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UNITED NATIONS
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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

TRIAL CHAMBER III

Original: English

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

Registrar: Mr. Adama Dieng

Decision of : 9 November 2001

THE PROSECUTOR
versus
LAURENT SEMANZA

Case No. ICTR-97-20-T

DECISION ON A DEFENCE APPLICATION TO ADMIT INTO EVIDENCE A REPORT OF PROSECUTION INVESTIGATOR P.J.J. HEUTS

Counsel for the Prosecutor:
Mr. Chile Eboe-Osuji
Ms. Patricia Wildermuth
Ms. Amanda Reichman

Counsel for the Accused:
Mr. Charles A. Taku
Mr. Sadikou Ayo Alao

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

SITTING as Trial Chamber III composed of Judge Yakov Ostrovsky, presiding, Judge Lloyd George Williams, and Judge Pavel Dolenc (the "Chamber");

BEING SEIZED during sessions of the Chamber on 6 and 7 November 2001 of the Defence application (the "Application") to admit into evidence in this case a report prepared by Prosecution investigator P.J.J. Heuts, dated 16 May and 18 June 1996, and entitled "Investigation church Musha parish, two mine shafts and an excavated massgrave on an old tin mine site in the commune Gikoro, Prefecture Kigali" (the "Report");

NOTING that during an open session on 7 November 2001 the Prosecutor objected to admitting the Report into evidence;

CONSIDERING that the Defence first made the same Application in its Defence Reply to Prosecution's Motion to Vary Witness to be Called in Prosecution Case-in-Chief pursuant to Rule 73*bis*E, Rule of Procedure and Evidence, ICTR, filed on 23 March 2001;

CONSIDERING that the Defence reiterated its Application during an open session of the Chamber on 26 March 2001 (*see* Tr., 26 March 2001, page 2, line 22 through page 3, line 6);

CONSIDERING that the Chamber reserved its decision on this matter at its sitting of 26 March 2001 (*see* Tr., 26 March 2001, page 4, lines 17-21) while at the same time granting the Prosecutor's request to drop from it witness list two witnesses, including investigator Heuts;

NOW DECIDES the matter.

WHEREAS the Chamber finds that the Report should be considered together with the photofile of 35 photographs attached to it and that these materials had not yet been admitted into evidence.

WHEREAS the Defence moved the Chamber to admit into evidence the Report, stating that the materials referred to in the Report had been previously tendered by the Prosecutor.

WHEREAS the Prosecutor objected to admitting the Report into evidence on the ground that the Chamber had granted its motion to drop Heuts from the list of witnesses and that the Defence cannot tender the Report into evidence when Heuts is not a witness.

WHEREAS the Chamber does not consider the fact that Heuts is not a witness in this case to be a legal obstacle to admitting the Report and the attached photofile into evidence pursuant to the Application. Notably, there is no dispute between the parties that the Report and the photographs were created by an authorized investigator of the Prosecutor P.J.J. Heuts regarding his investigations on 16 May and 18 June 1996 on the site of a massacre at Musha Church. The Prosecutor's objection is based merely on the fact that these materials are not being tendered into evidence in accordance with common law evidentiary rules regarding proper foundation and authentication of such documents.

However, pursuant to Rule 89(A) and (B) the Chamber is not bound by national rules of

evidence, rather it shall apply the rule, consonant with law, "which best favors a fair determination of the matter". In this case the documents were created by an authorized Prosecution investigator and are therefore official documents of the Tribunal. The Prosecutor's objection is based on an evidentiary rule which is not part of the Tribunal's rules of evidence. Further, the Prosecutor has not provided any objection of a substantive nature. In these circumstances, verification of authenticity of tendered documents pursuant to Rule 89(D) is needless. The Prosecutor shall not suffer any prejudice, moreover, it appears that she herself intended to tender the same documents into evidence and that she abandoned this intention because of logistical difficulties in calling Heuts to testify. To call the author of the documents only to lay a foundation appears, in these circumstances, completely impracticable and an inappropriate waste of time and resources of the Tribunal and would be, consequently, contrary to the fair determination of the matter.

WHEREAS the Chamber considers the Report and the said photfile admissible into evidence on the basis of Rule 89(C) and finds that the said materials are directly related to paragraph 3.11 of the concise statement of facts in the indictment and that these materials could have probative value.

CONSEQUENTLY, THE TRIBUNAL HEREBY

GRANTS the Defence Application to admit into evidence in this case the Report together with the annexed photofile; and

DIRECTS the Registry to include in the evidence in this case the said materials and to number them accordingly.

Arusha, 9 November 2001.

Yakov Ostrovsky
Judge, presiding

Lloyd George Williams
Judge
See Separate Dissenting Opinion LGW.

Pavel Dolenc
Judge

[Seal of the Tribunal]

Separate Dissenting Opinion of Judge Lloyd G. Williams on the Defence Application to Admit Into Evidence the Report of Investigator Pierre Heuts

1. The Majority Decision is extraordinary because every factual premise underlying the Defence application for the admission of the so called Heuts Report[1] is gone, leaving the application dangling without any foundation in fact or in law. Under these circumstances, I respectfully decline to subscribe to the exotic unprincipled brand of judicial discretion the Majority has exercised.

2. In order to fully appreciate the lack of factual underpinning for the Majority Decision it is necessary to recall some critical misapprehension of facts, which precipitated the Defence application in the first instance. On 22 March 2001, the Prosecutor filed a Motion to Vary Witnesses to Be Called in the Prosecution Case-in-Chief Pursuant to Rule 73 *bis* (E) (the "73 bis (E) Motion"). In the 73 *bis* (E) Motion, among other things, the Prosecutor asked to remove Heuts from the list of witnesses she intended to call at trial. On 26 March 2001 the Chamber rendered an oral decision granting the Prosecutor's 73 *bis* (E) Motion. In the decision on the 73 *bis* (E) Motion, however, the Chamber reserved disposition of the request of the Defence made in its response to the Prosecutor's motion.

3. In the Defence Response to the 73 *bis* (E) Motion and again during the trial proceedings of 26 March and 7 November 2001 the Defence made an application for the admission of the Heuts Report notwithstanding any decision permitting the Prosecutor not to call Mr. Heuts. In making the application, the Defence was labouring under the mistaken belief that a certain videocassette, allegedly prepared by Heuts, had been admitted in evidence through the testimony of another Prosecution witness, an investigator with the Office of the Prosecutor, Mr. Duclos. Moreover, the Defence submitted during the oral argument on its application that videotapes produced by Heuts were entered into evidence without the benefit of an explanatory report prepared by Investigator Heuts. Motivated by the foregoing understanding of the circumstances, the Defence hoped to admit the Heuts Report into evidence because it believed that allowing Heuts' videocassettes to remain in evidence without the benefit of the accompanying report would visit great injustice upon the Accused since the Heuts Report contained a forensic analysis on issues bearing directly on crimes charged in the Indictment. *See* 7 November 2001 Trial Transcript.

4. First, contrary to the cardinal belief motivating the Defence application to admit the Heuts Report, *nothing* prepared by Heuts was admitted into evidence through Duclos or any other witness. Duclos introduced only the three videotapes he created which were marked as Exhibits P6A-1, P6A-2, and P6A-3.[2] Thus the trial record does not contain the following

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1. Although the Majority has referred to the document Heuts prepared as the "Heuts Report," I don't believe that the document in question, which comprises nothing more than notes indexing certain photographic stills, merits such a designation. Indeed, without recourse to the photographs and the video referred to in the Heuts documents, it is wholly unintelligible because it contains no explanatory narrative. Nevertheless, for ease of reference, I shall refer to the Heuts document as the Heuts Report, using the nomenclature of the Majority.

2. In fact, owing to some confusion during the proceedings the three videotapes introduced by Duclos, although treated in the proceedings as trial exhibits, were never formally admitted into evidence. Because of this

materials that were disclosed by the Prosecutor to the Defence in the pre-trial phase of this case in compliance with Rule 66 (i) Video Tape prepared by Heuts or (ii) still photographs taken by Heuts during the course of his investigation.[3] *See* 17 October 2000 Trial Tr. 67:3-69:9.

5. Second, and equally important, Duclos tendered and testified only about those videos, or photographs in which he personally participated in creating. He did not rely on nor did he testify about materials prepared by other investigators. On this fact, Duclos, if his uncontested testimony is to be believed, stated that he approached the investigation as a "virgin" territory. *See* 17 October 2000 Trial Tr. 110:10-112:8

6. Finally, Duclos testified that he had no knowledge of nor did he use the Heuts Report and its associated still photographs and videotape in undertaking his investigations or in drawing his conclusions. Accordingly, he did not testify about the substantive contents of the Heuts Report or of the videotape prepared by "Unknown Investigator," a videotape the Defence believes was produced by Heuts. *See* 16 October 2000 Trial Tr. 119:20-122:11.

7. More troubling is that although the Defence never asked for the still photographs allegedly associated with the Heuts Report to be admitted into evidence, the Majority has nevertheless seen fit to admit them. This is judicial activism in the extreme. When a party makes an application predicated on factual (and legal) grounds which wholly fail, it is quite unusual, as the Majority Decision has done, for the Chamber not only to entertain it but to grant *more* relief than the movant has requested. More peculiar still, the Majority Decision makes no mention of the very videocassette that prompted the Defence to make its ill-founded application to admit the Heuts Report. On this, the Defence was clear: it sought the admission of the Heuts report to explain the contents of a certain videocassette it believed was produced by Heuts. *See* Defence Reply to the 73 Bis (E) Motion, filed 23 March 2001. *See* also, 7 November 2001 Trial Transcript.

8. Aside from lacking any basis in fact, the Defence application suffers from another fundamental infirmity: neither the Tribunal's Rules of Procedure and Evidence nor any other applicable or instructive rule from any authoritative or instructive national jurisdictions, based either on the civil code or the common law, would countenance the admission of the Heuts Report and still photographs under the current circumstances.

9. Although, Rule 89(A) frees the Chamber from rigid submission to the rules of evidence and procedure extant in national jurisdictions, the Rules, in no way permit the admission of out-of-court evidence lacking any indicia of reliability or authenticity. *See* Rule 89(D). The Majority Decision does not address this fundamental duty of the Chamber to ensure some threshold measure of authenticity and reliability of the out-of-court evidence it allows to litter the trial record. Rather than address legitimate issues regarding the authenticity and reliability of the

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irregularity, the Prosecutor filed on 8 November a motion to regularise the record in relation to exhibits P6A-1, P6A-2, and P6A-3. *See* 17 October 2000 Trial Tr. 67:3-69:9.

[3]. In discharge of her obligations pursuant to Rule 66(A), the Prosecutor did, however, disclosed to the Defence during the pre-trial phase of this matter, the Heuts Report and its accompanying and explanatory still photographs and video tape.

Heuts Report and photographs, the Majority blithely assuages such concerns by resting upon the erroneous assumption: "In this case the documents were created by an authorised Prosecution investigator and are therefore documents of the Tribunal." *See* Majority Decision at p. 2.

10. This premise of the Majority betrays a dangerous misunderstanding of the separation of powers and independence of the various autonomous units comprising the Tribunal. The Prosecutor is under an affirmative duty to function independent of any other organ of the Tribunal. Indeed, Article 15(2) provides, "The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda." Any other arrangement wherein the Chamber and the Prosecutor collude would impugn the impartiality and independence of the Chamber in fairly adjudicating the matters coming before it. Moreover, if this premise were true, *all* Prosecution witness statements prepared by the Prosecutor's investigator could be admitted into evidence, dispensing with the necessity of the Prosecutor of bringing witnesses to give evidence before the Chambers. Consequently, if placed in practice, the Majority belief that the reports of the Prosecutor's investigators are "official documents of the Tribunal", dangerously threatens to frustrate the Accused's guaranteed right to be confronted by and have the opportunity to examine *all* the witnesses against him pursuant to Article 20(e) of the Statute.

11. There is no hearsay rule in operation *per se* forbidding the admission of out-of court statements and reports, the Rules do not, however, permit the manner of wholesale disregard for the principles of authentication reliability underlying the Majority Decision. Accordingly, the Chamber should exercise its discretion sparingly with great care to avoid wielding the power in an inappropriate manner that impugns its appearance of impartiality or menaces cardinal rights of the parties.

12. Although the lack of legal and factual foundation for the Defence application is enough to have resulted in its denial, other, more paramount considerations of consistency, fairness, and precedential repercussions should have prevented the Majority from embarking on this treacherously slippery slope.

13. Notably, to date the trial in this matter has been conducted respecting, for the most part, the common law rules of procedure for matters not provided for in the Rules. *See* e.g., (i) exclusion of out-of-court Witness Statements as affirmative evidence; according the adverse party a right to cross-examination; (ii) the Accused's right to representation by counsel of his choice and to select his own investigators and expert witnesses; (iii) requiring that a foundation be laid for the admission of each trial exhibit, including requiring that the person who prepared a report or took photographs or video tapes or had custody of same to appear before the Chamber to give testimony and be available for cross-examination.

14. Having conducted the proceedings thus far largely adhering to a common law scheme, it would be prejudicial to all parties concerned for this Chamber to now, unilaterally, change the rules and procedures by which evidence becomes part of the trial record. It is essential that the Chamber adhere to jurisprudential consistency. Otherwise, litigants appearing before the Chamber will not know what to expect, creating uncertainty and prejudice, neither of which is in the interest of justice.

15. Documents ought not to be admitted into evidence on the mere whim of one of the parties. The circumstances in this case demand that a foundation be laid for the admission of the Heuts Report. Indeed, it is with respect to this very fundamental common law principle that the Defence even made the application for the admission of the Heuts Report. Operating under the belief that the Chamber had allowed, without the benefit of foundation, into the trial record testimony and a videotape of Heuts, through the testimony of Duclos, an investigator who took no part in the investigations nor possessed any first hand knowledge about the investigations and photographs and videos prepared by Heuts, another investigator.

16. While Rule 89 (A) liberates the Chamber from slavish adherence to the rules of evidence and procedure extant in national jurisdictions, Rule 89 (B) informs and delimits the boundaries of the liberty. In this regard, Rule 89(B) contains an affirmative injunction that "in cases not otherwise provided for in this Section, a Chamber shall apply the rules of evidence which best favour a fair determination of the matter before it and *are consonant with the Spirit of the Statute and general principles of law."* (Emphasis added).

17. The Statute and Rules promulgated pursuant to it decidedly favour the common law system's rules of procedure and evidence. This is plainly evident in the simple fact that the proceeding are largely conducted as adversarial, with each side, the Prosecutor and the Accused being represented by their respective counsel. It is for this reason that cross-examination is permitted to test the reliability and veracity of all evidence, be it testimony before the Chamber or out-of-court statements tendered into evidence. Had the rules envisioned adherence to a largely civil law system, the propriety for cross-examination would have been obviated. In a civil law system, the court operates more as an inquisitor rather than an arbiter. Under such systems, it is the court, not the parties, who appoint an independent investigator and experts who are to collect and opine upon all the evidence for and against the accused.

18. Perhaps the best demonstration of the common law grounding of the "spirit of the Statute" and the Rules may be found in the observation that *all* pre-trial and trial proceedings in this Tribunal are conducted in compliance with an adversarial system, a hallmark of the common law. Notably, each party, the Prosecutor, and independent counsel of his or her own choice represents the Accused. *See* Article 20 of the Statute. The various Chambers do not act as inquisitors but rather as arbiter of the proceedings. The witnesses are called to testify by the court, not the parties. The parties are afforded the right to examine their own witnesses and cross-examine their adversaries' witnesses. *See* Rule 85(B). Finally, an perhaps more important for the current purposes, the Tribunal does not appoint independent impartial experts or investigators. Rather, each party engages his or her own investigators and experts. These practices stand in contrast to those in courts operating under the civil code.

19. The majority has embarked on a very treacherous slippery slope, one which sets a dangerous precedent allowing any party to wave before the court any out-of-court statement or report and demand its admission without affording his or her adversary the opportunity to test the authenticity or reliability of the document in question. More, unsettling still is the Majority's apparent abandonment of its duty of impartiality and respect for the right of the Accused to be confronted by and have the opportunity to examine every witness against him.

20. Admitting documents in the *laissez faire* manner advocated by the Majority creates a dangerous precedent, one which creates an evidentiary free-for all. No doubt, the Chamber will encounter considerable difficulty in future when it will inevitably be necessary to reassert boundaries and principled rules for the admission of evidence.

21. As a final justification for admitting the Heuts Report and its associated photographs, the Majority Decision states: "To call the author of the documents (sic) only to lay a foundation appears, in these circumstances, completely impracticable and an inappropriate waste of time and resources of the tribunal (sic) and would be consequently contrary to the fair determination of the matter." *See* Majority Decision at p. 3. While it is commendable that the Majority considered the practicalities and costs associated with calling Heuts as a witness during the trial proceedings, such practical difficulties and parsimony, alone, do not warrant dispensing with consistency, fairness and the interests of justice in fostering a reasoned analysis of the propriety of admitting into evidence an unauthenticated document and photographs allegedly attributed to Heuts. In my view this is an oversimplification of the matter.

22. For the foregoing reasons, the Chamber should have denied the Defence application in its entirety.

Arusha, 12 November 2001

Lloyd G. Williams
Judge