Case No. ICTR-96-7-T

UNITED NATIONS NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

CHAMBER II

OR: ENG.

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

Registry: John M. Kiyeyeu

Decision signed: 7 December 1998

THE PROSECUTOR
VERSUS
THEONÉSTE BAGOSORA

Case No. ICTR-96-7-T

DECISION ON THE DEFENCE MOTION FOR INADMISSIBILITY OF DISCLOSURE BASED ON THE DECISION OF 11 JUNE 1998

The Office of the Prosecutor:

Mr. Frederic Ossogo

Counsel For the Defence:

Mr. Raphaël 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 ("the Trial Chamber");

CONSIDERING the indictment against Théoneste Bagosora ("the accused") indicting him for Genocide, Crimes Against Humanity, violations of Article 3 common to the 1949 Geneva Conventions, and the Additional Protocol II of 1977 thereto 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");

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

BEING seized of a defence motion filed on 10 September 1998, based on rule 66(A)(ii) of the Rules, requesting the Trial Chamber to consider as inadmissible the Prosecution motions filed on 31 July 1998 regarding the amendment of the instant indictment and joinder of trials of several accused persons, including the accused, on the ground that the Prosecutor did not comply with prior disclosure orders of 27 November 1997 and 11 June 1998 respectively;

CONSIDERING the Prosecutor's written response filed on 15 October 1998 in which she maintained that the requests made by the Defence were without merit both in law and in content;

CONSIDERING the provisions of rule 66(A)(ii) of the Rules regarding discolsure of material by the Prosecutor and rule 73 *bis* on Pre-Trial Conferences prior to the commencement of trials;

TAKING INTO ACCOUNT that the motion on joint trials of the accused and amendment of the indictment, filed on 31 July 1998, has been placed before a reconstituted Trial Chamber;

TAKING INTO CONSIDERATION that, currently, the date of hearing of this case on its merits has not been finalized due to various pending procedural matters that have arisen in this case;

HAVING HEARD the parties on 15 October 1998.

ARGUMENTS OF THE PARTIES

The Defence: The Defence Counsel had in his written brief requested that the above mentioned amendment and joint trials motions be ruled inadmissibile on the ground that the Prosecutor did not comply with the Trial Chamber's decision of 11 June 1998 to disclose by 30 April 1998. However, in his oral submission, the Defence Counsel noted that his motion had been overtaken by events and was, therefore, purely academic and theoretical.

He consequently narrowed the scope of his argument and concentrated on the issue of non adherence by the Prosecutor to the decisions of the Trial Chamber. He argued that any disclosure after 30 April 1998 should be deemed inadmissible based upon the decision of the Trial Chamber. Futhermore, he contended that when the Trial Chamber made the decision of 11 June 1998, it had intended at this point in the proceedings, to start the trial between 20 to 27 September 1998. Hence, no more disclosures should be made by the Prosecutor. In any event, the Prosecutor has not sought extension of time within which to disclose further documents.

The Prosecution: In response, the Prosecutor contended that she had actually disclosed a good portion of documents, about 306documents including many witness statements, *albeit,* belatedly. Moreover, her non-compliance with the Trial Chamber's decision was not intentional for the following reasons. First, the decision was retroactive and the Prosecutor was notified about it on 26 June 1998. Second, given the complexity of the case, the logistical constraints and the need to arrive at the truth, the Prosecutor could not meet the deadlines set by the Trial Chamber. Notwithstanding all those factors, the Prosecutor submitted that she intended to complete disclosure, at the appropriate time.

Rejoinder by The Defence: The Defence Counsel conceded that disclosure was made to the accused in May, August and October 1998, but he still maintained that these disclosures were belated as stated earlier and emphasized that the Prosecutor should have observed her commitment to disclose by 30 April 1998. Moreover, the Prosecutor should have adhered to the order of the Trial Chamber.

DELIBERATIONS

1. At the outset, during the hearing, the Trial Chamber informed the parties that it would not entertain any discussion regarding the motions concerning the amendment of the indictment and the proposed joint trials motion pending before the reconstituted Trial Chamber II. We in fact found that the submissions made by the parties, in that regard, were irrelevant completely to the issues at hand. The Trial Chamber finds the parties' blatant disrespect of its order reproachable.

2. As regards the Defence's request to the Trial Chamber to rule all disclosure provided by the Prosecution after the 30 April 1998 inadmissible, we are of the view that such a request is not grounded in law. There are no provisions either in the Statute or the Rules to grant such a request. The Trial Chamber, therefore, must dismiss the Defence request.

3. We, however, note that during the audience of 12 March 1998, the Prosecutor put forth the suggestion that she needed an extension of time for the completion of her disclosure obligations, provided for in rule 66(A)(ii) of the Rules and committed herself to complete the disclosure by 30 April 1998. The Defence insisted on an earlier date but the Trial Chamber accepted the Prosecutor's request. However, the Prosecutor failed to adhere to Trial Chamber's decision to meet the deadline, which she herself had proposed. Indeed, this is not the first time that she has disregarded an order of this Trial Chamber without satisfactory explanation. We find this pattern of non compliance deplorable.

4. It is important to note that, with regard to the issue of disclosure, the Prosecutor has disregarded not only the Decision of the Trial Chamber of 11 June 1998 but also the decisions of 27 November 1997 and 17 March 1998, pursuant to which the completion of disclosure could not have been delayed. Moreover, during 1998 alone, the dates for the commencement of the hearing of the case on its merits had been set by the Judges on two occasions (12 March and 15-20 September 1998) and in accordance with rule 66(A)(ii) of the Rules, disclosure should have been completed no later than 60 days before these dates.

5. The Trial Chamber is cognizant of the amendment and joinder motions filed on 31 July 1998. Without prejudice to those proceedings, the existing indictment is still in force and the previous non-disclosure is not justified. Under such circumstances, the issue of disclosure should no longer be an obstacle to the commencement of the hearing of the case on its merits.

FOR ALL THE FOREGOING REASONS, THE TRIAL CHAMBER

1. **DISMISSES** the Defence motion.

2. **DEPLORES** the Prosecution's previous non compliance with the Rules and Decisions of the Trial Chamber which could undermine the fair and expedient administration of justice.

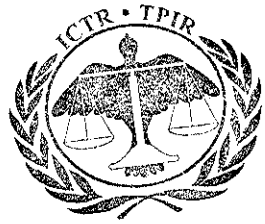
Arusha, 7 December 1998

Judge William H. Sekule
Presiding Judge

Judge Yakov Ostrovsky
Judge

Judge Khan appends a separate Declaration to this Decision.

Seal of The Tribunal



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DECISION ON THE DEFENCE MOTION FOR INADMISSIBILITY OF DISCLOSURE BASED ON THE DECISION OF 11 JUNE 1998 JUDGE TAFAZZAL H. KHAN'S SEPARATE DECLARATION

The Office of the Prosecutor:

Mr. Frederic Ossogo

Counsel For the Defence:

Mr. Raphaël Constant

While I agree with the majority opinion that this motion should be rejected, I wish to add some comments concerning the approach taken by both the Prosecution and by the Defence. This Defence motion was filed on 1 September 1998 under the existing indictment confirmed on 10 August 1996, with the broad heading "Defence Motion for Inadmissibility Based on the Decision of 11 June 1998" (the "motion").

Subject Matter and Scope of the Motion:

The gist of the Defence allegations on which the motion is based is that the disclosures made by the Prosecution after 30 April 1998, the deadline set by the Chamber for disclosure of materials by the Prosecutor to the Defence, are inadmissible because the Prosecution did not obtain an extension of time from that date. The Defence, however, admits receiving disclosure in installments during the months of May and August and on the 14 October 1998. Precisely on the basis of these brief facts, the legality or otherwise of the relief sought in the motion may be addressed. However, learned counsel for both parties indulged in arguments far beyond the scope of the motion. Furthermore, notwithstanding repeated reminders made by the Presiding Judge to be brief and to confine their submissions to matters relevant to the instant motion, both Counsel were excessively verbose. This resulted in a transcript which ran into eighty pages for this procedurally outdated and relatively routine motion.

Regarding the Prosecution:

The Prosecution failed to comply with the Chamber's direction that disclosure be completed by April 30 1998. This date was not only a time extension from the original disclosure date ordered on 27 November 1997, but was also a date that the Prosecution itself had requested. Although the Defence suggested an earlier date for disclosure, the Chamber accepted the Prosecution's request at the time of hearing. Accordingly, it was not proper for the learned counsel to submit that he was unaware of the disclosure date prior to the Chamber's written decision stating the same, as an excuse for belated disclosure. If the Prosecution was unable to comply with the order it should have returned before the Chamber to request further time.

Breach of Chamber's Order - Defence Grievance:

In its oral submissions the Defence requested the Chamber to rule all disclosure provided by the Prosecution after 30 April 1998, inadmissible. When called upon to identify the specific Rule(s) upon which he relied, the learned counsel candidly conceded that there were none. Indeed there is no Rule which expressly renders belated disclosure automatically inadmissible at this stage. The learned counsel for the Defence then posed the question as to what action the Chamber could take against the Prosecution for non-compliance with the order for disclosure. In other words, should the Prosecution continue to violate Chamber's order with impunity. I think this is a legitimate question which merits an answer. In my opinion it is implicit that when the Chamber is

empowered by the Rules to make appropriate rulings, in this case pursuant to rule 73 of the Rules, it follows that the Chamber also has implied power to enforce those rulings; and this enforcement power may even include rejection of belatedly disclosed material if the situation so demands. The virtue of applying such power will depend on the facts and circumstances of the particular controversy when it is brought before the Chamber. In my opinion, in the facts and circumstances of the present case, it is not in the interests of justice to reject the belated disclosure.

Regarding the Defence Prayers:

The prayers contained in the motion appear to be unusual and out of context. So far as I understand the first prayer in the written motion, I find it unacceptable. The Defence motion prays, firstly, that the Tribunal,

> *Rule that, under the circumstances, the Tribunal cannot hear the two motions filed belatedly.*

I reject the above prayer outright as it is outside the scope of the motion. Although this motion has been over taken by procedural events, even in the 'special context' in which it was filed, the above prayer was unjustified. The Defence did not explain how the belated disclosure adversely affects the hearing of the Prosecution motions for joinder and for amendment filed on 31 July 1998.

Further, despite the Defence's request for draconian measures, it has not supported its prayer with any provision either of the Statute or of the Rules. To expect this Chamber to grant such an extreme request without providing legal basis thereof is, in itself, objectionable.

The Defence motion prays, secondly, that the Tribunal,

> *Instruct the Prosecutor to take proceedings in the proper court.*

This prayer is incomprehensible. Which proceedings? Which proper court? If, by this, the Defence is suggesting that the Prosecution should come before the Chamber to request a further extension when it is unable to meet the set dead lines, then I understand this prayer. If, however, the Defence is again referring to the prosecutor's motions for amendment and for joinder, then I find this prayer ridiculous and express my utter displeasure that a Counsel of high standing would burden this Chamber with such frivolity.

It is desirable in interlocutory motions, that parties confine themselves to prayers which realistically reflect their particular objection(s) and refrain from introducing extraneous matters.

Conclusion:

As has become its habit, the Prosecution filed its written response to the Defence motion on the day of the hearing, 15 October 1998. This Chamber has previously requested that parties file the written response in a timely manner. These requests were, seemingly, to no avail.

It is well known and hardly needs mention that the Prosecutor has been entrusted with enormous responsibility by the Statute and the Rules relating to the trial and pre-trial proceedings, in addition to conduct of investigations. Therefore, it is expected that the members of the Office of the Prosecutor be diligent in scrupulously discharging their legal obligations to the Defence in accordance with the Rules and guidance of the Chambers and, thereby, ensure that the image of the Prosecutor is not tarnished. Indeed, this is not the first time that the Prosecution has disregarded an order of the Chamber; many of our previous urging and exhortations in this regard have fallen on deaf ears. I find this practice unacceptable.

With the above comments, I dismiss the Defence motion.

7 December 1998.

Judge Tafazzal H. Khan