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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER II

OR:ENG.

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

Registry: Mr. John Kiyeyeu

THE PROSECUTOR
VERSUS
THÉONESTE BAGOSORA

Case No. ICTR-96-7-T

DECISION ON THE DEFENCE MOTION FOR PRE-DETERMINATION OF RULES OF EVIDENCE

For the Office of the Prosecution:

Mr. James Stewart
Mr. Chile Eboe-Osuji
Mr. Frederick Ossogo

For the Defendant Bagosora:

Mr. Jacques Larochelle
Mr. Raphael Constant

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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 ("the Trial Chamber");

CONSIDERING the indictment against Thèoneste Bagosora (the accused), which was confirmed by Judge Lennart Aspegren on 10 August 1996 pursuant to rule 47(D) of the Rules of Procedure and Evidence ("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;

FURTHER CONSIDERING THAT pursuant to rule 62 of the Rules the initial appearance of Théoneste Bagosora was held on 7 March 1997 when he pleaded not guilty to all the counts of the indictment;

CONSIDERING THAT the trial of the accused was scheduled to begin on 12 March 1998 but was postponed by a decision of this Trial Chamber on 17 March 1998 until a joint indictment, including Théoneste Bagosora, submitted by the Prosecutor on 6 March 1998, had been decided upon by the confirming Judge;

BEING NOW SEIZED OF a Defence Motion filed on 16 February 1998, based on Articles 19 and 20 of the Statute of the Tribunal ("the Statute") requesting the Trial Chamber to predetermine the rules of evidence applicable to the instant case in order that the accused may be accorded a fair and just trial;

CONSIDERING the written response filed by the Prosecutor on 16 February 1998;

HAVING HEARD the oral arguments of the parties on 13 March 1998;

PLEADINGS BY THE PARTIES

The Defence:

The Defence Counsel referring to the Canadian case of *Smith vs. Queen 75 C.C.C. (3D) 257*, advanced several arguments in support of his contention that the minimum rules of evidence should be predetermined and contended:-

(i) that although pursuant to rule 89(B) of the Rules, a Trial Chamber may apply those rules of evidence which will best favour a fair determination of the matter before it, these rules are not set out in detail, hence the need for a further analysis;

(ii) that furthermore, 'rules' are general principles which are certain and determined, that is, they are known before hand by both parties and must be applied in an impartial

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manner by all the parties in order to achieve an equitable and fair trial for the accused;

(iii) that the said rules of evidence should be consonant with the spirit of the Statute, general principles of law and the spirit of the Rules;

(iv) that if one considered some aspects of evidence, such as the requirement of oral testimony as opposed to written depositions, the need to prove a case beyond reasonable doubt, the order of presentation of evidence, the right of rebuttal by the Prosecution, the provision for examination-in chief, cross-examination and re-examination, they are all common law principles, hence it could be argued that the spirit of the rules of evidence is predominantly the spirit of common law;

The Prosecutor:

The Prosecutor referred to several legal texts, *inter alia*, Rosanne, *The Law and Practice of The International Court* (1985) (pp. 608-611), Bin Cheng *General Principles of Law as Applied by International Courts and Tribunals* (1983) (pp. 299-230), and submitted as follows:-

(i) that the sources of the Rules are clear and that pursuant to Article 14 of the Statute and rule 89(A) of the Rules, the Trial Chamber shall not be bound by national rules of evidence;

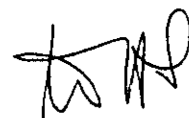
(ii) that pursuant to Article 19 of the Statute, the spirit of the Statute is to ensure the conduct of a fair and expeditious trial giving full respect for the rights of the accused and due regard for the protection of the victims and witnesses;

(iii) that in deciding on the applicability of any particular rule of evidence, the Trial Chamber is permitted to be flexible provided that it applies those rules which best favour a fair determination of the matters before it and as long as those rules are consonant with the spirit of the Statute and the general principles of law;

(iv) that the flexibility afforded to the Trial Chamber would reduce the chances of the Trial Chamber having to declare a point as *non liquet*, that is, the position of not being able to decide a point because the predetermined rules of evidence do not provide a clear answer to the point in issue;

(v) that although international law borrows its rules and institutions from domestic systems of law, this is not done by means of importing private law institutions " lock, stock, and barrel"(Lord MacNair's words in the *South West Africa Case , I.C.J. Reports 1950 p. 148-9*), ready made, fully equipped with a set of rules;

(vi) that this particular accused has no special interest in having the rules of evidence predetermined for his trial in face of the provisions of the Statute and the Rules because other trials have proceeded without such determination and moreover, there



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because other trials have proceeded without such determination and moreover, there were other accused who would appear before the Tribunal in future for whom the system would not accommodate separate negotiation;

(vii) that with regard to the indictment of the accused, the Prosecutor has met the requisite legal obligations under articles 17 and 20(4)(a) of the Statute as well as under rule 47 of the Rules. Hence, the accused has been given ample information to enable him to reasonably understand how and when his actions constituted one or more of the crimes under the Statute;

RESPONSE BY THE DEFENCE:

In response to the Prosecutor's submission, the Defence Counsel submitted:

(i) that as Counsel, who are entrusted with defending an accused facing very serious crimes, they were unsure of how to proceed and reiterated the need to have the Rules clearly spelt out to enable them defend the accused appropriately;

(ii) that even if the earlier trials proceeded without rules, that fact could not estop them from requesting that such rules be formulated;

(iii) that there was no precedent to which they could refer because the Nuremberg Trials, which they could emulate, took place in 1945 and were completely different from the instant trials and as such they were inapplicable;

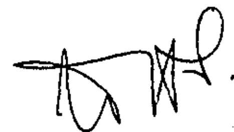
(iv) that international law *per se* was not applicable but rather those Rules dealing with individuals vis-a-vis States.

DELIBERATIONS:

It is the view of this Chamber that the Defence motion has raised a new issue, namely, the predetermination of the rules. However, in the face of the fact that the Tribunal has already adopted the Rules to be applied and considering that several trials have already taken place under the said Rules, the Trial Chamber has carefully considered the arguments advanced by the parties and makes the following observations:

A. With Respect to Fair and Expeditious Trial

The Trial Chamber is fully conscious that the rights of the accused at all stages of the trial should be observed. The Trial Chamber, at the same time, recognizes its obligation to ensure a fair and expeditious trial as stipulated in Articles 19(1) and 20(4)(c) of the Statute. Adherence to these principles does not necessarily call for the predetermination of the rules of evidence as contended by the Defence for reasons outlined below.



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B. With Regard to Predetermination of The Rules of Evidence

This Trial Chamber observes that under rule 89(A) of the Rules, the functions of the Tribunal are such that it is not bound by any particular legal system. The basic rule is to allow flexibility and efficacy in order to permit the development of the law and not to have pre-determined Rules. This flexibility is permitted under rule 89(B) of the Rules which empowers the Trial Chamber to determine given evidential issues in the best way possible and to arrive at a fair and just decision under given circumstances.

Furthermore, the view of this Trial Chamber is that flexibility is of importance in an International Tribunal such as this one. The Rules adopted by the Tribunal, pursuant to Article 14 of the Statute, are broader than either the common or civil law systems and they reflect an international amalgamated system without necessarily adopting a single national system of evidence.

The Tribunal has had occasion to apply this flexibility in cases it had already handled, namely, *The Prosecutor vs. Jean Paul Akayesu (ICTR-96-4-T), The Prosecutor vs. Rutaganda (ICTR -96-3-T)* and *The Prosecutor vs. Clement Kayishema and Obed Ruzindana (ICTR-95-I-T).*

In this regard, this Trial Chamber particularly recalls its decision of 17 April 1997 in *The Prosecutor vs. Clement Kayishema and Obed Ruzindana (ICTR-95-I-T)* concerning the probative value of evidence. In that case, the Defence Counsel objected to some portions of the oral testimony of witness A as being contradictory to that witness's earlier written statement. The Trial Chamber directed that should any issue arise concerning evidence, each party was at liberty to raise an objection on a case by case basis.

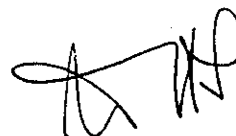
Incidentally, it may be mentioned that similar Rules have been adopted by our sister Tribunal, the International Criminal Tribunal for the former Yugoslavia ("ICTY"). Our Rules are, as it were, a replica of those Rules and until now, our Tribunal has not faced any insurmountable difficulty.

The Defence has stated that some principles as enumerated earlier have been adopted from the common law system. Besides this general observation, the learned Counsel for the Defence, could not point out any major deficiency in the existing Rules. Assuming, but not conceding, that those principles have been adopted from the common law system, this fact alone is not a valid ground for predetermination of the Rules because those principles are efficacious and have evolved in the course of time and long experience.

It is, therefore, the opinion of this Chamber that the submissions of the Defence regarding predetermination of the Rules cannot be accepted.

C. With Regard to The Formulation of Rules of Evidence under The Statute

Apart from case law that emerges in judicial proceedings as a result of judicial interpretation of the law, Judges do not make rules. As a general principle of law, this Trial Chamber, therefore, does not have the mandate to make rules in the manner requested by the Defence because according to Article 14 of the Statute and rule 6 of the Rules, this is a function of the Plenary of the Tribunal.



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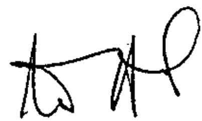
FOR ALL THE ABOVE REASONS

The Trial Chamber **DISMISSES** the Defence motion.

SIGNED at Arusha this 8th Day of July 1998

Judge William H. Sekule, Presiding Judge	Yakov A. Ostrovsky Judge	Tafazzal H. Khan Judge

Seal of The Tribunal



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