mr Taylor has been in custody since March 2006 and presumably investigations and preparations have been ongoing since that time... the last prosecution witness was heard on 29 January 2009...The Defence intends to call Mr. Taylor to give evidence and no doubt that will be a substantial amount of time which could be used for the further preparation of Defence witnesses".[22] Further, lead counsel are chosen by virtue of their ability to manage the case at the same time they are actively engaged in courtroom activities and other preparation. Therefore, while lead Defence Counsel has stated he will need several weeks to "prepare" the Accused to give evidence, this does not prevent him from directing the efforts of the team to analyze and synthesize the Defence case.

13. The Defence arguments regarding the alleged impact of the JCE and the Rule 98

[19] Application, paras. 11 and 10, respectively.
[20] For example, the Association for the Legal Defence of Charles Taylor, see http://for-taylor.net/index.html.
[21] T 4 May 2009 p. 24218 and T 20 August 2007, p.9.
[22] T 4 May 2009 p. 24220.

decisions have had on witness selection are abstruse. [23] Surely the Defence is not arguing that it could presume outcomes would be determined in its favour rather than preparing for the case before it? As for JCE, it is difficult to understand that the Defence would not have been preparing to address this mode of liability, which it has characterized as, in its view, "the backbone of this case".[24] Further, as noted even in the dissenting opinion of the Trial Chamber JCE decision, the Accused has been on notice for a considerable period of time about the substance of the allegations relating to the JCE, as set out in the Indictment, the Amended Case Summary, the Opening Statement, and elsewhere.[25] As for the Rule 98 decision, it simply held that the Defendant must answer the case against him, as set out in the Indictment. It strains credulity to argue that these decisions have required the Defence to interview new and additional witnesses. The argument that these decisions give rise to exceptional circumstances is without merit.

14. The Defence argument that this Accused has been allocated less time to prepare his case than other accused persons in cases before the Special Court provides no basis for granting leave to appeal. First, each case should be decided on its own merits. As an example, the CDF and RUF cases are distinct in that Trial Chamber I was simultaneously engaged in two trials, so during the Rule 98 adjournment in one trial the Trial Chamber also had to discharge its continuing duties in the other case. Moreover, none of the other defence teams in the Special Court have benefited from the significant resources that have been allocated to the Taylor defence team. Finally, in real terms, what is qualitatively different between "two months and five days" and the eight weeks the Defence is now saying it is requesting?

Failure to establish Irreparable Prejudice

15. The argument that the majority's refusal to grant the start date requested by the Defence will result in a "hastily prepared defence" which will give rise to "irreparable prejudice" is without merit. Mr. Taylor has been represented since March 2006; the

[23] Application, para. 12.
[24] T, 6 April 2009, p. 24102.
[25] *Prosecutor. v Taylor*, SCSL-03-01-T-751 "Decision on Public Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of Joint Criminal Enterprise – Dissenting Opinion of Richard Lussick", 27 February 2009, paras. 16-23.

change in lead Counsel occurred in August 2007; the last Prosecution witness in the Taylor case testified 29 January 2009, 5 months before the scheduled start of the defence case. It is difficult to envision that denial of the two additional weeks that the Defence is now stating it must have would result in irreparable prejudice. The argument ignores the substantial time which the Defence has had to conduct investigations and prepare the Defence case, including the five month adjournment prior to the start of this case, granted with the understanding – based on Defence assertions – that such delay would help to streamline the trial and avoid unnecessary delays during the trial.[26]

16. The Defence erroneously argues that the Accused will suffer irreparable prejudice because both the Accused and lead Counsel will be unable to provide instructions to the Defence team whilst the Accused is testifying. The Prosecution certainly would have no objection to the Accused giving instructions as needed in regard to legitimate matters concerning the "preparation" of other witnesses or the conduct of ongoing investigations. In addition, as discussed earlier, lead Defence Counsel is no doubt accustomed to - and capable of - leading the Accused in chief, whilst also providing instructions as necessary to his team.

17. Finally, the Defence argument that the current start date would not afford lead Defence Counsel adequate time for the preparation of the Accused's evidence, owing to the numerous exhibits that will be tendered during the Accused's testimony is also unmeritorious. The Defence has made it plain that it had in its possession the documental archives of Charles Taylor in the summer of 2007;[27] the bulk of the Prosecution disclosure had been received by that time. The Defence have therefore had at least two years to assess and analyse these documents with the assistance of the Accused.

18. The Defence argument that the current start date would not afford the Defence adequate time for preparation must fail for the reasons discussed above, most importantly that the majority considered the Defence arguments on this matter. The Impugned Decision

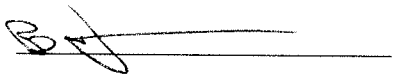
[26] T, 20 August 2007, pp. 20, 30 and 34.
[27] T, 7 May 2009, p. 24237, T, 20 August 2007, pp. 14-16.

does not result in irreparable prejudice being suffered by the Accused.

V. CONCLUSION

19. In setting the date for the start of the Defence case for 29 June 2009, the majority legitimately exercised its discretion in accordance with its case management function. The Defence has failed to satisfy the threshold required by Rule 73(B); the Application should be dismissed.

Filed in The Hague,
20 May 2009
For the Prosecution,



Brenda J. Hollis
Principal Trial Attorney

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(copy attached)

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Other

The Association for the Legal Defence of Charles Taylor

http://for-taylor.net/index.html.

25210

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Andrésia Vaz, Presiding**
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron

Registrar: **Mr. Adama Dieng**

Decision of: **12 May 2009**

Augustin NGIRABATWARE

v.

THE PROSECUTOR

Case No. ICTR-99-54-A

DECISION ON AUGUSTIN NGIRABATWARE'S APPEAL OF DECISIONS DENYING MOTIONS TO VARY TRIAL DATE

Counsel for the Defense:
Mr. David C. Thomas

Office of the Prosecutor:
Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Brian Wallace
Mr. Iskandar Ismail

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), is seized of "Dr. Ngirabatware's Appeal of Trial Chamber's Decision Denying Defence Motion to Vary Trial Date of May 18, 2009" filed on 21 April 2009 ("Appeal") by Augustin Ngirabatware ("Ngirabatware").

A. Background

2. Ngirabatware was arrested in Germany on 17 September 2007 and transferred to the Tribunal in Arusha on 8 October 2008. He made his initial appearance on 10 October 2008, during which he pleaded not guilty to all the counts in the indictment against him.[1]

3. On 29 January 2009, the President of the Tribunal issued an Interoffice Memorandum stating that Ngirabatware's trial was scheduled to start on 4 May 2009. On the same day, the Bench of Trial Chamber II of the Tribunal seized of Ngirabatware's case ("Trial Chamber") granted in part the Prosecution's motion to amend the initial indictment.[2] On 4 February 2009, Ngirabatware filed a motion requesting the Trial Chamber to vacate the scheduled trial date.[3]

4. During the further appearance held on 9 February 2009, Ngirabatware pleaded not guilty to all charges contained in the amended indictment filed by the Prosecution on 5 February 2009.[4]

5. On 25 February 2009, the Trial Chamber found that there was no justification to vacate the scheduled trial date and denied Ngirabatware's motion to vacate the 4 May 2009 trial date accordingly.[5] However, "due to scheduling issues", the Trial Chamber ordered that the trial should

[1] Initial Appearance, T. 10 October 2008 pp. 17-24.
[2] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Prosecution Motion for Leave to Amend the Indictment, 29 January 2009 ("Decision Granting Leave to Amend the Indictment").
[3] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Defence Motion to Vacate Trial Date of May 4, 2009, 4 February 2009.
[4] Further Appearance, T. 9 February 2009 pp. 26-28; *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Amended Indictment, 5 February 2009.
[5] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion to Vacate Trial Date of 4 May 2009, 25 February 2009 ("Decision Setting the Trial Date"), para. 12 and disposition.

commence on 18 May 2009.[6] Arguing that his Defence would not be ready for trial on 18 May 2009, Ngirabatware moved the Trial Chamber to strike the scheduled trial date.[7]

6. On 25 March 2009, the Trial Chamber denied in its entirety what it considered to be a request for reconsideration of its Decision Setting the Trial Date and reiterated that Ngirabatware's trial shall commence on 18 May 2009.[8] Thereafter, the Trial Chamber granted Ngirabatware certification to appeal the Decision Denying Reconsideration and ordered a stay of the commencement of the trial should a determination of the appeal be filed later than the set trial date of 18 May 2009.[9] In the meantime, the Prosecution filed another amended indictment pursuant to the Trial Chamber's decision of 8 April 2009.[10]

7. Ngirabatware filed his Appeal on 21 April 2009. The Prosecution responded on 1 May 2009, opposing the Appeal.[11] Ngirabatware filed a reply on 5 May 2009.[12]

B. Standard of Review

8. A Trial Chamber has discretion with respect to the scheduling of a trial.[13] As such, the decision of the Trial Chamber to set the 18 May 2009 trial date is a discretionary decision to which the Appeals Chamber accords deference. The Appeals Chamber's examination is therefore limited to establishing whether the Trial Chamber abused its discretion by committing a "discernible error". The Appeals Chamber will only overturn the Trial Chamber's exercise of its discretion where it is found to be (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[14]

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[6] *Idem.*
[7] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Defence Motion to Continue 18 May 2009 Trial Date, 11 March 2009.
[8] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion to Vary Trial Date, 25 March 2009 ("Decision Denying Reconsideration"), para. 23 and disposition.
[9] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Certification to Appeal the Trial Chamber's Decision of 25 March 2009 on Defence Motion to Vary Trial Date, 15 April 2009 ("Certification Decision"), para. 21 and disposition.
[10] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Amended Indictment, 14 April 2009 ("Amended Indictment"). *See also The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion to Dismiss Based Upon Defects in Amended Indictment, 8 April 2009, para. 4 and disposition.
[11] Prosecutor's Response to Augustin Ngirabatware's Appeal of the Trial Chamber's Decision Denying the Defence Motion to Vary Trial Date of 18th May 2009, 1 May 2009 ("Response").
[12] Dr. Ngirabatware's Reply to the Prosecutor's Response to Dr. Ngirabatware's Appeal of the Trial Chamber's Decision Denying the Defence Motion to Vary Trial Date of 18 May 2009, 5 May 2009 ("Reply").
[13] *The 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 ("*Milošević* Decision"), para. 16.
[14] *See, e.g., Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.15, Decision on Joseph Nzirorera's Appeal Against a Decision of Trial Chamber III Denying the Disclosure of a Copy of the Presiding Judge's

C. Submissions

9. In his Appeal, Ngirabatware submits that the Trial Chamber abused its discretion in denying him minimal adequate time to prepare for trial. He requests the Appeals Chamber to reverse the Decision Denying Reconsideration and remand the matter to the Trial Chamber with instructions to set a trial date in January 2010.[15] Before setting out the arguments in support of his contention that the Trial Chamber abused its discretion, Ngirabatware recalls that his Lead Counsel, legal assistant and investigator were assigned to his Defence team only on 3 December 2008, 15 January 2009 and 6 February 2009, respectively.[16]

10. In support of his Appeal, Ngirabatware first argues that the Trial Chamber failed to address his needs to prepare for trial, and instead deferred to the date set by the Office of the President, which was not in a position to know of those needs.[17] Although the Trial Chamber stated that the scheduling of trials depends on a number of factors, Ngirabatware submits, it never analyzed the trial date in light of those factors.[18]

11. Second, Ngirabatware submits that the Trial Chamber's decision constitutes an abuse of its discretion in light of the fact that it allowed the Prosecution to file an amended indictment containing 54 new charges less than four months before the trial date. He stresses that in the *Casimir Bizimungu et al.* case, leave to amend the indictment to expand the charges was denied on the ground that less than three months was not enough time to prepare a defence.[19]

12. Third, Ngirabatware claims that he is being given far less time to prepare for trial than any other person to ever appear before the Tribunal and that the Trial Chamber has never set forth any

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Written Assessment of a Member of the Prosecution Team, 5 May 2009, para. 8; *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR65, Decision on Matthieu Ngirumpatse's Appeal Against Trial Chamber's Decision Denying Provisional Release, 7 April 2009, para. 4; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.14, Decision on Matthieu Ngirumpatse's Appeal From the Trial Chamber Decision of 17 September 2008, 30 January 2009 ("*Karemera et al.* Decision of 30 January 2009"), para. 18; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR73.7, Decision on Jérôme-Clément Bicamumpaka's Interlocutory Appeal Concerning a Request for a Subpoena, 22 May 2008, para. 8.

[15] Appeal, paras. 27, 28, and Conclusion at pp. 16, 17.

[16] *Ibid.*, paras. 4, 7, 12.

[17] *Ibid.*, paras. 27(a), 27(c), 29, 30.

[18] *Ibid.*, para. 24.

[19] *Ibid.*, paras. 31, 32, referring to *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2003 ("*Bizimungu et al.* Trial Decision"), para. 34 and *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber's Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004, para. 19. Ngirabatware points out that two Judges of the present Trial Chamber were part of the bench that issued the *Bizimungu et al.* Trial Decision.

reason to justify this prejudicial treatment.[20] He adds that given that the Prosecution had years to prepare its case, the principle of equality of arms will be violated if the case proceeds as scheduled.[21]

13. Fourth, Ngirabatware asserts that the setting of the trial was motivated by the completion strategy of the Tribunal, rather than consideration of his rights and the need to prepare for trial.[22] In Ngirabatware's view, although neither the Office of the President nor the Trial Chamber referred to the completion strategy in connection with setting the trial date, "it is disingenuous to state and naive to believe that the setting has not been dictated by that fact".[23] He emphasizes that the Trial Chamber never identified any alternative reason for pushing the case to trial so quickly.[24] He submits that while the completion strategy is a worthy goal, the political considerations and administrative concerns reflected in it cannot prevail over his right to a fair trial.[25]

14. Finally, Ngirabatware argues that he will be irremediably prejudiced if the trial were to start on 18 May 2009 since it is not possible for his Defence team to complete the pre-trial investigation by this date.[26] Specifically, he points out that:

(i) the pre-trial investigation only began in February 2009 due to the filing of the first amended indictment and the time it took to staff the Defence team;[27]

(ii) the pre-trial investigation involves many witnesses from all over the world, as well as numerous documents, some of which are only in the Kinyarwanda language;[28]

(iii) his Defence team has received a very large amount of documents of disclosure from the Prosecution which need to be analyzed;[29]

(iv) the second amended indictment names additional witnesses and makes other changes to the allegations in Count 6;[30]

(v) he is charged with diversion of funds, a charge which involves a lot of documentary evidence, not all of which has been disclosed by the Prosecution;[31]

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[20] Appeal, paras. 27(b), 33, 34. Ngirabatware submits that the average period of time at the Tribunal between the initial appearance and judgement has been approximately four years and five months (*see also* Appeal, para. 16).
[21] Appeal, paras. 35, 37, 38.
[22] Appeal, paras. 39-42.
[23] Appeal, para. 40.
[24] Appeal, para. 25.
[25] Appeal, para. 41.
[26] Appeal, paras. 42-49.
[27] Appeal, para. 44.
[28] Appeal, heading (E) at p. 14, para. 46.
[29] Appeal, paras. 4, 13, 44, 45.
[30] Appeal, para. 44.
[31] Appeal, para. 45.

(vi) the lack of specificity of the second amended indictment regarding dates necessitates more time to conduct investigations.[32]

He avers that, taking into account the scope of the case, the time similar cases have taken and all the other factors involved, his Defence team will in all likelihood be ready for trial by the end of 2009.[33]

15. The Prosecution responds that the Appeal should be dismissed on the grounds that Ngirabatware fails to demonstrate that the Trial Chamber has made a discernible error and that the Trial Chamber's refusal to vary the trial date of 18 May 2009 is reasonable in the circumstances.[34]

16. The Prosecution submits that the Trial Chamber fully addressed the needs of Ngirabatware during the initial appearance and the further appearance and clearly revisited the issue in arriving at its decisions denying variation of the trial date.[35] In its opinion, the Trial Chamber duly took account of all relevant factors, such as the right of the accused to have adequate time and facilites to prepare his defence but also the right to have a trial without undue delay and the administrative and logistical matters that are necessary for the holding of a trial.[36] The Prosecution further contends that the Amended Indictment is considerably more concise, specific and up to date with the practice and jurisprudence of the Tribunal and that "the 'new allegations' have the overall effect of simplifying the proceedings by streamlining the indictment".[37]

17. As regards Ngirabatware's other arguments, the Prosecution submits that: (i) the matters between the Trial Chamber and the Office of the President are irrelevant considerations in the instant case;[38] (ii) the argument that Ngirabatware should be given as much time as previous accused persons is without merit since "each case is unique and all cases before the Tribunal are not subject to the same circumstances";[39] (iii) there is no evidence to suggest that the Tribunal's completion strategy has played any role in the setting of the trial date.[40] After emphasizing that Ngirabatware evaded capture and resisted transfer to the seat of the Tribunal, the Prosecution adds

[32] Appeal, para. 45.
[33] Appeal, para. 48. *See also* Reply, para. 18.
[34] Response, paras. 2, 9, 10, 29.
[35] Response, para. 11.
[36] Response, paras. 12-14, 16.
[37] Response, paras. 19-21. *See* Decision Granting Leave to Amend the Indictment, para. 30.
[38] Response, para. 16.
[39] Response, para. 22.
[40] Response, para. 25.

that it is clear that Ngirabatware's strategy is "to seek to avoid trial by delaying the proceedings beyond the temporal mandate of the Tribunal".[41]

18. The Prosecution concludes by noting that a focused Defence exercising due diligence will be able to complete its pre-trial preparation in time to commence trial on 18 May 2009.[42]

19. In reply, Ngirabatware reiterates that he has received far less time to prepare for trial than any other person ever to appear before the Tribunal.[43] In his opinion, it is "hypocritical" for the Prosecution to argue that the May trial date is necessary to protect his right to a speedy trial when he is not complaining of a violation of that right but of the denial of his right to have adequate time to prepare,[44] and "ludicrous" to suggest that filing 54 new charges less than four months before trial does nothing more than simplify the proceedings and is not prejudicial in terms of trial preparation.[45] Ngirabatware adds that he has no incentive to delay the trial unecessarily or seek to avoid trial, but that he is only seeking a fair trial.[46] The more time the Defence has to prepare for trial, he also argues, the more focused the case will be and the less time the trial will take.[47] Listing a number of pending pre-trial matters, Ngirabatware further argues that the Prosecution is not ready for trial either and contends that he is still "in the dark" about many aspects of the Prosecution's case.[48] He also emphasizes that his Defence team has not been assigned an office yet and that he is still without a Co-Counsel.[49] In conclusion, Ngirabatware reiterates that his Defence team cannot be ready for trial on 18 May 2009 and that the Trial Chamber abused its discretion in refusing to set a reasonable trial date.[50]

D. Discussion

20. As a preliminary matter, the Appeals Chamber notes that Ngirabatware does not take issue with the Trial Chamber's refusal to reconsider its previous decision on the date of the trial, but with the trial date itself and the manner in which it was set. When granting Ngirabatware's motion for certification to appeal the Decision Denying Reconsideration, the Trial Chamber defined the issue that should be put to the Appeals Chamber for resolution as whether Ngirabatware and his Defence

[41] Response, para. 27.
[42] Response, paras. 23, 28.
[43] Reply, para. 5(e). *See also ibid.*, para. 3.
[44] Reply, paras. 7-9.
[45] Reply, heading (C) at p. 7. *See also ibid.* paras. 10-12.
[46] Reply, heading (D) at p. 8, paras. 13-16.
[47] Reply, para. 17.
[48] Reply, para. 1(i).
[49] Reply, para. 2.
[50] Reply, para. 18.

would have sufficient time to prepare the Defence case if the trial proceeds on 18 May 2009 as scheduled.[51] Since the 18 May 2009 trial date was set in the Decision Setting the Trial Date, the consideration of the Appeal will necessarily require the Appeals Chamber to examine this decision. Therefore, although certification was formally granted to appeal the Decision Denying Reconsideration, the Appeals Chamber considers itself seized of a challenge against both the Decision Denying Reconsideration and the Decision Setting the Trial Date (together "Impugned Decisions").

21. Turning to the merit of the Appeal, the Appeals Chamber first notes that the 18 May 2009 trial date was not set by the Office of the President but by the Trial Chamber.[52] The question as to whether the Trial Chamber erroneously deferred to the Office of the President is therefore irrelevant to the resolution of the present Appeal.

22. The Appeals Chamber recalls that Trial Chambers enjoy considerable discretion in the conduct of the proceedings before them,[53] including in the scheduling of trials.[54] 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.

23. In the Decision Setting the Trial Date, the Trial Chamber duly recalled the right of an accused to a fair trial within a reasonable time and pointed out its obligation to balance the need for the accused to have adequate time for the preparation of his case and the need for an expeditious trial.[55] It also correctly pointed out that "[i]n arriving at a decision regarding the scheduling of the trial, the Chamber considers all the relevant factors and appropriate concerns".[56] However, the Appeals Chamber observes that nothing in the Impugned Decisions indicates that the Trial Chamber indeed did so.

24. The Trial Chamber reached its conclusion that there was no justification to vacate the original trial date and set the 18 May 2009 trial date[57] without expressly addressing Ngirabatware's concerns as to the fairness of his trial or any of the relevant factors. While the Trial Chamber mentioned issues related to the staffing of the Defence team, it omitted to discuss the impact of the staffing situation of the Defence team on the Defence's ability to prepare for trial within the

[51] Certification Decision, para. 19.
[52] Decision Setting the Trial Date, para. 12 and disposition.
[53] *See, e.g., Karemera et al.* Decision of 30 January 2009, para. 17 and references cited therein.
[54] *Milošević* Decision, para. 16.
[55] Decision Setting the Trial Date, para. 10.
[56] Decision Setting the Trial Date, para. 10, referring to *Milošević* Decision, paras. 16, 17.
[57] Decision Setting the Trial Date, para. 12.

available time.[58] Instead, the Trial Chamber merely stated that it "expected that the staffing position of the Defence team will be addressed and completed in a timely manner".[59] Nowhere in the Impugned Decisions did the Trial Chamber consider the decisive question as to whether the time for preparation available to the Defence was objectively adequate to permit Ngirabatware to prepare his case in a manner consistent with his rights.

25. The Appeals Chamber further observes that, contrary to the Prosecution's assertion, the issues regarding Ngirabatware's needs were not addressed during the initial appearance or the further appearance. Ngirabatware raised the issue of the trial date at the status conference held on 9 February 2009 but the Trial Chamber declined to discuss it on the ground that a status conference was not the right place to do so.[60] The Trial Chamber merely indicated that it would consider Ngirabatware's request to vary the trial date in a timely and expeditious manner, bearing in mind the rights of the accused.[61] The information on the staffing of the Defence team given at the status conference was not commented upon by the Trial Chamber, which only requested the Registry to provide the necessary assistance to the parties.[62]

26. Ngirabatware's right to have adequate time to prepare for trial was explicitely addressed in the Trial Chamber's Decision Granting Leave to Amend the Indictment.[63] However, the Trial Chamber's consideration therein was limited to the question as to whether the requested amendments would affect the accused's right to a fair trial, without regard to any other factors.

27. The Appeals Chamber finds that the Trial Chamber erred in failing to address the factors relevant to its making a fully informed and reasoned decision as to whether the setting of the 18 May 2009 trial date infringed Ngirabatware's right to a fair trial, in particular his right to have adequate time for the preparation of his defence provided for in Article 20(4)(b) of the Statute.

28. The Appeals Chamber considers 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.[64]

[58] Decision Setting the Trial Date, para. 11.
[59] Decision Denying Reconsideration para. 24. *See also* Decision Setting the Trial Date, para. 11.
[60] Status Conference, T. 9 February 2009 pp. 4-7.
[61] Status Conference, T. 9 February 2009 pp. 5, 7.
[62] Status Conference, T. 9 February 2009 pp. 6-8.
[63] Decision Granting Leave to Amend the Indictment, paras. 25, 30, 35.
[64] *Cf. Milošević* Decision, paras. 8-19.

Ngirabatware's comparison with other cases therefore provides very limited, if any, assistance. Likewise, the Appeals Chamber considers that Ngirabatware's argument premised on the principle of equality of arms is 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.[65] The principle of equality of arms invoked by Ngirabatware should not be interpreted to mean that the Defence is entitled to the exact same means as the Prosecution.

29. In the present case, the Appeals Chamber notes that Ngirabatware's Lead Counsel was assigned on 2 December 2008. A legal assistant and an investigator were assigned to his Defence team only in January and February 2009, respectively. At the time of the Reply, no Co-Counsel had been assigned yet. The Appeals Chamber further notes that the indictment was significantly amended on 5 February 2009, and further amended on 14 April 2009. Although the Prosecution withdrew counts, removed certain allegations and restructured the indictment so as to render it clearer and more specific, it also added a considerable number of new allegations. Ngirabatware is now charged with six different counts related to different offences[66] and for many different incidents. His responsibility is charged under both Article 6(1), including participation in a joint criminal enterprise, and Article 6(3) of the Statute. In addition, the Appeals Chamber observes that pre-trial matters are still pending.[67]

30. Taken in isolation, none of these factors would have justified the Appeals Chamber's intrusion in the Trial Chamber's exercise of its discretion. Considered together, however, they lead the Appeals Chamber to conclude that, in light of the particular circumstances of this case, the Defence was not allowed enough time to prepare for trial. Accordingly, the Appeals Chamber finds that, in this specific situation, the date of 18 May 2009 for the commencement of the trial is so

[65] *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 ("*Orić* 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.

[66] Ngirabatware is charged for conspiracy to commit genocide; genocide or, alternatively, complicity in genocide; direct and public incitement to commit genocide; and extermination and rape as crimes against humanity.

[67] The Appeals Chamber notes for instance that no decision has been rendered yet on Ngirabatware's motion objecting to the Prosecution Pre-Trial Brief filed on 19 March 2009: *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Defence's Objections, Pursuant to Rule 73 *bis*, to the Prosecutor's Pre-Trial Brief, 16 April 2009. In addition, upon reading "Ngirabatware's Reply to the Prosecutor's Response to the Defence Objections, Pursuant to Rule 73 *bis*, to the Prosecution's Pre-Trial Brief" filed on 27 April 2009, the Appeals Chamber observes that disclosure issues still remain.

unreasonable as to permit the Appeals Chamber to draw an inference of abuse of discretion on the part of the Trial Chamber.

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.[68] However, the Appeals Chamber stresses that these considerations should never impinge on the rights of the parties to a fair trial.[69]

32. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber abused its discretion in failing to address the factors relevant to its taking a fully informed and reasoned decision as to whether the setting of the trial in May 2009 infringed Ngirabatware's right to a fair trial and in setting an unreasonable date for the start of the trial. Because the Trial Chamber is in the best position to determine what would be an appropriate date for the start of the trial, the Appeals Chamber remands the matter to the Trial Chamber.

E. Disposition

33. Accordingly, the Appeals Chamber **GRANTS** the Appeal, **REVERSES** the Impugned Decisions and **REMANDS** the determination of a trial date consistent with this decision to the Trial Chamber.

Done this twelfth day of May 2009,
at The Hague, The Netherlands.

Judge Andrésia Vaz
Presiding

[Seal of the Tribunal]

[68] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.7, Decision on Defendant's Appeal Against "*Décision portant attribution du temps à la Défense pour la présentation des moyens à décharge*", 1 July 2008 ("*Prlić et al.* Decision of 1 July 2008"), para. 16; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007, para. 23, citing *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.2, Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination by Defence and on Association of Defence Counsel's Request for Leave to File an *Amicus Curiae* Brief, 4 July 2006 ("*Prlić et al.* Decision of 4 July 2006"), p. 4.

[69] *Cf. Prlić et al.* Decision of 1 July 2008, para. 16; *Orić* Decision, para 8; *Prlić et al.* Decision of 6 February 2007, para. 23; *Prlić et al.* Decision of 4 July 2006, p. 4.