

9702/H



**Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda**

**ICTR-99-52-A
12 January 2007
(9702/H – 9699/H)**

IN THE APPEALS CHAMBER

P.T.

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. Adama Dieng

Decision of: 12 January 2007

ICTR Appeals Chamber
Date: 12 January 2007
Action: P.T.
Copied To: concerned Judges,
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Archives

**Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE
(Appellants)**

v.

**THE PROSECUTOR
(Respondent)**

Case No. ICTR-99-52-A

**DECISION ON THE ADMISSIBILITY OF THE AMICUS CURIAE BRIEF FILED
BY THE "OPEN SOCIETY JUSTICE INITIATIVE" AND ON ITS REQUEST TO
BE HEARD AT THE APPEALS HEARING**

Counsel for Hassan Ngeze

Mr. Bharat B. Chadha

Counsel for Jean-Bosco Barayagwiza

Mr. Donald Herbert

Mr. Tanoo Mylvaganam

Counsel for Ferdinand Nahimana

Mr. Jean-Marie Biju-Duval

Ms. Diana Ellis

Open Society Justice Initiative

Mr. James A. Goldston

Mr. Floyd Abrams, Esq.

Ms. Diane Orentlicher

Office of the Prosecutor

Mr. James Stewart

Mr. Neville Weston

Mr. Abdoulaye Seye

Ms. Linda Bianchi

Mr. Alfred Orono Orono

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: *Patrice Tchidimbo*
SIGNATURE: *[Signature]* DATE: *12/01/07*

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THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (“Appeals Chamber” and “Tribunal”, respectively),

NOTING the Judgement in this case rendered by Trial Chamber I (“Trial Chamber”) on 3 December 2003;¹

NOTING the letter of the “Open Society Justice Initiative” filed on 18 December 2006 submitting its “*Amicus Curiae* Brief on *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor* (ICTR Case No. ICTR-99-52-A)” and seeking leave to present oral arguments (“Applicant” and “*Amicus Curiae* Brief”, respectively);

BEING SEIZED OF the “Prosecutor’s Motion to Object to the Admission of the *Amicus Curiae* Brief from the Open Society Justice Initiative” filed on 21 December 2006 (“Prosecution’s Motion”) requesting that the Appeals Chamber “refuse to grant leave to the [Applicant] to either appear as *amicus curiae* or to file the *Amicus Curiae* Brief at this late stage”² on the grounds that (i) the *Amicus Curiae* Brief has not been properly placed before the Appeals Chamber since the Applicant has neither sought leave to do so by way of motion, nor has been granted *amicus curiae* status by the Appeals Chamber; (ii) the *Amicus Curiae* Brief is irrelevant to the present case; and, (iii) being introduced at this late stage of the appellate proceedings, it creates prejudice to the Prosecution;³

BEING SEIZED OF the letter filed by the Applicant on 3 January 2007 resubmitting the *Amicus Curiae* Brief and “formally requesting leave to file the brief with the ICTR Appeals Chamber” under Rule 74 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) and to appear before the Appeals Chamber to present oral arguments (“Request”);⁴

NOTING that the Appellants Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze (“Appellants”) have not filed any responses to the Request or to the Prosecution’s Motion;

¹ *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003 (“Trial Judgement”).

² Prosecution’s Motion, para. 9.

³ *Ibid.*, paras 2-7.

⁴ Request, p. 2. The same document was filed again on 9 January 2007.

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NOTING the Scheduling Order for Appeals Hearing and Decision on Hassan Ngeze's Motion of 24 January 2006 issued on 16 November 2006 ("Scheduling Order"), scheduling the hearing of the appeals in the present case for 16, 17 and 18 January 2007 ("Appeals Hearing");

CONSIDERING that, pursuant to Rule 74 of the Rules, the Appeals Chamber "may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization, or person to appear before it and make submissions on any issue specified by the [Appeals] Chamber";

CONSIDERING that granting leave to make submissions under Rule 74 is a matter within the discretion of the Chamber;⁵

CONSIDERING that the primary criterion for the Appeals Chamber in determining whether to grant leave to an *amicus curiae* to submit a brief or to offer oral argument is whether such submissions would assist the Appeals Chamber in its consideration of the questions at issue on appeal;⁶

NOTING that the Applicant wishes to highlight its concerns with respect to some portions of the Trial Judgement, which may be interpreted as a "potential threat to expression" and thus seeks to have "certain aspects of the [J]udgement [...] modified or clarified to ensure that the aims of international justice are fulfilled without undermining protection of free expression";⁷

CONSIDERING that the issues of whether and what kinds of public speech may constitute incitement or instigation to commit genocide or the crime of persecutions as a crime against humanity⁸ are relevant to the issues on appeal in the present case;⁹

FINDING, therefore, that the *Amicus Curiae* Brief is admissible under Rule 74 of the Rules;

⁵ See *Prosecutor v. Ante Gotovina et al.*, Case No. IT-60-90-AR108bis.1, Decision on Prosecution's Motion to Strike Request for Review under Rule 108bis, 13 December 2006, para. 7; *Prosecutor v. Jadranko Prlić*, Case No. IT-04-74-AR108bis.1, Decision on Prosecution's Motion to Strike Request for Review under Rule 108bis, 13 December 2006, para. 7. See also, by analogy, "Information Concerning the Submission of *Amicus Curiae* Briefs" before the International Criminal Tribunal for Former Yugoslavia, 27 March 1997, IT/122, paras 2 and 5(c).

⁶ *The Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Association of Defence Counsel Request to Participate in Oral Argument, 7 November 2005, p. 3. See also *Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision on *Amicus Curiae* Application of Paul Bisengimana, 30 March 2004, p. 3.

⁷ Request, p. 2.

⁸ See *Amicus Curiae* Brief, p. 2.

⁹ Some of these issues have been raised by the parties: see "Appeal Brief (Revised)", filed confidentially by Appellant Ferdinand Nahimana on 27 September 2004, paras 186-216, 242-294 and 585-639; "Appellant's Brief (Pursuant to Rule 111 of the Rules of Procedure and Evidence)" filed confidentially by Appellant Hassan Ngeze on 2 May 2005, paras 167-169; 217-285; "Appellant's Appeal Brief" filed by Appellant Jean-Bosco Barayagwiza on 12 October 2005, paras 196-201, 231-235, 238-239 and 300-308; Consolidated Respondent's Brief filed by the Prosecution on 22 November 2005, paras 137-142, 298-376 and 380-445.

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FINDING, however, that in the determination of the appeals in the present case, it is not necessary for the Appeals Chamber to hear oral submissions from the Applicant;

CONSIDERING that it is in the interests of justice to allow each party to respond to the *Amicus Curiae* Brief;

FOR THE FOREGOING REASONS,

GRANTS the Request **IN PART** and **ACCEPTS** the *Amicus Curiae* Brief as validly filed before the Appeals Chamber;

DISMISSES the Request in all other respects;

DISMISSES the Prosecution's Motion;

HEREBY ORDERS the Appellants and the Prosecution, should they wish to do so, to file their responses to the *Amicus Curiae* Brief of no longer than 20 (twenty) pages each within 30 (thirty) days of the present Decision.

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



Fausto Pocar
Presiding Judge

Dated this 12th day of January 2007,
At The Hague, The Netherlands.






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**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

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**APPEALS CHAMBER – PROOF OF SERVICE
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12 January 2007	Case Name / <i>Affaire</i> : NAHIMANA ET AL. Case No / <i>No. de l'affaire</i> : ICTR-99-52-A	Ferdinand NAHIMANA, Jean-Bosco BARAYAGWIZA, Hassan NGEZE v. THE PROSECUTOR
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Decision on admissibility of the Amicus Curiae Brief filed by the "Open Society Justice Initiative" and on Requests to be heard at the Appeal hearing	January 12, 2007	9702/H 9699/H

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