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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

CONFIDENTIAL

Registrar: Adama Dieng

Date: 18 November 2003

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON ADMISSIBILITY OF EVIDENCE OF WITNESS DBQ

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

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion for the Exclusion of the Anticipated Testimony of Witness DBQ", filed by the Defence for Aloys Ntabakuze on 19 September 2003; the "Urgent Addendum" thereto, filed on 22 September 2003; and the "Requête en extrême urgence de la Défence aux fins de rejet de nouvelles déclarations", etc., filed by the Defence for Gratien Kabiligi on 22 September 2003;

CONSIDERING the Prosecution "Response", filed on 22 September 2003; the "Reply" thereto by the Ntabakuze Defence filed on 23 September 2003; the Prosecution "Brief on ICTY and ICTR Case-law", etc., filed on 29 September 2003; the Defence "Response" thereto, filed on 1 October 2003; and the oral submissions of the parties on 19, 23 and 25 September 2003;

HEREBY DECIDES the motion.

INTRODUCTION

1. The issue confronting the Chamber is whether anticipated testimony of a Prosecution witness, of which the Defence has notice only through "will-say" statements disclosed shortly before the witness's appearance, should be admitted; and, if so, whether the Defence is entitled to an adjournment, and of what duration, to prepare adequately for the new testimony.

2. Witness DBQ's first statement ("DBQ-1"), dated 27 August 1999, was disclosed to the Defence in redacted form more than sixty days prior to the commencement of the trial on 2 April 2002, in accordance with the requirements of Rule 66(A)(ii) of the Rules of Procedure and Evidence ("the Rules"). The unredacted version of that statement was disclosed on 28 July 2003, in accordance with the Chamber's Scheduling Decision.[1] Thereafter, on four separate occasions, the Prosecution communicated to the Defence additional elements of Witness DBQ's anticipated testimony. These will-say statements were disclosed on 6 August 2003; 12 September 2003 (in Kinyarwanda, followed by a translation into English and French on 19 September); 15 September 2003; and 21 September 2003.

3. In addition to submissions in writing, the Chamber heard extensive oral argument on the motions on 19 and 23 September 2003. On 25 September 2003, the Chamber held a Status Conference to determine whether the positions of the Prosecution and Defence could be reconciled. During that conference, the Prosecution stated its willingness to postpone the appearance of the witness until the trial session commencing 3 November 2003.[2] It further suggested that Witness DBQ be permitted to testify, and be cross-examined on those matters to which there was no objection, with the possibility of recalling the witness on the additional elements depending on the Chamber's decision; there was no objection from the Defence to this procedure.[3] The witness testified on 23, 26, 29 and 30 September 2003, but not on the matters raised in the will-say statements.

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[1] *Prosecutor v. Bagosora et al.*, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003.
[2] T. 25 September 2003, p. 10.
[3] *Id.* pp. 15-16.

SUBMISSIONS

4. The submissions of the parties were lengthy, and are summarized only briefly. The Defence argues that the evidence in the new statements cannot be characterized as mere detail of evidence already disclosed in Witness DBQ's own statement, in the pre-trial brief, or in the Indictment. Indeed, the new testimony constitutes new charges not contained in the Indictment and should, therefore, be excluded entirely, regardless of any adjournment to provide further time for Defence preparation.[4] In the alternative, even if it is within the scope of the Indictment, the new evidence should not be admitted if, with due diligence, it could have been discovered by the Prosecution and disclosed earlier in compliance with the Rules.[5] Finally, if the Chamber finds that the evidence is newly discovered without any fault by the Prosecution, then an adjournment giving the Defence sufficient time to prepare is required.[6]

5. In its submissions and during oral argument, the Prosecution argued that notice of each and every event had already been given to the Defence in the Indictment, pre-trial brief, statements of other witnesses, or Witness DBQ's original statement.[7] The four additional statements provided only additional details of these events and had been promptly disclosed as soon as they had been volunteered by the witness in compliance with the Rules, in particular Rule 67(D). Accordingly, the Defence was aware of these incidents and could not claim unfair surprise or prejudice. If, in the alternative, these were new elements of testimony which took the Defence by surprise, then the appropriate remedy is not exclusion but rather, upon a showing of prejudice, granting an adjournment for the Defence to prepare.

DELIBERATIONS

6. The Chamber notes at the outset that the Defence motions are not moot. Although Witness DBQ did not testify on the elements contained in the will-say statement, the Chamber is still seized of an outstanding Prosecution request to recall the witness and hear testimony on those elements.[8] The Defence objections requested either that this new testimony not be heard at all, or that it be heard only after an adjournment of unspecified duration. Accordingly, the Chamber must determine whether the evidence in the will-say statements is admissible at all; and, if so, whether sufficient time has now elapsed since the disclosure of the will-say statements to permit its admission. Further, the substance of this motion has now been raised in respect of at least two more witnesses, and is likely to arise again in respect of future witnesses.[9] The Chamber therefore considers it necessary to set out in detail the principles governing the admissibility of testimony disclosed in statements shortly before the date of appearance of the witness.

i) General Principles

7. Article 20 of the Statute of this Tribunal enshrines the right of the Accused to be informed promptly and in detail of the nature and cause of the charges against him or her; and to have adequate time and facilities for the preparation of his or her Defence. These rights

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[4] T. 25 September 2003, p. 5.
[5] Defence Response to 'Prosecutor's Brief', para. 10.
[6] T. 23 September 2003, p. 95; Requête en extrême urgence de la Defence aux fins de rejet de nouvelles déclarations de témoins, etc., filed on 22 September 2003, para. 44.
[7] T. 23 September 2003, pp. 70-79.
[8] T. 25 September 2003, pp. 10, 14-16.
[9] See e.g. Motion for the Exclusion of Portions of the Anticipated Testimony of Witness DP, filed by the Defence for Ntabakuze on 3 October 2003; Requête de la Défense de Théoneste Bagosora Demandant l'Exclusion de Certains Eléments de la Déposition à Venir du Témoin DA, filed on 12 November 2003.

find detailed expression in respect of the presentation of evidence at trial through a carefully crafted structure of Rules, all of which must be considered in addressing the issue now before the Chamber.

8. As a general matter, admissibility of evidence is governed by Rule 89 (B) and (C):

> (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and general principles of law.
>
> (C) A Chamber may admit any relevant evidence which it deems to have probative value.

The Chamber has a discretion to admit relevant evidence which it deems to have probative value, and conversely, an obligation to refuse evidence which is not relevant, or does not have probative value. Evidence whose reliability cannot adequately be tested by the Defence cannot have probative value.

9. The Defence's ability to be adequately prepared for testimonial evidence is defined and safeguarded by a mechanism of disclosure set out in a number of Rules. Rule 66(A)(ii) requires the Prosecution to disclose to the Defence no later than sixty days before the date set for trial "copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the defence within a prescribed time". Rule 67(D) requires that "If either party discovers additional evidence or information or materials which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional information or materials".

10. The Prosecution is under further duties of disclosure by virtue of Rule 73*bis* (B) which requires that it, no later than the date set for trial, disclose in the form of a pre-trial brief:

> (iv) A list of witnesses the Prosecutor intends to call with:
> ...
> (b) a summary of the facts on which each witness will testify;
> (c) the points in the indictment on which each witness will testify....

11. Disclosure obligations also arise in respect of the Indictment which, under Article 17(4) of the Statute and Rule 47(C), is to contain "a concise statement of the facts and the crime or crimes with which the accused is charged". The Appeals Chamber has remarked that

> ...this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.

The Appeals Chamber further held that

> ... the materiality of a particular fact cannot be decided in the abstract. It is dependent on the nature of the Prosecution case. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case

> in the indictment is the nature of the alleged criminal conduct charged to the accused. ... Obviously, there may be instances where the sheer scale of the alleged crimes 'makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes'".[10]

12. In *Kupreskic*, the Appeals Chamber recognized that an Indictment may not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession, but emphasized that the Prosecution is expected to know its case before it goes to trial. If the evidence turns out differently than expected, it may be required to amend the Indictment, grant an adjournment, or exclude certain evidence as not being within the scope of the Indictment.[11] It also follows from *Kupreskic* that defects in an Indictment may not render the trial unfair if notice is given in the Prosecution's pre-trial brief, opening statement or witness statements. In that particular case, the Appeals Chamber found that there had been a "transformation" or "drastic change" of the prosecution case from the allegations in the Indictments compared to the strategy pursued at trial.[12]

13. Accordingly, the Prosecution is subject to duties of disclosure of charges and of evidence in respect of the indictment (Rule 47(C)); the pre-trial brief (Rule 73*bis* (B)); and the statements of witnesses (Rule 66(A)(ii) and 67(D)). The importance of these Rules to the rights of the Accused is self-evident.

14. These Rules and the arguments of the parties give rise to three distinct questions. First, is this evidence relevant to charges in the indictments, or do they constitute entirely new charges? Second, do the will-say statements merely provide additional details of matters already disclosed in Witness DBQ's original witness statement, or in other materials disclosed to the Defence? Third, if this is indeed new evidence, should it be admitted and under what conditions?

ii) The Will-Say Statements Do Not Constitute New Charges

15. This new evidence is material to allegations in the Indictments. The Indictments contain broad allegations of criminal conduct throughout Kigali and the rest of Rwanda, including direct and superior responsibility for massacres and rapes.[13] Applying the language of the Appeals Chamber in *Kupreskic*, the evidence of the new incidents does not "dramatically transform" the Prosecution case:

> In effect, the main case against Zoran and Mirjan Kupreskic was dramatically transformed from alleging integral involvement in the preparation, planning, organization and implementation of the attack on Ahmici on 16 April 1993, as presented in the Amended Indictment, to alleging mere presence in Ahmici on that day and direct participation in the attack on two individual houses, as presented at trial. The Trial Chamber rejected all evidence relating to one of these houses and the other was not mentioned in the Amended indictment.[14]

The new evidence works no such transformation; rather, it describes incidents additional (and similar) to others described in the Pre-trial Brief, at other places and times, to the effect that he issued orders, planned, and had command responsibility over others who committed

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[10] *Prosecutor v. Kupreskic*, Judgement of 23 October 2001 (AC), paras. 88-89. Situations where it may be impracticable to require a high degree of specificity in the Indictments include "extensive number of attacks on civilians that took place over a prolonged period of time and resulted in large number of killings" (para. 90).

[11] *Id.* para. 92.

[12] *Id.* paras. 115-123.

[13] See eg. Kabiligi/Ntabakuze Indictment, paras. 6.31, 6.32, 6.33, 6.34, 6.36, 6.47, 6.48, 6.50, 6.51.

[14] *Kupreskic*, Appeals Judgment, 23 October 2001, para. 93.

criminal acts.[15] The evidence is not inadmissible as immaterial to charges in the Indictments as pleaded.

(iii) The Will-Say Statements Contain New Evidence

16. Given the fact-specific nature of the inquiry and the extensive argument on the character of the evidence in the will-say statements, each element of testimony in the will-say statements is set out below for ease of reference, along with the source of prior disclosure claimed by the Prosecution:

Disclosure date	**Item**	**Description of new evidence**	**Prior notification: Pre-trial brief; previous witness statement; indictments**
6 Aug 2003	1.a.	Para-commando attack on villagers in Mimuri in 1990, in presence of Ntabakuze	
	1.b.	Incidents of rape committed by para-commandoes and *interahamwe* near Christus Centre, April – May 1994	ET, WL, WQ; Ntabakuze 6.19, 6.31, 6.34, 6.36, 6.47, 6.51
12 Sep 2003	2.a.	Killings of 30 Bagogwe Tutsi in 1991-92, in presence of Ntabakuze	LAP, OAE, XAM, ZD; DesForges; Ntabakuze 5.32
	2.b.	Ntabakuze orders that about 50 people hiding near Christus Centre, Remera area, Kigali, be handed over to the *interahamwe* and they are ultimately killed	ET, WL, WQ; Ntabakuze 6.19, 6.31, 6.34, 6.36, 6.47, 6.51
	2.c.	Incidents of rape committed near the Christus Centre, Remera area, Kigali [similar to 1.b.]	ET, WL, WQ; Ntabakuze 6.19, 6.31, 6.34, 6.36, 6.47, 6.51
	2.d.	Ntabakuze orders massacre of more than 100 people from Groupe Scolaire Saint-André and Nyamirambo Mosque	BU, DBJ; Bagosora 6.53, Ntabakuze 6.38
	2.e.	Kabiligi arrives at the scene of the events occurring in 2.d; most people are dead	Bagosora 6.53, Ntabakuze 6.38
15 Sep 2003	3.a.	Soldiers given a typewritten list of "accomplices" to be arrested; list said to originate from Bagosora and Ntabakuze, October 1990	DBQ-1(p. 3): "Camp commander and the unit commanders ordered soldiers to arrest Tutsi"
	3.b.	Individuals arrested were interviewed at the office next to Bagosora, October 1990	DBQ-1(p. 3): "Those who were taken to Kanombe camp were detained in the camp jail...."
	3.c.	DBQ participated in mission to assassinate Prime Minister led by Ntabakuze, 1992	DesForges, DP; Bagosora 5.11, Ntabakuze 5.10
	3.d.	Bagosora attends meeting at Kanombe Camp on the night of the plane crash	DCB, LN
	3.e.	Ntabakuze came to Kajagali while the solders were killing Tutsi	DBQ-1(p. 6): While in Kajagali "I saw Ntabakuze passing by on two occasions"
	3.f.	Witness sees Ntabakuze in Remera, interviewing 7 Tutsi men, of whom he ordered that 5 be killed, who were, in fact, killed	

[15] As, for example, Witness DCK who, according to the Pre-trial Brief, is to testify that he heard that Ntabakuze gave orders on the night of 6 April that individuals at an unspecified location be killed (p. 52); Witness DBN, who is to testify that soldiers who killed people along a certain road after Kanombe Camp fell were following Ntabakuze's orders (p. 45); and Witness DBQ himself, who implies that Ntabakuze knew and approved of killings at Kajagali (p. 47).

Disclosure date	Item	Description of new evidence	Prior notification: Pre-trial brief; previous witness statement; indictments
	3.g.	Ntabakuze orders witness's company to clear out an area of buildings near the frontline	DBQ-1(p. 6): "...our company was deployed to Remera...to fight RPF troops. We fought at this position for about one month."
	3.h.	Witness and other soldiers protected refugees in houses in Remera; Ntabakuze orders them killed	DBQ-1(pp. 5, 6): witness under command of Ntabakuze
21 Sep 2003	4.a	While stationed in Remera area, Kigali, witness's company was ordered by Ntabakuze to clear the area of accomplices [similar to 3.g.]	DBQ-1(p. 6):"...our company was deployed to Remera...to fight RPF troops. We fought at this position for about one month."
	4.b.	Paracommandoes involved in massacres at IAMSEA	DBQ-1(pp. 5,6): "While our company...was committing massacres in Kajagali on 7 April...."
	4.c.	Soldiers took women from IAMSEA and raped them at houses across the road	DBQ-1(p. 5): "I noticed that whenever soldiers and *Interahamwe* found beautiful girls, they took them to a house. While leading the girls away, I heard them telling them that they would shoot them if they refused to sleep with them."
	4.d.	Ntabakuze would visit Remera 2-3 times per week to check on the witness's company's situation	DBQ-1(p. 6) (at Kajagali): "I saw Ntabakuze passing by on two occasions...."
	4.e.	The paracommandoes controlled the area of Kibagabaga Mosque and Church, along with the Military Police	Bagosora 6.55; Ntabakuze 6.39

17. The Chamber finds that three of the new elements of testimony were substantially disclosed in the Indictments, as claimed by the Prosecution: 2.e, 3.c, and 4.e. The latter two events are expressly referred to in the Indictments. Sufficient notice of item 2.e, that Kabiligi arrived at the scene after killings occurred, is given by the allegation that he ordered the killing of people at that specific location. The specific actions described are actually less prejudicial than, and may be taken as subsumed within, the accusation in the Indictments that the soldiers at that location were acting under his orders. When combined with the will-say disclosure in accordance with Rule 67(D), the Chamber considers this to be a detail which has been substantially disclosed.

18. At the other end of the spectrum are events described in Witness DBQ's will-say statements which are not mere details of incidents previously disclosed to the Defence, but which are substantially new and seriously incriminating of the Accused. This is not a case of correcting the place or time of an incident; or adding an incident proximate in time and place to other substantially identical incidents; or of providing additional information about an incident which has already been substantially indicated. The new testimony describes distinct events not meaningfully disclosed in *any* of the voluminous disclosures by the Prosecution of its case. Three of the incidents are illustrative.

19. In the Witness DBQ's will-say statement dated 12 September 2003, item 2.b is described as follows:

> ...in Kigali, near the Christus Centre in Remera area, on Kimironko Road, we hid many families comprising about 50 people. Ntabakuze, who had come to visit the troops saw those Tutsis in houses and asked what they were doing there. He then ordered that they should be taken where others had been taken. He ordered Lt. Meonard Muhawenima to hand them over to Interahamwes for killing and that was done.

The Prosecution claims that notice of this event is given in various paragraphs of the Indictment.[16] The most specific of these are 6.31 and 6.36 of the Ntabakuze/Kabiligi Indictment.[17] Paragraph 6.31 says that the Accused "exercised authority over members of the *Forces Armées Rwandaises*, their officers and militiamen. The military and militiamen, as from 6 April 1994 committed massacres of the Tutsi population and of moderate Hutu which extended throughout the Rwandan territory...." Paragraph 6.36 is also relied upon:

> Starting on 7 April, in Kigali, elements of the Rwandan *Gendarmerie* and *Interahamwe* perpetrated massacres of the civilian Tutsi population. Concurrently, elements of the Presidential Guard, Para-Commando Battalion and Reconnaissance Battalion murdered political opponents. Numerous massacres of civilian Tutsi took place in places where they had seek [sought] refuge for their safety.

The original statement had placed the witness, who was under the command of Ntabakuze, in Remera for over a month in April 1994. The Prosecution argued that, therefore, "it's just logical that there were orders coming from the defendant. It's just that we didn't have that information until the witness came here to Arusha and told us about it."[18] The Prosecution further claimed that notice of this incident is provided by the summaries of three of its witnesses in the Pre-trial Brief. Even the most generous and careful reading of these summaries, and the statements on which they are based, yields no reference to this incident. Two of those witness summaries do indeed refer to killings at the Christus Centre, by soldiers or individuals in uniform, but there is no reference to Ntabakuze or his involvement in killing fifty Tutsi who had sought refuge in Remera neighbourhood.

20. The Defence cannot be considered to be on notice of any and all possible orders to a witness in a specific location merely because there is notice that the witness is alleged to have been under the command of the Accused and was at that location. Here, the Defence for Ntabakuze has no notice of the killings of the fifty civilians in hiding in Remera; no notice that he gave the order that they be killed; and, indeed, no notice that he issued any particular order at all at that location. The nature of the criminal conduct alleged is at least arguably changed from one of superior responsibility for killings at roadblocks by subordinates, to a direct order to kill fifty individuals. The Defence's need to rebut the charge is substantial; and its ability to do so is seriously impaired in the absence of meaningful advance notice.

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[16] *Prosecutor v. Bagosora et al.*, Prosecutor's Response, para. 10.

[17] The other paragraphs are manifestly too vague to constitute notice of this event. Paragraph 6.19 says that elements of the Para-Commando Battalion, of which Ntabakuze is alleged to have been the commander, set up roadblocks around Kigali; paragraph 6.34 says that "several of the military and civilian figures who had planned and organized the massacres played a leading role in carrying out the massacres in Kigali"; paragraph 6.47 alleges that rapes and sexual assaults were committed throughout Rwanda during the events described in the indictment; paragraph 6.51 alleges that the Accused Ntabakuze and Kabiligi acted in concert with others to commit the offences described in the indictment, and that they committed these crimes personally, by persons they assisted, or by their subordinates with their knowledge and consent.

[18] T. 23 September 2003, p. 71.

21. Item 2.d in the 12 September statement is that "more than 100 people that came from [Groupe Scolaire] Saint-André and from Nyamirambo Mosque were massacred. In fact, Ntabakuze and former Chief of Staff, Major-General Bizimungu, gave the order to *interahamwe* and soldiers to kill them." The Prosecution relies on paragraph 6.38 and summaries in the Pre-trial Brief of two witnesses. These sources do refer to the killings in question, but state that it was on the orders of the Accused Kabiligi; Ntabakuze is not mentioned. Again, the criminal responsibility of Ntabakuze is arguably changed from one of superior responsibility for the acts of others to directly ordering the killing of more than one hundred people. The Ntabakuze Defence has no prior notice in the Pre-trial Brief or any witness statement that its client had knowledge of, witnessed, or participated in the event in question. The general description of events and the role of another Accused do not provide a reasonable opportunity to Ntabakuze to know the nature of the evidence which must be confronted.[19]

22. Item 3.f is that the witness saw Ntabakuze in Remera interviewing seven Tutsi men, of whom five were executed on his orders. The Prosecution argued that this was a "clarification" of the activities of the battalion while stationed in Remera, a fact mentioned in Witness DBQ's first witness statement, and that other witnesses "speak to these exact facts".[20] The Chamber has not been directed to any witness statement or summary in the Pre-trial Brief that refers to this incident, and for the reasons mentioned above, this event cannot be characterized as a clarification. Again, the event arguably changed the nature of the criminal responsibility of the Accused Ntabakuze from superior responsibility to knowledge of, and direct orders to commit, criminal acts. The presence of the alleged subordinate in Remera, without any reference to Ntabakuze at all, does not provide satisfactory notice that the Accused knew of and ordered those acts. It offers no reasonable opportunity to the Defence to undertake the investigations necessary to challenge the credibility of this testimony, or even to know that the witness will describe a particular type of seriously incriminating conduct of the Accused.

23. The Chamber need not evaluate the novelty of each and every remaining incident described in Witness DBQ's will-say statements. It is sufficient to say that novelty requires an analysis of the content of the witness's own prior statement or statements; the content of any other source of notice of the event, when viewed in conjunction with the timing of the will-say statement; and the extent to which the new evidence alters the incriminating quality of the evidence of which the Defence already has notice.

(iv) The Contents of These Will-Say Statements May Only Be Admitted After a Substantial Period of Notice

24. The power to preclude admission of late-disclosed testimony flows from the language of Rule 89(C), which gives the Chamber a discretion to admit relevant evidence which it deems to have probative value, and conversely, a power to refuse evidence which is irrelevant, or does not have probative value. As previously mentioned, evidence whose reliability cannot adequately be tested by the Defence cannot have probative value. Once the sting of prejudice has been removed, as by giving the Defence adequate time to investigate and prepare for the new evidence, then the evidence can be admitted.[21] The Chamber is of the

[19] In *Prosecutor v. Nahimana et al.*, T. 1 March 2001, pp. 37-38, the Prosecution attempted to lead evidence disclosed three days before testifying against one of the co-Accused who had not previously been mentioned in a witness statement, but which had identified the two other co-Accused. The Chamber ruled that the evidence should be disregarded in relation to the co-Accused for whom the evidence was new.

[20] T. 23 September 2003, pp. 75-76.

[21] This was the solution adopted in *Prosecutor v. Furundzia*, Decision on Motion of Defendant Anto Furundzia to Preclude Testimony of Certain Prosecution Witnesses (TC). On the other hand, exclusion may be ordered to

view that it is preferable to hear relevant evidence, but will only permit admission of such evidence when there is a reasonable opportunity to evaluate the probative value of the evidence in conformity with the rights of the Accused.[22]

25. There are occasions when new evidence may be admitted after only a very short adjournment, or even immediately, based on the court's assessment of the quantity of the new testimony; its similarity to other evidence of which the Defence has notice; and the extent of the new evidence. In its oral ruling of 30 June 2003, this Chamber admitted testimony which had not been previously disclosed concerning an attack by soldiers on a compound which resulted in the killing of the occupants.[23] The attack was not itself mentioned in the previously disclosed witness statements, although several other attacks of a similar nature in the same region were mentioned.[24] Further, this new evidence did not change the nature of the involvement or criminal responsibility of any of the Accused. The Chamber noted that if the Defence could show prejudice because it was taken by surprise, then it would entertain an extension of time to prepare for cross-examination.

26. In other cases, evidence has not been admitted, or has been struck after being heard where there did not appear to be any possibility of an adjournment to give the Defence sufficient time to prepare. In the so-called *Media* case, the Prosecution disclosed a statement three days before testimony. Noting that the disclosure requirements in Rule 66 were "essential fair trial mechanisms", the Chamber found that the absence of prior notification caused prejudice to the Accused and that the Defence was taken by surprise.[25] The Chamber did not doubt the good faith of the Prosecution in supplying the new information as soon as it was available, but observed that there was a limit as to how late new statements could be disclosed.[26] The problem of will-say statements recurred on a number of occasions in *Prosecutor v. Nyiramasuhuko*. The Prosecution in one instance tendered three will-say statements concerning previously undisclosed incidents of rape involving the Accused five, six, and seven days before the witness's testimony.[27] The Chamber ruled these new elements inadmissible because they had "not been disclosed in sufficient time in order to enable the Defence to adequately prepare its case."[28] Similar rulings followed in respect of two further

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ensure compliance with the Rules regarding disclosure. See Richard May, Marieke Wierda, *International Criminal Evidence* (Ardsley: Transnational Publishers Inc. 2002) p. 85; *Prosecutor v. Nahimana et al.*, T. 1 March 2001, pp. 7-8 ("This is what concerns the Judges and that is, in terms of the Rules which were all very carefully drawn and practiced in this Tribunal over a six year period now, rules providing for disclosure of witness statements for instance, Rules providing for copies of witness statement which supported the original indictment for instance, are there as essential fair trial mechanisms. They are there to give notice to the Accused as to the case he faces. And this Chamber is concerned that our Rules be observed and not flouted.")

[22] National legal systems favour the admission of late-disclosed testimony, and to use adjournments instead of exclusion of evidence to ensure protection of the rights of the accused. See e.g. § 246 of the German Code of Criminal Procedure, "Belated Proffer of Evidence": "I. The reception of specific evidence may not be refused on the grounds that the proof or the fact to be proved was presented too late. II. If, however, a witness or expert to be examined was named to the opponent of the person making the motion so late, or if a fact to be proved was presented so late that the opponent did not have sufficient time to collect information, he can, until the completion of the reception of evidence, move the court to postpone the main trial in order to collect such information." Federal courts in the United States have a power to exclude under Rule 16(d)(2) of the Federal Rules of Criminal Procedure, but "such a severe sanction would seldom be appropriate where – as here – the trial court finds that the government's violation did not result from its bad faith and that a less drastic remedy (such as a continuance) will mitigate any unfair prejudice." *United States v. Marshall*, 132 F.3d 63, 70 (D.C.Cir. 1998).

[23] *Prosecutor v. Bagosora et al*, T. 30 June 2003, pp. 57-59.

[24] See *id.* pp. 35, 44, 52.

[25] *Prosecutor v. Nahimana et al.*, T. 1 March 2001, pp. 7; 37-38.

[26] "So, it appears to us that the Prosecution, with the best of motives, is attempting to device a new procedure to cover-up their lapse of not recording a proper statement at the appropriate time." *Id.* p. 37.

[27] *Prosecutor v. Nyiramasuhuko et al.*, T. 28 May 2002, pp. 80-81.

[28] *Id.* p. 105.

will-say statements, one disclosed on the very day of testimony, and the other seven days before.[29]

27. In the present case, the Defence is facing an avalanche of new evidence, disclosed in will-say statements forty-eight days, eight days, four days and one day prior to Witness DBQ's appearance on 23 September 2003.[30] The Chamber finds the first will-say statement, containing two events, was disclosed with sufficient notice to allow testimony on 23 September. The new testimony in the remaining three will-say statements could only be introduced in the trial session commencing 3 November 2003. The trial session in which Witness DBQ was offered was scheduled to end on 3 October 2003. Given the number of new incidents raised in the will-say statements, the seriously incriminating nature of the conduct alleged, and the remoteness of the new factual allegations from any incidents of which the Defence had notice, the Defence needed more time to be prepared than remained in that trial session.

28. This decision is limited to consideration of the timeliness of disclosure. The Chamber is aware that the substance of items 1.a, 3.a, and 3.b, and 3.c were either objected to on the basis of the temporal scope of the indictments, or are now before the Appeals Chamber on that basis. The Chamber refrains from any ruling pending a decision of the Appeals Chamber.

29. The Chamber notes that the Defence made no allegation of bad faith on the part of the Prosecution, although there was a request that the Prosecution be censured for its "unfair practice."[31] The Chamber has expressed its concern at the repeated practice of disclosure of will-say statements immediately before the presentation of a witness.[32] The Chamber accepts and understands that witness statements from witnesses who saw and experienced events over many months which may be of interest to this Tribunal, may not be complete. Some witnesses only answered questions put to them by investigators whose focus may have been on persons other than the accused rather than volunteering all the information of which they are aware. But the onus of ensuring that there is sufficient notice to the Defence rests with the Prosecution. In the absence of a system to address this phenomenon, the Prosecution bears the risk that its witnesses will be postponed, and the Tribunal as a whole risks delays in its work.

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[29] *Prosecutor v. Nyiramasuhuko et al.*, T. 24 February 2003, p. 6; *Prosecutor v. Nyiramasuhuko et al.*, T. 3 March 2003, pp. 17-18.

[30] The witness statement known as "DBQ-2" was first disclosed to the Defence in Kinyarwanda only on 12 September 2003; a translation into the two official languages of the Tribunal was informally disclosed to the two Defence teams most concerned on 19 September 2003; and then formally filed on 22 September 2003. For the purposes of these calculations, the relevant date of disclosure is the day the document was actually communicated to the parties affected in an official language of the Tribunal. See T. 19 September 2003, pp. 61-63; Prosecutor's Response, 23 September 2003, p. 3.

[31] Urgent Addendum, filed on 22 September 2003, para. 9.

[32] T. 3 October 2003, pp. 3-8; T. 5 November 2003, p. 37 ("So in other words, it appears, then, that for the second time in connection with DAS-5, there is an omission or lack of sufficient routines when it comes to the Prosecution's disclosure or making known will-say statements to the other side, and the Prosecution should do something about this. This is important.")

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FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motions.

Arusha, 18 November 2003

Erik Møse
Presiding Judge

Jai Ram Reddy
Judge

Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]