

ICTR-96-5-D
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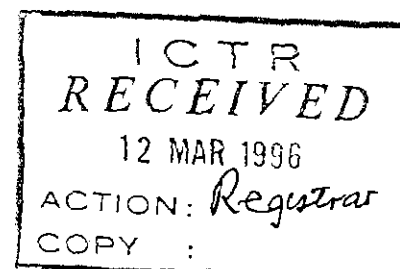
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UNITED NATIONS  NATIONS UNIES
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Case No: ICTR-96-5-D

THE TRIAL CHAMBER I

**DECISION ON THE FORMAL REQUEST
FOR DEFERRAL PRESENTED BY THE PROSECUTOR**



INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

IN TRIAL CHAMBER I OF THE
INTERNATIONAL CRIMINAL
TRIBUNAL FOR RWANDA

Case Number: ICTR-96-5-D
And

IN THE MATTER OF:
AN APPLICATION
BY THE PROSECUTOR
FOR A FORMAL REQUEST FOR
DEFERRAL BY SWITZERLAND

And
IN THE MATTER OF:
ALFRED MUSEMA

DECISION OF THE TRIAL CHAMBER ON THE APPLICATION
BY THE PROSECUTOR FOR A FORMAL REQUEST FOR DEFERRAL
TO THE COMPETENCE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR
RWANDA IN THE MATTER OF ALFRED MUSEMA
(PURSUANT TO RULES 9 AND 10 OF THE RULES OF PROCEDURE AND
EVIDENCE)

Considering the Application dated 4 March 1996 (“the Application”), filed by the Prosecutor of the International Criminal Tribunal for Rwanda (“the International Tribunal”),

Noting that Trial Chamber 1 has been designated by the President of the International Tribunal pursuant to Rule 9 of the Rules of Procedure and Evidence (“the Rules”) of the International Tribunal to answer the Application,

Having heard the Prosecutor at a public sitting held in Arusha on 11 March 1996,

Taking into account the documents submitted by the Representative of the Prosecutor at the public sitting on 11 March 1996, and in particular the correspondence from the Swiss judicial authorities and addressed to the Prosecutor,

I- The Application

1. This is an application by the Prosecutor of the International Criminal Tribunal for Rwanda, made pursuant to article 8 (2) of the Statute 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 such acts or violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, and in accordance with Rule 9 (iii) of the Rules of Procedure and Evidence, seeking an order from the Trial Chamber in relation to investigations and criminal proceedings being conducted by Switzerland respecting serious violations of International Humanitarian Law committed in the Prefecture of Kibuye in the territory of Rwanda between April 1994 and July 1994, and allegedly involving Alfred Musema, for a formal request to be made to the Government of Switzerland for its courts to defer to the competence of the Tribunal.
2. Pursuant to Rule 10 of the Rules, the Prosecutor has requested the Trial Chamber to issue a formal request to Switzerland in the following terms:
 - a) The courts of Switzerland defer to the competence of the Tribunal in regard to all investigations and all criminal proceedings in respect of Alfred Musema.
 - b) In regards to all such investigations and criminal proceedings of Alfred Musema, the Tribunal requests that Switzerland forward to the Tribunal the results of said investigations, criminal proceedings, copies of the courts' records and judgements concerning Alfred Musema, if any.
 - c) The reasons advanced by the Prosecutor in support of his proposal are:
 - 1) National investigations have been instituted against Alfred Musema by Switzerland for crimes alleged to have taken place in the Prefecture of Kibuye and elsewhere in Rwanda.

- 2) The Prosecutor has been conducting in the Prefecture of Kibuye investigations into crimes within the jurisdiction of the Tribunal and in which Alfred Musema is a suspect.
 - 3) The national investigations instituted by Switzerland closely relate to, or otherwise involve, significant factual and legal questions which may have implications for investigations or prosecutions before the Tribunal.
3. In his application the Prosecutor has furnished facts which, in brief, are that in February 1995 Switzerland decided to commence investigations in relation to Alfred Musema, which involve investigations into allegations of murder and incitement to murder Tutsis and moderate Hutus. Alfred Musema, who was the Director of the tea factory in Gisovu, prefecture of Kibuye, was arrested by the Swiss authorities on 11 February 1995, in the territory of Switzerland, following a warrant of arrest issued by the examining magistrate investigating the case. Alfred Musema is being detained in Switzerland. The *Tribunal de division suisse* ruled that he be kept in custody, a decision which has been confirmed monthly in accordance with the applicable provisions of Swiss law (Articles 56 and ff. of the Martial Criminal Procedure); the latest such decision extends the detention period to 25 March 1996. He is suspected of having committed crimes punishable under Swiss law (Articles 2, Chapter 9 and 109, Martial Criminal Code), including crimes which amount to serious violations of the Geneva Conventions of 12 August 1949 and the Additional Protocols of 8 June 1977. The Swiss examining magistrate has conducted investigations in various countries, including the Republic of Rwanda.
4. The Prosecutor has further stated that he has been investigating allegations of serious violations of international humanitarian law that occurred in the territory of the Republic of Rwanda including massacres perpetrated between April 1994 and July 1994 in the same Prefecture of Kibuye, in which Alfred Musema was allegedly involved. The Prosecutor's investigations include interviews of witnesses and the collection of documents in order to determine the truth of the allegations that the massacres, in particular in the Prefecture of Kibuye, were planned and resulted in the serial murder of a large number of people protected under international law. To the extent that his investigations essentially target people in a position of authority, the Prosecutor is of the opinion that Alfred Musema's alleged criminal responsibility might be preponderant. Indeed, Alfred Musema was the Director of the tea factory in Gisovu (Prefecture of Kibuye). He is alleged to have taken advantage of his position as a Director to aid and abet the execution of serious violations of international humanitarian law. More specifically, he is alleged to have been seen repeatedly on the massacre site known as Biseseero, Prefecture of Kibuye. He is alleged to have given instructions to the killers and to have directed the attacks. Several witnesses have stated that they saw him fire on the assembled civilians. Moreover, vehicles from his factory were allegedly used to transport the killers to the massacre site. His employees and drivers were also regularly present.

- 5. The Prosecutor has submitted that in order to develop the ongoing investigations, he must collect further essential evidence and obtain full access to the statements, documents and other findings of the investigations conducted by Switzerland in relation to Alfred Musema. According to the Prosecutor, if Switzerland continues investigations which are similar to his, a number of confusions and complications might occur. It could turn out to be detrimental to investigations before the Tribunal, in particular in relation to testimonies. It is indeed to be feared that witnesses might become reluctant to appear before successive investigators and would no longer be willing to cooperate fully and effectively in the questioning. Testimonies might thus lose credibility as the number of questionings in different conditions increases, whereas some other witnesses might even be exposed to threats and see their lives put in danger.

II – The analysis

- 6. Article 7 of the Statute of the International Tribunal extends its jurisdiction to the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994. Article 8 of the Statute states that:

- "1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.
- 2. The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda."

Such primacy, however, can only be exercised if a formal request is addressed to the national court to defer to the competence of the International Tribunal. The Rules specify the modalities for exercising this right.

7. Rule 9 of the Rules states that:

"Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:

(i) (...)

(ii) (...)

(iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal,

(...).

8. In order to meet the conditions for a deferral, the Prosecutor therefore must demonstrate:

a) that national investigations or criminal proceedings have been instituted against said Alfred Musema by the Government of Switzerland respecting crimes which come under the jurisdiction of the International Tribunal;

b) that investigations are being conducted by the Prosecutor on serious violations of international humanitarian law allegedly committed in the territory of Rwanda or in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in particular in the Prefecture of Kibuye, by several persons, including Alfred Musema;

c) that these investigations or criminal proceedings are closely related and otherwise involve factual or legal questions which may have implications for the Prosecutor's investigations or prosecutions.

9. The Prosecutor states, and this is confirmed by a letter dated 22 February 1996 addressed to the Prosecutor by Major Claude Nicati, the Swiss Examining Magistrate responsible for the case, that an investigation has been instituted against said Alfred Musema in Switzerland, and that said Alfred Musema has been arrested by the Swiss authorities in compliance of a warrant of arrest issued by the Examining Magistrate responsible for the case, and that he is still in custody.

10. The Prosecutor indicates that his Office is investigating allegations of serious violations of international humanitarian law committed in the territory of the Republic of Rwanda, including the massacres executed between April and July 1994 in the Prefecture of Kibuye, and allegedly involving Alfred Musema.

11. The Prosecutor is of the opinion that the International Tribunal is the appropriate jurisdiction to examine the case of Alfred Musema, taking into account the seriousness of the factual charges and of the legal questions which are bound to be raised in connection with the case before it.

12. The Prosecutor rightly observes that Article 9.2 of the Tribunal's Statute, concerning the principle of *non bis in idem*, sets limits to the subsequent prosecution by the Tribunal of persons who have been tried by a national court for acts constituting serious violations of international humanitarian law. As Swiss criminal legislation does not contain any provision concerning genocide or crimes against humanity, Alfred Musema has only been prosecuted by the Swiss courts for charges related to serious violations of the Geneva Conventions and of the Additional Protocols. Thus, should the Prosecutor subsequently wish to qualify the charges against Alfred Musema as genocide or crimes against humanity, Article 9 of the Statute would preclude any prosecution for such charges if a decision has already been made by the Swiss national courts.

13. The Prosecutor considers, not without reason, that the continuation of parallel investigations by the Swiss courts and the International Tribunal might be detrimental to the investigations, including the testimonies. As they are repeated, testimonies can lose their credibility, not to mention the risk of causing the witnesses to be distrustful; moreover the witnesses might be traumatised and even threatened of bodily harm.

14. The Swiss Government has already expressed its willingness to cooperate with the International Tribunal. Such willingness is demonstrated by the decision by the *Conseil fédéral suisse*, of 20 March 1995, to implement on their own Resolution 955 of the Security Council of the United Nations. Consequently, a federal decree was adopted on 21 December 1995, governing the cooperation with the International tribunal and enabling the Swiss courts to defer to the competence of the International Tribunal and to order provisional measures to maintain the status quo on the order of the International Tribunal. At the hearing on 11 March 1996, the Prosecutor has submitted copies of these two documents from the Swiss Government to Trial Chamber I.

15. In the light of the foregoing, the Judges of the Trial Chamber are of the opinion that the request for deferral by the Swiss authorities in the case of Alfred Musema meets the conditions set forth in Rule 9 of the Rules of Procedure and Evidence, and that such request should be favourably received.

III - The Decision

THE TRIAL CHAMBER
BASED ON THE FOREGOING DETERMINES AS FOLLOWS:

Considering all the matters before it and addressed in the public hearing,

Taking into account the provisions of Article 8 (2) of the Statute, and

Considering the requirements contained in Rule 9(iii) of the Rules,

the Trial Chamber consisting of Judge Laïty Kama, as Presiding Judge, Judge Lennart Aspergren and Judge Navanethem Pillay, being seized of the Application made by the Prosecutor,

HEREBY GRANTS the said Application,

FORMALLY REQUESTS the Swiss federal Government to defer to the International Tribunal all investigations and criminal proceedings currently being conducted in its national courts against Alfred Musema,

INVITES the Swiss Government to take all necessary steps, both legislative and administrative, to comply with this formal request and to notify the Registrar of the International Tribunal of the steps taken to comply with this formal request,

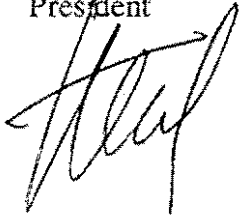
REQUESTS that the Government of Switzerland forward to the International Tribunal the results of its investigations and criminal proceedings and a copy of the court's records and the judgement, if already delivered,

REQUESTS that the Government of Switzerland continue to detain Alfred Musema until an indictment is established and confirmed and a warrant of arrest is issued against him by the International Tribunal,

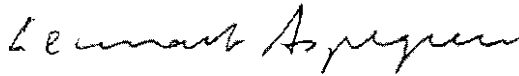
The Trial Chamber requests the Registrar of the International Tribunal to notify the Government of Switzerland of this Decision and Order.

Dated this 12th day of March 1996
Arusha

Laity Kama
President



Lennart Aspergren
Judge



Navanethem Pillay
Judge

