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UNITED NATIONS
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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

Registrar: Adama Dieng

Date: 18 November 2003

THE PROSECUTOR

v.

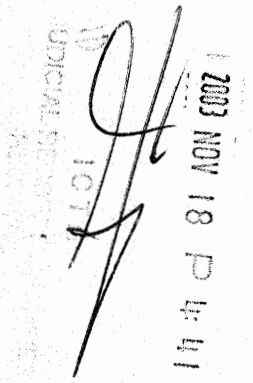
Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T



DECISION ON ADMISSIBILITY OF EVIDENCE OF WITNESS DP

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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 DP", filed by the Defence for Aloys Ntabakuze on 3 October 2003;

CONSIDERING oral argument heard on 2 October 2003; the Prosecution "Response" to the motion, filed on 21 October 2003; and the Defence "Reply" thereto filed on 5 November 2003;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 30 September 2003, the Prosecution filed a will-say statement indicating two "additional details" to which its witness, DP, would testify. At oral argument, the Defence made clear that it was only objecting to one of the two items, that concerning the witness's observation of two soldiers on 9 or 10 April, together with *interahamwe*, loading rifles into the back of a military jeep. When queried by the witness, one of the soldiers allegedly indicated that Aloys Ntabakuze had ordered that the *interahamwe* be brought into the camp and given the weapons.

SUBMISSIONS

2. The Defence argues that notification of new witness testimony at this stage contravenes the Prosecution's disclosure obligations under Rule 66(A)(ii). That Rule should be interpreted either as requiring full disclosure of any and all statements to be introduced sixty days before commencement of trial, or as imposing an implicit continuing duty of disclosure that requires, at a minimum, that the Defence be given an adequate opportunity to prepare for the new testimony. The extent of notice in this case violates either interpretation of the Rule. The Prosecution's frequent recourse in recent weeks to notification of newly discovered testimony threatens to undermine Rule 66(A)(ii) and the Chamber's Decision on the timing of disclosure of unredacted witness statements. Further, the Defence argues that this new testimony constitutes an entirely new accusation, the introduction of which at this stage of proceedings would violate the right of the Accused to be informed promptly and in detail of case against him, and Rule 73*bis* (B) governing the Pre-trial Brief. The Defence also notes that Witness DP had been in Arusha for three weeks prior to his appearance, and that there is no reason why notice of the new testimony could not have been given earlier. The Defence asks the Chamber to exercise its discretion to exclude the evidence.

3. The Prosecution argued orally that this new testimony is simply a detail of evidence contained in the witness's prior statement and that, in any event, it does not even describe criminal conduct as such. In its written submissions, the Prosecution argued that the motion was "moot", and the that Defence fees should be withheld by the Registrar, as the Chamber had already ruled on the motion orally on 2 October 2003. The Defence argued that the Chamber's ruling was only provisional and did not preclude further submissions on whether the evidence should be excluded.

DELIBERATIONS

5. The Chamber has set out the principles applicable to the admission of testimony disclosed in will-say statements in its recent Decision on Admissibility of Evidence of Witness DBQ.[1] That Decision sets out a two-step approach. First, is the disclosed evidence actually new? Second, if the evidence is new, what period of notice is required in order to give the Defence adequate time to prepare?

6. Whether evidence is new requires comparison with the witness's own prior statement; any other indication in the Indictment or Pre-Trial Brief of the event in question combined with the period of notice to the Defence that the particular witness will testify on that event; and the extent to which the new evidence alters the incriminating quality of the evidence of which the Defence already has notice. If the evidence is not new, but is merely a detail supplementing evidence which has previously been disclosed in accordance with the Rules, then it is immediately admissible. If, on the other hand, the evidence is characterized as new, then the Chamber assesses the extent of the new evidence, how incriminating it is, and its remoteness from any other incidents of which the Defence has notice, to determine what period of notice is adequate to give the Defence time to prepare.

7. The Chamber takes the view that this is new evidence. The Prosecution has not pointed to any prior disclosure that the Accused Ntabakuze is alleged to have distributed weapons to the *interahamwe*, whether at the Kanombe Camp or elsewhere, on or about 10 April 1994 or on any other date. That type evidence could have serious implications for the nature of the case to which the Defence must respond.

8. The Chamber is of the view that, under the circumstances, the two days was a sufficient period of notice for the Defence to be prepared to confront this new testimony. First, the evidence is of a single event, unlike the numerous elements of testimony sought to be introduced in respect of the Witness DBQ. Second, the newly incriminating evidence is based on hearsay and there are limited avenues for testing the reliability of this particular evidence. Accordingly, the possible investigations to be carried out by the Defence to test this testimony are rather narrow. Third, as hearsay, the evidence has limited probative value standing alone. The reliability of the testimony and its probative value are likely to depend primarily on corroborative or contradictory evidence to be presented later by the Defence or Prosecution. These factors together indicate that only a short period of notice for this evidence is required.

9. The Prosecution did not respond to the Defence assertion that Witness DP had been in Arusha for three weeks and that notice of this evidence could have, and should have, been given earlier. Without clearer indications, the Chamber is unsure how long the witness was in Arusha and readily available to the Prosecution. However, the Chamber again expresses its concern that there is no systematic practice of interviewing witnesses well in advance of their testimony, particularly where it may be evident from the date of their witness statements or other factors that new evidence is likely to be forthcoming.

10. The request for denial of costs is rejected. The Chamber's ruling was clearly intended to be preliminary and not to foreclose further submissions on an issue that had been a matter of ongoing contention in respect of this and other witnesses.

[1] 18 November 2003.

17649

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion;

DENIES the request for withholding fees.

Arusha, 18 November 2003

Erik Møse	Jai Ram Reddy	Sergei Alekseevich Egorov
Presiding Judge	Judge	Judge

[Seal of the Tribunal]