



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

Original: English

TRIAL CHAMBER II

Before: Judge Laïty Kama, Presiding
Judge William H. Sekule
Judge Mehmet Güney

Registry: Antoine Mindua
John Kiyeyu

Decision of: 20 November 2000

JUDICIAL RECORDS/ARCHIVES
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THE PROSECUTOR

v.

Sylvain NSABIMANA

Case No. ICTR-97-29A-T

**DECISION ON THE DEFENCE MOTION FOR THE REVIEW
OF THE DECISION OF 9 MAY 2000 AND FOR THE SCHEDULING
OF A STATUS CONFERENCE**

The Office of the Prosecutor:

Japhet Mono
Ibukunolu A. Babajide
Manuel Bouwknecht

Counsel for the Defence:

Josette Kadji
Charles Tchakoutie Patie

20.11.2000.

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("The Tribunal"),

SITTING as Trial Chamber II, composed of Judge Laïty Kama, Presiding, Judge William H. Sekule, and Judge Mehmet Güney;

CONSIDERING its Decision of 9 May 2000 on The Defence Motion to Withdraw Certain Counts of the Indictment against the Accused Nsabimana, ordered on 12 August 1999, whereby the Trial Chamber dismissed the said Motion, dated 2 November 1999, as being time barred under Rule 72(A) of the Rules;

BEING SEIZED of a Final and Extremely Urgent Preliminary Motion, filed on 24 October 2000 by the Accused Sylvain Nsabimana, for the Review, Due to New Material, of the said Decision dated 9 May 2000, and for the Convening of a Status Conference ("The Motion");

CONSIDERING the Prosecutor's Response, filed on 10 November 2000, to the said Final and Extremely Urgent Motion;

CONSIDERING the provisions of the Statute of the Tribunal ("the Statute"), specifically Article 25 of the Statute; the Rules of Procedure and Evidence ("the Rules"), in particular Rules 72, 73, 120 and 121 of the Rules; the Directive for the Registry of the Tribunal on Court Management Section No. 2/98 ("the Directive on Court Management Section"), notably Articles 25(1), 27(1) and 38 of the said Directive;

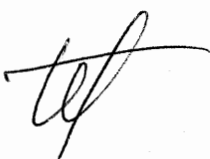
HAVING HEARD THE PARTIES at a hearing on 13 November 2000;

NOW CONSIDERS the Motion.

Arguments of the Parties

The Defence submit, *inter alia*, that:

1. The present Motion for review is timely filed pursuant to Rule 72(A) of the Rules, as the Prosecutor has only partially complied with his obligation of disclosure under Rule 66(A)(i) of the Rules, with respect to the supporting material to the Indictment against the Accused, and to the statements made by the Accused during an interrogation by the Prosecutor, as the transcripts thereof only, as opposed to the audio recordings thereof, have so far been disclosed. Alternately, they would bring their Motion under Rule 73 of the Rules.
2. As to the merits of their Motion, the Decision of 9 May 2000 dismissing their Motion dated 2 November 1999 should be reviewed in the light of "*new facts*", pursuant to Article 25 of the Statute and Rules 120 and 121 of the Rules, which are as follows: the latter Motion, submitted on 10 November 1999, when it was received at the Office of the President or, alternately, on 10 February 2000 when they filed it anew with the Registry, was to be reviewed pursuant to



Rule 72(A) of the Rules as amended on 1 June 1999, and not pursuant to the same Rule, as amended on 21 February 2000.

3. Their Motion was thus timely filed, as the version of Rule 72(A) in force at that time authorised the filing of preliminary motions, not only within “*sixty days following disclosure by the Prosecutor to the Defence of all the material envisaged by Rule 66(A)(i)*” but also “*before the hearing on the merits*”, whereas the latter mention disappeared upon the subsequent amendment of Rule 72(A) on 21 February 2000; amendment whereby the 60 days deadline following disclosure by the Prosecutor under Rule 66(A)(i) was moreover reduced to 30 days.
4. The Trial Chamber should set a date for a status conference to be held soon.

The Prosecutor replies, *inter alia*, that:

5. The motion is time barred under Rule 72(A) and cannot be entertained under any circumstances.
6. The request for review of the Decision of 9 May 2000 is inadmissible, as a review may only take place, in the light of new facts, with regard to a final judgement.

HAVING DELIBERATED,

7. Prior to reviewing the Arguments of the Parties, the Chamber notes that Rule 72(A) of the Rules provides that :

Rule 72: Preliminary Motions

[as amended on 1 July 1999]

(A) Preliminary motions by either party shall be brought within sixty days following disclosure by the Prosecutor to the Defence of all the material envisaged by Rule 66 (A) (i), and in any case before the hearing on the merits.

[as amended on 21 February 2000]

(A) Preliminary motions by either party shall be brought within thirty days following disclosure by the Prosecutor to the Defence of all the material envisaged by Rule 66 (A) (i).

8. Firstly, the Trial Chamber deems it necessary to bring the following clarifications to the attention of the Defence, with respect to its Decision of 9 May 2000:
 - Contrary to the allegations of the Defence, the Decision was founded on Rule 72(A) as in force prior to 21 February 2000. Indeed, even though this Rule allowed the filing of preliminary motions “*before the hearing on the merits*”, as the Defence submits, the Trial Chamber applied this time frame cumulatively



with the 60 days deadline following full disclosure by the Prosecutor under Rule 66(A)(i) of the Rules, in accordance, both with the jurisprudence of the Tribunal and with the use of the conjunction “and” articulating the time frame in general and the deadline itself, which, thus, is in any case compulsory.

- To declare the Motion time barred under Rule 72(A), as amended on 1st July 1999, the Trial Chamber took into account the fact that the Prosecutor had fully disclosed the documents under Rule 66(A)(i) by 30 August 1999, namely, the supporting material to the Indictment and the prior statements of the Accused, including the transcripts of the interrogation of the Accused by the Prosecutor. The Defence had filed their motion more than sixty days after that date, be that on 10 February 2000, when they filed it with the Registry, or, further, on 10 November 1999 when they informally submitted the same document to the Office of the President, in contradiction, as the Prosecutor rightly contends, with the official procedure for the filing of such documents as envisioned in Articles 25(1) and 27(1) of the Directive on Court Management Section, which state that “[a]ll documents which the Parties wish to serve on a Judge or Chamber must be first submitted to the Court Management Section» (Article 25(1)) and that documents otherwise submitted “shall be considered misdelivered and the Party so filing the document shall be responsible for any delay in the transmission of the document (...) to the Court Management Section” (Article 27(1)).
 - To have their motion reviewed by the Trial Chamber, the Defence should rather have asked for a waiver of the 60 days time-limit pursuant to Rule 72(F) of the Rules at the time of their first request, and shown “good cause” for the Chamber to proceed thus. They did not do so. Furthermore, neither did the Trial Chamber find any good cause to *proprio motu* grant the said waiver.
9. During the course of the hearing, the Defence brought their Motion for Review of the Decision of 9 May 2000, pursuant to Article 25 of the Statute and Rules 120 and 121 of the Rules, as a preliminary motion under Rule 72 of the Rules, as well as under Rule 73, as a motion (*See* transcripts of 13 November 2000).
10. With respect to the said Motion, as brought under Rule 72 of the Rules, the Trial Chamber notes that, not only is it time barred pursuant to Rule 72(A) of the Rules, as in force on 24 October 2000 when the Defence filed the said Motion, but also that it does not either fall within any of the categories of preliminary motions as listed in Rule 72(B) of the Rules.
11. With respect to the same Motion, as brought under Rule 73 of the Rules, the Trial Chamber considers that a Decision on a Preliminary Motion, as that of 9 June 2000, may not be reviewed. The Appeals Chamber of the Tribunal indeed clearly stated, at para. 49 of its *Decision* of 31 March 2000 in the Case Barayagwiza v. The Prosecutor, that “only a final judgement may be reviewed pursuant to Article 25 of the Statute and to Rule 120” and that “a final judgement in the sense of the above-mentioned articles is one which terminates the proceedings”, a position it reiterated



in a *Decision on review and/or Reconsideration* of 14 September 2000 in the above-mentioned case.

12. In this respect, the Trial Chamber declares itself concerned with the fact that, under the guise of a Motion for review of the Decision of 9 May 2000 on the basis of so-called "*new facts*", the Defence actually brought before the Trial Chamber an appeal against the said Decision, on the basis that the Trial Chamber erred in law in applying an incorrect version of Rule 72(A) of the Rules to declare their original Motion inadmissible, which, as we have seen, was not the case and could not have been the case.
13. With respect to the disclosure of the audio recordings of the interrogation of the Accused by the Prosecutor, the Trial Chamber seizes this opportunity to recall the Office of the Prosecutor of their promise, made before this Trial Chamber during a hearing on 25 September 1998, that is, more than two years ago, and orders them accordingly to disclose to the Defense of the Accused the said recordings, within 15 days from the date of the present Decision.
14. As to the last submission of the Defence regarding the scheduling of a status conference, the Trial Chamber emphasises that, according to Rule 65 bis of the Rules along with the practice of the Tribunal, it is and remains the prerogative of "*a Trial Chamber or a Judge thereof*" to decide on and set a date for such a status conference. Although the Parties may "*at any time before trial*" address such a request to the Trial Chamber directly or through Court Management Section, pursuant to Article 38 of the Directive on Court Management Section, the Chamber would rather receive such requests through an oral application or a letter. The Trial Chamber has however well noted the wish of the moving party to this respect, and shall bear it in mind.


FOR THE FOREGOING REASONS,

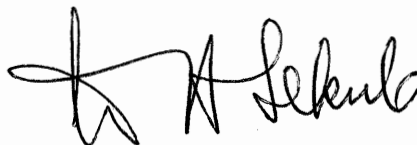
THE TRIAL CHAMBER

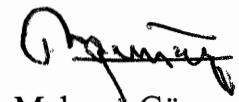
DISMISSES the Defence Motion for the Review of the Decision of 9 May 2000;

DISMISSES the Defence Motion for the Scheduling of a Status Conference.

Arusha, 20 November 2000


Laity Kama
Presiding Judge


William H. Sekule
Judge


Mehmet Güney
Judge

Seal of the Tribunal

