International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

TRIAL CHAMBER II

OR: ENG.

Before:
Judge William H. Sekule: Presiding Judge
Judge Yakov A. Ostrovsky
Judge Tafazzal H. Khan

Registry: John Kiyeyeu

Decision of: 17 March 1998

THE PROSECUTOR
VERSUS
THEONESTE BAGOSORA

Case No. ICTR-96-7-T

DECISION ON THE PROSECUTION MOTION FOR ADJOURNMENT

The Office of the Prosecutor:
Mr. James Stewart
Mr. Chile-Ebo Ossuji

Counsel For the Defence:
Mr. Jacques Larochelle
Mr. Raphael Constant

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

SITTING as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Yakov A. Ostrovsky, and Judge Tafazzal H. Khan;

CONSIDERING the order of 17 May 1996 issued by Judge Lennart Aspegren addressed to the Republic of Cameroon granting provisional detention and transfer of the accused

for a period of 30 days, pursuant to rule *40 bis* (B) of the Rules of Procedure and Evidence (the "Rules");

CONSIDERING FURTHER 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;

TAKING INTO ACCOUNT THAT the final provisional order for extending the detention of the accused, which was issued by Judge Laity 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;

GIVEN THE FACT THAT 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 Article 3 common 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;

WHEREAS t pursuant to rule 62 of the Rules, the initial appearance of the accused took place, on 7 March 1997;

HAVING RECEIVED the Motion filed by the Prosecutor on 9 March 1998, based upon rule 54 of the Rules requesting that the instant case be adjourned to a date to be fixed by the Registrar in consultation with both parties on the grounds therein stated;

WHEREAS the English text of the above mentioned motion was served on the Defence on 11 March 1998 and the French text was submitted to them on 12 March;

HAVING HEARD the oral arguments of both parties on 12 March 1998;

PLEADINGS OF THE PARTIES

THE PROSECUTOR

Prosecutor respectfully requested the Trial Chamber to adjourn the trial of the accused, on the following grounds:

(i) that pursuant to rule 54 of the Rules, the Trial Chamber is empowered, inter alia, to issue orders at the request of party, as may be necessary for the conduct of the trial and that in the case o**f The Prosecutor vs. Kanyabashi ICTR-96-15-T**, the Trial Chamber adjourned the trial at the request of the Defence;

(ii) that pursuant to what was agreed upon during the Status Conference held on

7 March 1997, the trial date of 12 March 1998 was a contingent date subject to filing of a joinder motion by the Prosecutor which has been fulfilled by the Prosecutor who submitted a new indictment on 6 March 1998 under rule 47 of the Rules stipulating new charges against the accused and others including the offence of conspiracy;

(iii) that no new trials should be undertaken by the Trial Chamber until the existing trials have been concluded for the reasons that the Prosecutor was faced with a shortage of staff. Further, that it was important to the accused as well as the victims and in the interest of public perception of criminal justice that such trials were finalized;

DEFENCE:

The Defence contended that the Trial Chamber should take into consideration several matters as stated below:-

(i) the fact that the accused had so far spent two (2) years in detention and in November 1997 the Prosecutor had promised to file a motion for joinder but failed and that, the Defence was expecting to proceed with case and not to adjourn;

(ii) that the Prosecutor could not purport to withdraw an existing indictment without leave of the Chamber as required under rule 51 of the Rules since there exists a trial before the Trial Chamber;

(iii) that the Prosecutor had delayed in disclosing materials to the defence yet she had informed the Defence in November 1997 that she would effect the necessary disclosure and preferably complete it by January 1998;

(iv) that by virtue of a decision by the Trial Chamber dated 27 November 1997 ordering the Prosecutor to disclose within two weeks, the Prosecutor has refused to honour that decision;

(v) that although rule 66 of the Rules requires the Prosecutor to disclose within thirty

(30) days from the date of the initial appearance, this was violated the first time and now for the second time, the Prosecutor had not disclosed material at least sixty

(60) days before the set trial date of 12 March 1998;

(vi) that for two (2) years since the accused was arrested nothing has been disclosed to him to enable him prepare his defence but instead, two (2) days ago, on 10 March 1998, fifty (57) redacted statements were submitted to him by the Prosecutor;

(vii) that there was a need for the Prosecutor to adhere to set time limits and that Defence was unwavering in its request to have full disclosure within the legally stipulated time limits;

(viii) the Trial Chamber strongly cautions the Prosecutor about such conduct so as not to promote her impunity in not respecting the decisions of the Tribunal by not adhering to set time limits;

(viii) that the behaviour of the Prosecutor so far was intolerable considering that the Defence has always been ready to proceed with the case;

(ix) that the Prosecutor has systematically violated the rights of the accused as stipulated in Article 19 and 20 (4/(c) of Statute and that according to rule 37 of the Rules, the Prosecutor has not respected the Rules with the consequent result that undue delay has been caused to the trial of the accused.

REPLY BY THE PROSECUTOR

Prosecutor clarified some issues raised before and stated that:

(i) in respect to the procedure for withdrawal of an indictment, she was aware of the proper procedure as stipulated in rule 51 of the rules which necessitates obtaining leave from Trial Chamber as opposed to a single judge;

(ii) that she had fulfilled the requisite disclosure under rule 66 of the Rules by providing supporting materials accompanying the indictment at the time of confirmation which materials contained extracts of statements and documents that supported the allegations. Further , that these materials were in fact submitted to the Defence on the day of initial appearance and that full statements, except a few, were submitted to the Defence in December 1997;

(iii) that the fifty seven (57) statements so far disclosed to the Defence were substantial compared to what has been disclosed in other Prosecution cases;

(v) that the Prosecution recognized that whether or not to undertake new trials before the existing trials are concluded was not for her to decide but it was the prerogative of the Tribunal;

(v) that the Defence should appreciate that the Tribunal was not a national jurisdiction court with limitless resources but they had to consider the constraints the Tribunal was facing such as lack of facilities, having to apply a novel procedure using divergent legal systems;

(vi) that it was unfair to put all the blame upon the Prosecutor which was endeavouring to respect the rights of the accused and at the same time contribute to the fulfilment of the Tribunal's mandate.

DELIBERATIONS

Trial Chamber has considered the arguments advanced by both parties, in particular those which are relevant to this application and has made the following observations:-

A. Concerning The Prosecutor's Submission That The Trial Chamber should Complete Case It Has Already Started

Considering the submission by the Prosecutor concerning the management of cases to ensure that existing cases are concluded before new ones are started, it is the view of the Chamber that this is not a sound excuse for not proceeding with the instant case. The decision to continue with the hearing or to take up new cases lies with the Trial Chamber which might accommodate cases where a good opportunity to do so exists as, for example, when another case stands adjourned, the Chamber could also take up two cases in one day at different hours.

B. With Regard to The Prosecutor's Application To Adjourn The Case

The Trial Chamber is aware that the Tribunal has been seized of a joint indictment pursuant to rule 47 of the Rules in which the accused and several others have been indicted. However, the Chamber also observes that there is still an existing indictment which is yet to be withdrawn.

The Trial Chamber is of the opinion that the submission of a joint indictment by the Prosecutor on 6 March 1998, only six days before the date set for the hearing despite her commitment to file the joinder motion by 15 September 1997, is unacceptable.

The joint indictment should have been submitted in good time in order not to delay the trial of Theoneste Bagosora further as has happened in this case. The Trial Chamber notes the concern of the Defence and states that pursuant to Articles 19 and 20 (4)(c) of the Statute, it is a fundamental human right for one who is detained be given a fair hearing within a reasonable time and without undue delay.

It is, however, the view of this Trial Chamber that the submission of the joint indictment raises legal issues which the Chamber cannot overlook since it is a judicial process. It is, therefore, our considered opinion that it is necessary that this joinder process be concluded before the instant case could proceed. We wish to state that, but for this reason, this case would have proceeded on schedule.

FOR ALL THE ABOVE REASONS,

THE TRIAL CHAMBER,

(1) POSTPONES the trial until a decision on the joint Indictment has been made. If the joint indictment is accepted, the judicial process will take a different course. However, in

the event that it is not accepted, the Trial of Theoneste Bagosora should resume without any delay.

Arusha, 17 March 1998.

Judge William H. Sekule: Presiding Judge

Judge Tafazzal .H. Khan: Judge

Judge Yakov A. Ostovsky's separate opinion is attached to the Decision of Trial Chamber II.

(Seal of the Tribunal)

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SEPARATE OPINION OF JUDGE YAKOV OSTROVSKY ON THE PROSECUTION'S MOTION FOR ADJOURNMENT

The Office of the Prosecutor:
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1. I have carefully considered the factual and legal aspects of the decision taken by my two learned colleagues and agree with their decision to postpone the trial until a decision on the joint indictment, filed on 6 March 1998, has been made. I share their view that in the event that this indictment is not accepted, the Bagosora trial should resume without any delay.

2. However, I respectfully differ with their analysis of the conduct of the Prosecutor and of her reasons for the adjournment of the Bagosora trial. In her request, the Prosecutor raised a number of important issues that should be examined in a more thorough manner.

3. The first reason offered by the Office of the Prosecutor ("OTP") in favour of an adjournment, was not addressed in the Chamber's decision. The Prosecutor, in her written request, states that the disclosure process is not yet complete and "it has been impossible for the Prosecutor to make the disclosure required by rules 66 and 67 of the Rules of Procedure and Evidence ("the Rules") in compliance with a 12 March 1998 set trial date."

On 27 November 1997, the Trial Chamber issued a decision that the Prosecutor provide disclosure to the Defence within two weeks of the signing of the decision. More than three months later the Prosecutor claims that the disclosure process remains incomplete. This shows a blatant lack of respect for the decision of the Trial Chamber.

4. The second reason for adjournment given by the Prosecutor in her request is that "no new trials should be undertaken before the existing trials are concluded." It is also pointed out "that the *Kayishema and Ruzindana* trial be permitted to continue to its conclusion without being interrupted by the commencement of new trial proceedings."

As it was correctly indicated in the decision of the Trial Chamber on this matter and recognized by the Prosecutor during the oral deliberations, it is for the Judges and not the Prosecutor to decide whether to start new trials before existing trials are completed.

5. Nevertheless, the point of view of the OTP, that the current trials should reach their conclusion before starting new ones, is of certain importance and deserves to be considered on its merits, which was not done in the Chamber's decision. In my opinion, the suggested approach by the Prosecutor cannot be accepted on the following grounds.

a. Acceptance of the approach suggested by the OTP leads to a situation where the three Judges of Chamber II will be inactive for two full months. We are unable to continue the *Kayishema and Ruzindana* trial as it has been proposed by the Prosecutor. This is because the Defence Counsels for these accused, have requested an adjournment until 1 June 1998 to prepare their witnesses. As a result of deliberations, the Trial Chamber issued a decision to postpone the trial until 11 May 1998.

b. Our experience shows that the Trial Chamber is unable to conduct trial proceedings continuously without interruptions. This is due to a variety of factors including the unavailability of witnesses, untranslated documents, lack of disclosure of supporting materials in a timely fashion and the need for preparation time by the parties. Therefore, it is important for each Chamber to conduct a few trials during the same period of time in order to expedite the proceedings. The experience of Chamber I, which has engaged in conducting two simultaneous trials, has proven that such an approach is justified and hastens the process.

c. The approach suggested by the Prosecutor could be deemed reasonable if we were able to complete each trial within a short time span. But the practice has been to the contrary. Each of the three trials started in the beginning of 1997, has lasted for more than one year and this has been primarily due to the position of the OTP. For example, in the *Kayishema and Ruzindana* case -- heard by Chamber II -- four months were spent on the presentation of the Prosecutor's witnesses. Over fifty witnesses have been produced. Chamber I was faced with a similar situation. Taking into account the scale of the Rwanda massacres in 1994, it is quite possible to present even more witnesses. However, such a stance disregards the fact that this is an international *ad hoc* tribunal established for four years only. In order to fulfill our mandate, planning should be reasonable. Simple calculation shows that with the current approach taken by the OTP the Tribunal will not be able to complete its mission and dispense with the estimated case load, even before the expiration of a possible second term in May 2003.

6. The final reason submitted by the Prosecutor in favour of adjourning the Bagosora trial is that she "does not intend to proceed on the present indictment, but to proceed on a joint indictment against this accused and others."

The intent of the OTP is understandable. However, what is incomprehensible is that a new joinder strategy was widely announced about *seven months ago*. Undoubtably, it is the OTP's prerogative to file a motion for joinder. However, it is for the Judges to determine whether such a motion complies with the requirements of the Rules and to accept or reject such a request. The reality is that the OTP assumed the obligation to file a first motion for joinder, pursuant to rule 48, by 15 September 1997. To date, no such motion has been filed. It is clear that seven months are more than sufficient to file a joinder motion to be considered by the Judges.

7. Instead, the Prosecutor submitted a joint indictment and it was done only a few days before the Bagosora trial was set to begin. Moreover, the request for the adjournment of the Bagosora case itself, was filed only two days before the set trial date. These last minute manoeuvres show a disrespectful attitude toward the Trial Chamber and Defence Counsels.

8. Furthermore, I cannot agree with my colleagues who recognize, in the Trial Chamber's decision, that the Tribunal has been seized of a joint indictment pursuant to rule 47 of the Rules. This joint indictment should not be seen to be based on rule 47. The Prosecutor informed us that new charges have been added against Bagosora. In accordance with rule 50 of the Rules this cannot be done without leave of the Trial Chamber. The Prosecutor also recognized that the previous Bagosora indictment should be withdrawn because a joint indictment has been prepared. But in accordance with rule 51 of the Rules, the existing Bagosora indictment cannot be withdrawn without preliminary permission from the Trial Chamber. I question why the Prosecutor disregards the Rules and finds it possible to present the Judges with a *fait accompli*?

9. A further important argument as to why the Bagosora trial cannot be postponed is that he has been in custody for two years without trial. It is inadmissible when an international

tribunal such as our's, due to the position of the Prosecutor, fails to act in conformity with article 20 of its Statute, which provides the accused with the right to a trial without undue delay. It is a commonly accepted fact that justice delayed is justice denied.

10. In both her written request and oral statements for adjournment of the Bagosora trial, the Prosecutor raised a number of issues which went beyond the scope of the present request. The issues raised impact the whole of our judicial activity. Therefore, some observations of general character are necessary.

a. The Prosecutor insisted on postponing all trials, including the Bagosora affair, until such time that the current trials come to an end. This is in contradiction with our efforts to accelerate the pace of the matters at hand. In order to speed up the proceedings, the President of the Tribunal has requested that the number of Judges be increased and a third Trial Chamber be established, so that new trials may begin. This proposal is currently under consideration by the United Nations Security Council.

Under these circumstances, the Prosecutor declares in paragraph (4) of her written request for the adjournment of the Bagosora trial that "it is impossible for the Prosecutor to undertake new trials, while the current trials are still in progress." Thus, the question arises whether this approach can be seen as a responsible one.

b. Additionally, the failure of the Prosecutor to file the motion to join Bagosora and others, leads to disorganization of the Tribunal's activities and creates much uncertainty. The judicial calendar for the beginning months of 1998 was circulated only on 3 February 1998. The Registrar has been unable to prepare the judicial calendar for the forthcoming months, because he still awaits the promised joinder motion which to have been filed in September 1997. Undoubtably, without receiving such a motion and without having knowledge of the decision of the Judges, the calendar cannot be prepared. Without a calendar it is difficult for the Judges and the Defence Counsels, living in various countries, to schedule their activities.

c. Finally, the position taken by the Prosecutor with regard to the Bagosora trial cannot be reconciled with the decision of the Security Council to establish this Tribunal in order to bring to justice the persons responsible for the 1994 genocide in Rwanda. It is of crucial importance to fulfill this mission and before the expiration of our mandate, in May 1999, to begin and complete the trials at least of the primary perpetrators of the Rwandan genocide as well as those who remain detained for more than two years without trial.

However, to date the OTP has only brought four persons to trial. In my opinion, to have started only three trials and to refuse to begin the Bagosora and other trials, when thirty five persons have been indicted is absolutely insufficient. The Judges had attempted to initiate the start of new trials last year but these trials were postponed. The judicial calendar for the first months of 1998 provided for the commencement of the Bagosora and other trials. However, the OTP position remains the same -- postponement. Therefore, because of postponements much time was lost in 1997 and due to the current position of the OTP more time could be lost this year. When just fourteen months remain

before the expiration of the Tribunal's mandate, the delay tactics used by the Prosecutor are intolerable.

In my opinion, such a stance is not in the interest of dispensing fair, prompt and efficient justice, undermines the efforts of the Judges and jeopardizes the fulfilment of the mission assigned to this Tribunal by the Security Council.

Done at Arusha, this 17th day of March 1998.

Yakov A. Ostrovsky: Judge

(Seal of the Tribunal)