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ICTR-99-52-T
07-03-2003
(31790 - 31788)



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

31790
S. Mussa

OR: ENG

TRIAL CHAMBER I

Before: Judge Erik Møse

Registrar: Adama Dieng

Date: 7 March 2003

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

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**DECISION ON THE PROSECUTOR'S MOTION FOR DEPOSITIONS OF NGEZE
WITNESSES**

Office of the Prosecutor:

Mr Stephen Rapp
Ms Simone Monasebian
Ms Charity Kagwi
Mr William Egbe

Counsel for Ferdinand Nahimana:

Jean-Marie Biju-Duval
Diana Ellis, Q.C.

Counsel for Hassan Ngeze:

Mr John Floyd, III
Mr René Martel

Counsel for Jean-Bosco Barayagwiza:

Mr Giacomo Barletta-Caldarera
Ms Paolina Massidda

P.h.

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”);

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

BEING SEIZED of the:

- 1) “Prosecutor’s Motion For Depositions of Ngeze Witnesses”, filed on 4 March 2003 (“the motion”);
- 2) “Response of the Defence for Hassan Ngeze to the ‘Prosecutor’s Motion for Depositions Ngeze Witnesses’”, filed on 5 March 2003;
- 3) “Prosecutor’s Reply to Ngeze Defence’s Response”, filed on 6 March 2003; and
- 4) “Response from the Defence of Ferdinand Nahimana to the Prosecutor’s Motion for Depositions of Ngeze Witnesses”, filed on 6 March 2003;

CONSIDERING the Statute of the Tribunal (“the Statute”), in particular Articles 11 and 20, and the Rules, in particular Rules 15*bis* and 71;

HEREBY DECIDES the motion.

SUBMISSIONS OF THE PARTIES

1. The Prosecution seeks depositions of witnesses for Hassan Ngeze, as one or more judges are unavailable due to illness and other reasons. According to the Prosecution, the unavailability of a judge constitutes an “exceptional circumstance” warranting depositions in the interests of justice, pursuant to Rule 71, as the Accused has a right to be tried without undue delay. In support of this contention, the Prosecution refers to both ICTR and ICTY jurisprudence. In the event the Accused opposes the motion, the Prosecution further moves that these witnesses be called by the Chamber as Court witnesses pursuant to Rule 98.
2. The Ngeze Defence opposes the motion on the basis that the Accused has not consented to such depositions and such a motion could only relate to a party’s own witnesses. It cites as support the “Decision on Appeal by Dragan Papic Against Ruling to Proceed by Deposition” in *Prosecutor v. Kupreskic et al.*, IT-95-16 (AC), dated 15 July 1999. The Nahimana Defence opposes the motion on similar grounds.

DELIBERATIONS OF THE CHAMBER

3. The Chamber notes that Article 20(4)(c) of the Statute guarantees that the Accused shall be tried without delay.
4. The Chamber further notes that Rule 15*bis* of the Rules permits the Chamber to sit with two judges, for a maximum of five working days, in the absence of a judge if in the interests of justice. Rule 71 allows the taking of depositions in exceptional circumstances and in the interests of justice. Previous jurisprudence of the two ad hoc Tribunals has determined that the unavailability of a judge constitutes an exceptional circumstance and that it is in the interests of justice that the hearing of witnesses in the

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trial should not be stayed.¹ In almost all the cases the parties agreed to the use of Rule 71.

5. The present motion was not filed by the party who is calling the witnesses concerned, that is, the Ngeze Defence, but rather, by the Prosecution. In addition, the Ngeze Defence objects to the use of Rule 71 in this instance. The Nahimana Defence further argues that such a use of Rule 71 would result in the circumvention of Rule 15*bis*. It is further noted that the witnesses concerned are either already in Arusha or due to arrive in Arusha shortly.
6. In *Kupreskic*, the Appeals Chamber held that a ruling on a deposition motion may not be made by two judges, as Rule 71 provides for such an order by the Trial Chamber composed of three judges, pursuant to Article 11 (paragraph 14).
7. The Appeals Chamber further held that where witnesses are already at the seat of the Tribunal (in that case, The Hague) to give evidence directly to the Chamber, there were no exceptional circumstances, and that the unavailability of a judge is not a situation for which Rule 71 was originally intended (paragraph 21). However, the Appeals Chamber did not rule out the possibility of such a use of Rule 71 where the Accused consents. The Appeals Chamber also noted in paragraph 20 that such a request for a deposition would "normally" relate to that party's own witnesses.
8. The Chamber sees no need to enter into a detailed discussion of the *Kupreskic* decision (AC). It notes that the facts in that decision are similar to those in the present case. The Chamber has decided to deny the motion in view of the circumstances in the present case.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the motion.

Arusha, 7 March 2003

Erik Møse

Erik Møse
Judge



[Seal of the Tribunal]

¹ See "Decision on Prosecution and Defence Requests to Proceed by Deposition" in *Prosecutor v. Kupreskic et al.*, dated 11 February 1999; "Decision(s) on Prosecution Request to Proceed by Deposition" in *Prosecutor v. Kordic and Cerkez*, dated 13 April 1999, 3 November 1999 and 29 November 1999; "Further Decision on Prosecution Request to Proceed by Deposition" in *Prosecutor v. Kordic and Cerkez*, dated 2 December 1999; and Oral Decision delivered on 16 July 2002 in *Prosecutor v. Ntagerura et al.*