



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER I

Original: English

Before: Judge Erik Møse

Registry: Mr. Adama Dieng

Date of Order: 25 October 2002

**THE PROSECUTOR
V.
FERDINAND NAHIMANA,
JEAN-BOSCO BARAYAGWIZA
AND
HASSAN NGEZE**

CASE NO. ICTR-99-52-T

**DECISION ON THE PROSECUTOR'S EX PARTE APPLICATION TO
EXCLUDE CERTAIN DOCUMENTS FROM DEFENCE INSPECTION OF
MICROFICHE MATERIAL**

Pursuant to Rule 66(C), Rules of Procedure and Evidence

The Office of the Prosecutor

Mr Stephen Rapp
Ms Simone Monasebian
Ms Charity Kagwi

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

SITTING as Trial Chamber I, constituted of Judge Erik Møse, designated by the Trial Chamber pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal ("the Rules");

BEING SEIZED OF an ex parte motion on 11 October 2002 pursuant to Rule 66 (C), in which the Prosecution seeks to exclude certain materials from inspection by the Defence;

TAKING INTO ACCOUNT the Prosecution's oral submissions during an ex parte hearing held on 14 October 2002;

DECIDES AS FOLLOWS.

INTRODUCTION

In her testimony, expert witness Alison Des Forges referred to microfiche material held by the US State Department. Subsequently, the Defence for Ferdinand Nahimana made requests to obtain access to this material in Washington D.C. On 16 September 2002 the presiding Judge, in her capacity as President of the Tribunal, contacted the US Ambassador-at-Large for War Crimes. In a letter of the same date, he informed her that steps were taken to duplicate the material. A microfiche would be brought to Arusha by the Deputy War Crimes Ambassador. He added, however, that the material might contain sensitive witness information in need of protection.

On 17 September 2002, the Parties were provided with a copy of the Ambassador's letter. The parties made submissions during a status conference held on the same day. The Defence reiterated its request. The Prosecution stated that it would need some time to go through the material in order to meet the concerns expressed by the Ambassador about confidentiality of witnesses.

Following the receipt of the material in Arusha, the matter was discussed during a status conference on 27 September 2002. The Defence for all three Accused requested access to the microfiche material. The Prosecution explained that it had verified that the microfiche material was the same as that which it has in its possession in Arusha and that it had fulfilled its disclosure obligations. It strongly objected to the material being sent out of the ICTR. Reference was made to Rule 66 (C). The presiding Judge stated that she would take the precaution of speaking to the Deputy Prosecutor before the Chamber made a final ruling on the matter. Following representations from the Prosecutor the Presiding Judge informed the Defence that the Chamber would look into the matter again when it had received further information.

SUBMISSIONS OF THE PROSECUTION

In its ex parte application, the Prosecution explains that it has in its possession 27,755 pages of documents on 14 reels of microfiche. These reels have been digitised, converted into a separate computer file and then copied on to a set of four CD-ROMs. The Prosecution has now examined the 14 reels of microfiche that were recently delivered to Arusha by the US Deputy War Crimes Ambassador. It is clear from the examination that these reels represent the results of a microfilming project undertaken on behalf of the Tribunal by the US Government in order to preserve the files that were in the possession of the Office of the Prosecutor as of July 1995. The documents contain internal

memoranda, correspondence and notes of meetings at the office of the Prosecutor at a time when it was developing its investigation and prosecution strategy. There are also interviews conducted by independent bodies that allege the involvement of specific individuals in mass killings.

According to the Prosecution, it has previously made available to the Defence everything in its files that it is required to disclose or to open for inspection under Rules 66 and 68. However, it is now willing voluntarily to make the vast majority of the microfiche material available for Defence inspection. To assist this inspection it will allow the material to be copied on to CD-ROM for review elsewhere. Documents to be excluded from inspection are internal documents as defined by Rule 70 (A) and material revealing the identity of witnesses, not called in this trial, who could properly be subject to protective measures under Rules 69 and 75 in other and future proceedings. This material is irrelevant to the specific allegations in the present case and largely in the form of handwritten questionnaires. In order to protect the rights of the Accused, the documents excluded from inspection are made available to the Chamber for an *in camera* inspection under Rule 66 (C). An index appended to the Prosecution's application indicates whether the material proposed is being excluded as internal documents or for reasons of witness protection.

The Prosecution argues that it has the right to allow its retained consultants to have access to its internal documents or to sensitive witness information, without rendering that material disclosable. Moreover, it has the right to share information with outside bodies that provide part of the information, such as the US Department of State, without causing a waiver of any claims to confidentiality on the part of either the Prosecution or the outside body.

The Prosecution has contacted Dr. Alison Des Forges to inquire whether she relied on any of the microfiche material to form the opinions in her expert report or in her testimony in this trial and reports that she confirms that she did not rely upon any of it, other than the material that was disclosed prior to her testimony.

DELIBERATIONS

The Chamber has reviewed the index and the material that according to the Prosecution should be excluded from inspection as internal documents under Rule 70 or for reasons of witness protection pursuant to Rule 69 and 75. The material has been provided in the form of a CD-ROM.

It is clear from this examination that many documents contain internal memoranda, correspondence, and notes of meetings at the Office of the Prosecutor at a time when it was developing its investigation and prosecution strategy. Furthermore, many of the documents are in the form of handwritten questionnaires which should be excluded from inspection having the character of internal documents as defined by Rule 70 (A). There is also material revealing the identity of witnesses, not called in this trial, who could properly be subject to protective measures under Rules 69 and 75 in other and future

proceedings. Many documents relate to "investigations" pursuant to Rule 70 or cannot reasonably be regarded as having any relevance to the present trial.

Some of the documents do not seem to be of internal character and could be disclosed: THN002 1191-99, which is a "wire" copy of news stories and THN002 1500-1508, which is labelled as confidential and not to be disclosed by SIU is simply an index of other materials. For instance, the Trial Chamber notes the reference to CDR Documents consisting of press releases and letters to Government officials from the head of the CDR Party in document THN 002-1500. There are also references to Rwandan magazines and journals such as the *Umuravu* Magazine editions 14 of 12/25/92, 15 of 2/10/93, 17 and 18 in respect of which no dates are given; *TUZA* Magazine, Special Rwanda September 1994 printed in Kinyarwanda in Bujumbura contain lists of perpetrators of violence and *KANGURA* 6 of December 1990 containing an article in French entitled "A Call to the Bahutu Conscience" and indicating the 10 Commandments. These may be disclosed. TKR004 208, which is an internal report about news clipping on the "expulsion" of Ferdinand Nahimana from Cameroon may also be disclosed, as well as the hand-written summaries of Radio Muhabura referred to in THN 002 1473-4.

FOR THE FOREGOING REASONS THE TRIAL CHAMBER HEREBY

1. **GRANTS in part** the Prosecution's ex parte application to exclude materials indicated in parentheses within the index attached to its motion;
2. **ORDERS** that the Prosecution should, immediately after receipt of this Order, enable the Defence to inspect the following material:
 - a) THN002 1191-99, which is a "wire" copy of news stories.
 - b) THN002 1500-1508, an index of other materials, particularly THN 002-1500.
 - c) TKR004 208, which is a report about news clipping on the "expulsion" of Ferdinand Nahimana from Cameroon.
 - d) Hand-written summaries of Radio Muhabura referred to in THN002 1473-4.

Arusha, 25 October 2002.

Erik Møse
Judge

Seal of The Tribunal