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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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TRIAL CHAMBER III

Original: English

Before: Judge Lloyd George Williams, Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registrar: Mr. Adama Dieng

Date: 05 October 2001

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THE PROSECUTOR
v.
**THÉONESTE BAGOSORA, ANATOLE NSENGIYUMVA,
GRATIEN KABILIGI and
ALOYS NTABAKUZE**

Case No. ICTR-98-41-I

**DECISION ON BAGOSORA'S
MOTION FOR DISCLOSURE OF EVIDENCE AND ON THE PROSECUTOR'S
URGENT MOTION FOR DIRECTION AND FOR EXTENSION OF TIME IN THE
MATTER OF THE SCHEDULING ORDER REGARDING BAGOSORA'S MOTION
FOR DISCLOSURE OF EVIDENCE**

The Office of the Prosecutor:

Mr. Chile Eboe-Osuji
Ms. Patricia Wildermuth
Ms. Amanda Reichman

Defence Counsel:

Mr. Raphael Constant
Mr. Jacques Larochelle
Mr. Clément Monterosso

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The International Criminal Tribunal for Rwanda ("Tribunal"), sitting today as Trial Chamber III, composed of Judges Lloyd George Williams, Presiding, Yakov Ostrovsky, and Pavel Dolenc (the "Chamber");

BEING SEISED OF the Motion for Disclosure of Evidence (Article 20 of the Statute and Rules 66, 68, and 70 of the Rules) filed on behalf of the Accused, Théoneste Bagosora, on 17 October 2000 (the "Bagosora Disclosure Motion");

CONSIDERING the "Prosecutor's Response to the Defence Motion for Disclosure of Evidence, Article 20 of the Statute and Rules 66, 68, and 70 of the Rules," filed (in French) on 21 October 2000 ("Prosecutor's Response");

RECALLING the Chamber's Scheduling Order Regarding Bagosora's Motion for Disclosure, filed on 7 February 2001 (the "Scheduling Order");

CONSIDERING the Prosecutor's Notice of Motion in the Prosecutor's Urgent Motion for Direction and for Extension of Time in the Matter of the Scheduling Order Regarding Bagosora's Motion for Disclosure of Evidence ("Prosecutor's Motion for Direction"); and the "Affidavit of Mr. Keating" ("Keating Affidavit"), the "Prosecution's Memorial," the "Prosecution Book of Authorities," ("Book of Authorities"), all filed on 22 February 2001, and the "Prosecution Book of Authorities (Vol. 2)" ("Supplemental Book of Authorities"), presented during the public hearing of 30 August 2001.

CONSIDERING the oral submissions of the Prosecutor and respective counsel to the Accused Théoneste Bagosora and Aloys Ntabakuze at the hearing on Bagosora's Disclosure Motion and on the Prosecutor's Motion for Direction held on 30 August 2001 (the "Hearing");

NOW DECIDES the matter.

I. SUBMISSIONS

A. SUBMISSIONS OF DEFENCE FOR BAGOSORA

i. Submissions in Support of Disclosure Motion

1. In the Bagosora Disclosure Motion, the Defence seeks disclosure from the Prosecutor of three specific types of evidence under the authority of Rules 66 and 68 of the Tribunal's Rules of Procedure and Evidence. Relying on their knowledge of the report prepared by Mr. Michael Hourrigan, dated 7 August 1997, which report relates to an investigation aimed at identifying the persons or entities responsible for the downing of the plane of former Rwandan President Habyrimana on 6 April 1994, Bagosora seeks the disclosure of the statements of the three eyewitnesses who are characterised in the report as having been members of a secret commando group led by General Paul Kagame, the current President of Rwanda. Second, the Bagosora Defence argues that the Prosecutor has possession of, and therefore must disclose, documents in the form of written statements or notes memorialising oral statements, all "tending to show that the RPF, notably its head Paul Kagame, was responsible for the death of President Habyrimana." Finally, Bagosora seeks the disclosure of "investigator's comments on the information obtained from the eyewitnesses who provided the information that forms the basis of the Hourrigan Report."

2. The Defence Expostulates that the rigors of Rule 70 pose no impediment to the disclosure of the information it seeks, since its applicability is subordinate to the countervailing and paramount right of an accused to compel the Prosecutor pursuant to Rule 68 to disclose potentially exculpatory evidence or evidence in mitigation of the guilt of an accused or impugn the credibility of Prosecution witnesses.

3. Specifically, the Defence of the Accused Bagosora advances that the requested disclosure is material to its ability to launch and sustain various of its strategies aimed at exculpating or mitigating the Accused's culpability for a number of the crimes charged in the Indictment. Among other arguments, Bagosora's Defence believes the disclosure of the evidence tending to prove that the RPF was responsible for bringing down the presidential plane would add fortification for its defense strategy to negate the premeditation element with respect to the crime of genocide. In addition, the Defence believes that the requested disclosures would figure largely in its arguments tending to show that if Bagosora distributed any weapons, such weapons were distributed as self-defense against the RPF which had launched an attack against the government of Rwanda by shooting down the plane carrying President Habyrimana. See Hearing Transcript at 61:5- 65:24.

4. Arguing that the Prosecutor precipitated the present motion by her failure to clearly indicate to the Chamber whether she possessed information or documents responsive to the Defence disclosure request, Bagosora asks the Chamber to order the Prosecutor to comply with the Scheduling Order and, ultimately, to disclose to the Defence any responsive documents in the possession of the Office of the Prosecutor.

ii. Submission in Opposition to the Prosecutor's Motion for Direction

5. In opposition to the Prosecutor's Motion for Direction, the Defence advances the following principal argument, namely, that compliance with the Scheduling Order neither imposes a vexatious burden upon the Prosecutor nor does it threaten to cripple the investigative or trial preparatory work of the Office of the Prosecutor. See Hearing at 36:20-37:6.

B. SUBMISSIONS OF DEFENCE FOR NTABAKUZE

6. Although conceding that it did not formally join in the Bagosora Disclosure Motion and that it failed to submit any written brief in opposition to the Prosecutor's Motion for Direction, the Defence for Ntabakuze argued that it had *locus standi* to make oral submissions during the Hearing. Having received the right of audience, the Ntabakuze Defence argued that the Prosecution has misstated the burden the Defence must meet before being entitled to the requested disclosure. It is Ntabakuze's contention that the Prosecutor is not the arbiter charged with interpreting the materiality of or what benefit is to be drawn from requested disclosures to the Defence's case. In addition, while conceding the differences between the case against Bagosora and the case against Ntabakuze, Counsel for Ntabakuze argued that such differences did nothing to attenuate the potentially material relevance of the requested information in preparation of the defense of Ntabakuze. Finally, the Defence for Ntabakuze asks that it also receive any disclosures made to the Bagosora Defence as a result of the present motion.

C. SUBMISSIONS OF THE PROSECUTOR

i. Submissions in Response to the Bagosora Disclosure Motion

7. In response to the Bagosora Disclosure Motion, the Prosecutor underscores the absence in the Defence submissions of any allegations establishing a good faith belief that the Prosecutor was in possession of specific documents establishing that the presidential plane was shot down by the RPF or by Paul Kagame obtained from the witnesses who provide facts that formed the basis for the Hourrigan Report. Consequently, argues the Prosecutor, the Bagosora Disclosure Motion must fail because it is founded upon the same fundamental misunderstanding of reality which resulted in the dismissal of a similar motion by Kabiligi and Ntabakuze. See, The Prosecutor vs. Kabiligi, supra.



8. Next, the Prosecutor posits that even in the “unlikely chance” that it was in possession of documents responsive to the Defence request the Defence would first have to demonstrate the exculpatory value of such information in order to qualify for its disclosure. See Prosecutor’s Response at ¶ 10.

9. With respect to the Defence request for investigator’s notes, the Prosecutor contends that even if documents responsive to this request existed, she would be entitled pursuant to Rule 70 to hold information about the very existence of such information or documents inviolate from disclosure to the Defence.

ii. Submissions in Support of the Prosecutor’s Motion for Direction

10. In response to this Chamber’s Scheduling Order, the Prosecutor filed the Motion for Direction seeking both clarification of its obligations and requesting additional time to make the required diligent searches of its files to uncover any documents responsive to the three categories of disclosure sought in the Bagosora Disclosure Motion.

11. In the Notice of Motion, the Prosecutor seeks several clarifications including the following principal relief. First, the Prosecutor requests a modification of the Scheduling Order to relieve her of the obligation of revealing to the Chamber evidence in her “possession.” Next, the Prosecutor requests the Chamber’s direction with respect to the manner it should proceed in the search of its records for documents responsive to the Bagosora Disclosure Motion in light of practical difficulties which seriously hampered her performance of the necessary diligent searches of its files to uncover any responsive documents or information. These difficulties include shortage of staffing to perform the searches and absence of adequate language translating facilities to translate thousands of pages of documents existing only in Flemish, or other languages. Moreover, the Prosecutor seeks clarification and confirmation that the memoranda it is required to file pursuant to the Scheduling Order are to be reviewed *in camera*, i.e., not to be disclosed to the Defence. In addition, the Prosecutor seeks an order directing the Defence to describe with more specificity the documents it seeks. Finally, the Prosecutor seeks an extension of time within which to comply with the Scheduling Order, pending the determination of its Motion for Direction.

12. In the Memorial the Prosecutor advances several legal arguments and public policy and practical concerns which it believes relieve it from any obligation to disclose the requested information to the Defence.

13. In support of the Motion for Direction, the Prosecutor has appended the Keating Affidavit, in which Mr. Anthony Keating, Officer in Charge of the Information and Evidence Section of the Office of the Prosecutor, avers to having conducted electronic searches of the Prosecutor’s data bases in search of documents responsive to the Bagosora Disclosure Motion. These searches uncovered not less than 1,500 documents containing the search terms retrieved from the Defence disclosure request, some comprising more than 300 pages. Given the volume of the documents retrieved from the electronic search, the Office of the Prosecutor, claims the Prosecutor is without the necessary resources and staffing to read and digest all the documents in order to determine whether they are responsive. The very daunting volume of documents retrieved, argues the Prosecutor, frustrates her attempts to comply with the letter and spirit of the Scheduling Order places her under a burdensome obligation, one which the current resources allotted to her office do not permit her to fulfil, without crippling her ability to discharge the mandate of the Office of the Prosecutor – To investigate and prosecute alleged perpetrators of the atrocities in Rwanda in 1994.

14. The Prosecutor argues that the operation of Rules 66 and 68 coupled with the widely recognized presumption that the Prosecutor discharges her obligations in the utmost good faith necessarily places a two-pronged quasi ‘evidentiary’ burden on the Defence. First, the Defence must

specifically identify the matters of which it seeks disclosure. Second, the Defence must make a *prima facie* showing of the materiality of the document or material in question in the preparation of its case. Consequently, submits the Prosecutor, since the Defence failed to meet its burden, any disclosure motion on its part must fail. *See Cheng, General Principles of Law as Applied by International Courts and Tribunals*, p. 305 (1987); *Regina v. Chaplin*, CarswellAlta 72 para. 21, 96 CCC (3d) 225. In an expression of her good faith, the Prosecutor indicated that she did produce to the Defence a document, which purports to establish that the RPF was responsible for the crashing of the presidential plane. Hearing at 72:14-73:5.

15. Applying what it characterizes as a “surfeit of [legal] authority,” to the specific facts of this case, the Prosecutor characterizes the Defence disclosure request as nothing more than an ill-fated “fishing expedition,” into matters that possess no discernable relevance to the crimes with which the Accused Bagosora is charged. *See e.g., Prosecutor v. Delalic et al.*, (IT-96-21-A), Decision on Motion by the Accused Zejnir Delalic for Disclosure of Evidence (26 September 1996); *Prosecutor v. Blaskic*, (IT- 95-14-A), Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings (26 September 2000).

16. Cognizant of her disclosure obligations under Rules 66 and 68 and without waiving her right to exercise the privilege of Rule 70, which vests her with the right not only to withhold internal documents but to resist any request to even indicate the existence of internal documents, the Prosecutor states at para. (iii) of the Prosecutor’s Motion for Direction: “This *Prosecutor has knowledge* of the existence of *no evidence* tending to show that the Rwandan Patriotic Front or its leaders were responsible for the death of President Habyarimana by virtue of the crash of the aeroplane on 6 April 1994.” (emphasis original); *See also*, Hearing at 29:1-30:24.

17. Finally, in unambiguous terms, the following exchange took place at the Hearing:

President: What I want to be clear about is, you are saying that, in spite of your best effort, you have not located any document in relation to which reference might be made by the Defence.

Mr. Eboe-Osuji: Yes, Your Honor that is what I am saying.

Hearing at 82:1-8.

DELIBERATIONS AND FINDINGS

20. As indicated by the Prosecutor, the Bagosora Disclosure Motion is a redux of an earlier motion for disclosure filed by the Accused Ntabakuze and Kabiligi requesting the disclosure of the very documents and information it sought. *See The Prosecutor vs. Gratién Kabiligi, Aloys Ntabakuze* (ICTR-97-34-I) Decision on Kabiligi’s Supplementary Motion for Investigation and Disclosure of Evidence (8 June 2000).

21. However, the Bagosora Disclosure Motion has the benefit of this Chamber’s Scheduling Order that recognised the Prosecutor’s previous failure to clearly indicate whether she was in possession of any documents or information responsive to the Defence requests. Consequently, notwithstanding the dismissal of the previous Defence disclosure motion, the Chamber is satisfied that the Bagosora Defence has requested with sufficient specificity the documents it wishes the Prosecutor to Produce.

22. The Chamber now acts on the basis of the statement of Counsel for the Prosecutor that in spite of his best efforts he has not been able to locate any document responsive to the Defence’s disclosure request. On this basis, the Chamber denies the Bagosora Disclosure Motion.

23. Having denied the Bagosora Disclosure Motion, the Chamber considers the entirety of the Prosecutor’s Motion for Direction to be moot.

24. Accordingly, the Chamber

25. **DENIES** that portion of the Bagosora Motion for Disclosure of Evidence requesting the disclosure of the written statements or notes relating to witnesses whose statements formed the basis of the Hourigan Report; and further

26. **DENIES** as moot the request of the Defence for Ntabakuze request that it be made a party to any disclosure made by the Prosecutor to the Bagosora Defence in response to the Bagosora Motion for Disclosure of Evidence.

27. **DENIES**, the Prosecutor's Urgent Motion for Direction and for Extension of Time in the Matter of the Scheduling Order Regarding Bagosora's Motion for Disclosure and Evidence in its entirety.

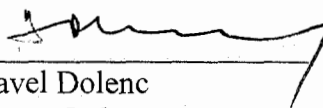
Arusha, 05 October 2001



Lloyd George Williams
Judge, Presiding



Yakov Ostrovsky
Judge



Pavel Dolenc
Judge

Seal of the Tribunal