UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

TRIAL CHAMBER I

OR:ENG

Before: Judge Laïty Kama, Presiding
Judge Lennart Aspegren
Judge Navanethem Pillay

Registry: Ms Marianne Ben Salimo

Decision of: 23 April 1999

ICTR
CRIMINAL REGISTRY
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THE PROSECUTOR
VERSUS
GEORGES ANDERSON NDERUBUMWE RUTAGANDA

Case No. ICTR-96-3-T

DECISION ON THE DEFENCE'S MOTION FOR LEAVE TO HAVE 14 WRITTEN WITNESS STATEMENTS ADMITTED AS EVIDENCE

The Office of the Prosecutor

Mr. James Stewart
Ms Holo Makwaia

Counsel for the Defence

Ms Tiphaine Dickson

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: Dr. MINDUA ... K.M. Antoine ...
SIGNATURE: ..... DATE: 05.05.1999

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

1. Trial Chamber I of the Tribunal, composed of Judge Laïty Kama, presiding, Judge Lennart Aspegren, and Judge Navanethem Pillay, has received from Counsel for the Defence a motion requesting leave to tender as evidence thirteen written witness statements made by potential defence witnesses who had disappeared subsequent to the attack of 2 March 1997 on the Tingi-Tingi refugee camp in Zaïre (now Democratic Republic of Congo). The motion was filed on 6 April 1999 in terms of Rules 54, 73 and 89 of the Rules of Procedure and Evidence of the Tribunal ("the Rules").

2. The parties presented their submissions to the Chamber during the hearing held on 9 April 1999.

3. The Defence thereafter amended the motion to reflect the number of witness statements in question from thirteen to fourteen.

The submissions

The Defence

4. The Defence submits in its motion of 6 April 1999 that despite the Decision of this Chamber rendered on 6 March 1997 on the Defence motion for the taking of teleconference depositions, and the efforts of the Tribunal's Witness and Victims Support Unit in the implementation of the said Decision, of the sixteen affected potential witnesses, two have been positively identified and located, whereas fourteen remain untraceable. However, of these sixteen identified witnesses, fifteen were able to produce exculpatory written witness statements. Two of these fifteen witnesses have already testified in this case. It is the remaining thirteen written witnesses statements that the Defence requests the Chamber to admit into evidence.

5. The number of statements the Defence wishes to tender was subsequently corrected on 12 April 1999 from thirteen to fourteen.

6. Counsel for the accused argues that the Defence's inability to call these untraceable or inaccessible witnesses causes serious, irreparable prejudice to its right to a full defence and an equitable trial. However, the Defence contends that the admission into evidence of the witness statements would lessen the prejudice suffered, adding that even though these statements are not comparable to testimony given in court, they still retain a certain probative value.

7. In support of the motion, the Defence cited, *inter alia*, the Decision on Defence Motion on Hearsay, rendered in the case "The Prosecutor v. Duško Tadić" (Case No. IT-94-1-T) on 5 August 1996 by the International Criminal Tribunal for the Former Yugoslavia (the "ICTY"). The Defence also cited paragraph 136 of the ICTR Judgement rendered on 2 September 1998 in the case "The Prosecutor v. Jean-Paul Akayesu"(Case No. ICTR-96-4-T), where it held that the Chamber can freely assess the probative value of all relevant evidence. Thus the Chamber held,

that pursuant to Rule 89, all relevant evidence having probative value may be admitted into evidence, provided it is in accordance with the requisites of a fair trial. In conclusion, the Chamber found that "hearsay evidence is not inadmissible *per se* and has considered such evidence, with caution, in accordance with Rule 89."

The Prosecutor

8. The Prosecutor, in the interests of a fair trial and a good administration of justice, does not, in principle, object to the Defence introducing such statements into evidence.

9. Notwithstanding the above, the Prosecutor submits that the issue in this matter is one of admissibility of evidence and not the probative value to be attached thereto. She contends that jurisprudence of the Tribunal and of the ICTY has established the admissibility of hearsay evidence, though, in practice, witnesses presenting such hearsay evidence can be cross-examined as to how it came into their knowledge. However, in the present matter, there is no possibility to cross-examine on the statements which the Defence wishes to tender into evidence.

10. It is further contended by the Prosecutor that the relevance of the witness statements is not called into question, but rather their reliability. The Prosecutor believes that the Defence should at least have called the investigators who obtained the statements so that the circumstances surrounding the production of the statements can be properly ascertained.

AFTER HAVING DELIBERATED,

The Tribunal states the following:

11. As a point of order, the Tribunal notes that the correction of the number of witness statements as sought in the letter of 12 April 1999, is justified by the Defence on the basis that the Defence motion of 6 April 1999 erroneously stated that its object was thirteen witness statements, when in fact there were fourteen witness statements. The Tribunal, mindful of the rights of the accused in the determination of the charges against him, grants leave to the Defence to amend the object of the motion to fourteen witness statements.

12. This said, however, given that no other arguments were presented in support of this request for amendment, the Tribunal finds that there are resulting ambiguities between the number of witness statements in question, and the submissions of the Defence as summarized in paragraph 4 above. These ambiguities will be dealt with accordingly by the Tribunal in evaluating the merit of the request of the Defence.

13. Notwithstanding the above, the issue before the Tribunal is whether the fourteen witness statements which the Defence wish to tender into evidence are admissible. Before the Tribunal proceeds to examine the relevancy and probative value to be accorded to the statements, it must first be convinced that the criteria for admissibility, *viz* reliability and authenticity, have been satisfied.

14. In accordance with Rule 89(C) of the Rules, the Trial Chamber may admit any relevant evidence which it deems to have probative value. Further, under Rule 89(D), the Chamber may request verification of the authenticity of evidence obtained out of court. In the present matter, these two sub-Rules should be read conjunctively. Indeed, were a finding to be made as to such evidence not being reliable, the evidence would *ipso facto* have no probative value.

15. This reasoning was similarly followed in the above mentioned ICTY Decision referred to by the Defence in support of its motion. It was held in paragraph 15 thereof that reliability is a component of admissibility, thus implying that the Trial Chamber may exclude evidence that lacks probative value because it is unreliable. The Trial Chamber concluded that "the focus in determining whether evidence is probative within the meaning of Sub-rule (C) should be at a minimum that the evidence is reliable". Thus, in the present matter, for the fourteen witness statements to be deemed admissible, the Tribunal must be satisfied as to their reliability and authenticity.

16. In response to a question from the Chamber, the Defence explained that these statements had been written by the witnesses themselves, and that some had been typed at the request of the then Defence Counsel, Mr. Luc de Temmerman. It was further indicated that Mr. de Temmerman had taken the necessary measures to enable persons in refugees camps wishing to produce witness statements to do so. The present Defence Counsel discovered these statements only on being assigned to this case. She was unable to provide any further information of the circumstances in which the statements were made, on the basis that she was not present in Zaïre in 1996 (now Democratic Republic of Congo).

17. In the opinion of the Tribunal, the Defence has provided little or no information which provides indicia as to the reliability, voluntariness, truthfulness and trustworthiness of the statements. The limited information which has been presented by Defence Counsel is insufficient to establish the reliability and authenticity of the written statements.

18. Indeed, the Defence has not convinced the Tribunal of the identity of the witnesses, whether the statements submitted were in fact made by the persons named and signed by them. The Tribunal notes also that not all the statements bear signatures, they were not witnessed, the handwritings are not authenticated and some are not dated. The Defence has given very little or no description or particulars of the circumstances surrounding the production of these statements. No information was tendered pertaining to the identity of the investigators, the context of the interviews and whether the statements were made under oath or solemn declaration. Further, the Tribunal notes that Defence Counsel herself conceded during the hearing that she was unable to produce any other information establishing the reliability and authenticity of the statements on the basis that she had not been present at the time of the depositions. Thus, the Tribunal finds these statements to be inadmissible as their reliability and authenticity has not been established.

FOR THE ABOVE REASONS,

THE TRIBUNAL

DISMISSES the motion of the Defence for leave to tender fourteen written witness statements as evidence.

Rendered on 23 April 1999,
Signed in Arusha on 28 April 1999.

Laity Kama
Presiding Judge

Lennart Aspegren
Judge

Navanethem Pillay
Judge

(Seal of the Tribunal)