International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER I

Before: Judge, Navanethem Pillay, presiding
Judge Erik Møse
Judge Andrésia Vaz

Decision of: 10 July 2002

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THE PROSECUTOR
V.
Siméon NCHAMIHIGO

Case No. ICTR-2001-63-DP

DECISION ON THE DEFENCE MOTION SEEKING REVIEW OF THE DECISION OF 8 MAY 2002

The Office of the Prosecutor:

Richard Karegyesa
Holo Makwaia
Andra Mobberley

Counsel for the Defence:

Mr. David Gachuki

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

SITTING as Trial Chamber I, composed of Judge Navanethem Pillay, presiding, Judge Erik Møse, and Judge Andrésia Vaz ("the Chamber");

BEING SEIZED OF the Defence Motion Seeking Review Of The Chambers Decision Of 08-05-2002 Denying Defence Motion Of 02-04-2002 Seeking Release Of The Accused And Or Any Other Remedy filed on 19 June 2002 pursuant to Rule 120 of the Rules of Procedure and Evidence of the Tribunal ("the Rules").

NOTING the Prosecutor's response filed on 20 June 2002;

HEREBY DECIDES the motion on the sole basis of the written brief pursuant to Rule 73(A).

SUBMISSION OF THE PARTIES

1. The Defence requests the Trial Chamber to review its Decision of 8 May 2002 and submits that an oral hearing would enable the Defence to prove their case beyond a reasonable doubt by evidence and reference to documentary evidence. The grounds upon which the Defence relies for the review is that there exists new facts, as follows:

(i) That the truth, not only told by way of an affidavit and argued in a supporting brief but also expressly admitted by the respondent could be ignored and termed as frivolous.
(ii) That a breach of a rule, proved and admitted by the respondent could be ignored by the Chamber.
(iii) That the prosecution could refuse to reply to an affidavit and be allowed by the Chamber to give evidence from the floor from itself and not from witnesses thus acting as prosecutor and witness simultaneously.
(iv) That the Chamber could actually give evidence for the prosecution and make a decision on the basis of that evidence without any proof where the only reliable method of proof is documentary which was not tabled by the prosecution and whose actual search proves the contrary.
(v) That the Chamber could actually rule that a motion is 'frivolous in that it substantially covers issues already adjudicated by the Tribunal...'. While is fact none of the issues raised in the motion has ever been brought before the Tribunal by the Defence and the record so proves.

2. The Defence further submits that the Trial Chamber failed to consider certain documents relied upon in their motion: the affidavit of the accused, its annexures and the supporting brief. For example, concerning the supporting brief, the Defence states, *"It is our client's opinion that our supporting brief was neither considered nor answered by the Chamber. It is further his considered opinion that the Chamber's Decision is more of a summary of the prosecution's response than a considered opinion on our motion."*

3. The Prosecutor in response submits that the motion is inadmissible on the ground that Rule 120 is not applicable because a final judgement has not been rendered. Further, the Prosecutor submits that none of the five "new facts" identified by the Defence are new facts

within the meaning of Rule 120, nor do they meet the criteria for new facts laid down in the case of *Barayagwiza v. Prosecutor*. The Prosecutor relies on paragraph 41 of the main decision in that case.[1] Furthermore, the Prosecutor contends that the Defence has failed to demonstrate how the "new facts" they raise could have been a decisive factor in reaching the original decision by the Chamber.

DELIBERATIONS OF THE CHAMBER

4. The Chamber emphasizes at the outset that the review of a decision is in itself an exceptional measure.[2]

5. The Chamber recalls its Decision of 8 May 2002, where the Defence motion sought release of the accused person pursuant to Article 19 of the Statute of the Tribunal and Rules 3, 5, 40 *bis*, 43 and 73 of the Rules. In this decision, the Chamber stated that there had been no violation of the Accused's rights in respect of the tapes of his interview and the disclosure of supporting materials pursuant to Rule 66(A)(i) and therefore found that there was no basis upon which to release the accused.

6. The Chamber also noted that "the issue of the arrest of an accused falls within the domain of the requested State and it is that State and not the Tribunal, which organizes controls and carries out the arrest in accordance with its domestic law." The Chamber held that issues raised had already been adjudicated upon and concluded that the Accused's rights had not been violated either under Rule 43 or under Rule 66(A)(i), and that there was therefore no basis advanced for the release of the Accused.

7. It follows from the above decision by the Chamber, that this matter has already been determined. Article 25 of the Statute provides:

> "Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement."

8. Furthermore, Rule 120 stipulates:

> "Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber, if it can be reconstituted or, failing that, to the appropriate Chamber of the Tribunal for review of the judgement."

9. Review proceedings can only be moved before a Chamber in respect of a final judgement. Indeed, the Appeals Chamber held that "only a final judgement may be reviewed pursuant to Article 25 of the Statute and to Rule 120. ... [A] final judgement in the sense of

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[1] *Jean Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, App. Ch. "Decision (Prosecutor's Request for Review or Reconsideration)", 31 March 2000 ("the Barayagwiza Decision").

[2] *Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case No. ICTR-99-46-T, Tr. Ch. III, "Decision on the Coalition for Women's Human Rights in Conflict Situation's Motion for Reconsideration of the Decision on Application to File an Amicus Curiae Brief", 24 September 2001, para. 9.

the above-mentioned article is one which terminates the proceedings; only such a decision may be subject to review."[3]

10. The Appeals Chamber further stated that "it is clear from the Statute and the Rules that, in order for a Chamber to carry out a review, it must be satisfied that four criteria have been met. There must be a new fact; this new fact must not have been known by the moving party at the time of the original proceedings; the lack of discovery of the new fact must not have been through the lack of diligence on the part of the moving party; and it must be shown that the new fact could have been a decisive factor in reaching the original decision."[4]

11. In the present case, the Chamber notes that the impugned Decision is not a final judgement. The motion for review therefore has to fail.

12. Furthermore, the Chamber notes that the statements raised as facts by the Defence, which are set out above, are neither facts nor new. Nor can they be described as not known at the time of the proceedings before the Trial Chamber. In reality, they appear to be no more than arguments raised by the Defence against the Decision of 8 May 2002. Hence, the motion appears as a disguised appeal.

13. Finally, regarding the Defence argument that the Chamber did not consider certain documents in support of the motion of 2 April 2002, the Chamber relies on the Appeal Chamber's interpretation of the requirement, pursuant to Article 22(2) of the Statute, that a judgement "be accompanied by a reasoned opinion in writing," holding that the extent of this requirement "must be determined on a case by case basis and [that] courts are generally not obliged to give a detailed answer to every argument." Accordingly, the Chamber concludes that, "it is sufficient for the Trial Chamber to explain its position on the main issues raised."[5]

14. The Trial Chamber therefore rules that the motion is inadmissible.

15. In light of the clear wording of Article 25 of the Statute and Rule 120 and well-established jurisprudence, which must have been known to the Defence, the Trial Chamber is of the view that the Defence motion is an abuse of process.

[3] The Barayagwiza Decision, Note 1 above, para. 49.
[4] Ibid, p.4 at para 41.
[5] The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, App. Ch. "Judgment (Reasons)," 1 June 2001, p 64, para 165. The Appeals Chamber hereby relied on Judgments rendered by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), which itself referred to jurisprudence of the European Court of Human Rights (ECHR). Ibid, footnote 246.

FOR THE ABOVE REASONS, THE TRIBUNAL

1. **DENIES** the Defence motion.

2. **DIRECTS** the Registry, pursuant to Rule 73(E), not to pay to the Defence the fees or costs associated with this motion.

Arusha, 10 July 2002

Navanethem Pillay
Presiding Judge

Erik Møse
Judge

Andrésia Vaz
Judge

(Seal of the Tribunal)