

Case no.: MICT-13-37-R.1

Date: 23 July 2015

Mechanism for International Criminal Tribunals

Original: French

PRESIDENT OF THE MECHANISM

Before: Judge Theodor Meron, President

Registrar: Mr John Hocking

Filing date:

THE PROSECUTOR
v.
FERDINAND NAHIMANA

UNCLASSIFIED

BRIEF IN REPLY

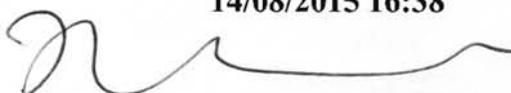
The Office of the Prosecutor

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1- On the existence of new facts

1. Firstly, contrary to what the Prosecution argues, the disclosure of the content of the diplomatic telegrams recently obtained by the Defence constitutes in itself a new fact, pursuant to Article 24 of the Statute and Rule 146 of the Rules of Procedure and Evidence. During the trial and until now, only the alleged existence of these telegrams was taken into consideration by the judges to assess the credibility of Expert Witness Des Forges.
2. The non-disclosure of these telegrams during the trial is the sole responsibility of the Prosecution, which, although it bore the burden of proof, did not launch any investigation to obtain them from the French authorities even though the Defence expressly requested their disclosure (*see* Annex 6).
3. Secondly, the content of these telegrams reveals facts that were not known during the trial and which, consequently, could not be taken into consideration by either the Trial Chamber or the Appeals Chamber:
 - The conversations during which Mr Ferdinand Nahimana allegedly committed to intervene with the journalists of *RTLM* radio took place in the afternoon of 2 July 1994 ;
 - The commitments made by Mr Ferdinand Nahimana during these conversations were not honoured; in other words, he did not intervene with the journalists of *RTLM* radio. Contrary to what the Prosecution suggests,¹ the commitment to “cease the propaganda of *Mille Collines*” is clearly one of the commitments that was not “respected”.
4. As stated in the Request for Review,² these new facts, unknown during the trial, provide proof, on the one hand, that when broadcasts ceased on 4 July 1994, the date on which the RPF captured Kigali, it can in no way be considered as circumstantial proof of intervention with the journalists of *RTLM* Radio and, on the other, that contrary to the testimony of Expert Witness Des Forges, the French diplomat who drafted the telegrams expressed his conviction that there had been no intervention.

¹ Prosecution Response, para. 14.

² Request for Review, paras 32 to 42.

5. These facts also prove the lack of reliability of the sole testimony accepted in support of the claim that Mr Ferdinand Nahimana had direct control over these radio journalists after 6 April 1994.³

2- The Defence did not fail in its obligations

6. Firstly, contrary to what the Prosecution submits,⁴ during the trial it was not incumbent upon the Defence to provide proof – negative proof – of Mr Ferdinand NAHIMANA’s failure to intervene with the journalists of radio *RTL*M. On the contrary, it was the responsibility of the Prosecution to provide proof – positive proof – of Mr Ferdinand NAHIMANA’s effective control over the journalists after 6 April 1994,⁵ that is to say to provide proof of effective and efficient intervention. Such proof was not provided.
7. In that respect, it is important to recall that in an interlocutory decision, the Trial Chamber expressly ruled that, regardless of their content, the conversations held in late June or early July 1994 between Mr Ferdinand NAHIMANA and French diplomats were not relevant to establish control by the accused over the journalists.⁶ Therefore, the Defence legitimately took into account, when preparing its final trial brief, that the Prosecution’s argument had rightly been definitively dismissed. The fact that a few months later, the trial judges adopted a finding that was the complete opposite of their initial assessment and completely unforeseeable must be considered particularly objectionable.⁷
8. Secondly, contrary to what the Prosecution argues,⁸ the Defence has continuously, during the trial proceedings⁹ and on appeal,¹⁰ challenged the use of the testimony of

³ Request for Review, paras 43 to 50.

⁴ Prosecution Response, paras 11 and 12.

⁵ The Appeals Chamber’s decision of 28 November 2007 expressly notes (para.790): “It was indeed for the Prosecutor to prove the Appellant’s effective control over *RTL*M after 6 April 1994”.

⁶ Decision of 9 May 2003 amended by the Order of 13 May 2003 (32430-32414), para.62: “As far as rebutting the evidence that Nahimana never spoke to Operation *Turquoise* officials about *RTL*M is concerned, this is also not directly relevant and would not in any case establish that Nahimana did in fact have control of *RTL*M.”

⁷ See also Annex II of the Appeal Brief (1343/A) which describes the procedural details concerning the allegation that the Appellant had intervened with the *RTL*M journalists in late June or early July 1994.

⁸ Prosecution Response, paras 11 and 19.

⁹ See in particular, hearing of 23 May 2002, French transcript, pages 269-271; see also “Motion to Restrict the Testimony of Alison Des Forges to Matters Requiring Expert Evidence”, filed on 10 May 2002, 28815; see also hearing of 20 May 2002, English transcript pages 78-79, 79-80, 92, 94-95, 112,113, 114, 116.

¹⁰ Defence Appeal Brief, paras 496 and 497.

Expert Witness Des Forges in lieu of that of fact-based witnesses, particularly in respect of the said conversations.

9. Thirdly, contrary to the Prosecution's submission,¹¹ the Defence stated clearly in its Appeal Brief¹² and during the appeal hearing¹³ that the only reasonable explanation as to why broadcasts had ceased at the beginning of July 1994 was the capture of Kigali by the RPF on 4 July 1994 and not because of an intervention by Mr Ferdinand NAHIMANA with the *RTL*M journalists.

3- The new facts raised in the request could have been decisive elements for the judgement

10. Paragraphs 826 to 834 of the judgement rendered by the Appeals Chamber on 28 November 2007 reveal that the essential fact that led the Appeals Chamber to dismiss any reasonable doubt as to the continuous control by the Appellant over the journalists of *RTL*M radio after 6 April 1994 is the determination of an effective and efficient intervention by him to have broadcasts directed against the UNAMIR cease.
11. It is not disputed that this determination rests exclusively on the testimony of Expert Witness Des Forges, which was itself based on alleged statements made by a French diplomat who referred to diplomatic telegrams that were not presented at the trial. This determination therefore actually rests, *in fine*, on the alleged content of these telegrams attesting to such an intervention.
12. Contrary to the Prosecution's arguments,¹⁴ there is no other evidence that specifically supports the claim that Mr Ferdinand NAHIMANA continued having effective control over radio *RTL*M after 6 April 1994.¹⁵ In particular, the reference to the testimony of Philippe Dahinden, examined in paragraph 828 of the Appeal Judgement, is devoid of relevance as the Appeals Chamber expressly pointed out in its decision that the joint statements made by Appellants Nahimana and Barayagwiza "were not sufficient to

¹¹ Prosecution Response, para. 15.

¹² Appeals Brief, paras 497 and 498; *see also*, "Defence Reply" filed on 21 April 2006, paras 154 and 155, 7182/A.

¹³ Hearing of 18 January 2007, French transcript page 43.

¹⁴ Prosecution Response, para. 21.

¹⁵ The reference (footnote no. 28) in paragraphs 789 to 822 of the Appeal Judgement is irrelevant as these paragraphs specifically examine the issue of "effective control before 6 April 1994".

demonstrate that the Appellant (Barayagwiza) continued to exercise effective control over *RTL*M after 6 April 1994".¹⁶

13. Under these conditions, the presentation of diplomatic telegrams, which, far from proving an intervention by Mr Ferdinand NAHIMANA, as Expert Witness Des Forges suggests, on the contrary establishes the lack of any intervention with the journalists, and raises a particularly serious doubt concerning his alleged continued power of intervention with them after 6 April 1994.
14. If he did have such powers on that date, it is reasonable to consider that he would have used them as part of the commitments he made to the French authorities, at least in an attempt to convince them to accept the requests of the Rwandan authorities present during those discussions. The lack of intervention on his part is therefore proof that he did not have the power to intervene with the journalists of *RTL*M radio.

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¹⁶ Appeals Chamber Decision of 28 November 2007, para. 635.



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