



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER I

Before: Judge Erik Møse, Presiding
Judge Asoka de Z. Gunawardana
Judge Mehmet Güney

Decision of: 8 June 2000

**THE PROSECUTOR
VERSUS
IGNACE BAGILISHEMA**

Case No. ICTR-95-1A-T

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**DECISION ON THE REQUEST OF THE DEFENCE FOR AN ORDER FOR
DISCLOSURE BY THE PROSECUTOR OF THE ADMISSIONS OF GUILT OF
WITNESSES Y, Z, AND AA**

The Office of the Prosecutor:

Ms Anywar Adong
Mr. Charles Adeogun Phillips
Mr. Wallace Kapaya

Counsel for the accused:

Mr. François Roux
Mr. Maroufa Diabira

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber I, composed of Judge Erik Møse, Presiding, Judge Asoka de Z. Gunawardana and Judge Mehmet Güney;

BEING SEIZED of a motion filed by the Defence on 20 April 2000, requesting that the Trial Chamber order the Prosecutor to disclose the admissions of guilt of witnesses Y, Z and AA, all of whom have testified in the present case;

HAVING RECEIVED on 10 May 2000 the response of the Prosecutor to the said motion;

HAVING HEARD the parties on 25 May 2000;

The Submissions of Parties

1. In the said motion of 20 April 2000, and supplemented by oral submissions during the hearing of 25 May 2000, the Defence is requesting the Chamber to order the Prosecutor to disclose to the Defence the confessions of three witnesses, Y, Z and AA, who testified for the Prosecution in this case. During their respective testimonies, each of these witnesses stated that they had confessed to the Rwandan authorities about their participation in events in Rwanda. According to the Defence, prior to the admission of guilt, Witness AA had written a letter to the State Prosecutor of Kibuye in which he directly implicated the accused Ignace Bagilishema.

2. Although the witnesses testified that they had put their admissions of guilt in writing, the Prosecutor did not present any such written confessions as evidence during their testimonies. The Defence contends that the Prosecutor must, obviously, either be in possession of the confessions, or must be in a position to obtain them. Reference is made to the Rwandan Organic Law of 30 August 1996, according to which confessions shall be recorded and signed by the person concerned (Article 6 (d)). Consequently, the Defence seeks an order, pursuant to Rule 68 of the Rules of Procedure and Evidence (the “Rules”), from the Chamber for the disclosure by the Prosecutor of such written confessions. The Defence deems such confessions to be necessary for the manifestation of the truth and for evaluating the credibility of the witnesses.

3. The Prosecutor in response argues that the motion should be dismissed. She is not in possession of the above written confessions. It is for the Defence to use the resources available to it to conduct its investigations. The Defence has failed to show how these confessions may suggest the innocence or mitigate the guilt of the accused. Moreover, the Prosecutor, by reference to transcripts of the testimonies of these witnesses, stated that the confessions of the witnesses were not exculpatory of the accused, and were merely limited to their personal involvement in the Rwandan massacres of 1994.

The Chamber

4. The legal basis of the Defence request is Rule 68 of the Rules:

“ The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence. ”

5. This Rule carries two main elements. Firstly, the evidence must be known to the Prosecutor, and, secondly, it must in some way be exculpatory. The Chamber will first establish the meaning of the term ‘known’ (‘dout il a connaissance’).

6. The disclosure obligation under Rule 68 relates to “the existence of evidence known” to the Prosecutor. A literal interpretation might suggest that mere knowledge of exculpatory evidence in the hands of a third party would suffice to engage the responsibility of the Prosecutor under that provision. However, to adopt such a meaning, would, in the extreme, allow for countless motions to be filed with the sole intention of engaging the Prosecutor into investigations and disclosure of issues which the moving party considered were ‘known’ to the Prosecutor. This would not be in conformity with Article 15 of the Statute. Under that provision, the Prosecutor is responsible for investigations. She shall act independently and not receive instructions from any source.

7. The Chamber is inclined to equate ‘known’ to ‘custody and control’ or ‘possession’. This wording is used in Rules 66 (B) and 67 (C) of the Rules, which pertain to the inspection by one party of documents, books, photographs and tangible objects of the other party. Thus the obligation on the Prosecutor to disclose possible exculpatory evidence would be effective only when the Prosecutor is in actual custody, possession, or has control of the said evidence. The Prosecutor cannot disclose that which she does not have.

8. This approach was favoured by the International Criminal Tribunal for the Former Yugoslavia, in its Decision on the Production of Discovery Materials in the case “The Prosecutor v. Thomir Blaškic” (Case No. IT-95-14-T), rendered on 27 January 1997, see in particular paragraphs 47 and 50.

9. In the present case, the Prosecutor has stated categorically that she is not in possession of the written confessions of witnesses Y, Z and AA, and the Defence has brought no evidence to the contrary. Thus the Chamber must dismiss the Rule 68 motion of the Defence.

Rule 98 Request by the Trial Chamber

10. Under Rule 98 the Chamber may, *propriu motu*, order either party to produce additional evidence. Having considered the facts and circumstances of this case, the Chamber is of the view that, for a better determination of the matters before it, the Prosecution is ordered to produce the written confessions of Prosecution witnesses Y, Z and AA. The Chamber is of the view that the said written confessions could be material in evaluating the credibility of the said Prosecution witnesses.

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11. The Chamber hereby decides that the Prosecution should take the necessary steps to obtain the written confessions of witnesses Y, Z and AA. The Prosecution is directed to take such steps by 23 June 2000, and to forward the said written confessions to the Chamber.


FOR ALL THE ABOVE REASONS,

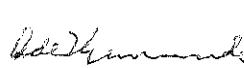
THE TRIBUNAL


DISMISSES the Rule 68 motion of the Defence for disclosure by the Prosecutor of the admissions of guilt of witnesses Y, Z, and AA.

ORDERS the Prosecutor, pursuant to Rule 98, to take the necessary steps, by 23 June 2000, to obtain the written confessions of witnesses Y, Z and AA, and to forward them to this Trial Chamber.

Signed in Arusha on 8 June 2000.


Erik Møse,
Presiding Judge


Asoka de Z. Gunawardana
Judge


Mehmet Güney
Judge

(Seal of the Tribunal)