



UNITED NATIONS
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**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

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571

ENGLISH
Original: FRENCH

APPEALS CHAMBER

Before: Claude Jorda, Pre-Hearing Judge
Registry: Adama Dieng
Decision of: 6 February 2002

ICTR-95-1A-A
3 APRIL 2002

(571/H₀₁₅ - 566/H₀₁₅)

THE PROSECUTOR
(Appellant)

v.

IGNACE BAGILISHEMA
(Respondent)
Case No. ICTR -95-1A-A

JUDICIAL RECORDS SECTION
RECEIVED
ICTR

2002 APR - 3 1 P 5

03/04/2002
[Signature]

DECISION

ON THE MOTION FOR A REVIEW OF THE DECISION BY THE PRESIDENT OF THE APPEALS CHAMBER; ON THE MOTION PURSUANT TO ARTICLE 73 OF THE RULES OF PROCEDURE AND EVIDENCE PRAYING THE CHAMBER TO ORDER THE PROSECUTOR TO DISCLOSE TO THE DEFENCE THE TAPES CONTAINING THE RECORDINGS OF RADIO MUHABURA; ON THE MOTION FOR A REVIEW OF THE DECISION BY THE PRESIDENT OF THE APPEALS CHAMBER)

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ICTR Appeals Chamber
Date: 03/04/2002
Action: P. Bagilishema
Copied To: Concerned Appeals Chamber

Judges, their ALOs, the Parties,
Appeals Unit Arusha. Mr. J. Hocking
Thanks. A. Z. Z. Z.
03/04/2002.

Translation certified by LCSS, ICTR
Hag(a)02-014 (E)

I, Claude Jorda, Pre-Hearing Judge in the present matter,

Considering the Appeals Chamber's Decision of 5 February 2002 on the motions for review of the Pre-Hearing Judge's Decisions of 30 November and 19 December 2001 ("the Decision"),

Considering the *Prosecution's Appeal Brief* filed by the Prosecutor (the "Appellant") on 29 October 2001 ("Appellant's First Brief"),

Considering the Respondent's motion for translation and for an extension of the time-limit filed by Ignace Bagilishema on 31 October 2001 (respectively "the Respondent's motion of 31 October 2001" and "the Respondent"), in which the Respondent, following reception of the Appellant's first brief in English and not being able to understand it, in particular prayed the Appeals Chamber to grant him an extension of time to file a reply to the said brief,

Considering the "*Prosecution's Urgent Motion for Authorisation to exceed the page limit to the Prosecution's appeal Brief and alternative Request for Extension of Time*" filed on 2 November 2001 ("the Appellant's First Motion"), in which the Prosecutor, acknowledging that his first brief exceeded the limit to the number of pages specified in the Practice Direction relating to the length of briefs and motions on appeal ("the Practice Direction"), prayed the Appeals Chamber to accept his first brief or, alternatively, to grant him a seven days extension of time to file a new brief,

Considering the Pre-Hearing Judge's 30 November 2001 Decision "*Requête de l'Intimé en demande de traduction et de délais supplémentaires*" "Respondent's application for a translation and extension"; "*Prosecution's Urgent Motion for Authorisation to exceed the page limit to the Prosecution's Appeal Brief and alternative Request for extension of time*" ("the Decision of 30 November 2001") in which the said Judge:

(1) Allowed the Appellant's first prayer and ordered the said Appellant to file an appellant's brief in conformity with the Practice Direction;

(2) Partially allowed the "Respondent's motion of 31 October 2001" by ordering that the 30-day period for a reply granted him under Rule 112 of the Rules of Procedure and Evidence start running from the time the Registry served him and his Counsel with the French version of the Appellant's new brief;

(3) Requested the Registry to have the Appellant's new brief translated and served on the parties not later than 4 January 2002;

Considering the Motion for a review of the Decision by the President of the Appeals Chamber filed by the Respondent on 12 December 2001 ("the First Motion for Review") wherein the Respondent prayed the Appeals Chamber to re-examine the Decision of 30 November 2001 in which the Pre-Hearing Judge denied two prayers made in the Respondent's motion of 31 October 2001, the first being that, thenceforth and in the instance, the time-limits granted the Respondent under the Rules should start running only from the time the Registry served the Respondent and his Counsel with the French version of all the documents intended for him, and the second being that the 30-day time-limit to reply granted the Respondent under the Rules should be extended by an additional two months from the time the Respondent and his Counsel were served with the French version of the Prosecutor's brief.

Considering the Respondent's prayer to the Appeals Chamber to determine that the 30-day period for a reply be extended for an additional period of two months (making a total of three months) starting from the time the accused was served with the appellant's brief,

Considering the "*Prosecution Response to the Respondent's Motion for a Review of the Pre-Hearing Judge's Decision of 30 November 2001*" filed by the Appellant on 20 December 2001 ("the Prosecution's Response to the First Motion for Review") in which the Prosecution submitted that:

(1) The First Motion for Review should be disallowed because it was inadmissible;

(2) Were the motion to have been considered by the Appeals Chamber as equivalent to a motion for reconsideration, the Respondent had not demonstrated that there were special circumstances that would justify reconsideration;

(3) The arguments advanced by the Respondent were without merit;

Considering that the Respondent has not filed a response to the Prosecutor's response to the first motion for review and has not seized the Pre-Hearing Judge or the Appeals Chamber of a motion for extension of time to file such a reply,

Considering the "*Prosecution's Appeal Brief (reduced version)*" filed by the Appellant on 7 December 2001 (the Appellant's Second Brief);

Considering the internal memorandum sent by the Assistant Registrar to the Presiding Judge and the Judges of the Appeals Chamber on 14 December 2001 in which the Registry informed them that the Appellant's second brief was neither in compliance with the Practice Direction nor the Decision of 30 November 2001,

Considering the "*Prosecution's Urgent Motion for Extension of Time to File its Appeal Brief in compliance with the Practice Direction on the length of Briefs and Motion on Appeal*" filed on 19 December 2001 ("Appellant's Second Motion"), in which the Prosecution prayed the Appeals Chamber to grant an extension of time to file an appellant's brief in compliance with the criteria specified in by the Practice Direction,

Considering the "*Prosecution's Appeal Brief (further reduced version Brief)*" appended to the Appellant's Second Motion ("the Appellant's Third Brief"),

Considering the Pre-Hearing Judge's 19 December 2001 Decision ("*Prosecution's Urgent Motion for Extension of Time to File its Appeal Brief in compliance with the Practice Direction on the length of Briefs and Motion on Appeal*") in which the Pre-Hearing Judge allowed the Appellant to file his Third Brief, requested the Registry to have the Appellant's Third Brief translated and served on the parties before 7 January 2002, and confirmed that at that stage of the appeals procedure, the time-limit for the Respondent to reply would start running from the time the Registry served the Respondent and his Counsel with the French version of the Appellant's Third Brief,

Considering the Motion for a review of the decision by the President of the Appeals Chamber filed on 21 December 2001 ("the Second Motion for a Review"), in which the Respondent:

(1) Prayed the Appeals Chamber to review the Decision of 19 December 2001 on grounds that the Pre-Hearing Judge allowed the Appellant to file a new brief without the Respondent being in a position to reply to it;

(2) Submitted that, had the Pre-Hearing Judge waited until the Respondent expressed himself on the Appellant's second motion, the issue of irregularity of the Appellant's Third Brief and inadmissibility of the Prosecutor's appeal would have been raised;

Noting the "*Prosecution's Response to Respondent's Application for a review of the Requête en demande de révision de l'ordonnance du Président de la Chambre d'Appel*", filed by the Appellant on 4 January 2002 ("the Prosecutor's Response to the Second Motion for Review"), in which the Prosecutor submitted that:

(1) The Second Motion for Review should have been disallowed as being inadmissible;

(2) Were the motion to have been considered by the Appeals Chamber as equivalent to a motion for reconsideration, the Respondent has not proved any miscarriage of justice warranting reconsideration of the decision;

(3) The arguments advanced by the Respondent in his motion were without merit;

Considering that the Respondent did not file a reply to the Prosecutor's response to the Second Motion for review and did not seize the Pre-Hearing Judge or the Appeals Chamber of a motion for extension of time to file such a reply,

Whereas in its Decision, the Appeals Chamber referred the First and Second Motions for review to the Pre-Hearing Judge for reconsideration;

Considering the Motion under Rule 73 of the Rules of Procedure and Evidence praying the Chamber to order the Prosecutor to disclose the Radio Muhabura tape recordings to the Defence, filed by the Respondent on 12 December 2001 ("the Motion for disclosure of evidence"), in which the Respondent, referring to a declaration by a Prosecution Trial Attorney in *The Prosecutor v. Ferdinand Nahimana*, according to which the Prosecution allegedly possessed tape recordings of Radio Muhabura broadcasts in the process of being transcribed and translated, prayed the Appeals Chamber to order the Prosecution to disclose to the Defence the said tapes in accordance with Rule 68 of the Rules,

Considering the "*Response to Respondent's Motion under Rule 73 for an order for Disclosure of Recordings of Broadcasts on Radio Muhabura*" filed by the Prosecutor on 20 December 2001, in which the Prosecution submitted that the Motion for disclosure of evidence was unfounded and premature, and ought to be dismissed in particular on the grounds that the transcription and translation thereof was not finished, and that it was hence impossible for the Prosecution to determine whether the tapes contained exculpatory evidence within the meaning of Rule 68 of the Rules,

Considering that the Respondent did not file a reply to the Prosecutor's above response and that he did not seize the Pre-Hearing Judge or the Appeals Chamber of a motion for extension of time to file such a reply.

Considering the "Prosecutor's supplementary response to the motion filed by the Respondent under Rule 73 of the Rules of Procedure and Evidence for a decision ordering the disclosure of tape recordings of Radio Muhabura broadcasts" filed by the Appellant on 28 January 2002, in which the Prosecution informed the Appeals Chamber that, in *The Prosecutor v. Ferdinand Nahimana*, it had informed the Trial Chamber that it did not have any tape recording of Radio Muhabura for the month of April 1994 but only a certain number of UNAMIR reports giving summaries of broadcasts by various radio stations received in Rwanda between 11 May and 13 July 1994; that the motion for disclosure of evidence was therefore unfounded; that an examination of the said reports shows no item of information that could fall under Rule 68 of the Rules.

On the First and Second Motions for review:

Considering Article 25 of the Statute and Rules 120 and 121 of the Rules,

Whereas, in its Decision, the Appeals Chamber stated that the "issues raised in the Respondent's two motions imply that they should be viewed as motions for reconsideration";

Whereas, in the case of the First Motion, no special circumstance warrant that the Pre-Hearing Judge reconsider his decision;

Whereas in the case of the Second Motion, the Respondent has not demonstrated in what aspect the Pre-Hearing Judge, given the special circumstances, should have reconsidered his decision;

Whereas, furthermore, the Pre-Hearing Judge did emphasize in his Decision of 19 December 2001 that the Appellant, by failing to file a brief in compliance with the Decision of 30 November 2001, had not executed the Pre-Hearing Judge's order as contained in the said Decision, and that, noting the non-execution of the said order by the Appellant, the Appeals Chamber would, if necessary and when appropriate, apply the proper sanctions;

Whereas, in any event, the Respondent may, if necessary, advance arguments as to the irregularity of the Prosecutor's brief as part of an *addendum* to his response to the Appellant's brief;

On the Motion for disclosure of exculpatory evidence:

Considering Rule 68 of the Rules,

Whereas, under the said Rule, it is the Prosecutor who determines *ab initio* whether an item of evidence is exculpatory or not, and that, if it has not been shown that the Prosecutor's judgement in that respect, is wrongful, the Appeals Chamber shall not intervene in the Prosecutor's exercise of his freedom in such matters;

Whereas the Appeals Chamber will intervene if the Respondent can show that the Prosecutor has not fulfilled his obligations;

¹ "Decision ("Defence Motion under Rule 68 Requesting the Appeals Chamber to Order the Disclosure of Exculpatory Material and for leave to File Supplementary Grounds of Appeal")", *Alfred Musema v. Prosecutor*, Case No. ICTR-96-13-A Appeals Chamber 18 May 2001, ¶ 4

Whereas in the instance, the Prosecutor has stated that he does not possess the evidentiary material requested by the Respondent, and, should the documents requested by the Respondent be the UNAMIR reports containing summaries of broadcasts by various radio stations received in Rwanda between 11 May and 13 July 1994, the Prosecutor has stated that the said reports contain no material that could be disclosed under Rule 68 of the Rule;

Whereas the Motion for disclosure of exculpatory evidence is therefore unfounded;

For the foregoing reasons,

Dismiss all the Respondent's Motions;

Reiterate that the Respondent must file his response to the Appellant's brief no later than 7 February 2002;

Decide that any *addendum* to the said response, not exceeding 10 pages, must be filed no later than seven days after notification of the instant Decision, and that the Prosecutor shall, if necessary, file a reply, not exceeding 10 pages, no later than seven days after the filing of the said *addendum*;

Done in English and French, the text in French being authoritative.

[signed]

Claude Jorda,
Pre-Hearing Judge

Done at The Hague, The Netherlands, 6 February 2002

[Seal of the Tribunal]

