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SCSL-2003-02-PT-024
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN - SIERRA LEONE
(258-289)

Before: Judge Bankole Thompson,
Designated Judge

Registrar: Robin Vincent

Date filed: 1 May 2003

THE PROSECUTOR

Against

FODAY SAYBANA SANKOH

also known as (aka) POPAY aka PAPA aka PA

CASE NO. SCSL - 2003 - 02 - PT

**PROSECUTION RESPONSE TO
REQUEST FOR AN ORDER STAYING PROCEEDINGS
IN THE CASE OF FODAY SAYBANA SANKOH**

Office of the Prosecutor:

Luc Côté, Chief of Prosecutions

Brenda J. Hollis, Senior Trial Counsel

Defence Office:

John R.W.D. Jones,
Acting Chief of Defence
Office and Legal Advisor

Eustace Thompson
1-5-03 3:02pm

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INTRODUCTION

The Acting Chief of Defence Office and Legal Advisor (Acting Chief) seeks “an order to stay all proceedings until a final determination is made as to the physiological and psychiatric condition of [the Accused]”. The relief requested is unnecessary, inappropriate and fails to appreciate that “a final determination ... as to the physiological and psychiatric condition of [the Accused]” is, itself, a determination which must be made as a part of the proceedings for which a stay is requested. The requested relief should be denied.

BACKGROUND

1. On 15 March 2003 the Initial Appearance of this Accused was commenced. Judge Itoe, the Designated Judge, adjourned the Initial Appearance until 20 March 2003 and ordered a physiological and psychiatric examination of the Accused (Order for Physiological and Psychiatric Examination and Detention on Remand, dated 15 March 2003).
2. On 17 March 2003, Judge Itoe, the Designated Judge, further adjourned the Accused’s Initial Appearance until 21 March 2003.

3. On 21 March 2003, at the second session of the Accused's Initial Appearance, Judge Itoe ordered further physiological and psychiatric examination of the Accused and adjourned the matter to a date after consultation with all parties concerned. (Order for Further Physiological and Psychiatric Examination, dated 21 March 2003).
4. The Prosecution filed two motions dated 7 April 2003, Extremely Urgent Prosecution Motion to Allow Disclosure to the Registry and to Keep Disclosed Material Under Seal Until Appropriate Protective Measures Are In Place, and Prosecution Motion for Immediate Protective Measures For Witnesses and Victims and for Non-Public Disclosure, both motions dated 7 April 2003.
5. By Decision dated 17 April 2003, Judge Thompson, the Designated Judge, denied the Prosecution motion to allow disclosure to the Registry. The Designated Judge found the motion to be premature, given that the Accused's initial appearance has not been concluded. In paragraph 6 of that decision, the Designated Judge stated that the 21 March 2003 Order for Further Medical Examination of the Accused "clearly suspends *sine die* the continuing of the initial appearance of the Accused. The proceedings will resume as soon as it is feasible to determine the medical status of the Accused and, in particular, to establish his fitness to enter a plea"

ARGUMENT

I. The requested relief is unnecessary

6. The proceedings in this case are at present adjourned, or as Judge Thompson characterized them, "suspended *sine die*", until such time as the additional physiological and psychiatric examination is complete so that a determination can be made as to the Accused's fitness to enter a plea. This adjournment, or "suspension" adequately protects the Accused's rights. There are no "humanitarian grounds" which require the existing adjournment to be revisited.

II. The requested relief is inappropriate

7. The Prosecution rejects the Acting Chief's allegations that service of motions, and by implication, other actions which are a normal part of criminal proceedings, violate the Accused's fundamental human rights. In particular, the Prosecution rejects the assertions that such actions would constitute inhuman and degrading treatment, offend the principle of human dignity, vitiate the integrity of the Court's proceedings or subject the Accused to inhuman or degrading treatment (*see* Motion, paragraphs 10, 11, 12, 13).
8. The Acting Chief seems to base his allegations and request for relief on a premature conclusion that the Accused is "incompetent and incapable of understanding the proceedings against him, and therefore is unfit to plead"; "lacks the ... mental ability to move or eat without assistance"; "... unmoving, unseeing and uncomprehending"; "does not have the capacity to understand or

meaningfully to participate”; “has not the slightest ability to respond [to service of process] or to instruct his legal representatives to respond to them on his behalf” (see Motion, paragraphs 3, 8, 11, 12, 13).

9. The Accused’s competency to enter pleas and stand trial is still in issue, an issue which this Court, not the parties or medical personnel, must decide. The Acting Chief’s arguments based on his premature conclusions regarding the Accused’s competency should be rejected.
10. The remedy sought, as well as the bases upon which it is sought, is inappropriate herein. In the jurisprudence of the ad hoc tribunals a stay of proceedings is infrequently requested, even more infrequently granted, and is typically discussed as a potential remedy in the context of:
 - a. “an alleged extensive violation of [an] Accused’s rights” (see *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Decision On Two Defence Motions Pursuant To, *Inter Alia*, Rule 5 Of The Rules And The Prosecutor’s Motion For Extension Of Time To File The Modified Amended Indictment Pursuant To The Trial Chamber II Order Of 20 November 2000, 27 February 2001, in particular paragraph 54, in which decision the Court found misconduct of counsel on the part of the Prosecutor’s Counsel (paragraph 37), but refused to grant a stay of proceedings);
 - b. an abuse of process (see, *Prosecutor v. Niyitegeka*, *supra*, Decision On The Preliminary Motion Of The Defence (Objections Based On Lack Of Jurisdiction And Defects In The Form Of The Indictment) and On The Urgent Defense Motion Seeking Stay Of Proceedings, 21 June 2000, in particular paragraphs 19, 22, 60, in which decision the Court denied the request for a stay of proceedings); or,
 - c. to prevent a miscarriage of justice (see *Prosecutor v. Brdanin and Talic*, ICTY, IT-99-36, Decision On Second Motion By Brdanin To Dismiss The Indictment, 16 May 2001, in particular paragraph 5, in which decision the Court refused to grant a stay of proceedings; see also *Prosecutor v. Tadic*, ICTY, IT – 95 – 1 - A, Appeals Chamber Judgement, 15 July 1999, paragraph 55, wherein the Appeals Chamber notes that where a fair trial is not possible because of obstructionist efforts of a State, the defence has the option of requesting a stay of proceedings).
11. One decision in the ICTY, in the case of *Prosecutor v. Sikirica et al*, IT-95-8, was entitled “Order Granting Stay of Proceedings and Ordering Medical Examination”, dated 23 April 2001. In that case, however, the Court:

HEREBY CONFIRMS THE ORDERS as follows: “1. a medical examination of the accused ... shall be carried out to ascertain his current fitness to stand trial
.....

3. the presentation of oral testimony in this matter is **adjourned** until further order.” (Emphasis added.)

So, even though the caption indicates a **stay of proceedings** had been ordered, the Prosecution submits that, by the plain language of the *Sikirica* order, it was in fact an **adjournment** which was ordered. Thus, the actual *Sikirica* order is consistent with the current status of this case, which is adjourned.

III. The Acting Chief fails to appreciate that “a final determination ... as to the physiological and psychiatric condition of [the Accused]” is, itself, a determination which must be made as a part of these proceedings

12. The order sought seeks to stay **all proceedings** in this case until a **final determination** is made as to the condition of the Accused. The Acting Chief fails to appreciate that this final determination is made by the Court, not by medical personnel. Thus, this final determination, the associated pleadings and, possibly, oral argument, are a part of the proceedings which the Acting Chief seeks to stay.

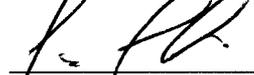
13. In addition, other appropriate pleadings would be prohibited if the requested relief were granted. The Prosecution concurs that, given the Court’s determination that the initial appearance of this Accused has not been concluded, motions such as those seeking protective measures, would be premature until such time as the Accused has entered a plea and the initial appearance has been concluded. However, other motions, such as those relating to the status of the further physiological and psychiatric examination, or motions in the nature of writs of habeas corpus, would not be premature, but would nonetheless be prohibited. Such inappropriate result is not warranted in this case.

CONCLUSION

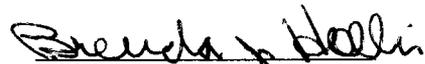
The current adjournment protects the rights of this Accused and the integrity of these proceedings. No fundamental rights of the Accused are being violated. The requested relief is unnecessary, would inappropriately prohibit appropriate actions in this case and fails to appreciate that the final determination of the Accused’s competence to enter pleas and to stand trial is a judicial determination which will be made as a part of the proceedings in this case. The relief requested should be denied.

Freetown, 1 May 2003

For the Prosecutor,



Luc Côté
Chief of Prosecutions



Brenda J. Hollis
Senior Trial Counsel

Index of Authorities

1. *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Decision On Two Defence Motions Pursuant To, *Inter Alia*, Rule 5 Of The Rules And The Prosecutor's Motion For Extension Of Time To File The Modified Amended Indictment Pursuant To The Trial Chamber II Order Of 20 November 2000, 27 February 2001
2. *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Decision On The Preliminary Motion Of The Defence (Objections Based On Lack Of Jurisdiction And Defects In The Form Of The Indictment) and On The Urgent Defense Motion Seeking Stay Of Proceedings, 21 June 2000
3. *Prosecutor v. Brdanin and Talic*, ICTY, IT-99-36, Decision On Second Motion By Brdanin To Dismiss The Indictment, 16 May 2001
4. *Prosecutor v. Tadic*, ICTY, IT – 95 – 1 - A, Appeals Chamber Judgement, 15 July 1999
5. *Prosecutor v. Sikirica et al*, IT-95-8, entitled "Order Granting Stay of Proceedings and Ordering Medical Examination", 23 April 2001

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OR: ENG

TRIAL CHAMBER II

Before:

Judge Laïty Kama, Presiding
Judge William H. Sekule
Judge Mehmet Güney

Registry: John Kiyeyeu

Date: 27 February 2001

THE PROSECUTOR

v.

Eliézer NIYITEGEKA

Case No. ICTR-96-14-T

DECISION ON TWO DEFENCE MOTIONS PURSUANT TO, *INTER ALIA*, RULE 5 OF THE RULES AND THE PROSECUTOR'S MOTION FOR EXTENSION OF TIME TO FILE THE MODIFIED AMENDED INDICTMENT PURSUANT TO THE TRIAL CHAMBER II ORDER OF 20 NOVEMEBR 20000

WARNING TO THE PROSECUTOR'S COUNSEL PURSUANT TO RULE 46(A)

The Office of the Prosecutor:

Ken Flemming
Melinda Pollard
Jayantha Jayasuriya

Counsel for the Accused:

Sylvia Geraghty

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (The "Tribunal");

SITTING as Trial Chamber II, composed of Judges Laïty Kama, Presiding, William H. Sekule, and Mehmet Güney;

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BEING SEIZED of the "Urgent Motion Pursuant to, inter alia, Rule 5 of the Rules of Evidence and Procedure," by the Accused Eliézer Niyitegeka, filed on 8 February 2001, (the "Motion");

CONSIDERING the Oral Response of the Prosecutor made at the hearing of the Motion on 21 February 2001 ("Prosecutor's Response");

BEING SEIZED of the "Extremely Urgent Defense Motion Pursuant to Articles 19(1) and 20 of the Statute, Rules 54 and 5 of the Rules of Procedure and Evidence" filed on 22 February 2001 (the "Second Motion");

CONSIDERING the "Prosecutor's Response to the Extremely Urgent Defense Motion Dated 22 February 2001" filed on 23 February 2001 (the "Prosecutor's Response to the Second Motion");

BEING SEIZED of the Prosecutor's "Extremely Urgent Motion for Extension of Time to File the Modified Indictment in Pursuant to the Trial Chamber II Order of 20 November 2000" filed on 23 February 2001 (the "Prosecutor's Motion");

CONSIDERING the "Defense Response to the Prosecutor's Motion filed on 23 February 2001, Seeking an Extension of Time to File "A Complete Amended Indictment" Pursuant to Order of 20 November 2000" filed on 26 February 2001 (the "Defense Response to the Prosecutor's Motion");

CONSIDERING the provisions of the Statute of the Tribunal ("Statute"), notably Articles 19 and 20 of the Statute, and the Rules of Procedure and Evidence ("Rules"), specifically Rules 5, 46, 54, 66 and 68;

HAVING HEARD the Parties on 21 and 27 February 2001, the Chamber now considers the Motions.

SUBMISSIONS OF THE PARTIES

The Motion

Main Defense Requests

1. The Defense brings the Motion pursuant to Rule 5 of the Rules, which states that:

RULE 5: Non-Compliance with Rules

(A) Where an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to that party.

(B) Where such an objection is raised otherwise than at the earliest opportunity, the Trial Chamber may in its discretion grant relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to the objecting party.

(C) The relief granted by a Trial Chamber shall be such remedy, as the Trial Chamber considers appropriate to ensure consistency with fundamental principles of fairness.

2. The Defense refers to its facsimile letter dated 16 January 2001 in which it requested the Prosecutor to make full disclosure, at the latest, on 23 January 2001, as the Prosecutor had undertaken to do at the Status Conference of 25 September 2000. The Defense submits that the Prosecutor has not fully complied with the above obligation, in breach of Rules 66 and 68 of the Rules.

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3. The Defense enumerates the specific items yet to be disclosed by the Prosecutor, including: inculpatory and exculpatory evidence, all untruncated and redacted witness statements as obtained in their original language, expert reports, certain Rwandan Legislation, certain texts in the public domain but also in the possession of the Prosecutor, audio cassettes and video cassettes requested for in letters dated 30 March and 5 April 2000 and at the Status Conference held on 25 September 2000, a certified copy of the plan outlining the intention to exterminate the Tutsi population and eliminate members of the opposition, complete, official records or minutes of specified meetings, abridged copy of the lists of people to be executed, the diaries of Jean Kambanda for the years 1994, 1995 and 1996, official letters of specific dates and bank documentation. The Defense maintains that the Prosecutor's failure to comply with the obligations laid out in Rules 66 and 68 deprives the Accused of his rights to fully and properly prepare his defense in a timely manner in accordance with Articles 19(1), 20(2) and 20(4)(a), (b), (c) and (d) of the Statute.

4. The Defense submits that the Prosecutor does not respect the Chamber's Decision issued on 4 February 2000 and the Chamber's Oral Ruling of 30 March 2000, directing the Prosecutor to disclose immediately to the Defense any witness statement, or any other evidence, which the Prosecutor intends to use in relation to the then existing indictment, pursuant to Rule 66 (A)(ii) of the Rules.

5. Furthermore, the Defense argues that the Prosecutor has repeatedly disregarded the orders and directions of the Chamber, issued in the Decision of 20 November 2000 that the Prosecutor file the New Amended Indictment, as modified within twenty-one (21) days, a deadline subsequently extended in an order issued on 8 December 2000, ordering the Prosecutor to file the New Amended Indictment by 19 December 2000.

6. Accordingly, the Defense requests that the Chamber dismiss, with prejudice, the Indictment against the Accused and unconditionally grant the release of the Accused, pursuant to Rule 5(A) of the Rules. Alternatively, the Defense requests that the Chamber direct the Prosecutor to fully comply with the Statute and the Rules and to make full and frank disclosure of all inculpatory and exculpatory evidence in her possession.

Prosecutor's Response

7. The Prosecutor orally submitted on Rules 66(A)(i) and (ii), (B) and 68 of the Rules and argued that she has fully complied with all the requirements under Rule 66(A)(i) and (ii) of the Rules. Nonetheless, the Prosecutor states that she will make inquiries with regard to the Defense request pertaining to interviews of the Accused made by the Prosecutor's investigators in Arusha in February 1999, which may be in her possession, and that if they are, she shall disclose them to the Defense as soon as possible.

8. The Prosecutor further argues that all the other requests made by the Defense pertain to requests under Rule 66(B) of the Rules, which provides that, at the request of the Defense, the Prosecutor shall, subject to Sub-Rule (C), permit the Defense to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defense. The Prosecutor, however, argues that she does not have these items in her custody, and that even if she did, the Defense has not demonstrated how the items sought will be material to its defense. The Prosecutor states that she will disclose a few video tapes, which she has in her custody, even though the Defense has not demonstrated how they will be material to its defense.

9. As to the requests under Rule 68 of the Rules, the Prosecutor argues that she has no exculpatory evidence in her possession and that if she finds any, she shall disclose them to the Defense.

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10. Consequently, the Prosecutor argues that the Defense Motion should be dismissed as frivolous, because it is a recycled form of the Motion the Defense filed on 30 March 2000, which was decided upon and an oral ruling made the same day.

11. As regards the compliance with the Chamber's Orders of 20 November and 8 December 2000, which directed that the Prosecutor file the New Amended Indictment, as modified, by 19 December 2000, the Prosecutor states that, she understands that the document entitled "Prosecutor's Filing in Response to the Trial Chamber II Decision on Defense Motion on Matters Arising from Trial Chamber Decisions and Preliminary Motion Based on Defects in the Form of the Indictment and Lack of Jurisdiction" does not comply with the said Orders of the Chamber. The Prosecutor, subsequently, made an oral request that the Chamber grants her time to bring a Motion to file the New Amended Indictment in compliance with the Chamber's Orders of 20 November 2000.

Defense's Rejoinder

12. The Defense orally argues that it has made efforts to get possession of some of the documents, which may be in the public domain, such as books and some Rwandan Legislation from Rwanda, but it has been impossible as the authorities in Rwanda state that they have already given all of these documents to the Prosecutor.

The Second Motion

13. In the Second Motion, the Defense mainly argues that the Prosecutor has breached the Direction of the Chamber made in the Decisions of 20 November 2000 and the Order of the Chamber made in the Decision of 8 December 2000. The Defense argues that to the date of filing the instant Motion, the Prosecutor has failed or refused to comply with the said Trial Chamber Direction and Order.

14. The Defense submits that the Prosecutor filed a document on 8 January 2001, after the time limits laid out in the Order 8 December 2000. The said document was entitled; "Prosecutor's Filing in Response to the Trial Chamber II Decision on Defense Motion on Matters Arising from Trial Chamber Decisions and Preliminary Motion Based on Defects in the Form of the Indictment and Lack of Jurisdiction," and to it were attached two annexes, which were neither signed nor sealed by the Prosecutor and so could not be considered as the New Amended Indictment, as modified, filed pursuant to the Chamber's Direction and Order.

15. The Defense further argues that the Prosecutor has failed to make full and frank disclosure, in accordance with Rules 66 and 68 of the Rules, and has, therefore, deprived the Accused of his right to fully and properly prepare his defense in a timely manner in accordance with Articles 19(1), 20(2) and 20(4)(a), (b), (c) and (d) of the Statute.

16. On this basis, the Defense requests the Chamber to grant mandatory relief under Rule 5(A) of the Rules by dismissing, with prejudice, the Amended Indictment of 26 June 2000 and grant the unconditional release of the Accused.

17. In response to the Second Motion, the Prosecutor recalls her apology made at the hearing of the initial Motion held on 21 February 2001. At the hearing of 21 February 2001, the Prosecutor made a request to bring a Motion requesting to file the New Amended Indictment, as modified, pursuant to the Chamber's Orders of 20 November 2000.

18. The Prosecutor, argues that the Defense has repeated, verbatim, its initial Motion, which was

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heard on 21 February 2000, and has only added paragraph O, which states that the Annexes to the "Prosecutor's Filing in Response to the Trial Chamber II Decision on Defense Motion on Matters Arising from Trial Chamber Decisions and Preliminary Motion Based on Defects in the Form of the Indictment and Lack of Jurisdiction," were neither signed nor sealed by the Prosecutor.

19. The Prosecutor submits that the instant Motion is frivolous and seeks to further delay the proceedings by asking the Chamber to dismiss the 26 June 2000 Amended Indictment. The Prosecutor argues that the improper format of an amendment to an indictment could not substantiate nor justify the dismissal of an earlier amendment to the indictment. The Prosecutor requests the Chamber to consider whether a warning, or other sanction, pursuant to Rule 46, may be issued against the Defense, because of its persistent abuse of process amounting to conduct which is contrary to the interests of justice.

The Prosecutor's Motion

20. By its Motion, the Prosecutor requests an extension of the time limits within which to comply with the Chamber's Orders made in the Decision of 20 December 2000. The Prosecutor specifically requests an additional two weeks to file a complete Amended Indictment pursuant to the Decision of 20 November 2000.

21. The Prosecutor requests this extension because she states that she experienced difficulties in obtaining the necessary translations as well as other technical difficulties, which prevented her from adhering to the Order of 8 December 2000, which directed her to file the New Amended Indictment, as modified, by 19 December 2000.

22. The Prosecutor points out that she filed the "Prosecutor's Filing in Response to the Trial Chamber II Decision on Defense Motion on Matters Arising from Trial Chamber Decisions and Preliminary Motion Based on Defects in the Form of the Indictment and Lack of Jurisdiction," on 4 January 2001, including 2 Annexes. She clarifies by stating that Annex A contains a revised section 7bis, including all the modifications to the Indictment pursuant to the Chamber's Orders in the Decision of 20 November 2000. The Prosecutor, however, states that she realizes that the said revised section 7bis should formally be incorporated into the Amended Indictment and the Prosecutor should then file a New Amended Indictment, modified pursuant to the Chamber's Order made in the Decision of 20 November 2000.

23. The Defense objects to the Prosecutor's Motion and relies on the matters she raised at the hearing of 21 February 2001 and those raised orally, while arguing its Second Motion, pertaining to *inter alia* the Prosecutor's persistent non-compliance with the orders and directions of the Chamber.

AFTER HAVING DELIBERATED

24. The Chamber will consider the initial Motion by first laying out the background of this case with respect, in particular, to the Indictment and also dispose of the Second Motion, which requests for *inter alia* the dismissal of the Amended Indictment of 26 June 2000. The Chamber will then review the requests for disclosure on the merits before it considers the Prosecutor's request for an extension of the deadline.

As Regards the background with respect to the Indictment against the Accused

25. On 15 July 1996, Judge Ostrovsky confirmed the original Indictment against the Accused, which was subsequently served upon him on his arrest in Nairobi on 9 February 1999. The Accused was transferred to the Tribunal's Detention Facility in Arusha on 11 February 1999.

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26. On 15 April 1999, at the initial appearance of the Accused, the Prosecutor made an oral application to amend the Original Indictment without adding new facts and new charges, incorporating only corrections of translation, grammar and punctuation. The oral application was granted during the Accused initial appearance, whereupon the Accused entered a plea of not guilty to all counts. The First Amended Indictment was subsequently served upon the Accused on 29 April 1999.
27. On 21 June 2000 the Chamber rendered a Decision granting the Prosecutor's request for leave to amend the Indictment by *inter alia* adding four (4) new charges against the Accused. The Prosecutor was ordered to file a new Amended Indictment by 23 June 2000 so that it is served immediately upon the Accused.
28. On 23 June 2000, the Chamber rendered a Decision, where it *proprio motu* decided to extend the deadline for filing the new Amended Indictment to 26 June 2000 so that it be served upon the Accused in preparation for his initial appearance.
29. On 26 June 2000, the Prosecutor served upon the Defense the new Amended Indictment, (the "Amended Indictment").
30. On 3 July 2000, the Accused made an Initial Appearance on the new charges included in the Amended Indictment.
31. On 20 November 2000, the Chamber rendered a Decision, pursuant to a Defense Motion on *inter alia* Defects in the form of the Indictment. The Decision was in favour of the Defense, directing the Prosecutor to file with the Registry the New Amended Indictment, modified as ordered, within twenty-one (21) days of the Decision of 20 November 2000, i.e., 11 December 2000. The deadline for filing the New Amended Indictment, modified as ordered, was extended, following the Prosecutor's request for extension of the deadline, to 19 December 2000.
32. On 4 January 2001, the Prosecutor filed the "Prosecutor's Filing in Response to the Trial Chamber II Decision on Defense Motion on Matters Arising from Trial Chamber Decisions and Preliminary Motion Based on Defects in the Form of the Indictment and Lack of Jurisdiction". It is the Chamber's view and the Prosecutor agreed at the hearing of 21 February 2001, that this document, which is incomplete, does not comply with its Order made in the Decision of 20 November 2000.
33. The Chamber, further, notes that, even if the document entitled the "Prosecutor's Filing in Response to the Trial Chamber II Decision on Defense Motion on Matters Arising from Trial Chamber Decisions and Preliminary Motion Based on Defects in the Form of the Indictment and Lack of Jurisdiction," was to be considered as the New Amended Indictment, filed pursuant to the Order made in the Decision of 20 November 2000, which directed that, "[...] the Prosecutor file with the Registry within twenty-one days from the date of this Decision[...]the New Amended Indictment, as modified," it is still filed sixteen (16) days past the deadline prescribed in the Chamber's order made on 8 December 2000.
34. At this point, it is noteworthy to mention that the Prosecutor, in her Motion, seeks two weeks within which to file the New Amended Indictment modified pursuant to the Chamber's Order of 20 November 2000. The Prosecutor makes the request stating that she experienced difficulties in obtaining the necessary translations as well as other technical difficulties, which prevented her from adhering to the Order of 8 December 2000.
35. In objection to the Prosecutor's Motion, the Defense *inter alia* highlights the breaches to the

Chamber's Orders committed by the Prosecutor and requests that the motion be dismissed.

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36. In considering this matter, the Chamber analyses the Prosecutor's conduct, through her Counsel, in the present case, following the Decision of 20 November 2000. Upon being ordered, at para. 46 in the said Decision, to file, within twenty-one days, the New Amended Indictment, as modified pursuant to the said Decision, the Prosecutor requested an extension of that deadline. On the 8 December 2000, the Chamber granted the said request and set a deadline on the 19 December 2000. From that date, to the hearing the Defense's initial Motion on 21 February 2001, the Chamber notes that the Prosecutor has:

- (i) Failed to seek an extension of the deadline of 19 December 2000;
- (ii) Filed a document it has entitled the "Prosecutor's Filing in Response to the Trial Chamber II Decision on Defense Motion on Matters Arising from Trial Chamber Decisions and Preliminary Motion Based on Defects in the Form of the Indictment and Lack of Jurisdiction," on 4 January 2001, sixteen days past the deadline on 19 December 2000;
- (iii) Failed to comply with the Orders, at para. 46 (a) to (g), made in the Decision of 20 November 2000, with its document entitled "Prosecutor's Filing in Response to the Trial Chamber II Decision on Defense Motion on Matters Arising from Trial Chamber Decisions and Preliminary Motion Based on Defects in the Form of the Indictment and Lack of Jurisdiction;"
- (iv) And only after being prompted by the Chamber at the hearing of 21 February 2001, the Prosecutor made a request to file a Motion requesting the Chamber to file the New Amended Indictment modified pursuant to the Order in the Decision of 20 November 2000. (See Transcripts of 21 February 2001 at page 50)

37. The Chamber finds that the attitude of the Prosecutor's Counsel in the matter, as described above, qualifies as a Misconduct of Counsel pursuant to Rule 46(A) of the Rules. Consequently, in accordance with the provisions of the said Rule, the Chamber hereby warns the Prosecution Counsel, in the present case that, were their conduct to remain "offensive" or be otherwise considered "abusive," or were they to "obstruct the proceedings" or act "contrary to the interests of justice," the Chamber would be obliged to impose sanctions pursuant to that Rule.

38. In the instant case, however, the Chamber has carefully considered the matter and finds that it is in the interests of justice and for the benefit of the Defense that the Amended Indictment be modified pursuant to the Orders, at para. 46 (a) to (f) in the Decision of 20 November 2000. The Chamber, therefore, directs the Prosecutor to file the New Amended Indictment, as modified, in French and in English, by 15 March 2001, by close of business.

As Regards the Defense Requests for Disclosure

39. The Chamber notes that the requests made fall under Rules 66(A)(i) and (ii), 66(B) and 68 of the Rules.

40. With regard to Rule 66(A)(i), the Chamber notes that Parties are in agreement that these include supporting material which accompanied the Indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the Accused. It therefore follows that, if the Prosecutor has in her possession interviews of the Accused made in February 1999, then disclosure in

this regard would not have been completed. Consequently, the Chamber orders the Prosecutor to disclose immediately, the interviews of the Accused made in February 1999, pursuant to Rule 66(A)(i) of the Rules, if indeed they are in her possession. 271

41. The Chamber further notes that the Defense requests *inter alia* that the Prosecutor disclose all untruncated and redacted witness statements, which the Prosecutor intends to use at trial in the original language in which they were obtained. The Prosecutor, in response, states that she has disclosed all the witness statements, which she intends to use at trial, in the original language in which they were obtained from the Accused Niyitegeka.

42. As to the Defense further argument that some of these statements and other materials are heavily redacted and truncated, the Prosecutor responds by stating that the only redacted documents disclosed to the Defense, are those ordered to be redacted in order not to disclose any identifying information to the Defense until 21 days prior to the testimony of the witness at trial. (*See, inter alia*, para. 16 of the "Decision on the Prosecutor's Motion for Protective Measures for Witnesses" of 12 July 2000 in the present case.)

43. After considering the submissions of the Parties, the Chamber is of the view that the Prosecutor has complied with her obligations under Rule 66(A)(ii) of the Rules that she disclose, no later than sixty days before the date set for trial, copies of the statements of all witnesses whom she intends to call to testify at trial. The Chamber further states that, after this deadline, if the Prosecutor shows good cause, she may be allowed to produce additional witnesses and the Chamber may order that copies of the statements of these additional prosecution witnesses, be made available to the defense within a prescribed time.

44. As regards the other materials requested for by the Defense, the Chamber agrees with the Prosecutor that these are requests that should have been made under Rule 66(B) of the Rules.

45. It therefore follows that the Defense, pursuant to Rule 66(B) of the Rules, should have made a request to the Prosecutor to inspect the items, if they are in the custody or control of the Prosecutor. The Defense must demonstrate one of the following criteria: (a) that it considers (the items) material to the preparation of its defense, or (b) (the items) are intended for use by the Prosecutor as evidence at trial, or (c) (the items) were obtained from or belonged to the accused. The Prosecutor is obliged to permit the Defense to inspect the items in her custody or control, if; the Prosecutor intends to use them as evidence at trial, and if they were obtained from or belonged to the Accused.

46. As for the documents found in the public domain, and also found in the custody of the Prosecutor, which the Defense seeks stating that she has made efforts to obtain them in Rwanda and elsewhere, without success, the Chamber notes the Prosecutor's undertaking to go beyond her obligations under Rule 66(B) by providing them to the Defense. The Chamber recalls the Prosecutor's undertaking that she will provide these items, the Defense considers necessary, to the extent feasible provided the Defense makes a formal request for them.

47. On the issue of materiality, the Chamber recalls its jurisprudence in *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T in the "Decision on Defense Motion for Disclosure of Evidence," rendered on 1 November 2000. In the said Decision, the Chamber found that it could grant leave to inspect books, documents, photographs and tangible objects, only if the Defense provided specific indications on such items and showed that such items are material to its defense. In the instant case, the Defense has not made such a request, nor has it shown how the items it requests would be material to its defense.

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48. As to the Defense other argument that the items it requests could be exculpatory evidence that the Prosecutor is obliged to disclose pursuant to Rule 68 of the Rules, the Chamber recalls the provisions of the said Rule. Rule 68 of the Rules states that; the Prosecutor shall, as soon as practicable, disclose to the defense the existence of evidence known to her which in any way tends to suggest innocence or mitigate the guilt of the Accused or may affect the credibility of prosecution evidence.

49. The Chamber further recalls the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v. Blaskic*, (Decision on the Defense Motion for "Sanctions for Prosecutor's Repeated Violations of rule 68 of the Rules of Procedure and evidence")(29 April 1998) which analyzed the issue of disclosure and stated, at para. 14 that: "[...] the Prosecution bore the sole responsibility for disclosing to the Defense the evidence which tends to suggest the innocence or mitigate the guilt of the accused and that it did so under its own responsibility and under the supervision of the Trial Chamber which, in case of an established failure to comply, would have to draw all the consequences, particularly at trial." The Decision further went on to state at para 20 that, "[...] by expressly restricting itself to Rule 68, the Defense, while requesting such broad access to Prosecution documentation, is avoiding the reciprocal obligation which it would have pursuant to Rule 66 and 67 of the Rules. Acceding to its request without limitations would consequently disturb the balance of the trial, particularly since such a disclosure would manifestly occur beyond the strict requirements of Rule 68 which requires the disclosure of exculpatory "evidence" and not all...of the Prosecutor's documentation."

50. The Chamber is generally persuaded by the reasoning in the *Blaskic Decision*. It, therefore, considers the Defense request for disclosure of items in the custody or control of the Prosecutor, simply because they could be exculpatory, to be without merit.

51. The Chamber, however, orders the Prosecutor to meet her obligations under Rule 68 to disclose items, in her custody or control she considers exculpatory, as well as her obligation under Rule 66(B) to disclose items, in her custody or control, she intends to use at trial, items she obtained from the Accused and items that belong to the Accused, as soon as she comes into possession of such items.

As Regards the Relief Sought Pursuant to Rule 5 of the Rules

52. The Chamber notes that the Defense seeks in her initial Motion the dismissal, with prejudice, of the Indictment against the Accused and in her Second Motion the dismissal of the Amended Indictment of 26 June 2000 and that he be granted an unconditional release, pursuant to Rule 5 of the Rules. The Defense seeks this relief on grounds of the Prosecutor's repeated disregard of the orders and directions of the Chambers, specifically issued on 4 February, 30 March, 20 November and 8 December 2000. Alternatively, the Defense requests that the Chamber direct the Prosecutor to fully comply with the Statute and the Rules and to make full and frank disclosure of inculpatory and exculpatory evidence in her possession.

53. The Chamber agrees with the Defense, as it has observed above in this Decision, in so far as the Prosecutor has not complied with its orders pertaining to the timely filing of the New Amended Indictment, as modified and as directed in the Decision of 20 November 2000.

54. At this juncture, the Chamber recalls on its jurisprudence in the *Kanyabashi Decision* it rendered on 23 May 2000 entitled, "Decision on the Defense Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings." In the said Decision, the Defense requested a stay of proceedings as a remedy for the Prosecutor's alleged extensive violation of the Accused rights. The Chamber held, at par. 81, that, "[...] even if there is a violation and if the violation is not so extensive, it will not

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necessitate a remedy of a stay of the proceedings,"

55. In the instant case, the Chamber finds that the Defense's argument that the Prosecutor has not complied with the Chamber's Orders pertaining to disclosures pursuant to Rules 66 and 68 of the Rules is misconstrued. Furthermore, the Chamber considers that the Prosecutor's non-compliance with the Order on the timely filing of the New Amended Indictment would not warrant the remedy sought by the Defense, i.e., the dismissal, with prejudice, of the Indictment against the Accused or the Amended Indictment of 26 June 2000 and that he be granted an unconditional release. The Chamber, therefore, grants the Defense's alternative remedy requested for in the initial Motion, which is that the Chamber direct the Prosecutor to fully comply with the Statute and the Rules, and to make full and frank disclosure of all evidence in her possession as discussed herein above.

56. Moreover, the Chamber agrees with the Prosecutor's observations that the Defense's Second Motion is similar to its initial Motion, and could well be considered frivolous. The Chamber warns that these kinds of motions would in the future be declared frivolous and attract the denial of fees payment, pursuant to Rule 73(e) of the Rules.

FOR ALL THESE REASONS,

THE CHAMBER,

- I. WARNS** the Prosecutor's Counsel in the matter that, were their conduct to remain "offensive", or otherwise "abusive" or were they to "obstruct the proceedings", or otherwise act "contrary to the interests of justice", the Chamber would impose sanctions pursuant to Rule 46 of the Rules.
- II. ORDERS** the Prosecutor to file the New Amended Indictment, as directed at para. 46(a) to (f) in the Decision of 20 November 2000, in French and in English by 15 March 2001, by close of business.
- III. DIRECTS** the Prosecutor to fully comply with the Statute and the Rules, and to make full and frank disclosure of all evidence she has undertaken to disclose.
- IV. ORDERS** the Prosecutor to disclose immediately the interviews of the Accused made in February 1999, pursuant to Rule 66(A)(i) of the Rules, if indeed they are in her possession.

Arusha on 27 February 2001

Laïty Kama
Presiding Judge

William H. Sekule
Judge

Mehmet Güney
Judge

(Seal of the Tribunal)

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OR: ENG

TRIAL CHAMBER II

Before:

Judge Laïty Kama, Presiding
Judge William H. Sekule
Judge Pavel Dolenc

Registry: Agwu U. Okali

Decision of: 21 June 2000

THE PROSECUTOR

v.

Eliezer NIYITEGEKA

Case No. ICTR-96-14-T

DECISION ON THE PRELIMINARY MOTION OF THE DEFENCE (OBJECTIONS BASED ON LACK OF JURISDICTION AND DEFECTS IN THE FORM OF THE INDICTMENT) and ON THE URGENT DEFENSE MOTION SEEKING STAY OF PROCEEDINGS

The Office of the Prosecutor:

Ken Flemming
Don Webster
Ifeoma Ojemeni

Counsel for the Accused:

Sylvia Geraghty

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

SITTING as Trial Chamber II composed of Judge Laïty Kama, Presiding, Judge William H. Sekule, and Judge Pavel Dolenc as assigned by the President to temporarily replace Judge Mehmet Güney;

BEING SEIZED of a motion filed on 11 April 2000 by the Defence, entitled; Urgent Preliminary Motion: Objections Based on Lack of Jurisdiction and Defects in the Form of Indictment, (the “Preliminary Motion”);

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BEING SEIZED of a motion by the Defence, filed on 20 April 2000, entitled; Urgent Defence Motion: Seeking Stay of Proceedings Pending Final Decision/Judgement on Urgent Preliminary Defence Motion, filed on 11 April, (“The Motion Seeking Stay of Proceedings”)

CONSIDERING the three responses from the Prosecutor for the above two motions filed respectively 15 May 2000, 17 May 2000, and the Supplementary Prosecutor’s Response to: (i) Urgent Preliminary Defence Motion: Objections Based on Lack of Jurisdiction and Defects in the Form of the Indictment; (ii) Urgent Defence Motion Seeking Stay of Proceedings, and (iii) Defence Motion Objecting to the Prosecutor’s Request for Leave to File an Amended Indictment, on the Grounds of, *inter alia*, Abuse of process, Inadmissibility and Lack of Jurisdiction. filed on 30 May 2000, “The Supplementary Prosecutor’s Response;”

TAKING NOTE of the Decision rendered by this Trial Chamber on 7 February 2000 on the Defence’s Application of Extreme Urgence for Disclosure of Evidence filed by the Accused on 9 November 1999, where the Trial Chamber specifies the different time frames for disclosure of supporting material based on Rule 66;

NOTING that on 3 March 2000, the Accused filed the ‘Very Urgent Defence Motion for Order of Compliance by the Prosecutor with Order of the Tribunal Dated 7 February 2000,’ the Hearing of which was on 30 March 2000.

NOTING that Prosecutor has complied with the disclosure required under Rule 66;

CONSIDERING the provisions of the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), in particular Rules 66 and 72;

HAVING HEARD the parties on the motions on 1 June 2000;

WHEREAS on 1 June 2000 the Trial Chamber rendered an oral decision on this case on the Preliminary Motion and the Motion Seeking Stay of Proceedings, and the parties were notified that the written decision would be filed at a later stage.

THE SUBMISSIONS OF THE PARTIES

The Defense on the Preliminary Motion

1. The Defense raises several issues to substantiate allegations that the Trial Chamber lacks jurisdiction. In the light of the serious violations of the rights of the Accused, given the conduct and *mala fides* of the Prosecutor, the Accused has suffered serious prejudice to the extent that no fair trial can take place and therefore, to try him would be so unfair as to amount to an abuse of process. The Defense Counsel in support of this motion made, *inter alia* the following submissions:

Abuse of process

2. In support of its Preliminary Motion the Defence uses Affidavits filed in April 2000 as Annexes 5 and 6 to the Defense Motion. The Preliminary Motion alleges, *inter alia*:

3. That pursuant to Rule 47(H)(ii), the Indictment against the Accused was confirmed on 15 July 1996 and an Order pursuant to Rule 40*bis* addressed to the Government of Kenya to search for, arrest and transfer the Accused to the Tribunal was also signed on 16 December 1998.

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4. On 9 February 1999, the Accused was arrested in Nairobi, Kenya.

5. The Prosecutor conducted interrogation of the Accused, without recordings being made and in the absence of a lawyer, in breach of the provisions of Article 19(1) and (2) and Article 20(3) and (4)(g) of the Statute, and Rules 42(A) (i) and (iii): 42(B) and 43 (i), (ii), (iii), (iv) and (v), *mutatis mutandis*, Rule 44 bis (D), 45 (under Rule 45 bis), with no provision having been made for any such interrogation under Rules 55 or 57.

6. The Prosecutor, during the course of interrogation, attempted to compel the Accused to admit guilt to all the charges alleged against him in the Indictment. The Prosecutor, in order to encourage a guilty plea, made mention of certain promises and inducements, including:

(a) that some of the charges proffered against the Accused would be removed.

(b) that if the Accused accepted the demands, the Prosecutor would arrange for the family of the Accused to be transferred, without delay, receiving financial assistance for at least six months, whilst awaiting intervention of UNHCR.

(c) that if the Accused refused to co-operate, the Prosecutor could proceed to amend the Indictment and include, *inter alia*, the additional charge of rape even though she knew that the Accused had not raped anyone and that there was no credible evidence to prove such a charge.

7. The Defence emphasizes that in order to deter a potential abuse, there must be strict adherence to the Rules considering the vulnerability of the Accused.

8. On 18 February 1999, the duty counsel of the Accused informed the Prosecutor that the Accused was innocent of the charges being brought against him and that he could not plead guilty to false charges and was ready to prove his innocence.

9. The Defence reminds the Tribunal that to date the Prosecutor has neither sworn an affidavit, nor has she filed one to rebut all of the matters, which the Accused has deposed to. The evidence as given by the Accused stands unchallenged and should be taken as true, in the absence of any rebutting evidence.

10. The Accused awaited disclosure under Rules 66(A) and 68 comprising of the exculpatory evidence, supplementary materials and the full witness statements, redacted or otherwise, especially the extracts of witness statements, which are to be provided within thirty days of the initial appearance of the Accused. The Defence has written to the Prosecutor several times seeking a definitive answer on this point.

11. On 13 March 2000, seven weeks later, disclosure was made of supporting material comprising of witness statements. At the end of April 2000 the Prosecutor disclosed some exculpatory evidence, which it had denied possessing, up to then.

12. The Defence submits that, this Preliminary Motion has been filed within thirty days of receipt from the Prosecutor of what is, in reality, the supporting material envisaged by the Defence pursuant to Rule 66A(i).

13. The Defence submits that the Prosecutor's case, which charges the Accused of committing crimes under Article 2, 3 and 4 of the Statute is not grounded in evidence, because:

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14. The Prosecutor relies on the statements of a witness who has already been discredited in two separate trials: *Prosecutor v Alfred Musema*, ICTR – 1996-13-T, as Witness “Z” (Judgement of 27 January 2000) and in the case of *Prosecutor v Clement Kayishema and Obed Ruzindana*, ICTR-95-1-T, as Witness “NN” (Judgement of 21 May 1999). The Defence submits that to put forward the testimony of this witness, is incontrovertible proof of the overwhelming abuse of process and *mala fides* of the Prosecutor towards this Accused.

15. Defence further submits that in putting forward sixteen witness testimonies, of whom not one witness makes allegations of having seen the Accused killing anyone manifests, *inter alia*, to an abuse of process. This is contrary to Rule 95, which states that, no evidence shall be admissible if its admission is antithetical to and would seriously damage the integrity of these proceedings.

16. The Defence further submits that the charge of conspiracy brought against the Accused in the existing Indictment is false and without foundation. The evidence to ground these allegations having emerged since Operation NAKI in July 1997.

17. The Prosecutor impedes the Trial Chamber in carrying out its obligation to the Accused in ensuring his right to a fair and expeditious trial as set out in Article 19(1) of the Statute. The Prosecutor’s Motion and Brief for Leave to File an Amended Indictment is specifically referred to.

18. The Prosecutor’s Application to Amend the existing Indictment against the Accused three years and nine months after he was indicted will delay his trial and constitutes an abuse of process.

19. The Defence grounds its arguments on the abuse of process against the Accused by making reference to, *inter alia*, the case of *Regina v Horseferry Road Magistrates Court ex parte Bennet*, IAC, 42.95 [1994], ILR, House of Lords, 380 (1993). The House of Lords stated, *inter alia*, that one would hope the number of reported cases in which a Court has to exercise jurisdiction to prevent abuse of process are comparatively rare, usually confined to cases in which the conduct of the Prosecution has been such as to prevent a fair trial of the Accused.

20. Further reference is made to *Jean-Bosco Barayagwiza v The Prosecutor*, ICTR-97-19-AR72, page 42, Decision of 11 march 1999, where it was stated that, ‘To proceed with a trial against the Accused would amount to a further act of injustice in forcing him to undergo a lengthy and costly trial, only to have him raise once again these issues currently before this chamber.’

21. The Accused requests the Trial Chamber that given all the circumstances outlined herein, to take this Motion under Rule 72 as it existed before its amendment in February 2000.

22. The Defence therefore prays that the Trial Chamber stay these proceedings with prejudice to the Prosecutor, order immediate unconditional release of the Accused, and compensate the Accused

The Defence on the Motion Seeking Stay of Proceedings

23. The Defense submits that because of lack of jurisdiction any further proceedings stay until the Trial Chamber has deliberated on this Preliminary Motion.

The Prosecutor on the Preliminary Motion

24. In response, the Prosecutor submits, as follows;

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Abuse of Process

25. That the Defence does not appreciate the distinction between 'supporting material' pursuant to Rule 66(A)(i) and 'witness statements' pursuant to Rule 66(A)(ii).
26. That this Trial Chamber accepted in its Decision rendered on 7 February 2000 that all of the supporting material was sent at the latest on 11 June 1999, which the Accused still ignores completely and seeks to have another determination of the issue.
27. That the Accused had '60 days', following disclosure of all the material envisaged by Rule 66(A)(i) by the Prosecutor since June 11 1999 within which to bring a preliminary motion. The Accused is eight months out of time in bringing this so-called 'Urgent Motion' and the Defence has not requested an extension of the deadline for good cause.
28. That in response to the misapprehension shown by the Accused that the Prosecutor has exculpatory evidence, the Prosecutor responds again, as she has maintained before this Trial Chamber in a hearing of 7 December 1999, that she does not have any material she considers exculpatory.
29. That the Accused misstates Articles 2, 3, and 4 by not stating them fully. The Defence complains about the adequacy of evidence, which in essence, is an issue for trial and not for a preliminary motion. The Prosecutor refers to the case of *Prosecutor v Jérôme Bicomumpaka*, ICTR-99-50-I, Decision of Trial Chamber II given on 8 May 2000.
30. The Prosecutor submits that the Defence ignores the substantial learning on genocide and related crimes contained in the Decisions of this Tribunal. The case of *Prosecutor v Jean Paul Akayesu*, paragraph 112 to 129 and 492 – 562 and particularly at paragraphs 523 – 524, ICTR-96-4-T Judgement of 2 September 1998, is one such case, with respect to inferences to be drawn from multiplicity of facts.
31. The Prosecutor further submits that the Accused is charged with heinous crimes because there is evidence, which in accordance with the law, was and is sufficient to confirm the Indictment and to put the Accused on trial as was determined by the confirming Judge.
32. The Prosecutor, whereupon, made reference to the witness statements where in at least three of the witnesses referred to the Accused by name.
33. The Prosecutor therefore submits that the witness statements are not 'truncated' and are full statements in respect to the witness it is intends to call. The Defences' submissions in respect of these matters are false and mischievous.
34. As to the allegations by the Defence concerning the Prosecutor's Motion to Amend the indictment, the Prosecutor submits that filing a Motion to Amend an Indictment does not amount to an abuse of rights, which is a totally different issue and is not a matter of jurisdiction.
35. The Prosecutor submits that the Defence's Preliminary Motion may be addressed under Rule 72(H), which deals with objections based on jurisdiction. This rule exclusively challenges an Indictment on the ground that it does not relate to, *inter alia*, specific persons, territories, period and violations as provided for in the Statute. This Motion does not, therefore relevantly relate to this Rule. This Preliminary Motion is instead, an attempt to review the Decision of the confirming Judge, of 15 July 1996.
36. As to the issue of Affidavit, the Prosecutor submits that she received the sealed Affidavit of the

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Defence Council on the 30 May 2000 after the Court had ordered that it be disclosed. For that same reason, the Prosecutor submits accounts for the delay in delivering the Affidavit in response to the Defence Counsel's Affidavit.

37. The Prosecutor further submits on the understanding of certain of the facts in the Affidavit of the Accused that it was the Accused who initiated conversations with the Prosecutor because he wanted to ensure the safety of his wife and children. Furthermore, the Accused wanted to know what sort of a deal he could get if he did co-operate with the Prosecutor.

38. The Prosecutor also submits that the Accused further wanted to know if the Prosecutor would remove certain parts of the Indictment. It was therefore the accused bargaining with the Prosecutor to have certain charge taken out so that he could co-operate.

39. As to the issue of recording interrogations and conversations made with the Accused, the Prosecutor submits that it was the Accused himself, a journalist, who stipulated that he would not talk if there were to be any recording. The Accused had made reference to Jean Kambada whose co-operation was soon broadcast amongst the detainees and who was considered to be a 'cockroach' by the other detainees.

The Prosecutor's response on the Motion Seeking Stay of Proceedings

40. The Prosecutor relies on its Motion titled 'Supplementary Prosecutor's Response to, *inter alia*, Urgent Defence Motion Seeking Stay Of Proceedings' filed on 30 May 2000. The Prosecutor submits, *inter alia*, the following:

41. That this Urgent Motion Seeking Stay of Proceedings is premised on the Defence complaints concerning disclosure of witness statements that has motivated every Defense Motion that has been filed and argued before this court. The Defense has been in possession of the supporting materials since the time of his arrest. Copies of the full witness statements were delivered to him by the Registry on 11 June 1999. The first Defense preliminary motion is this preliminary motion before us, which is a full nine months out of time as prescribed under Rule 72.

42. The Prosecutor therefore requests that the Defense application for stay be denied and that this Trial Chamber sanction the Defense by withholding compensation for the Defense Motion Seeking Stay of Proceedings.

AFTER HAVING DELIBERATED

Extent of the Motion

43. Although the Defence filed its Preliminary Motion making objections based on lack of jurisdiction and defects in the form of the indictment, at the hearing of 1 June 2000, the Defence indicated that it will only dwell into the issue of Lack of Jurisdiction.

Timeliness of the Preliminary Motion

44. The Defence filed its Preliminary Motion on 11 April 2000 under Rule 72. The Trial Chamber notes that the Defence has not sought relief under Rule 72(F) for the extension of the time limit as prescribed in Rule 72(A). Instead, the Defence maintains that this Preliminary Motion is filed within thirty days of receipt from the Prosecutor of the supporting materials envisaged under Rule 66(A)(i). In the brief supporting this Motion, the Defense maintains that the Prosecutor continues to breach its obligations in

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failing to disclose 'supporting materials' and that the applicable 'supporting materials' for disclosure within thirty days were the full witness statements, redacted or otherwise.

45. Pursuant to Rule 72(A) as amended on 22 February 2000, all preliminary motions must be filed within thirty days following disclosure by the Prosecutor to the Defence of all materials envisaged by Rule 66(A)(i). Rule 72(F) further provides that failure to comply with the time limits prescribed in this Rule shall constitute a waiver of the rights unless the Trial Chamber grants relief from the waiver upon showing good cause.

46. Thus the question of whether the Defence has filed the Preliminary Motion in a timely manner, depends on the date when copies of the supporting material that accompanied the indictment at its confirmation are disclosed to the Defence.

47. The Trial Chamber deems it necessary at this juncture, to point out the important distinction between the different specified time frames for the disclosure of various documents pursuant to Rule 66 by referring to its decision of 7 February 2000.

48. In the 7 February 2000 Decision, the Trial Chamber distinguished between:

(a) *The Disclosure of Supporting Material pursuant to Rule 66(A)(i):*

The Prosecutor should have disclosed to the Defence, copies of the Supporting material, which accompanied the Indictment when confirmation was sought within 30 days of the initial appearance of the Accused and not 57 days later (i.e. 11 June 1999.)

(b) *The Disclosure of Witness Statements pursuant to Rule 66(A)(ii):*

Although the trial date is not set yet, the Prosecutor is required to make a concerted effort to continue and complete the Prosecutor's disclosure obligations at the earliest opportunity.

49. Rule 66(A)(i) states that the Prosecutor shall disclose to the Defence within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought, as well as all prior statements obtained by the Prosecutor from the accused. The Trial Chamber emphasises the importance of the link between the disclosure of supporting materials as envisaged by Rule 66(A)(i), and the specified time limit for the filing of a preliminary motion as prescribed in Rule 72(A).

50. This Chamber addressed the same issue in *Prosecutor v. Sylvain Nsabimana and Alphonsbe Nteziryayo*, ICTR-97-29-I, pg. 4, paras. 4-5, (10-9-1999) where in, the Tribunal held that the period for filing a preliminary motion begins to run once the Prosecutor has disclosed the supporting material pursuant to Rule 66(A)(i). In the same decision, the Trial Chamber noted that the Prosecution must disclose supporting material and prior statements of the accused within thirty days of the initial appearance.

51. Similarly, in *Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-96-11-I, pg. 3, para. 4, (8-31-1999) in which the Trial Chamber ruled that Rule 72(A) specifies the time limit to file all preliminary motions following disclosure by the Prosecutor. The materials that are subject to disclosure, as envisaged in Rule 66(A)(i) of the Rules are copies of the supporting material that accompanied the indictment at its confirmation, as well as prior statements obtained by the Prosecutor from the Accused.

52. In the instant case, the Trial Chamber acknowledges that the issue of disclosure has been raised repeatedly by the Defence.

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53. As indicated in the above decision dated 7 February 2000, the Accused made his initial appearance on 15 April 1999. It is undisputed that on or about 11 June 1999, the Defence received a second set of supporting materials identical to the one disclosed to the Accused on the day of his arrest on 9 February 1999 (see Decision On the Defence Motion For Disclosure of Evidence, pg. 1, para. 1; see also Defence Application of Extreme Urgence For Disclosure of Evidence, filed 9 November 1999). Hence, the Trial Chamber found that the Prosecutor has complied with the mandatory obligation stated in Rule 66(A)(i) as of 11 June 1999.

54. Thus, the date when the Prosecutor communicated the supporting materials to the Defence serves as the triggering factor for the running of the time limit to file the preliminary motion within thirty days of the disclosure date as specified in Rule 72(A). Therefore the Preliminary Motion which was filed on 11 April 2000 is submitted after the time limit expired.

55. The Defense requests that the Trial Chamber apply 'old' Rule 72, which is as it stood before its amendment in February 2000, but it fails to show any prejudice for the accused if the amended rule is applied. Furthermore, even if this Trial Chamber was to consider the Defence's request to apply the previous Rule 72 prior to its amendment, (which allowed sixty days following disclosure by the Prosecutor to the Defence to file any preliminary motions), the prescribed time limit for filing preliminary motions would have long been expired.

56. Therefore because the Accused has not adhered to the provisions of Rule 72 and no relief was sought for a waiver of this time limit pursuant to Rule 72(F), the Trial Chamber rules that the Defence's preliminary motion is inadmissible.

57. Furthermore, in view of the aforementioned Decision and the subsequent hearing on 30 March 2000, when the Trial Chamber again noted that the Prosecutor has complied with the disclosure requirements, the issue of disclosures has previously been ruled on and decided upon.

58. Thus, in accordance with the principle of *res judicata*, the Trial Chamber holds that the issue of disclosure shall not be reopened or re-challenged by the parties. In addition, mindful of Rule 73(E), the Trial Chamber reminds, *in limine*, counsel for the Defence, the obligation not to make frivolous or unwarranted motions.

59. In any case, it is evident from the submissions by the Defence, the issue raised was not one of jurisdiction rather it was an attempt to review the decision of the confirming Judge, which is inadmissible under Rule 72.

60. The Defence also raised and linked the issue of jurisdiction to the question of abuse of process. As already explained, the Preliminary Motion is out of time under Rule 72. The Trial Chamber has considered the issue of abuse of process and it holds that it is unfounded.

61. The Trial Chamber accepts that the parties met noting the fact that there have been plea agreements leading to pleas of guilty in some proceedings before the Tribunal. It further notes, that the alleged events are said to have happened during the first days the Accused came into contact with representatives of the Prosecutor's office in February 1999. Yet the Accused raised them for the first time in April 2000, upon filing this Preliminary Motion to the Tribunal. In these circumstances, therefore, the Trial Chamber is led to believe that the allegations by the Accused are unfounded.

Stay of Proceedings

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62. The Defence's second Motion asking for stay is thus moot and denied.

FOR THE FOREGOING REASONS,

THE TRIAL CHAMBER,

DISMISSES the Defence's Preliminary Motion, because it is out of time, and;

DISMISSES the Defence request for seeking stay of proceedings pending final decision on the Defence's Preliminary Motion filed on 9 April 2000 as inadmissible because it is moot.

Decision Rendered on 1 June 2000
Signed in Arusha on 21 June 2000

Laïty Kama,
Presiding Judge

William H. Sekule
Judge

Pavel Dolenc
Judge

(Seal of the Tribunal)

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IN TRIAL CHAMBER II

Before:
Judge David Hunt, Pre-Trial Judge

Registrar:
Mr Hans Holthuis

Decision of:
16 May 2001

PROSECUTOR

v

RADOSLAV BRDANIN & MOMIR TALIC

**DECISION ON SECOND MOTION BY BRDANIN
TO DISMISS THE INDICTMENT**

The Office of the Prosecutor:

Ms Joanna Korner
Mr Nicolas Koumjian
Mr Andrew Cayley
Ms Anna Richterova
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

1. The accused Radoslav Brdanin ("Brdanin") has filed a motion in which he seeks the dismissal of the indictment.¹ He complains that the Tribunal has not provided him, and is not prepared to provide him, with sufficient resources properly and legally to prepare his defence, and that it has caused unnecessary delay by failing to provide sufficient translation services to the Office of the Prosecutor. He says that either the Tribunal has the necessary resources to provide equality between the prosecution and the defence or it has failed and refused to request the Security Council or the General Assembly of the United Nations for additional funding. The delays caused by these failures are in violation of his right to be tried without undue delay.² He asserts that he is at a significant disadvantage in preparing for trial

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compared to the prosecution because the prosecution has access to greater resources.³ He submits that the indictment should be dismissed as the only reasonable remedy for the failure of the Tribunal to "honour the principle of equality of arms and provide sufficient resources to the defence in this case".⁴ Alternatively, he requests an order to the Registrar to provide resources to the defence "commensurate with those devoted by the Prosecutor" to the case, and he submits that, if there be a default by the Registrar to do so within a reasonable time, the indictment should be dismissed.⁵

2. In its Response,⁶ the prosecution argues that the Motion is concerned only with the allocation of Resources and, in accordance with the Tribunal's Directive on Assignment of Defence Counsel,⁷ any dispute regarding the allocation of resources remains within the domain of the Registry and/or the President.⁸ The prosecution expresses confidence that a settlement under this Directive would satisfy the objections of Brdanin.⁹

3. When stripped of its rhetoric and unsubstantiated assumptions, the Motion is indeed concerned only with the sufficiency of the resources made available to Brdanin in his defence. It is appropriate that he first exhaust the avenues of redress open to him under the Directive before seeking redress from the Trial Chamber. The Registry has now acted upon his most recent request for further resources.¹⁰ The Motion will therefore be dismissed.

4. However, the Trial Chamber is not indifferent to the difficulties faced by the defence in preparing a case of this complexity. It is fundamental to any criminal justice system that no-one should be convicted of a crime otherwise than after a fair trial according to law. Articles 20.1 and 22.2 of the Tribunal's Statute expressly provide that an accused before the Tribunal is entitled to a fair trial. Article 20.1 makes it an essential function of the Trial Chambers to ensure that the accused receives such a fair trial.

5. If it is demonstrated that the resources necessary to ensure a fair trial are not available, a Trial Chamber cannot permit a miscarriage of justice to occur. There would be no miscarriage of justice if an accused person were shown to be freely willing to go to trial without the provision of such resources. Even where a trial would amount to a miscarriage of justice, it would only be in exceptional circumstances that the dismissal of the indictment would be appropriate. However, if the Trial Chamber is satisfied that the absence of such resources will result in a miscarriage of justice, it has the inherent power and the obligation to stay the proceedings until the necessary resources are provided, in order to prevent the abuse of process involved in such a trial.¹¹ The consequences of such a stay upon the continued detention of the accused would depend upon the circumstances of the particular case.

Disposition

6. The Motion is dismissed.

Judge David Hunt
Pre-Trial Judge

Dated this 16th day of May 2001
At The Hague
The Netherlands

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[Seal of the Tribunal]

- 1 - Motion to Dismiss the Indictment, 2 May 2001 ("Motion"), pars 16-17.
- 2 - *Ibid*, pars 1(a)-(d).
- 3 - *Ibid*, par 1(e).
- 4 - *Ibid*, par 16.
- 5 - *Ibid*, par 17.
- 6 - Prosecution's Response to "Motion to Dismiss the Indictment" Filed by the Accused Radoslav Brdanin", 8 May 2001 ("Response").
- 7 - Directive No.1/94 (IT/73/Rev 7). Article 33 of the Directive provides: "In the event of disagreement on questions relating to calculation and payment of remuneration or to reimbursement of expenses, the Registrar shall make a decision, after consulting the President and, if necessary, the Advisory Panel, on an equitable basis."
- 8 - Response, par 2.
- 9 - *Ibid*, par 3.
- 10 - Copy letter to Mr Ackerman of Counsel, 10 May 2001.
- 11 - The burden upon an accused seeking a stay upon this basis was not argued, and it is unnecessary for the purposes of the present decision to determine the issue. It may be sufficient if it is demonstrated that the absence of such resources is likely to result in a miscarriage of justice



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No.: IT-94-1-A
Date: 15 July 1999
Original: English

IN THE APPEALS CHAMBER

Before: Judge Mohamed Shahabuddeen, Presiding
Judge Antonio Cassese
Judge Wang Tieya
Judge Rafael Nieto-Navia
Judge Florence Ndepele Mwachande Mumba

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 15 July 1999

PROSECUTOR

v.

DU[KO TADI]

JUDGEMENT

The Office of the Prosecutor:

Mr. Upawansa Yapa
Ms. Brenda J. Hollis
Mr. William Fenrick
Mr. Michael Keegan
Ms. Ann Sutherland

Counsel for the Appellant:

Mr. William Clegg
Mr. John Livingston

of evidence via video-conference link from Banja Luka in the *Republika Srpska*, and granting confidentiality and safe conduct to several Defence witnesses are set forth in the Judgement of the Trial Chamber.⁹¹ Indeed, the Decision on Admissibility of Additional Evidence, by which the Defence was precluded from presenting additional evidence, was based on the fact that the Defence had failed to establish that it would have been in the interests of justice to admit such evidence. This indicates that the fact that it could not present such evidence did not detract from the fairness of the trial.

54. A further example of a measure of the Trial Chamber which was designed to assist in the preparation and presentation of the Defence case is that the Trial Chamber's Presiding Judge brought to the attention of the President of the International Tribunal certain difficulties concerning the possible attendance of three witnesses who had been summoned by the Defence.⁹² She requested the President of the International Tribunal to send a letter to the Acting President of the *Republika Srpska*, Mrs. B. Plavsic, to urge her to assist the Defence in securing the presence and cooperation of these Defence witnesses. Consequently, on 19 September 1996, the President of the Tribunal sent a letter to Mrs. Plavsic. In this letter, he made reference to obstacles encountered by the Defence in securing the cooperation of these witnesses. In view, *inter alia*, of the accused's right to a fair trial, Mrs. Plavsic was therefore enjoined to "take whatever action is necessary immediately to resolve this matter so that the Defence may go forward with its case."⁹³

55. The Appeals Chamber can conceive of situations where a fair trial is not possible because witnesses central to the defence case do not appear due to the obstructionist efforts of a State. In such circumstances, the defence, after exhausting all the other measures mentioned above, has the option of submitting a motion for a stay of proceedings. The Defence opined during the oral hearing that the reason why such action was not taken in the present case may have been due to trial counsel's concern regarding the long period of detention on remand. The Appeals Chamber notes that the Rules envision some relief in such a situation, in the form of provisional release, which, pursuant to Sub-rule 65(B), may be granted "in exceptional circumstances". It is not hard to imagine that a stay of proceedings occasioned by the frustration of a fair trial under prevailing trial conditions

⁹¹ Judgement, paras. 29-35.

⁹² T. 59, 60 (20 April 1999).

⁹³ Letter from President Cassese to Mrs. B. Plavsic of 19 September 1996, referred to by Judge Shahabuddeen during the hearing on 20 April 1999 (*ibid.*).

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IN THE TRIAL CHAMBER

Before:

**Judge Richard May, Presiding
Judge Patrick Robinson
Judge Mohamed El Habib Fassi Fihri**

Registrar:

Mr. Hans Holthuis

Order of:

23 April 2001

PROSECUTOR

v.

**DUSKO SIKIRICA
DAMIR DOSEN
DRAGAN KOLUNDŽIJA**

**ORDER GRANTING STAY OF PROCEEDINGS
AND ORDERING MEDICAL EXAMINATION**

The Office of the Prosecutor:

**Mr. Dirk Ryneveld
Ms. Julia Baly
Mr. Daryl Mundis**

Counsel for the Accused:

**Mr. Veselin Londrovic and Mr. Michael Greaves, for Dusko Sikirica
Mr. Vladimir Petrovic and Mr. Goran Rodic, for Damir Dosen
Mr. Dušan Vucicevic and Mr. Jovan Ostojic, for Dragan Kolundžija**

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal"),

BEING SEISED of "Defendant, Dragan Kolundzija's Emergency Motion for a Stay of Trial Proceedings" filed on behalf of Dragan Kolundzija on 20 April 2001 ("the Motion"),

HAVING HEARD the parties in closed session on 23 April 2001,

NOTING the medical reports as to the condition of the accused provided by the Registry of the International Tribunal,

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CONSIDERING the reasons given in support of the Motion,

HAVING GRANTED THE REQUEST orally on 9 April 2001 with the agreement of the parties,

PURSUANT TO Rules 54 and 74 *bis* of the Rules of Procedure and Evidence of the International Tribunal

HEREBY CONFIRMS THE ORDERS as follows:

1. a medical examination of the accused, Dragan Kolundzija, shall be carried out to ascertain his current fitness to stand trial and the Trial Chamber instructs the Registrar to entrust this task to one of the experts whose name appears on the list drawn up by the Registry of the International Tribunal;
2. the expert shall provide an oral or written report to the Trial Chamber no later than Tuesday 1 May 2001;
3. the presentation of oral testimony in this matter is adjourned until further order.

Done in English and French, the English text being authoritative.

Patrick Robinson
Presiding

Dated this twenty-third day of April 2001
At The Hague
The Netherlands

[Seal of the Tribunal]