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ICTR-99-52-T  
11-04-2003  
(32113 - 32108)

International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda

32113

S. MUSA

TRIAL CHAMBER I

Before: Judge Navanethem Pillay, presiding  
Judge Erik Møse  
Judge Asoka de Z. Gunawardana

Registry: Mr. Adama Dieng

Decision of: 11 April 2003

OR: ENG

JUDICIAL RECORDS/ARCHIVES  
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THE PROSECUTOR  
v.  
FERDINAND NAHIMANA  
HASSAN NGEZE  
JEAN BOSCO BARAYAGWIZA  
(Case No. ICTR-99-52-T)

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**DECISION ON THE DEFENCE'S EXTREMELY URGENT MOTION TO RECONSIDER  
THE SCHEDULING ORDER DATED 26 MARCH 2003 ON THE FOLLOWING  
DIRECTION FOR THE REMAINING DEFENCE FACTUAL WITNESSES**

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Counsel for Hassan Ngeze

Mr. John Floyd III  
Mr. René Martel

Counsel for Ferdinand Nahimana

Mr. Jean-Marie Biju-Duval  
Ms. Diana Ellis QC

Counsel for Jean Bosco Barayagwiza

Mr. Giacomo Barletta Caldarera

The Office of the Prosecutor:

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

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

**SITTING** as Trial Chamber I, composed of Judge Navanethem Pillay, presiding, Judge Erik Møse and Judge Asoka de Z. Gunawardana;

**BEING SEIZED OF** an extremely urgent motion “to reconsider the Scheduling Order dated 26 March 2003, filed on 2 April 2003, concerning the remaining Defence factual witnesses;

**CONSIDERING** the Registrar’s response of 4 April 2003, the Defence’s reply to the response, the Registrar’s response to the Defence reply, both filed on 7 April 2003, and the Defence’s reply to the Registrar’s response, filed on 10 April 2003;

**CONSIDERING** Rule 73*ter* of the Rules, which provides that the Trial Chamber or the designated Judge may order the Defence to reduce the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts;

**HEREBY DECIDES** the said Defence motion on the basis of the written submissions.

**INTRODUCTION**

1. During the status conference of 3 May 2001, when the Chamber anticipated the end of the Prosecution case, it requested the Defence to indicate the time it would need for its case but was unable to do so.<sup>1</sup> At the Pre-defence Conference on 12 July 2002, the Chamber was scheduling its work for the latter part of October 2002. Counsel for Hassan Ngeze, Mr. Floyd, requested the Chamber not to sit in the second half of the month, 14 October onwards as had been scheduled, to enable the Ngeze Defence team to travel and get documents required by the Witness and Victims Support Section (WVSS (D)). At that time he stated: “We need time. The Prosecutor had a year and a half; we would like at least a couple of months to try to put things in order.”<sup>2</sup>

2. At the Pre-defence conference, Mr. Floyd also informed the Chamber that Mr. Martel had undertaken travel for 18 days. This would take him to several places including African countries at the end of July 2002, “and then through August and early September he will complete what has to be completed.”<sup>3</sup> Furthermore, Lead Counsel stated that while the Ngeze team was finishing its motion for judgement for acquittal, it would proceed to deal with witnesses in the United States and “we will be ready with our paperwork for WVSS.”<sup>4</sup> On 17 September 2002, Mr. Floyd explained to the Chamber that in order to get the facts needed under Rule 73*ter*, the team had to meet with people and talk to them and obtain documents that WVSS needs and that they had not had time over the last couple of years. Mr. Floyd also submitted that the seizure of Hassan Ngeze’s documents at the UNDF caused a setback, and that the team had not had an investigator for about 5-6 months.<sup>5</sup>

3. During the status conference on 17 September 2003, the Chamber stated: “Now the last word on the judicial calendar is that we, unfortunately, cannot change this schedule. This schedule stands. ... we have worked very hard to get all these court days available and we

<sup>1</sup> Transcripts (T.) 3 May 2002 pp. 9-11.

<sup>2</sup> T. 12 July 2002 pp. 4-5.

<sup>3</sup> Ibid. p. 6.

<sup>4</sup> Ibid. p. 6.

<sup>5</sup> T. 17 September 2002 p. 49.

cannot hold up matters if one Accused has witnesses available and another Accused's counsel is not ready or not available."<sup>6</sup>

4. On 7 November 2002, the presiding Judge remarked: "We are willing to accommodate Defence in scheduling to a certain extent only because, in our view, your preparation should begin from the day the indictments have been issued and you have been assigned as Counsel, not scrambling around now at the last minute."<sup>7</sup> The presiding Judge added: "We expect, Mr. Floyd that you have your witnesses available and you use every one of those court days."<sup>8</sup>

5. During a status conference on 11 December 2002, Mr. Floyd informed the Chamber that "obviously we have submitted to the Registrar a list of our proposed witnesses ... we were ordered basically to do it by the close of this session so we've done it; we've done it exhaustively. ... It's a large list. There are many names on there that we have not ... contacted yet. ... We're trying through stipulations and other things to deal with this."<sup>9</sup> Most of the ten factual witnesses at issue were included in this list of 11 December 2002. The presiding Judge stated: "Mr. Floyd, we have heard you and will look at your list and your summaries. The Chamber has final control on the number of witnesses and we will look at your summaries and watch out for aspects such as whether issues are in dispute, whether they can be admitted by the Prosecution, and also whether there's duplication of testimony."<sup>10</sup>

6. Concerning the ten factual witnesses at issue, the Chamber issued a Scheduling Order on 26 March 2003 in which the Chamber stated:

If Defence witnesses are to make any depositions, the Defence must finalize arrangements with the Chamber by 11 April 2003.

As for the remaining factual witnesses requested by Hassan Ngeze, the Chamber makes the following directions:

- i) Substantial summaries of the anticipated testimony of these witnesses are to be provided to the Chamber and other parties by Friday 4 April 2003;
- ii) The Chamber will then determine the list of witnesses to be called and will hear any such witnesses from 8 May 2003; and
- iii) Unredacted statements of any witnesses on this list are to be provided to the Chamber and other parties by 11 April 2003.

7. The Chamber set the tentative closure of the Defence case on 7 May 2003 unless the Ngeze Defence meets the requirements of the Scheduling Order as stated above.

## **SUBMISSIONS OF THE PARTIES**

### *The Defence*

8. Defence Counsel submits that every mission done by any Defence member must be approved by the Defence Counsel Management Section (DCMS) prior to the mission travel. To this end, the travel of the investigator for the Ngeze team was approved by the DCMS in

<sup>6</sup> Ibid. pp. 56-57.

<sup>7</sup> T. 7 November 2002 pp. 27-28.

<sup>8</sup> Ibid. p. 28.

<sup>9</sup> T. 11 December 2002 pp. 3-4.

<sup>10</sup> Ibid. p. 4.

January 2003 for him to travel in February 2003. On 19 March 2003, it requested DCMS to approve the postponement of that travel to April 2003 but the DCMS has not responded to the request although it normally does so within a week. Consequently, it was impossible for the Ngeze Defence to carry out the mission in an expeditious manner as advised by Judge Møse on 21 March 2003. The Defence cannot, therefore, submit a substantial summary of other factual witnesses by 4 April 2003 as ordered by the scheduling Order of 26 March 2003, for reasons beyond its control.

9. In reply to the Registrar's response, the Defence states, inter alia, that it "does not give the same Pseudonyms to the DCMS for strategy and security reasons." According to the Defence, it did not violate the spirit of the Circular of 11 March 2000.

#### *The Prosecution*

10. The Prosecution did not file a written submission but during the status conference on 21 March 2003, the Prosecution submitted that it was understood that the Defence was supposed to bring all of these protected witnesses by the end of March 2003. It was Mr. Floyd's complaint that he could have done that if it had not been for his unwillingness to pay an air ticket and be reimbursed for it later. The problems of payment of fees and expenses from 2002 should not affect Counsel's work and the team had elected not to proceed with trips to Europe for those witnesses that could have been taken in February 2003. Under those circumstances, the decision that the Defence should not move ahead and not present a list of those witnesses in March, suggests that it should not be able to call those additional witnesses. Moreover, there has already been a great deal of repetitive testimony. Under the provisions of Rule 73bis and 73ter, the Chamber has the power to shorten a witness list because of repetitive testimony. For more than 20 Ngeze witnesses, who have already been heard, there was certainly an immense amount of repetitive testimony that could have been stricken.<sup>11</sup>

#### *The Registrar*

11. The Registrar's written submission under Rule 33 (B) of the Rules states that the reasons provided by the Defence in support of its motion are misleading and cannot justify a reconsideration of the Scheduling Order of 26 March 2003. Prior to the authorization of an initial travel request for Defence team members or a postponement of a travel request, the DCMS needs a reasonable amount of time to carry out the relevant verifications to assess whether the request is in conformity with the "reasonable and necessary" criteria. The Defence failed to mention the urgent need to carry out this mission. It did not specify the exact dates of the beginning of the mission in Europe in order to meet with witnesses RM 145, RM 18, FN 39, FN 300, FN 320, FN 350, RM 500, RM 600, RM 700, and RM 800. During its consideration of the request for postponement of the mission, the DCMS noticed that none of the above witnesses listed in support of the travel request for the investigator's mission appears in the final list of Defence witnesses dated 20 January 2003. Consequently, the request was denied on 7 April 2003.

12. The Registry notes that although the Defence Counsel, as Officers of the Court, are under an obligation to provide the Chamber with exact and accurate facts, they have failed to comply with their obligations. In response to the Defence's reply to the Registrar's

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<sup>11</sup> T. 21 March 2003 p. 8.

submission, the Registrar clarifies that in a circular dated 10 March 2000, all Defence counsel were requested by the then Lawyers and Detention Facilities Management Section to use a definite, unchanging pseudonym for each witness throughout the judicial proceedings. The purpose of the memorandum is to ensure better control and objectivity in the assessment of requests made by Defence teams for travel. Ms. Mongo and Mr. Floyd, then Counsel and co-Counsel, received this memorandum on 16 March 2000. The Defence has clearly violated the terms of the memorandum.

#### DELIBERATIONS OF THE CHAMBER

13. The Chamber notes that during the status conference on 21 March 2003, the Defence for Hassan Ngeze informed the Chamber that no member of the Defence has met the ten factual witnesses and that Counsel recently received their names from their client. Furthermore, Mr. Martel informed the Chamber that the investigators "are leaving immediately after this session to go and meet them, and as soon as that reconnaissance mission is accomplished I will also go and meet them in order to be able to come and call them here and present them here."<sup>12</sup>

14. As observed by the Bench at the status conference, nothing prevented the Defence from sending an investigator to interview witnesses in parallel with the on-going trial.<sup>13</sup> It was only on 19 March 2003 that the Defence submitted to the DCMS its request for postponement of the investigator's mission from February to April. It is true that the Registry did not make a decision on the request until 7 April 2003. However, according to the request the investigator's mission would "be carried out in the course of April" once the DCMS had approved the postponement. The intention was obviously to send the investigator after the current session ending on 11 April 2003, as confirmed by Mr. Martel during the status conference (see para. 13 above). The Defence did not inform the DCMS after the status conference that it would send the investigators in parallel with the trial, as suggested by the Bench. The fact that other requests were processed by the DCMS within a week should have alerted the Defence to approach the Registry in order to seek clarification.

15. In this context the Chamber observes that the processing of the request was complicated by the fact that the Defence identified the ten witnesses by pseudonyms other than those in its final list of witnesses. In the Chamber's view, this was a clear violation of the Registry's circular of 10 March 2000, which reads as follows:

To promote administrative efficiency and to avoid any confusion regarding the identity of the witnesses called to testify before the Tribunal, you are requested to use a definitive, unchanging pseudonym for each witness throughout the judicial proceedings.

16. The Ngeze Defence received this circular. Its explanation why it used different pseudonyms to identify the same witnesses is not convincing. Moreover, the Chamber is not persuaded by the Defence's additional arguments in its reply of 10 April 2003.

17. Consequently, the Chamber does not accept the Defence submission that it has been unable to interview potential witnesses in parallel with the current session of the trial because of delays within the Registry. The responsibility falls on the Defence, which caused the lack of clarity.

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<sup>12</sup> Ibid. p. 12.

<sup>13</sup> Ibid. pp. 12-13.

18. More generally, it is the view of the Chamber that the Defence has not exercised due diligence in preparing its witnesses despite being advised by the Chamber to do so several times. In fact, since May 2002, the Chamber gave the Defence ample notice.<sup>14</sup> The Chamber recalls its opinion as expressed by the presiding Judge during the status conference on 7 November 2002. At that time, the Chamber indicated its willingness to accommodate the Defence in scheduling but to a certain extent only. In the view of the Chamber "preparation should begin from the day the indictments have been issued and you have been assigned as Counsel, not scrambling around now at the last minute."<sup>15</sup> The ten witnesses were on the final list of witnesses of 20 January 2003 and most of them were known to Counsel earlier, as illustrated by its list of 11 December 2002, even if they may not have been precisely located.

19. The Chamber also stands by its statement during the status conference on 11 December 2002 that it has the "final control on the number of witnesses," and that it will look at the summaries and watch out for aspects such as whether issues are in dispute, whether they can be admitted by Prosecution and also whether there is duplication of testimony.<sup>16</sup>

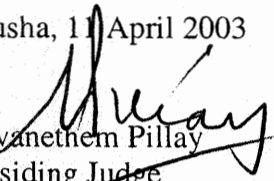
20. During the status conference on 21 March 2003, the Defence was asked to indicate the substance matter on which the witnesses would testify. The answers were not clear, as Defence Counsel had not spoken with the witnesses. Reference was made to "fabrication of evidence" and "Tutsi women, who will come and testify."<sup>17</sup>

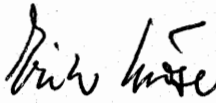
21. The Chamber has already heard many Defence witnesses testify about Hassan Ngeze's assistance to Tutsi during the events in 1994, the way he was usually dressed, by whom he was accompanied and the killing of Modeste Tabaro. Further evidence on these matters will only amount to unnecessary repetition. The Chamber has also heard allegations about fabrication of evidence. Consequently, the Chamber does not find that the Defence has substantiated its claim to bring further witnesses at this late stage of the trial. In relation to the ten witnesses for Hassan Ngeze, it maintains its Scheduling Order of 26 March 2003 and declines to hear the ten factual witnesses for the Defence.

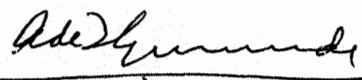
#### FOR THE ABOVE REASONS THE CHAMBER

**DENIES** the Defence motion to reconsider its Scheduling Order of 26 March 2003 in respect of the ten factual witnesses.

Arusha, 11 April 2003

  
Navanethem Pillay  
Presiding Judge

  
Erik Møse  
Judge

  
Asoka de Z. Gunawardana  
Judge

The Seal of the Tribunal



<sup>14</sup> T. 17 September 2002 p. 56.

<sup>15</sup> T. 7 November 2002 pp. 27-28.

<sup>16</sup> T. 11 December 2002 p. 4.

<sup>17</sup> T. 21 March 2001 pp. 11-13.