



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

34748

ICTR-98-41-T  
18-04-2007  
(34746-34740)

S. Nkur

TRIAL CHAMBER I

**Before:** Judge Erik Møse, presiding  
Judge Jai Ram Reddy  
Judge Sergei Alekseevich Egorov

**Registrar:** Adama Dieng

**Date:** 18 April 2007

THE PROSECUTOR

v.

**Théoneste BAGOSORA**

**Gratien KABILIGI**

**Aloys NTABAKUZE**

**Anatole NSENGIYUMVA**

*Case No. ICTR-98-41-T*

JUDICIAL RECORDS ARCHIVES  
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**DECISION ON NTABAKUZE PETITION FOR A WRIT OF MANDAMUS AND  
RELATED DEFENCE REQUESTS**

**The Prosecution**

Barbara Mulvaney  
Drew White  
Christine Graham  
Rashid Rashid  
Kartik Murukutla

**The Defence**

Raphaël Constant  
Allison Turner  
Paul Skolnik  
Frédéric Hivon  
Peter Erlinder  
Marc Nerenberg  
Kennedy Ogetto  
Gershon Otachi Bw'Omanwa

S. Nkur

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA**

**SITTING** as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

**BEING SEIZED OF** the Ntabakuze "Petition for a Writ of Mandamus", filed on 7 December 2006; Annexes in Support of the Petition, filed on 13 December 2006; Additional Appendices, filed on 1 March 2007; and a Corrigendum, filed on 14 March 2007;

**CONSIDERING** the Prosecutor's Response, filed on 15 December 2006; and the Ntabakuze Reply, Supplement to the Petition, and Motion for the Appointment of an Independent Special Prosecutor, filed on 22 January 2007;

**BEING ALSO SEIZED OF** the Ntabakuze "Petition to Extend the Mandate of the Tribunal: and Halt Transfer of Detainees to Rwanda; and Suspend All ICTR Prosecutions Pending Independent Investigations of the RPA/F Role in Initiating, Prolonging, and Committing the 1994 Rwanda Massacres", filed on 22 January 2007;

**BEING FURTHER SEIZED OF** the Bagosora "Motion for Disclosure Pursuant to Rule 68 and Submissions in Support of Ntabakuze Petition Dated 22 January 2007", filed on 15 February 2007;

**HEREBY DECIDES** the requests.

**INTRODUCTION**

1. The Ntabakuze Defence requests that the Trial Chamber order the Office of the Prosecutor to complete its investigations and to initiate criminal proceedings against Rwandan President Paul Kagame and other leaders of the Rwandan Patriotic Front ("RPF") for crimes committed in Rwanda during 1994. It seeks an independent investigation into potential improper influence, misfeasance, or malfeasance on the part of the Office of the Prosecutor during the period of October 1994 to the present, in the course of its investigations, and it also requests the appointment of an independent special prosecutor to investigate and prosecute RPF leaders.<sup>1</sup> In support of its petition, the Defence encloses a number of documents.

2. In a separate but related petition, the Ntabakuze Defence requests an extension of the mandate of the Tribunal to permit full investigation and prosecution of all those responsible for crimes committed in Rwanda in 1994, including the RPF; a halt to all transfer of cases and detainees to Rwanda; and the suspension all ICTR proceedings pending an independent investigation of the RPF's role in the 1994 massacres in Rwanda. The Bagosora Defence filed a supporting motion, which also seeks an order for disclosure of all evidence suggestive of RPF crimes in Rwanda in 1994. The Bagosora Defence argues that this is exculpatory material and should have been disclosed.<sup>2</sup> The Prosecution did not respond to these requests.

<sup>1</sup> Petition, in particular pp. 20-21; Reply, paras. 1-9, 10-21. The requests are also addressed to the President of the Tribunal and any "other appropriate organ of the Tribunal and/or the United Nations Security Council".

<sup>2</sup> Bagosora Motion, paras. 30-46.

## DELIBERATIONS

### (i) Writ of Mandamus

3. The Ntabakuze Defence argues that the Chamber has inherent authority to ensure the integrity of the Tribunal proceedings and thus to issue a writ of mandamus. Although not specifically mentioned in any Security Council Resolutions, the ICIR Statute, or the Rules of Procedure and Evidence, the exercise of mandamus is appropriate where a court officer – in this case the Prosecutor – fails to carry out his or her statutory duties.<sup>3</sup> The Defence further contends that the Office of the Prosecutor cannot be responsible solely to the Security Council.<sup>4</sup>

4. The Prosecution submits that the Tribunal is not authorized to issue an order for mandamus by Security Council Resolutions, the Statute or the Rules. Any attempt to confer such power on itself would be *ultra vires*. The Statute and Rules clearly establish that the Prosecutor's discretion in the conduct of its investigations and prosecutions is not subject to judicial review.<sup>5</sup> The Prosecution strenuously objects to the accusation that it "has been guilty of malfeasance and has improperly succumbed to pressure from the Rwandan government".<sup>6</sup>

5. The Chamber recalls that a writ of mandamus has not previously been sought before the Tribunal but is known in some national jurisdictions.<sup>7</sup> This remedy is not explicitly mentioned in either the ICIR Statute or the Rules of Procedure and Evidence. The Chamber has inherent authority to take certain measures which may not be expressly provided for in the Statute or the Rules.<sup>8</sup> However, a plain reading of the Statute reveals that a Trial Chamber cannot issue the requested writ of mandamus.

6. Article 15 (2) of the Statute provides that the Prosecutor "shall act independently as a separate organ of the International Criminal Tribunal for Rwanda [and] shall not seek or receive instructions from any government or from any other source". Furthermore, Article 17 (1) of the Statute, which is entitled "Investigation and Preparation of Indictment", states that the Prosecutor "shall assess the information received or obtained and decide whether there is sufficient basis to proceed". According to Article 17 (4), upon a "determination that a *prima facie* case exists", the Prosecutor shall prepare an indictment. These statutory provisions establish that the Prosecutor has independence and unfettered discretion to decide which investigations and prosecutions to pursue.

<sup>3</sup> Petition, pp. 4, 20-21.

<sup>4</sup> Ntabakuze Reply, paras. 4-5.

<sup>5</sup> Prosecution Response, paras. 3, 8.

<sup>6</sup> Response, para. 5.

<sup>7</sup> It has been defined as "a supervisory remedy, issuing to an officer subordinate to the jurisdiction of a superior court having jurisdiction to issue the writ commanding the performance of a public duty which in the opinion of the superior court, the officer has wrongly refused to perform". Prosecution Response, para. 6 fn. 4-5 (quoting *Re Jarman: Ex parte Cook (No 1)* (1997) 188 CLR 595, 603-604 (Brennan CJ), a case before the High Court of Australia). The Defence has defined it as "the vehicle by which the Judiciary may require officials charged with enforcement of law to carry out their responsibilities". Petition, p. 4 fn. 2 (citing *United States v. United States District Court*, 407 U.S. 297 (1972), a case before the U.S. Supreme Court). Neither of these cases involved a request for mandamus against a national prosecutor.

<sup>8</sup> See *Bagosora*, Decision on the Admissibility of the Prosecutor's Appeal From the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 Others (AC), 8 June 1998, paras. 44-46 ("[T]he ICIR may apply what is not specifically prohibited by the Rules only where this would be consistent with the objects and purposes of the Statute").

7. Turning to the Rules of Procedure and Evidence, Rule 54 allows a Judge or Trial Chamber to issue “such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial”, either at the request of a party or *proprio motu*. This provision cannot be interpreted in a way which gives a Chamber the power to issue orders which are not in conformity with the Statute. Rule 73 authorizes a Chamber to decide motions but not petitions. Rule 98 permits a Chamber *proprio motu* to order either party to produce additional evidence. These two provisions appear in Part Six of the Rules (“Proceedings before Trial Chambers”) and clearly relate to ongoing trials. They cannot be used in relation to individuals who have not been charged and brought to trial. Nor can these provisions empower a Chamber to order the Prosecutor to pursue investigations and prosecutions against an accused.

8. Consequently, the Chamber finds that it has no jurisdiction to direct the Prosecutor’s course of action in conducting investigations or prosecutions and denies the Defence request for a writ of mandamus.

9. This said, it is correct – as pointed out by the Defence – that the constituent instruments of the Tribunal are generally formulated and cover all serious violations of international humanitarian law between 1 January 1994 and 31 December 1994.<sup>9</sup> The Chamber notes that the Prosecutor has “taken account of the mandate of the ICTR, as emphasized by Resolution 1503, to investigate reports of violations by the Rwanda Patriotic Front (RPF)”.<sup>10</sup>

*(ii) Investigation of the Office of the Prosecutor*

10. In its petition for a writ of mandamus, the Defence also requests that the Chamber authorize an independent investigation of the Office of the Prosecutor.<sup>11</sup> As stated previously, the Prosecutor has independence to decide which investigations and prosecutions to pursue. The Chamber has no competence to dictate the conduct of the Prosecutor’s investigations or to inquire into the reasons for prosecuting certain individuals and not others. Consequently, the Defence request is denied.

*(iii) Extension of the Tribunal’s Mandate*

11. The Ntabakuze Defence’s second petition is premised on the same factual basis as its mandamus request, *i.e.* the purported failure by the Office of the Prosecutor to investigate and prosecute RPF crimes. It requests an extension of the Tribunal’s mandate in order to allow for such prosecutions and to avoid impunity.

<sup>9</sup> Statute, art. 1 (“The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute”); art. 15 (1) (“The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994”). See also S.C. Res. 955 (1994), 1503 (2003), and 1534 (2004).

<sup>10</sup> ICTR Completion Strategy of 30 November 2006, para. 30.

<sup>11</sup> Petition, p. 21.

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12. The present target for completion of all trials at the ICTR – the end of 2008 – has been set by the Security Council in its Resolution 1503 and reiterated in Resolution 1534.<sup>12</sup> Any modification of this deadline falls within the province of the Security Council. The Defence request must be denied.

*(iv) Halt of Transfer of Cases to Rwanda*

13. The Defence also requests that all potential transfers of cases and detainees to Rwanda be suspended. The transfer to a national jurisdiction must be assessed on a case-by-case basis by the Trial Chamber which is seized of the particular matter under Rule 11 *bis* of the Rules of Procedure and Evidence. As no transfer of Ntabakuze or any other Accused in this case has been sought, the Defence request has to be denied.

*(v) Suspension of All Proceedings*

14. The Defence asks for the suspension of all current ICTR proceedings and the review of all completed cases. It argues that all accused at the ICTR have been wrongly charged with crimes which were actually the responsibility of the RPF leadership in whole or in part.

15. Decisions to suspend proceedings must be assessed on a concrete basis by the Trial or Appeals Chamber that is seized of the case. This Trial Chamber has no authority to suspend all proceedings before the Tribunal. Similarly, a request for review of a completed case must be made to the Chamber which rendered the judgement, in conformity with Article 25 of the Statute and Part Eight of the Rules of Procedure and Evidence. Consequently, the request is denied.

*(vi) Appointment of Independent Special Prosecutor*

16. The Defence also seeks the appointment of a special prosecutor and staff, independent of the Office of the Prosecutor, to undertake investigations and prosecutions of RPF leaders for crimes committed in 1994 that have been wrongly charged to the Accused.<sup>13</sup> However, neither the Statute nor the Rules provide any legal basis for a Trial Chamber to take such action. Therefore, the request is denied.

*(vii) Bagosora Motion for Disclosure*

17. The Bagosora Defence argues that the Prosecution possesses materials suggesting that the RPF shot down the plane of President Habyarimana. It cites the Hourigan Report as an example of such exculpatory evidence and considers it “probable, and virtually certain, that the Prosecutor is withholding additional exculpatory and relevant evidence”.<sup>14</sup>

<sup>12</sup> S.C. Res. 1503 (2003): “Urging the ICTR to formalize a detailed strategy ... in order to allow the ICTR to achieve its objective of completing investigations by the end of 2004, all trial activities at [the] first instance by the end of 2008, and all of its work in 2010”. See also S.C. Res. 1534 (2004): “Recalling that resolution 1503 (2003) called on the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010...”.

<sup>13</sup> Reply, paras. 10-21.

<sup>14</sup> Bagosora Motion, paras. 36-41.

18. Rule 68 (A) requires the Prosecution to disclose "any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence". This Chamber has enunciated the guiding principles for disclosure of exculpatory information on several occasions and has stated:

The Appeals Chamber has consistently interpreted the words "actual knowledge" to require that the information be in the Prosecution's possession. Accordingly, "[t]he decision as to whether material has to be disclosed under Rule 68 has to be made by the Prosecutor". This determination "is primarily a facts-based judgement made by and under the responsibility of the Prosecution", which is presumed to discharge its obligation in good faith. If the Defence claims that the obligation has been violated, it must: (i) define the exculpatory material with reasonable specificity; (ii) establish that the material is in the custody and control of the Prosecution; and (iii) present a *prima facie* case that the material is exculpatory.<sup>15</sup>

19. The Defence has not been specific in identifying additional exculpatory material in the possession of the Prosecution. The only concrete example cited is the Hourigan Report, which has already been admitted into evidence.<sup>16</sup> In relation to this issue, the Defence argues that the Prosecution is attempting to hold the Accused Bagosora responsible for shooting down the Presidential plane.<sup>17</sup> However, this assertion is not accurate. The Chamber has previously held that the Accused is not charged with that crime and that responsibility for the assassination of President Habyarimana does not have any bearing on the offences alleged to have been committed by the Accused or his subordinates after 6 April 1994. The identity of the killers of President Habyarimana is a matter of contextual significance for the events described in the Indictment against the Accused.<sup>18</sup>

20. Without further precision from the Defence as to the exculpatory material it seeks, the Chamber must accept that the Prosecution has reviewed all materials in its possession in good faith and has complied with its disclosure obligations. Consequently, the Chamber does not have a sufficient basis to issue an order for disclosure.

<sup>15</sup> *Bagosora et al.*, Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68 (TC), 6 October 2006, para. 2. See also *Bagosora et al.*, Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A) (TC), 8 March 2006, para. 3; *Bagosora et al.*, Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses (TC), 27 September 2005, para. 9; *Kordic & Cerkez*, Decision on Motion by Dario Kordic for Access to Unredacted Portions of October 2002 Interviews with Witness "AT" (AC), 23 May 2003, para. 24; *Blaskic*, Judgement (AC), 29 July 2004, paras. 264, 268.

<sup>16</sup> The Hourigan Affidavit, with three annexes, was recently admitted, following *Bagosora et al.*, Decision on Ntabakuze Motions to Admit Documents Under Rule 92 bis (TC), 12 April 2007. A French version of Annex I of the Hourigan Report was tendered as Defence Exhibit DB 247 on 2 November 2005.

<sup>17</sup> *Bagosora Motion*, paras. 35-39.

<sup>18</sup> *Bagosora et al.*, Decision on Requests for Disclosure and Investigations Concerning the Assassination of President Habyarimana (TC), 17 October 2006, para. 2; *Bagosora et al.*, Decision on Request for Subpoenas of United Nations Officials (TC), 6 October 2006, paras. 12-18.

34740

**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIES** the Ntabakuze requests; and

**DENIES** the Bagosora motion.

Arusha, 18 April 2007



Erik Mose  
Presiding Judge



Jai Ram Reddy  
Judge



Sergei Alekseevich Egorov  
Judge

[Seal of the Tribunal]





## TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

**COURT MANAGEMENT SECTION**  
(Art. 27 of the Directive for the Registry)

### I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

<b>To:</b>	<input checked="" type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input type="checkbox"/> Trial Chamber III G. K. Hometowno	<input type="checkbox"/> Appeals Chamber / Arusha F. A. Talon
	<input type="checkbox"/> Chief, CMS J.-P. Fomété	<input type="checkbox"/> Deputy Chief, CMS M. Diop	<input type="checkbox"/> Chief, JPU, CMS M. Diop	<input type="checkbox"/> Appeals Chamber / The Hague R. Muzigo-Morrison K. K. A. Afande
<b>From:</b>	<input checked="" type="checkbox"/> Chamber I Judge Mose Judge Reddy Judge Egorov (names)	<input type="checkbox"/> Defence (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other (names)
<b>Case Name:</b>	The Prosecutor vs. <b>BAGOSORA ET AL.</b>			<b>Case Number:</b> ICTR-98-41-T
<b>Dates:</b>	Transmitted: <b>18 APRIL 2007</b>		Document's date: <b>18 APRIL 2007</b>	
<b>No. of Pages:</b>	7		<b>Original Language:</b> <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda	
<b>Title of Document:</b>	<b>DECISION ON NTABAKUZE PETITION FOR A WRIT OF MANDAMUS AND RELATED DEFENCE REQUESTS</b>			
<b>Classification Level:</b>	<input type="checkbox"/> Strictly Confidential / Under Seal <input type="checkbox"/> Confidential <input checked="" type="checkbox"/> Public			
<b>TRIM Document Type:</b>	<input type="checkbox"/> Indictment <input type="checkbox"/> Warrant <input type="checkbox"/> Correspondence <input type="checkbox"/> Submission from non-parties <input checked="" type="checkbox"/> Decision <input type="checkbox"/> Affidavit <input type="checkbox"/> Notice of Appeal <input type="checkbox"/> Submission from parties <input type="checkbox"/> Disclosure <input type="checkbox"/> Order <input type="checkbox"/> Appeal Book <input type="checkbox"/> Accused particulars <input type="checkbox"/> Judgement <input type="checkbox"/> Motion <input type="checkbox"/> Book of Authorities			

### II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

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Filing Party hereby submits only the original, and **will not submit** any translated version.

Reference material is provided in annex to facilitate translation.

**Target Language(s):**

English  French  Kinyarwanda

**CMS SHALL NOT take any action regarding translation.**

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Filing Party **will be submitting the translated version(s)** in due course in the following language(s):

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### III - TRANSLATION PRIORITISATION (For Official use ONLY)

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<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: