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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
14-10-2004
(22104-22094)

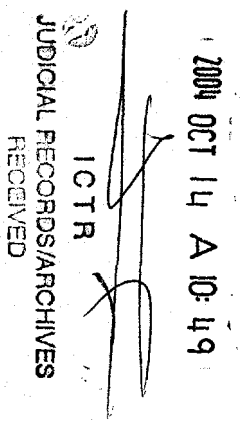
22104
S. Thiwa

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 14 October 2004



THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON THE PROSECUTOR'S MOTION FOR THE ADMISSION OF CERTAIN MATERIALS UNDER RULE 89 (C)

The Prosecution
Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence
Raphaël Constant
Paul Skolnik
Jean Yaovi Degli
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

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

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

BEING SEIZED OF the Prosecution's "Motion for the Admission of Certain Materials under Rule 89 (C) of the Rules of Procedure and Evidence", filed on 28 April 2004; and the "Prosecutor's 2nd Motion for the Admission of Certain Documents into Evidence under Rule 89 (C) of the Rules of Procedure and Evidence", filed on 25 May 2004;

CONSIDERING the Response of the Bagosora Defence, filed on 6 May 2004; the Response of the Kabiligi Defence, filed on 7 May 2004; the Prosecution Reply thereto, filed on 18 May 2004; the Second Response of the Kabiligi Defence, filed on 4 June 2004; the Response of the Bagosora Defence, filed on 9 June 2004; the "additional arguments" of the Kabiligi Defence filed on 28 June 2004; the Prosecution "Further Reply", filed on 14 July 2004; the Response of the Kabiligi Defence, filed on 20 July 2004; and the further Response of the Kabiligi Defence, filed on 7 September 2004;

HEREBY DECIDES the motions.

INTRODUCTION

1. The Prosecution seeks to admit the following materials pursuant to Rule 89 (C) of the Rules of Procedure and Evidence ("the Rules"): (i) a recording and transcript of an interview conducted by ICTR investigators with the Accused Ntabakuze on 19 July 1997 (NTABALO-14, NTABALO-15); (ii) a recording and transcript of an interview conducted by ICTR investigators with the Accused Kabiligi on 19 July 1997 (KABIGRA-01, KABIGRA-02); (iii) a written authorisation to purchase arms and ammunition, dated 27 July 1993, purportedly signed by Bagosora in his capacity as *Directeur de Cabinet* of the Ministry of Defence (BAGOTHE-38); (iv) the Agreement between the United Nations and the Government of the Republic of Rwanda on the status of the United Nations Assistance Mission for Rwanda, signed in New York on 5 November 1993 (UNAMIRZ-04); and (v) documents allegedly signed by the Accused Bagosora regarding the transportation of arms from Seychelles to Zaire (BAGOTHE-25) and a hand-written note by the Accused Bagosora offering to transport General Dallaire to Gitarama (BAGOTHE-26).

SUBMISSIONS

(i) Custodial Interrogation of Ntabakuze and Kabiligi

2. The Prosecution asserts that the Accused Ntabakuze has consented to the admission of his interview by investigators.[1] The Defence for Ntabakuze filed no response to the motion.

3. The interview of the Accused Kabiligi has previously been the subject of defence motions which have been rejected; the Defence should, therefore, be precluded from relying on those same arguments to challenge.[2] In any event, the Accused Kabiligi voluntarily

[1] Prosecution Motion para. 8, citing Letter from Mr. Tremblay to Messrs. Chile Eboe-Osuji and Drew White, Office of the Prosecutor, dated 22 July 2002, filed with the Registry on 13 August 2002, p. 11166*bis*.

[2] Prosecution Motion paras. 9-10, citing *Kabiligi*, Decision on the Defence Motion to Lodge Complaint and Open Investigations Into Alleged Acts of Torture Under Rule 40 (C) and 73 (A) of the Rules of Procedure and Evidence (TC), 6 October 1998; *Kabiligi*, Decision Rejecting Notice of Appeal (TC), 18 December 1998; *Kabiligi*, Decision Rejecting Notice of Appeal (AC), 18 July 1999.

waived his right to counsel and the interview was otherwise conducted in a proper and legal manner. Defence allegations of coercion during the interview are unsubstantiated.

4. The Defence for Kabiligi argues that previous decisions do not preclude raising the alleged involuntariness of the interview, as they concerned remedies other than exclusion or were ruled premature. The interview was oppressive and involuntary and should be excluded pursuant to Rules 89 (C) and 95. The Accused was handcuffed and threatened with return to Rwanda if he did not cooperate, which he perceived to be a death threat. Nor was the Accused informed of the reasons for his arrest, the charges against him, or his rights. The Kabiligi Defence further argues that the Accused did not receive a copy of the tapes and transcripts of the interview in a timely manner, and that the original tapes were not sealed in his presence, in violation of Rules 43 (iv) and (v).

(ii) Documents Created Contemporaneous with Events

(a) BAGOTHE-38

5. The Prosecution submits that the Rules and jurisprudence of the Tribunal permit the admission of documents as evidence without identification or other authentication by a witness. The provenance and relevance of the proposed exhibits is either admitted by the Defence, or is self-evident. The documents should, accordingly, be admitted. The Prosecution further contends that the Defence for Bagosora has previously acknowledged the authenticity of BAGOTHE-38, and objects to its admission only because the document, though signed, was not prepared in its entirety by Bagosora.[3] The Prosecution argues that such an objection is relevant to the weight, but not the admissibility, of the document. The document is said to be relevant to the form of the Accused Bagosora's signature on official documents.[4]

6. The Bagosora Defence argues that the Prosecution has failed to establish either the relevance or the authenticity of the document referred to as BAGOTHE-38. It admits that the signature at the bottom of the document appears to be that of the Accused, but argues that the Prosecution has failed to establish the origin or chain of custody of the document.

(b) BAGOTHE-25 and BAGOTHE-26

7. The Prosecution submits that BAGOTHE-25 and BAGOTHE-26 are admissible without testimony as neither their relevance nor their provenance is disputed. The Defence for Bagosora previously consented to the admission of the documents.[5]

8. The Bagosora Defence indicates that it does not object to the admission of BAGOTHE-25, provided that two other documents disclosed by the Prosecution, BAGOTHE-34 and BELGGVT-2, are also admitted as evidence under Rule 98. The latter documents, an administrative file concerning Bagosora's entries and exits from Seychelles, and a statement from a Belgian judge, are said to provide additional information necessary for understanding BAGOTHE-38.

9. The Bagosora Defence asserts that it has not been shown the original version of document BAGOTHE-26, and argues that there are indications that the document is not authentic. It asks the Chamber to reserve its ruling until the Prosecution has made the original available for inspection, at which time the Defence will make additional submissions.

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[3] Prosecution Motion paras. 11-14, citing Letter from Maitre Constant to Messrs. Chile Eboe-Osuji and Drew White, Office of the Prosecutor dated 24 July 2002, filed with the Registry on 29 July 2003, p. 12184.
[4] Prosecution Reply 18 May 2004, para. 7.
[5] Prosecution Second Motion 25 May 2004, paras. 2-3.

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(c) UNAMIRZ-04

10. The Prosecution notes that all Defence teams have agreed to the admission of the Agreement between the United Nations and the Rwandan Government on the Status of UNAMIR.[6] There were no submissions in opposition to the admission of this document.

DELIBERATIONS

(i) Custodial Interrogation of Kabiligi and Ntabakuze

11. Article 17 (3) of the Statute, "Investigation and Preparation of the Indictment", provides:

> If questioned, the suspect shall be entitled to be assisted by Counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as necessary translation into and from a language he or she speaks and understands.

Article 20 (4)(g) confers on any Accused the right "[n]ot to be compelled to testify against himself or herself or to confess guilt". Rule 42, entitled "Rights of Suspects During Investigation", prescribes that:

> (A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands:
>
> (i) The right to be assisted by counsel of his choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it;
>
> (ii) The right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning; and
>
> (iii) The right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.

Rule 42 (B) prescribes the consequences of the absence of counsel, and provides for the possibility of waiver of the right:

> (B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

Rule 40 (C) makes clear that a suspect benefits from the rights enumerated in Rule 42 from the moment of transfer into the custody of the Tribunal. Rule 95 requires the exclusion of evidence "if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings".

12. The transcript of the custodial interview of the Accused Ntabakuze shows that he unambiguously invoked the right to counsel and refused to answer any questions of substance. However, the Defence for Ntabakuze has made no objection to its admission. On

[6] Prosecution Motion para. 15, fn. 14.

the basis of the absence of objection from the Defence, and noting that the Accused made no statements of substance during the interview, the Chamber finds that no issue arises under Rule 95 and that the statement may be admitted.

13. The admissibility of the Kabiligi statement is, by contrast, contested. As a preliminary matter, the Prosecution contends that the objections raised by the Defence have already been litigated and rejected. This is not the case. A decision dated 6 October 1998 rejected an application for an investigation into allegations of torture, and refused to quash the proceedings against the Accused. Nothing was said about the admissibility of the interview at trial.[7] Another pre-trial decision held that a request for a declaration of inadmissibility was premature as the Prosecution had not yet sought to tender the interview.[8] The issue of its admissibility is now before the Chamber for the first time.

14. The Prosecution claims that the questioning of the Accused Kabiligi was conducted after he had been advised of his rights by the investigators who interviewed him and made a voluntary waiver of his rights in accordance with Rule 42 (B). During the dialogue which is set forth below, the Accused was handed a form, written in French, entitled "Notice of Suspect's Rights" which substantially recapitulates the rights enumerated in Rule 42 (A) and (B). At the bottom of the form is a declaration indicating that the signatory has read and understands the rights enumerated therein; that he is ready to respond to questions; that he does not wish to have counsel at this time; and that no threats or promises have been made against him to procure his consent. At the end of the dialogue, the Accused signed the declaration.

15. The genuineness of that consent must be considered in the context of the entire conversation preceding his signature.

> *Investigator:* We will now provide you a copy [of the "Notice of Suspect's Rights, which had just been read to the Accused orally] to read, if you wish. Can you tell us what you have decided? Do you understand your rights? Do you have any questions about that?
>
> *Kabiligi*: Thank you. I do have one question. I am prepared to exercise my rights as soon as I understand the reasons for my arrest and the case brought against me.
>
> *Investigator:* Can you be more specific? Please clarify what you want?
>
> *Kabiligi:* I would like to know the reason for my arrest. Am I indicted? By whom, and why? Have I committed any crimes? Where, when and why? And how? That's it. I am prepared as soon as I find out the reasons for my arrest, I will be entitled to request the assistance of counsel provided by the International Tribunal, as I do not have sufficient means to pay for it.
>
> *Investigator*: So, at this time, you are laying down the condition that we must first inform you of all the charges the Tribunal has against you. Is that what you are requesting?

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[7] *Kabiligi*, Decision on the Defence Motion to Lodge Complaint and Open an Investigation into Alleged Acts of Torture Under Rules (40) (C) and 73 (A) of the Rules of Procedure and Evidence (TC), 6 October 1998.

[8] *Kabiligi and Ntabakuze*, Decision on Kabiligi's Motions to Nullify and Declare Evidence Inadmissible (TC), 2 June 2000, para. 22 ("The Tribunal decides the admissibility of particular evidence at trial, only after a party gives notice or seeks to introduce the particular item ... The Tribunal notes that at this stage of the proceedings it is unknown whether the Prosecutor will seek to introduce any evidence of the questioning at trial. Thus, the Tribunal defers from ruling on the issue of admissibility of the challenged possible evidence").

Kabiligi: Precisely. Before exercising my rights, before requesting the assistance of counsel, I must be informed of the charges against me ... At the least the offences I am accused of.

Investigator: Yes. But, of course, that's indeed [?] disclosure is part of the process. In any case, at some point, the Tribunal will have the obligation to disclose in full the case against you. That's part of the standard procedure for your defence procedure. It is obvious that you were not [?]. At some point during your defence, you will be entitled to examine your case file. For the moment, this interview, considered to be the first questioning [?] by Tribunal investigators, what we are requesting is that, if you accept to speak to us. First [?] If you accept to speak to us, we will ask you questions. Should you decide not to speak to us, please tell us what your choice is.

Kabiligi: Personally, I am prepared to talk at this time. But, questioning or preliminary investigation or interview of me, but reserving the right to request the assistance of counsel and exercise the full benefit of the rights that have just been read to me, as soon as I find out the case against me, because I don't know what it is at this time.

Investigator: So, you are saying that before you speak to us, you require that your case file be disclosed to you? That's the condition you seem to be laying down. We are just trying to understand what you are saying. Tell us what you want. Are you saying that you will not talk to us unless your case file is disclosed to you? That's what I understood. You want your case file disclosed to you before we ask you any questions? Is that what you are suggesting? What exactly do you want?

Kabiligi: What I am asking is that at this time, as you explained yesterday, this is a preliminary interview. In case – once I discover the case against me, I will request the assistance of counsel. I am not insisting on having the presence of counsel during this interview, but once I discover the case against me, I must be able to exercise the full extent of the rights that have just been read to me, that I have just taken cognisance of.

Investigator: [?]

Kabiligi: I'm ready to continue.

Investigator: At this time, you are prepared to answer our questions?

Kabiligi: I am prepared to answer your questions. Alone, without the assistance of counsel, as I have not yet read my case file. Once I have read my case file, I will request the assistance of counsel.

Investigator: That implies that you have now waived that right. That means that you have now waived [?]. Momentarily. At least for today. Because should you accept to answer our questions, that means that for the moment, you waive that right. For now.

Kabiligi: But, it doesn't mean I waive it?

Investigator: It is not an absolute waiver. In any event, you are entitled to the assistance of counsel for full answer and defence. This is an international tribunal with all the attendant guarantees.

Kabiligi: All right. I accept.

Investigator: Okay. In that case....

> *Kabiligi*: At this time, for this interview, I am not requesting the assistance of counsel. However, once I have read my case file, I will exercise the full extent of my rights.
>
> *Investigator*: Now, could you sign the waiver?
>
> *Kabiligi*: During this interview, I have decided to answer all your questions without the presence of counsel. However, in due course, I may stop the interview and request the assistance of counsel.[9]

16. Article 17 of the Statute and Rule 42 of the Rules state in unconditional terms that a detainee has a right to the immediate assistance of counsel; and, further, that questioning of the suspect "shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel". Not all legal systems confer this right on a detainee, but it is deeply and eloquently inscribed in the annals of many national and international legal systems.[10] Along with the right to silence, this right is rooted in the concern that an individual, when detained by officials for interrogation, is often fearful, ignorant and vulnerable; that fear and ignorance can lead to false confessions by the innocent; and that vulnerability can lead to abuse of the innocent and guilty alike, particularly when a suspect is held incommunicado and in isolation.

17. The importance of the right to counsel, and the precariousness of its exercise by a suspect in detention, is reflected in the stringent requirement in Rule 42 (B) that a suspect has "*voluntarily waived* his right to counsel" before a custodial interrogation can take place. The heavy burden of the words "voluntarily waived" were interpreted by a Chamber of the ICTY in *Delalic*:

> The burden of proof of voluntariness or absence of oppressive conduct in obtaining a statement is on the Prosecution. Since these are essential elements of proof fundamental to the admissibility of a statement, the Trial Chamber is of the opinion that the nature of the issue demands for admissibility the most exacting standard consistent with the allegation. Thus, the Prosecution claiming voluntariness on the

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[9] Prosecution Motion, Appendix "KABIGRA-02", pp. K0232817-20.

[10] Constitution of Canada (1982), s. 10: "Everyone has the right on arrest or detention ... (b) to retain and instruct counsel without delay and to be informed of that right"; New Zealand Bill of Rights Act (1990), s. 23 (1): "Everyone who is arrested or who is detained under any enactment ... [s]hall have the right to consult and instruct a lawyer without delay and to be informed of that right"; Constitution of South Africa (1996), Art. 35 (1): "Everyone who is arrested for allegedly committing an offence has the right (a) to remain silent; (b) to be informed promptly of (i) the right to remain silent; and (ii) the consequences of not remaining silent; (c) not to be compelled to make any confession or admission that could be used in evidence against that person"; Art. 35 (2): "Everyone who is detained ... has the right ... (b) to choose, and to consult with, a legal practitioner and to be informed of this right"; Fiji Constitution (Amendment) Act 1997, s. 27: "Every person who is arrested or detained has the right: (c) to consult with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of that right promptly ..."; Statute of the International Criminal Court, Art. 55 (2): "Where there are grounds to believe that a person has committed a crime ... that person shall also have the following rights of which he or she shall be informed prior to being questioned: ... (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence; (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel"; *Miranda v. Arizona* 384 U.S. 346 (1966) ("*Miranda*"); *Dickerson v. United States* 530 US 428 (2000) (reaffirming that the rules announced in *Miranda* were constitutional rules). See also *Imbriosca v. Switzerland*, A 275 1993 (E Ct HR), para. 36 (finding that Article 6 of the European Convention of Human Rights, including the right to the assistance of counsel, applies in principle to preliminary investigations).

part of the Accused/suspect, or absence of oppressive conduct, is required to prove it convincingly and beyond reasonable doubt.[11]

National courts in which the right to counsel is recognized have elaborated that a waiver cannot be voluntary unless a detainee knows of the right to which he is entitled.[12] To be so informed, the suspect must be informed that the right includes the right to the prompt assistance of counsel, prior to and during any questioning. Any implication that the right is conditional, or that the presence of counsel may be delayed until after the questioning, renders any waiver defective.[13] These rights, and the practical mechanisms for their exercise, must be communicated in a manner that is reasonably understandable to the detainee, and not "simply by some incantation which a detainee may not understand".[14] Generally, a suspect may be taken to comprehend what a reasonable person would understand; but where there are indications that a witness is confused, steps must be taken to ensure that the suspect does actually understand the nature of his or her rights.[15]

18. Once the detainee has been fully apprised of his right to the assistance of counsel, he or she is in a position to voluntarily waive the right. The waiver must be shown "convincingly and beyond reasonable doubt". It must be express and unequivocal, and must clearly relate to the interview in which the statement in question is taken.[16]

19. Relying on these principles, the Chamber is of the view that the Prosecution has not discharged its burden of showing that the Accused Kabiligi voluntarily waived his right to the assistance of counsel, as required by Rule 42 (B). At the beginning of his interview with the investigators, the Accused demonstrated that he did not understand that he had an immediate right to the assistance of counsel. He asked repeatedly to be informed of the charges against

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[11] *Prosecutor v. Delalic et al.*, Decision on Zdravko Mucic's Motion For the Exclusion of Evidence (TC), 2 September 1997 ("*Delalic* Exclusion Decision") , para. 42.

[12] *Miranda* p. 475 (right to counsel must be "knowingly and intelligently waived"); *R. v. Cullen* 1992 NZLR LEXIS 689 (CA) ("*Cullen*") p. 10 ("[t]he purpose of making the suspect aware of his rights is so that he may make a decision whether to exercise them and plainly he cannot do that if he does not understand what those rights are"); *R v. Evans* [1991] 1 SCR 869 ("*Evans*"), p. 891 ("[A] person who does not understand his or her right cannot be expected to assert it").

[13] *Miranda* p. 479 ("[The detainee] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be sued against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot an attorney one will be appointed for him prior to any questioning if he so desires."); *R v. Bartle*, [1994] 3 S.C.R. 173 ("*Bartle*"), p. 191 ("[A] person who is "detained" within the meaning of s. 10 of the *Charter* is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty .... a detainee is entitled as of right to seek such legal advice 'without delay' and upon request").

[14] *Cullen* p. 10 ("[t]the fundamental rights conferred or confirmed by the New Zealand Bill of Rights Act 1990 are not to be regarded as satisfied simply by some incantation which a detainee may not understand. The purpose of making the suspect aware of his rights is so that he make a decision whether to exercise them and plainly he cannot do that if he does not understand what those rights are"); *S v. Melani and others* 1995 SACLR LEXIS 290 pp. 47-48 (Sup. Ct., Eastern Cape) ("[i]n order to give effect to an accused's right in terms of section 25 (1)(c) he or she must be informed of his or her right to consult in manner that it can reasonably be supposed that he or she has understood the content of that right").

[15] *Evans* pp. 890-91 ("In most cases, one can infer from the circumstances that the accused understands what he has been told. In such cases, the police are required to go no further ... But where, as here, there is a positive indication that the accused does no understand his right to counsel, the police cannot rely on their mechanical recitation of the right to the accused; they must take steps to facilitate that understanding ... It is true that [the police] informed the appellant of his right to counsel. But they did not explain that right when he indicated that he did not understand it").

[16] *Delalic* Exclusion Decision, para. 42. See *Pfeifer and Plankl v. Austria*, A 227 1992 (E Ct HR), para. 37 ("the waiver of a right guaranteed by the Convention – insofar as it is permissible – must be established in an unequivocal manner"); *Bartle* para. 39 (must be "clear and unequivocal that the person is waiving the procedural safeguard"); *Miranda* p. 475 ("An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver").

him, and seems to have believed that "as soon as I find out the reasons for my arrest, I will be entitled to request the assistance of counsel", and that "before exercising my rights, before requesting the assistance of counsel, I must be informed of the charges against me". Rather than correcting the Accused's misperception that his right to counsel was conditional upon being informed of the case against him, the investigators responded that "standard procedure" is that disclosure would happen later. The Accused then attempted to reserve the right to request the assistance of counsel "as soon as I find out the case against me, because I don't know what it is at this time". This again should have demonstrated to the investigators that the Accused was still confused, and probably did not understand that he had the right to assistance of counsel immediately. Nothing in the remainder of the interview indicates that the Accused's misunderstanding was ever corrected, and at no time did the investigators advise the Accused that he had an immediate right to the assistance of counsel during questioning. Under these circumstances, the Prosecution has not proven that there was a waiver of the right to counsel, as required by Rule 42 (B).

20. The Chamber is further of the view that the Accused actually did invoke the right to counsel at the beginning of his interview. The Accused states three times that as soon as he is informed of the case against him, he would then "exercise" the right of, or "be entitled" to, the assistance of counsel. He also purports to "exercise the full benefit of the rights that have just been read to me, as soon as I find out the case against me". The investigators should have recognized that this was a confused attempt to invoke the right to counsel, and ceased their questioning immediately. Rule 42 (B) expressly states that questioning "shall not proceed" in the absence of a voluntary waiver. It was improper for the investigators to have explained that "standard procedure" was that disclosure occurred at a later time, thereby possibly implying that the right to counsel was also only available at a later time. The Accused was under the impression that the interview was "preliminary", but the investigators proceeded to ask important questions of substance. The questioning of the Accused after his attempted invocation of the right to counsel, including the apparent waiver of that right, violated Rule 42 (B).

21. The right to counsel during a custodial interrogation is closely intertwined with the exercise of the right to silence; the right to be cautioned that any statement made may be used against the detainee in evidence at trial; and the right in Article 20 (4)(g) of the Statute "[n]ot to be compelled to testify against himself or herself or to confess guilt". Without at least the opportunity to choose whether to consult with counsel, there is a possibility that an accused will answer the questions of investigators in ignorance of the other rights to which he or she is entitled. For this reason, the consequence of non-waiver of the right is expressly set forth in the Rule 42 (B): questioning "shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel". As stated by the ICTY Chamber in *Delalic*, it is difficult to imagine a statement taken in violation of the fundamental right to the assistance of counsel which would not require its exclusion under Rule 95 as being "antithetical to, and would seriously damage, the integrity of the proceedings".[17] In any event, no circumstances have been raised by the Prosecution to suggest that exclusion is not the appropriate response to the violation of the right. The interview of the Accused Kabiligi is excluded.

[17] *Delalic* Exclusion Decision, para. 43.

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(ii) *Documents Created Contemporaneous with Events*

(a) BAGOTHE-38

22. Rule 89 (C) provides the Chamber with the discretion to admit any relevant evidence which it deems to have probative value. Conversely, this rule imposes an obligation to refuse evidence which is not relevant or does not have probative value.[18] At the admissibility stage, the moving party need only make a *prima facie* showing that the document is relevant and has probative value.[19] This Chamber recently discussed in detail the conditions for admission of documentary evidence:

> In offering a document for admission as evidence, the moving party must as an initial matter explain what the document is. The moving party must further provide indications that the document is authentic – that is, that the document is actually what the moving party purports it to be. There are no technical rules or preconditions for authentication of a document, but there must be "sufficient indicia of reliability" to justify its admission. Indicia of reliability which have justified admission of documents in the jurisprudence of the *ad hoc* Tribunals include: the place in which the document was seized, in conjunction with testimony describing the chain of custody since the seizure of the document; corroboration of the contents of the document with other evidence; and the nature of the document itself, such as signatures, stamps, or even the form of the handwriting.[20] Authenticity and reliability are overlapping concepts: the fact that the document is what it purports to be enhances the likely truth of the contents thereof. On the other hand, if the document is not what the moving party purports it to be, the contents of the document cannot be considered reliable, or as having probative value.[21]

23. The Prosecution asserts that the written authorisation to purchase arms and ammunition, dated 27 July 1993, purportedly signed by Bagosora in his official capacity as *Directeur de Cabinet* of the Ministry of Defence (BAGOTHE-38), is relevant to the manner in which Bagosora signed authorisations, given that the Defence for Bagosora challenged this in its cross-examination of Prosecution Witness KJ. The Chamber notes that the Defence has not conceded the authenticity of the document and only admits that the signature appears to be that of Bagosora. The document is relevant and will be admitted. Its authenticity and evidentiary weight will be assessed in the context of all available evidence.

(b) BAGOTHE-25 and BAGOTHE-26

24. The Defence for Bagosora agrees to the admission of BAGOTHE-25 on condition that two other documents produced by the Prosecution, BAGOTHE-34 and BELGGVT-2, also be admitted into evidence to provide additional context. This is not a valid objection to the admission of the document. There is no need to condition the admission of one document upon the introduction of a second document which may provide additional information on a matter discussed in the first. The Defence may itself introduce any relevant and admissible evidence at the time of its choosing. Accordingly, BAGOTHE-25 is admissible.

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[18] *Bagasora, et. al.*, Decision on Admissibility of Evidence of Witness DBQ (TC), 18 November 2003, para. 8.
[19] *Bagosora et al.*, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole (TC), 13 September 2004, para. 7; *Musema*, Judgement, TC, paras. 35-38.
[20] *Delalic*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998, para. 18; *Kordic and Cerkez*, Decision on Prosecutor's Submissions Concerning 'Zagreb Exhibits' and Presidential Transcripts (TC), 1 December 2000, paras. 43-44; *Brdanin and Talic*, Order on the Standards Governing the Admission of Evidence (TC), 15 February 2002, para. 20.
[21] *Bagosora et al.*, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole (TC), 13 September 2004, para. 8.

25. The Defence for Bagosora asks the Chamber to refrain from any decision on the admissibility of BAGOTHE-26 until such time as an original of the document is produced for inspection by the Prosecution. The Prosecution has not indicated whether it is in possession of an original of the document. While an original of a document is not a precondition for admissibility, the Chamber would expect that, when available, an original of a document should be provided for inspection to assist the parties in assessing the authenticity of the document. Without further clarification concerning the availability of an original of the document, the Chamber declines to admit the document at the present stage.

(c) UNAMIRZ-04

26. The Defence made no objection to the admission of the agreement between the United Nations and Rwanda on the status of UNAMIR forces in Rwanda in 1994. The Chamber considers the document admissible.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution motions to admit into evidence the records of interviews of the Accused Ntabakuze, identified as NTABALO-14 and -15; the written authorisation to purchase arms (BAGOTHE-38); the documents relating to transport of arms (BAGOTHE-25); the Agreement between the United Nations and Rwanda on the Status of UNAMIR (UNAMIRZ-04);

DIRECTS the Registry to mark each of the admitted documents as a Prosecution exhibit; and

DENIES the Prosecution motion in respect of KABIGRA-01 and -02 and BAGOTHE-26.

Arusha, ~~14 October 2004~~

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

[Seal of the Tribunal]