



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

CHAMBER II

OR:ENG.

Before:

Judge William Sekule: Presiding Judge

Judge Yakov Ostrovsky

Judge T.H. Khan

Registry: Prisca Nyambe

Decision of: 27 November 1997

**THE PROSECUTOR
VERSUS
THEONESTE BAGOSORA**

Case No. ICTR-96-7-T

**DECISION ON THE MOTION BY THE DEFENCE
COUNSEL FOR DISCLOSURE**

The Office of the Prosecutor:

Mr. James Stewart

Mr. Luc Côté

Counsel For the Defence

Mr. Raphaël Constant

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the
"Tribunal"),**

SITTING as Trial Chamber II (the "Tribunal"), composed of Judge William H. Sekule,
Presiding Judge, Judge Yakov Ostrovsky, and Judge Tafazzal H. Khan;

CONSIDERING the order of 17 May 1996 for provisional detention and transfer of the
accused for a period of 30 days, issued by Judge Lennart Aspegren addressed to the

Republic of Cameroon, pursuant to rule 40*bis* (B) of the Rules of Procedure and Evidence (the "Rules");

CONSIDERING the order for continued detention of the accused, which was issued by Judge Lennart Aspegren on 18 June 1996, pursuant to rule 40*bis* (D) of the Rules addressed to the Republic of Cameroon, extending the detention of the accused for a further period of 30 days as of 17 June to 16 July 1996 inclusive;

CONSIDERING the final provisional order for extending the detention of the accused, which was issued by Judge Laïty Kama on 15 July 1996, pursuant to rule 40*bis* (D) addressed to the Republic of Cameroon, for a further maximum period of 30 days beginning 15 July 1996 up to and including 14 August 1996;

CONSIDERING the indictment against the accused, which was confirmed by Judge Lennart Aspegren on 10 August 1996 pursuant to rule 47 (D) of the Rules, on the basis that there was sufficient evidence to provide reasonable grounds for indicting him for Genocide, Crimes Against Humanity, violations of common Article 3 to the 1949 Geneva Conventions, and of the 1977 Additional Protocol II thereto, as alleged in the indictment;

CONSIDERING ALSO that the accused was transferred to the Tribunal's Detention Unit on 23 January 1997 from the Republic of Cameroon;

FURTHER CONSIDERING that at his initial appearance pursuant to rule 62 of the Rules, on 7 March 1997, the accused pleaded not guilty to all counts of the indictment;

HAVING RECEIVED a Defence Motion filed on 22 October 1997, based on rule 66 (B) of the Rules for requesting the disclosure of evidence;

HAVING RECEIVED from the Prosecution, on 24 October 1997, a reply to the abovementioned Defence Motion;

HAVING ALSO RECEIVED a rejoinder from the Defence Counsel on 31 October in support of his motion for disclosure of evidence;

HAVING PERUSED the Defence Motion, reply of the Prosecution to the motion and rejoinder of the Defence Counsel;

HAVING HEARD the parties on 31 October 1997;

ARGUMENTS BY THE PARTIES

(A) Though the Defence Counsel generally referred to rule 66 when alleging irregularities in the disclosure of evidence by the Prosecution, he primarily based his motion on rule 66 (B) of the Rules;

(B) The Defence Counsel in support of his motion made the following specific submissions:

(i) that the Tribunal should acknowledge that the Prosecution has violated the rights of the accused as enshrined in Article 20 (4) (a) of the Statute of the Tribunal (the "Statute") and rule 66 of the Rules (adopted on 5 July 1996 and as amended on 6 June 1997), and it should direct the Prosecution to disclose specific evidence as mentioned in his motion;

(ii) that the accused has been in detention for more than one year without having been informed of any evidence against him, and thereby has not been able to prepare his defence;

(iii) that although the Prosecution has communicated to the accused a document entitled "Supporting Material", this in itself does not constitute a complete disclosure within the ambit of rule 66 (B) of the Rules, and the Defence Counsel, therefore requests that the full disclosure be made of all the materials in the custody or control of the Prosecution;

(iv) that the Prosecution failed to respond to his 3 letters, dated 12, 21 and 25 August 1997 respectively, requesting full disclosure;

(v) that the filing of a motion by the Prosecution under rule 69 of the Rules for protective measures for witnesses does not relieve the Prosecution of its obligations under rule 66 (A) of the Rules, and consequently the Prosecutor should disclose redacted witness statements; and

(vi) that the date of trial was fixed for 24 October 1997; therefore it was incumbent on the Prosecution to make full disclosure of evidence not later than 60 days before said date, as provided under Rule 66 (A) (ii) of the Rules.

(C) The Prosecution in response contended that it has disclosed some evidentiary material to the Defence Counsel on 5 July 1996 and another version thereof on 6 June 1997; therefore it has fulfilled its obligations under rule 66 (A) of the Rules (adopted on 5 July 1996 and as amended on 6 June 1997) and there has been no violation of Article 20 (4) (a) of the Statute;

(D) Furthermore, the Prosecution raised the following specific contentions:

(i) that the right guaranteed under Article 20 (4) (a) of the Statute constitutes a continuing process whereby the accused will continue to receive any new evidence, the Prosecution intends to use against him;

(ii) that the documents which are in the archives of the Ministry of Defence of the Republic of Rwanda are not in her possession or control, though she has been given access to some material, hence the allegation of the Defence is not tenable;

(iii) that the specific documents requested for by the Defence Counsel in paragraphs 1, 2 and 4 up to 12 as mentioned in his motion are witness statements, and the disclosure of the said documents could be made after the Tribunal's decision on the Prosecution motion for protective measures for witnesses;

(iv) that documents or records requested for by the Defence Counsel in paragraph 3 of his motion are not under the custody of or control of the Prosecution;

(v) that it is the intention of the Prosecution to complete disclosure, in accordance with rules 66 (B) through to rule 70, either in redacted or non-redacted form depending upon the decision by the Tribunal on the Prosecution motion for protective measures for witnesses; and

(vi) That the scheduled date of 24 October 1997 was in fact a tactical date so far as the trial was concerned, and dependent on the availability of the courtrooms; therefore the date was intended only for the consideration of the Prosecution motion for protective measures for witnesses, and as indicated in the Registrar's notice of 19 September 1997, not for the trial as argued by the Defence Counsel.

DELIBERATIONS

That pursuant to rule 69 (A) of the Rules, the Prosecution may apply to the Trial Chamber for an order of non-disclosure of the identity of a victim or a witness, who may be in danger or at risk, until such person is brought under the protection of the Tribunal. Similarly, rule 75 (A) of the Rules provides that a Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Unit (the "WVU") order appropriate measures for the privacy and protection of victims and witnesses.

However, in both rule 69 and rule 75 (A), it is stipulated that the measures applied should not prejudice the right of the accused to a fair trial. Therefore, the Prosecution has an obligation to comply with the time limits prescribed in rule 66 (A) (i) and (ii) of the Rules.

With respect to the contention of the Prosecution whereby the scheduled date for the start of the trial was merely a tactical date dependant on several practical factors. It is noted that the first official indication that the trial may not commence on this date came with the Registrar's notice of 18 September 1997 scheduling the hearing of the Prosecution Motion on protective measures for its witnesses. However, in view of rule 66 (A) (ii), the disclosure of copies of the statements of all witnesses the Prosecution intends to call to testify before the Tribunal, should have taken place by 24 August 1997. Therefore, on 18 September 1997, the deadline for the disclosure had already expired, as such the contention of the Prosecution with regard to the 18 September 1997 notice is untenable. However, the Trial Chamber notes that part of the supporting material was communicated to the Defence Counsel on two occasions, 5 July 1996 and 6 June 1997.

The Tribunal, therefore opines that had the Trial commenced on 24 October 1997 as originally planned, the right of the accused to a fair trial in accordance with Article 20 of the Statute would have been prejudiced. The Tribunal is at all times mindful of the full respect of the rights of the accused. Thereupon, the Tribunal will unequivocally ensure that the Defence Counsel has sufficient time to prepare the defence of the accused as laid down in Article 20 (4) (b) of the Statute. However, in respecting the rights of the accused under Article 20 (4) (b) of the Statute, the Tribunal must take due notice of the rights of the accused to be tried without undue delay in accordance with Article 20 (4) (c) of the Statute. In this case, however, as the trial has already been postponed, no material prejudice has been caused to the rights of the accused under Article 20 of the Statute, despite the incomplete disclosure of evidence by the Prosecution.

Further, with the respect to rule 66 (B) of the Rules, the Tribunal is of the opinion that the Defence Counsel must fulfill two fundamental requirements in order to succeed in his claim for disclosure of evidentiary material, which has relevant to the accused. First, the defence must demonstrate *prima facie* materiality of the evidence in question, and secondly that the said evidence is in the custody or control of the Prosecution. Moreover, it is also implied therein that the Defence Counsel must make specific identification of any requested documentation, thus enabling the Trial Chamber to take action. In this regard, the Defence Counsel, however, has only made a broad request for documents without specifying any categories thereof from the archives of the Ministry of Defence of the Republic of Rwanda. The Prosecution, however, has denied the possession of these documents.

The Trial Chamber also takes note of the assurance given by the Prosecution that if and when they will have access to the documents from the archives, and if it intends to use them against the accused, the defence Counsel will be supplied the copies thereof. The Trial Chamber takes note of the lack of response by the Prosecution to the 3 letters written by the Defence Counsel asking for disclosure of evidence, and expects more cooperative attitude of the Prosecution towards the defence.

(E) FOR ALL THE ABOVE REASONS,

THE TRIAL CHAMBER FINDS: -

(i) That the non-disclosure of the witnesses statements by the Prosecution to the Defence Counsel is violative of rule 66 (A) (i) of the Rules. The mere fact of filing a motion by the Prosecution for protective measures for her witnesses does not in any way relieve it of the obligations for disclosure to the defence under rules 66 (A) (i) of the Rules. The Prosecution should note that the pendency of a motion under rule 53 of the Rules for protective measures does not exonerate the Prosecution of its other obligations imposed by the Rules:

(ii) That if the Prosecution apprehends any potential risk to any of her witnesses in fulfilling her obligations of disclosure under rule 66 (A) of the Rules, she should promptly approach the Trial Chamber for an appropriate order;

(iii) That complete non-disclosure by the Prosecution to the Defence Counsel 60 days before the scheduled date 24 October 1997 is in violation of rule 66 (A) (ii) of the Rules;

(iv) That the Defence has been unable to demonstrate a *prima facie* materiality of the evidence requested for, and also failed to show that such evidence is under the control or custody of the Prosecution, as required under rule 66 (B) of the Rules;

(v) That despite the failure of the Prosecution to strictly comply with the provisions of rule 66 of the Rules in furnishing the witnesses' statements to the defence, this Trial Chamber is clearly of the view that the defence will not be prejudiced in any way in as much as the trial of the case has been postponed and the defence will consequently have sufficient time to prepare for the trial; and

(vi) That in the instant case the Prosecution has been non-cooperative with the Defence Counsel as it did not reply to any of the 3 letters written to her by the Defence Counsel seeking disclosure and underscores the need of such cooperation in future.

THE TRIAL CHAMBER

(1) **DIRECTS** the Prosecution to fulfill its obligations under rules 66 (A) (ii), by disclosing the witnesses statements to the Defence Counsel within two weeks from the signing of this decision, if need be, in redacted form;

(2) **ALSO DIRECTS** the Prosecution to disclose any other evidence to the Defence Counsel promptly, if it obtains the custody or control over any evidence, which she intends to use against the accused;

(3) **FURTHER DIRECTS** the Prosecution to comply with the requirements of complete disclosure in accordance with rules 66 to 70 without undue delay;

(4) **DEPLORES** that the Prosecution did not respond to any of the requests of the Defence Counsel for disclosure of evidence; and

(5) **EXHORTS** the Prosecution to be more cooperative with the Defence Counsel in general, and with respect to disclosure in particular;

Arusha, 27 November 1997

Judge William H. Sekule: Presiding Judge

Judge Yakov Ostrovsky: Judge

Judge T.H. Khan: Judge

(Seal of the Tribunal)

