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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER I

Before: Judge Navanethem Pillay
Judge Erik Møse
Judge Asoka de Zoysa Gunawardana

Registrar: Adama Dieng

Date: 5 June 2003

THE PROSECUTOR
v.
FERDINAND NAHIMANA
HASSAN NGEZE
JEAN BOSCO BARAYAGWIZA
(Case No. ICTR-99-52-T)

DECISION ON THE MOTION TO STAY THE PROCEEDINGS IN THE TRIAL OF FERDINAND NAHIMANA

Counsel for Ferdinand Nahimana:
Jean-Marie Biju-Duval
Diana Ellis QC
Counsel for Jean Bosco Barayagwiza
Mr. Giacomo Barletta Caldarera
Counsel for Hassan Ngeze
Mr. John Floyd III
Mr. René Martel
Office of the Prosecutor:
Mr Stephen Rapp
Ms Simone Monasebian
Ms Charity Kagwi
Mr William Egbe

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal");

SITTING as Trial Chamber I, composed of Judge Navanethem Pillay, presiding, Judge Erik Møse, and Judge Asoka de Zoysa Gunawardana ("the Chamber");

BEING SEIZED of a Defence motion filed, on 13 May 2003, in which the Defence seeks a stay of the proceedings against Ferdinand Nahimana ("the Accused"), on the grounds of breaches of the fair trial proceedings set out in Articles 19 and 20 of the Statute of the Tribunal;

CONSIDERING the Prosecution's response, filed on 15 May 2003, in which it objects to a stay of proceedings and states that Ferdinand Nahimana can only complain that his trial has not been perfect but cannot claim that it has been unfair;

NOTING that the Defence case was closed on 9 May 2003 and that the closing arguments are scheduled for hearing from 18-21 August 2003;

CONSIDERING Article 28 of the Statute of the Tribunal on Cooperation and Judicial Assistance and several decisions issued by the Chamber requesting the cooperation of States.

HEREBY DECIDES THE MOTION UPON WRITTEN BRIEFS.

SUBMISSION BY THE PARTIES

The Defence

1. "The Defence asserts that the failure of the Rwandan authorities to cooperate and provide assistance in the manner envisaged by Article 28 of the Statute, in the course of the preparation of its case, has made it impossible to obtain access to material which would provide an answer to the Prosecutor's case; and further, has prevented the Defence from being able to put forward material in support of its own case. As a result the trial process is rendered unfair and it has proved impossible for the accused to have a fair trial."[1]

2. The Defence provides details of its efforts to obtain documents from the Rwandan Government, which would refute the Prosecution's case and support the case for the Accused in the relevant Annexes. The Defence states, inter alia, that:

(a) It has, for more than three and a half years, been diligent in its endeavours to obtain relevant admissible evidence for its case. It made formal requests for cooperation to the Trial Chamber in May 2002 and also made several trips to Rwanda but it has been only partially successful in gaining access to the required materials. Furthermore, the Rwandan authorities cooperated well with the Prosecution and have provided them with

[1] Skeleton Argument for Defence Application to Stay Proceedings, filed on 8 May 2003, Para. 1.3

information yet they have given shifty answers to the Defence on whether the documents or materials do exist or not;

(b) The Defence has direct information that some evidence and certain other materials still exist in Rwanda. The differential treatment afforded to the Defence and the Prosecution is tantamount to lack of "equality of arms" in obtaining evidence. The actions of the Rwandan authorities have deprived Nahimana of the opportunity to present evidence before the Chamber to disprove charges against him. Additionally, there is no equality in carrying out investigations because the Defence is confronted with a lack of cooperation. The Defence Counsel Management Section must also clear the Defence and their visits to Rwanda are strictly limited by financial criteria. The Defence cannot conduct investigations privately anywhere;

(c) The Chamber's intervention to request the cooperation of relevant bodies in Rwanda does not alleviate the problem as the situation did not change. The Chamber's obligation does not extend beyond mere attempts to assist. As a result, the Chamber is not in a position to fairly assess the culpability of Nahimana because evidence to answer the charges against him has not been released by the Rwandan authorities;

(d) The late disclosure of documents by the Prosecution, which it relied on or which were exculpatory, deprived the Defence of the opportunity to prepare its case properly before the trial commenced. The Defence could not give proper consideration to all the contents in the microfiche materials, which Alison Des Forges adequately considered, but which the Defence had to consider after the commencement of the Defence case. The Defence also did not receive copies of the interview of Omar Serushago and despite requests to the Prosecutor, their existence was only disclosed months after Serushago had testified. Furthermore, PA2's statement, which could have assisted the Defence in the cross-examination of witnesses, was only disclosed in April 2003 yet the Prosecution had it since 1998;

(e) The Chamber's decision of 24 January 2003, prohibited the Defence from calling evidence concerning certain aspects of the Arusha Accords yet no such strictures were imposed on the Prosecution. Thus the Defence was also denied the opportunity to challenge the Prosecution's assertion that a plan existed to kill the Tutsis.

The Prosecutor

3. The Prosecutor submitted that:

(a) It is undisputed that the parties to these proceedings are entitled to "equality of arms" but Accused Nahimana cannot now rely on the language from *Tadic* case because his complaints do not involve a State's obstruction of the appearance of his witnesses. In fact, the Defence applied for and received assistance of the Trial Chamber in the facilitation of the transfer of Witness Valerie Bemeriki, when the Chamber issued a formal Request to the Government of Rwanda on 25 February 2003. Ms. Bemeriki testified before the Trial Chamber on 8-10 April 2003;

(b) Concerning the differential treatment, the Prosecution has also suffered from the unavailability of the hundreds of thousands of witnesses who were killed as part of an effort to "leave none to tell the story" and from the disappearance of documents into the former Zaire with the retreating interim government;

(c) Even in much less complex criminal cases, where all of the witnesses and evidence are in a single jurisdiction, there are often problems with persons or entities, which will not cooperate or even come forward for reasons of self-interest, fear, or hostility to authorities or to those whom they believe to be criminals. If every case were stayed because there was not perfect access to all information, justice would never be done;

(d) Regarding the complaints on disclosure, the Prosecution has always complied with its duty to disclose materials and to make them available for the Defence to inspect as set forth in Rules 66. The Prosecution did not breach its duty to disclose exculpatory material under Rule 68, as well as complying with Orders of the Chamber. On the contrary, it was the Defence which did not provide the Prosecution with any documents it used during cross-examination of Prosecution witnesses, claiming that it had no reciprocal disclosure obligations, and also that it could only form an intention of what it would use in cross-examination after the completion of direct examination. Furthermore, in this case, the Defence has had the benefit of the disclosure and inspection of documents, including the microfiche material, that represents the early work of international experts, special investigative units, and non-governmental organizations to determine what happened in Rwanda. All these materials had been gathered by the Prosecution over the years often by non-selective processes;

(e) Concerning specifically mentioned materials such as the microfiche, the Serushago documents and PA2's statement, these have been disclosed as best as the Prosecution could do so. For example, Dr. Des Forges reviewed the materials as a consultant on behalf of all of the Prosecution. The Defence was clearly given an "opportunity to consider the contents" before completing the cross-examination of Dr. Des Forges, who began her direct examination on 20 May 2002 and completed her cross-examination in July 2002. The complaint concerning the microfiche materials is res judicata because the Defence has already made one motion for reconsideration in this regard that was dismissed by the Chamber;

(f) For the Omar Serushago materials, the Defence had access to the full transcripts of these videotaped interviews well in advance of Serushago's testimony. The Prosecution made the video tapes available for inspection. However, the Defence did not view them. Furthermore, although Omar Serushago did not testify about Ferdinand Nahimana in his direct-examination, the Chamber nonetheless allowed the Defence to cross-examine Serushago in depth. Lastly, PA2 was only a potential rebuttal witness relating to the Ngeze case. PA2 never testified in the Media Case. Accordingly, there was no prejudice to a cross-examination that never occurred. Consequently, this has meant that the whole of the material has been more accessible to the Nahimana Defence than to the Office of the Prosecutor;

(e) It was the Nahimana Defence team that steadfastly refused to provide the Office of the Prosecutor with videotapes or transcripts of its interviews in the year 2000 with Defence witness Bemeriki. The existence of these transcripts was confirmed by Bemeriki herself during her testimony when she encouraged the Prosecution to review them;

(g) The stay applied for in this case would be for an indefinite period with no triggering event provided for its termination and, if granted in the form sought, it would effectively terminate the proceedings against the Accused Ferdinand Nahimana in a manner not contemplated by the Statute or the Rules of the Tribunal;

(h) The Nahimana Defence once again revisits the Chamber's ruling on the scope of Dr. Strizek's testimony, which has been the subject of previous decisions barring his testimony. Nonetheless, the Trial Chamber permitted the Nahimana Defence to put questions, regarding the Arusha Accords, to Dr. Strizek;

(i) Regarding the complaint that the Nahimana Defence was unable to conduct its investigation in conditions of privacy when seeking documents from the United Nations in New York, the record needs to be straightened. The Prosecution was not aware of the documents being sought by the Defence when its Senior Trial Attorney made a personal visit to a lawyer at the Office of Legal Counsel during the week of 21-25 April 2003. The lawyer asked him why a Defence Counsel in the "Media case" was requesting peacekeeping documents at this late stage of the proceedings and about the need for haste in responding to the request. The Senior Trial Attorney answered that it was probably for the purpose of an offer of documentary evidence that had been promised by the Nahimana Defence for the close of evidence in early May, and it was thus important to respond quickly. He was not invited nor did he review the documents, obtain a set, or grant consent for their disclosure. He volunteered that he hoped the documents would be provided and that the redactions would be minimal;

(j) The Tribunal has provided the Accused Nahimana with assistance in the preparation of his case. He has had the services of a Lead Counsel, a Co-Counsel, two Legal Assistants, and a succession of investigators as well as resources for investigative missions. The President has thrice issued formal Requests for Cooperation and Assistance to the Government of Rwanda and appears to have issued similar requests to the Federal Republic of Germany and other nations. The Nahimana Defence has obtained the testimony of an important detained witness through these Requests. Nahimana has had the benefit of Rules of Procedure and Evidence regarding disclosure and inspection that are more liberal than those of many nations, including the United States. Furthermore, though the Nahimana Defence has often made accusations, the Trial Chamber has never found that the Prosecution was in violation of its obligations under the Rules.

DELIBERATIONS

Equality of arms

4. Article 19 (1) of the Statute provides that "the Trial Chambers shall ensure that a trial is fair and expeditious [] ". This provision mirrors the corresponding guarantee provided for in international and regional human rights instruments: the International Covenant on Civil and Political Rights (1966) ("ICCPR"), the European Convention on Human Rights (1950), and the American Convention on Human Rights (1969). Furthermore, Article 20 on the Rights of the Accused provides, *inter alia*, that all persons shall be equal before the International Tribunal for Rwanda. The right to a fair trial guaranteed by the Statute covers the principle of equality of arms.[2] Hence, the Chamber accepts that the principle of equality of arms falls within the fair trial guarantee under the Statute.

5. The Chamber is guided by the opinion of the Appeals Chamber that the principle of equality of arms between the Prosecutor and Accused in a criminal trial goes to the heart of the fair trial guarantee and that a fair trial must entitle the accused to adequate time and facilities for his defence.[3] The Chamber adopts the *Tadic* Appeals Chamber's conclusion on the scope of application of the principle of equality of arms that "---equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case."[4] Furthermore, the Chamber concurs with the reasoning in the *Tadic* Appeal that "under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case."[5]

6. The Chamber has, in the course of the proceedings, accordingly paid careful consideration to the right of the Accused to be accorded a fair and expeditious trial.

Cooperation and judicial assistance

7. Relying on the principle of equality of arms, the Defence is submitting that the trial is unfair and the Accused, Ferdinand Nahimana, cannot have a fair trial because relevant and admissible evidence was not presented due to lack of cooperation of the authorities in the Republic of Rwanda in securing certain information. Article 28 of the Statute of the Tribunal states:

"Article 28: Cooperation and Judicial Assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

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[2] *Tadic* Appeals Chamber Judgment, 15 July 1999, para. 44.
[3] Ibid, para. 44 and 47 respectively.
[4] Ibid, para. 48.
[5] Ibid, para. 52.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

(a) The identification and location of persons;
(b) The taking of testimony and the production of evidence;
(c) The service of documents;
(d) The arrest or detention of persons;
(e) The surrender or the transfer of the accused to the International Tribunal for Rwanda."

8. The wording in Article 28 (2) of the Statute is clear: a Trial Chamber has the power to issue Requests or Orders to a State. The provisions of Article 28 of the Statute do not leave any direct latitude for enforcing Orders or compelling States to respond to their requests, neither is the Chamber empowered to prevail upon States to cooperate. The Chamber is aware of the interpretation of this Article by various Trial Chambers[6] and the ICTY Appeals Chamber and notes that it possesses power only to issue requests and binding orders.

9. However, as observed by the Appeals Chamber in the *Blaskic* case, the International Tribunal does not possess any power to take enforcement measures against States. According to the Blaskic case, there exists exceptional legal basis for this Article, which "accounts for the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign States. Under customary international law, States, as a matter of principle, cannot be "ordered" either by other States or by international bodies."[7] Furthermore, this obligation, which is set out in the clearest of terms in Article 28, is an obligation incumbent on every Member State of the United Nations, that is, an "obligation *erga omnes partes*."[8] Thus, the Chamber can request or order but cannot enforce either its request or its order.

10. The Chamber also concurs with the Appeals Chamber in the *Blaskic* case, where it endorses the Prosecution's contention, that "as a matter of policy and in order to foster good relations with States, ... cooperative processes should wherever possible be used, they should be used first, and ...resort to mandatory compliance powers expressly given by Article 29(2) should be reserved for cases in which they are really necessary."[9]

11. The Appeals Chamber lays down the criteria to be followed in making applications for the requests. The Appeals Chamber holds the view that any request for an order for production of documents issued under Article 29, paragraph 2, of the Statute, whether before or after the commencement of a trial, must fulfil four criteria, namely, the requested materials must appear to the Trial Chamber to be relevant, admissible and not

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[6] *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, ICTR-98-41-T, Request to the Government of United States of America for Cooperation, 10 July 2002 (Trial Chamber III); *The Prosecutor v. Tihomir Blasikic,* Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 dated 29 October 1997.

[7] *Blaskic* ibid, para. 26.

[8] Ibid.

[9] Ibid, para. 31.

be in broad categories; must be identified with sufficient specificity; must succinctly provide the reasons why such documents are deemed relevant to the trial and not be unduly onerous. Hence, a party cannot request hundreds of documents, particularly when it is evident that the identification, location and scrutiny of such documents by the relevant national authorities would be overly taxing and not strictly justified by the exigencies of the trial. Lastly, the requested State must be given sufficient time for compliance.

12. The Chamber observes from the motion that the Defence is alluding to "a large amount of documentary material and cassettes of radio broadcasts and speeches" without providing sufficiently specific identification of the items and their relevancy. The request to the Rwandan authorities for cooperation goes beyond a mere request to provide access to materials; it is tantamount to requesting the authorities to conduct the onerous task of locating and identifying such documents and tapes. Such an undertaking is not strictly justified by the exigencies of the trial.

13. Furthermore, the Trial Chamber notes the submission by the Defence that "---it cannot assert categorically that all materials/information it has requested are still in existence," they have indications that some exist and the existence of others can be inferred. The Chamber is, therefore, not satisfied that materials sought by the Defence are in fact available. Defence Counsel asserts that the documents and tapes may exist and may be in the custody of the Rwandan authorities and that the Government is unwilling to disclose them. However, the information provided by the Defence in this regard does not assist the Trial Chamber to assess the validity of the conclusions drawn by the Defence.

14. In this particular case, the Trial Chamber acted within the limits of its powers to assist the Defence.[10] The Trial Chamber was seized of a request from the Defence and it assisted the Defence by issuing formal requests for access to material sought by the Defence.

15. In one instance, the Chamber relaxed the protection order to enable the Defence to investigate protected Prosecution witnesses in detention in Rwanda and to contact the Rwandan Minister of Justice.[11] On another occasion, Counsel for Ferdinand Nahimana made requests to the Trial Chamber to obtain access to microfiche material in Washington D.C., USA. The presiding Judge, in her capacity as President of the Tribunal, intervened with the US Ambassador-at-Large for War Crimes, who provided copies of the materials.

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[10] 24 September 2002 (access to exculpatory materials in Rwanda); 30 May 2002 (investigations in Rwanda); 25 February 2003 (transfer of Witness SM); 31 January 2003 (request to the Belgian Government); 26 March 2003 (request to UNICEF); 7 November 2000(Order to disclose identity of Witnesses AEH, AHA, AFZ, AGI and PV, who were in custody in Rwanda).

[11] *The Prosecutor v. Ferdinand Nahimana*, ICTR-96-11-T, Decision on the Defence Request for Measures of Investigation with Regard to Certain Prosecution Witnesses, 7 November 2000.

16. The Chamber notes that the Defence had ample opportunity and resources to defend the Accused under the same procedural conditions and with the same procedural rights as were accorded to the Prosecution. The Tribunal provided the accused with a legal team comprising a lead counsel, co-counsel, two legal assistants and investigators. The Defence has had at least three years in which to conduct its investigations in preparation of its defence. Indeed the Defence put forward a vigorous defence by presenting the defences of alibi and by extensive cross-examination of the witnesses, especially Dr. Alison Des Forges, Witnesses GO and Agnes Murebwayire, in respect of whom the materials are sought. Additionally, the Chamber notes that the Defence obtained extensive disclosures from the Prosecution in compliance with Rule 66. It also received disclosures from the Prosecution of exculpatory material in its custody.

17. Furthermore, the Chamber observes that the Defence had in fact received some measure of cooperation from the Rwandan authorities both in respect of on site investigations and access to material.

18. Concerning the other matters raised, namely complaints about disclosures involving Witnesses PA2, Omar Serushago and Dr. Alison Des Forges and the microfiche materials, these are *res judicata*.[12] The Chamber will not revisit its decisions.

19. The Chamber is not satisfied that the rights of the Accused to a fair trial have been violated by any lack of cooperation on the part of the authorities of the Republic of Rwanda. The Chamber notes that the Defence case was closed on 9 May 2003 and that it was only on the last day that the "Skeleton Arguments" in support of a stay of proceedings were filed. The Chamber finds no convincing basis for ordering a stay of the proceedings.

FOR THE FOREGOING REASON, THE TRIBUNAL

DENIES THE MOTION FOR STAY OF PROCEEDINGS.

Arusha, 5 June 2003

Navanethem Pillay
Presiding Judge

Erik Møse
Judge

PP Asoka de Z. Gunawardana
Judge

Seal of the Tribunal

[12] Decision on the Prosecutor's ex parte Application to exclude certain documents from the Defence Inspection of Microfiche Material (Rule 66(C) of the Rules), dated 25 October 2002, and Decision on the Defence's Application for Inspection of Microfiche material, dated 24 January 2003.

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