

ICTR-99-52-T  
(32644-32641)  
05-06-2003

32644



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER I**

**Before:** Judge Navanethem Pillay, presiding  
Judge Erik Møse  
Judge Asoka de Zoysa Gunawardana

**Registrar:** Adama Dieng

**Date:** 5 June 2003

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

**DECISION ON THE NAHIMANA DEFENCE'S MOTION TO ADMIT INTO  
EVIDENCE CERTAIN MATERIALS AND THE PROSECUTION OBJECTION  
THERETO**

**Office of the Prosecutor:**

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

**Counsel for Hassan Ngeze:**

Mr John Floyd, III  
Mr René Martel

**Counsel for Jean-Bosco Barayagwiza:**

Mr Giacomo Barletta-Caldarera

**Counsel for Ferdinand Nahimana:**

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

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**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 Zoysa Gunawardana (“the Chamber”);

**BEING SEIZED** of:

1. The Nahimana Defence’s oral request on 9 May 2003, the last day of trial, to admit 16 documents into evidence (whereupon the Prosecution requested, and was given time, to object to the admission of the documents);
2. The Prosecution’s objection entitled “Prosecutor’s Motion to Deny the Admission into Evidence of Certain Materials Proposed by the Nahimana Defence on the Last Day of Trial”, filed on 12 May 2003 (“the motion”);
3. The Reply thereto, filed by the Nahimana Defence on 15 May 2003 (“the reply”);
4. The “Prosecutor’s Response to the Nahimana Defence’s Reply”, filed on 19 May 2003 (“the Prosecutor’s first response”);
5. The “Defence Reply to the Prosecutor’s Response”, filed by the Nahimana Defence on 21 May 2003 (“the second reply”); and
6. The Prosecutor’s Response thereto, filed on 26 May 2003 (“the Prosecutor’s second response”);

**CONSIDERING** the relevant provisions of the Statute of the Tribunal (“the Statute”) and the Rules of Procedure and Evidence (“the Rules”), in particular, Rules 89(C) and 92*bis*.

**HEREBY DECIDES** the motion, pursuant to Rule 73(A) of the Rules, solely on the basis of written briefs filed by the parties.

**SUBMISSIONS OF THE PARTIES**

1. The Prosecution objects to six of the sixteen documents sought to be admitted by the Nahimana Defence, on the general basis that the Nahimana Defence failed to comply with its disclosure obligations. However, the Prosecution agrees to the admission of the document entitled “Système d’appréciation du Comportement Professionnel de L’UNHCR”, which is a sub-document within the document entitled “Summary of the UNHCR Presentation Before Commission of Experts”. With respect to the other documents within the Summary, the Prosecution objects on the basis that the document is incomplete and occasionally illegible, and relates to matters not previously testified to by any witness. In respect of the other five documents, which also contain sub-documents (Statements of Jef Vandensande, Aloys Ngendahimana, Anselme Bigirimana and Oswald Ahigombeye, and Information in Connection with UNICEF, Kigali), the Prosecution objects on the basis that the persons whose statements sought to be admitted should be called as witnesses, in order that the Prosecution may cross-examine these persons. In its first response, the Prosecution argues that the Nahimana Defence has not complied with the procedural requirements under Rule 92*bis* for the admission of the statements, in particular subsections (B) and (E). In its second response, the Prosecution additionally argues that since the issues concerned are pivotal to the case, statements cannot be admitted without affording the Prosecution the opportunity to cross-examine the makers of the statements.

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2. The Nahimana Defence argues that the Summary is relevant in determining the causality of the massacres after 6 April 1994, and that the parts tendered are those it is authorized to use, whilst the parts excluded relate to events after July 1994 and are therefore not pertinent. With respect to the statements sought to be admitted, the Nahimana Defence submits that these statements should be admitted under Rule 92bis. It states that the documents were only received recently and could not have been disclosed to the Prosecution earlier. In its second reply, the Nahimana Defence argues that it has been hampered in the presentation of its defence by its inability to secure evidence from Rwanda.

3. In its reply, the Defence further seeks reconsideration of the Chamber's decision not to admit the statement of Mr Jean-Marie Vianney Ndagijimana. The Prosecution objects to the application to reconsider as no new evidence has been adduced to justify reconsideration.

### **DELIBERATIONS OF THE CHAMBER**

4. Rule 89(C) provides that the Chamber "may admit any relevant evidence which it deems to have probative value". Rule 92bis provides for admission of a witness's written statement in lieu of oral testimony, which goes to proof of a matter other than the acts and conduct of the accused as charged. Subsection (B) stipulates that a declaration, by the person making the statement, of the truth and accuracy of the contents of the statement, must be attached, although this requirement may be dispensed with if the person is unavailable (Subsection (C)). Subsection (E) provides that 14 days' notice must be given to the opposing party, who may object within seven days.

5. The Chamber considers that the best evidence remains that of oral testimony before the Chamber from the person making the statement.

#### *Summary of the UNHCR Presentation Before Commission of Experts*

6. The Nahimana Defence does not seek to admit the summary under Rule 92bis and the admission of the document would be assessed within the rubric of Rule 89(C). The Chamber considers that evidence relating to the history of Rwanda would be relevant only if it related to the causality of the massacres in 1994 or to the role of RTLM or Kangura. The Chamber notes that the summary relates to the causality of the massacres in Rwanda during April to July 1994.

7. The Chamber notes that the main objection to the admission of the summary is that it is incomplete. The Chamber has no means of knowing if the excluded parts of the summary contain similar or different conclusions from that contained in the included parts, or the procedure of selection used by the Nahimana Defence in determining which parts to include. However, the Chamber considers that this is an official document of the UNHCR presented to a UN Commission of Experts, in the nature of other official documentation presented by the Prosecution. The document is reliable and is probative of the causality of the massacres after 6 April 1994. The Chamber will admit the extracts of the document authorized for use, subject to consideration of the defects enumerated above.

*Statements of Jef Vandensande, Aloys Ngendahimana, Anselme Bigirimana and Oswald Ahigombeye*

8. The Chamber notes that the Nahimana Defence only claimed for the first time in its reply that it sought to admit these statements pursuant to Rule 92bis.

9. The Chamber considers that the Nahimana Defence has not complied with the requirements for the use of Rule 92bis, although the makers of the statements appear to be available. The Chamber also considers that these persons should have been called as witnesses so that the Prosecution would have had an opportunity to cross-examine them. For these reasons, the Chamber will not admit the statements.

*Information in Connection with UNICEF, Kigali*

10. The Nahimana Defence does not seek to admit this document under Rule 92bis and the admission of the document would be assessed according to the provisions of Rule 89(C).

11. The Chamber notes that the Nahimana Defence had previously made an *ex parte* application with respect to the same matter, which application was denied. The Nahimana Defence is essentially seeking a reconsideration of the Chamber's decision on the application. The Chamber considers that this is not an official document and that Mr Koty is unwilling to sign the statement. In light of this, the Chamber will not admit the document.

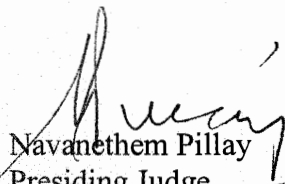
*Statement of Jean-Marie Vianney Ndagijimana*

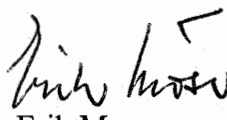
12. The Chamber declines to revisit the issue of the admissibility of this statement, previously decided upon by the Chamber.

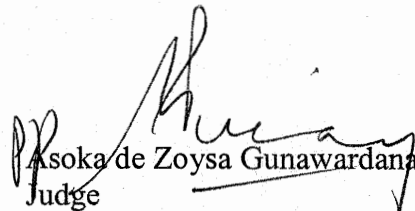
**FOR THE ABOVE REASONS, THE TRIBUNAL**

- (a) **ALLOWS** the admission of extracts of the document entitled "Summary of the UNHCR Presentation Before Commission of Experts" as tendered by the Nahimana Defence, which incorporates the document entitled "Système d'appréciation du Comportement Professionnel de L'UNHCR";
- (b) **DENIES** the admission of the other documents mentioned above.

Arusha, 5 June 2003

  
Navanethem Pillay  
Presiding Judge

  
Erik Møse  
Judge

  
Asoka de Zoysa Gunawardana  
Judge

[Seal of the Tribunal]