

ICTR-2001-70-I  
25-10-2002  
(1655-1651)

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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda

OR: Eng

**TRIAL CHAMBER III**

Before: Judge Yakov Ostrovsky

Registrar: Adama Dieng

Date: 25 October 2002

**The Prosecutor**

v.

**Emmanuel RUKUNDO**

**Case No. ICTR-01-70-I**

JUDICIAL RECORDS DIVISION  
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ICTR  
2002 OCT 25 P 1:24  
*Emmanuel Rukundo*

**DECISION ON THE PROSECUTOR'S MOTION TO ORDER THE REGISTRAR TO  
PROVIDE PHOTOGRAPHS OF THE ACCUSED FOR PURPOSES OF  
IDENTIFICATION**

**Counsel for the Prosecutor**

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Mr. Jonathan MOSES  
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Mr. Dennis MABURA

**Counsel for the Defence**

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (Tribunal),**

**SITTING** as Judge Yakov Ostrovsky, as designated by Trial Chamber III pursuant to Rule 73(A) of the Rules of Procedure and Evidence (the "Rules");

**BEING SEISED** of the "Prosecutor's Motion to Order the Registrar to Provide Photographs of the Accused for Purposes of Identification" filed on 26 September 2001;

**CONSIDERING** the Registry's written representations to the Chamber pursuant to Rule 33(B) dated 15 October 2002;

**NOTING** that the Defence has not responded or indicated an intention to respond to the Prosecutor's motion;

**NOW DECIDES** the Prosecutor's motion solely on the basis of her brief pursuant to Rule 73(A) of the Rules;

**SUBMISSIONS OF THE PROSECUTOR:**

1. The Prosecutor seeks an order from this Tribunal directing the Registrar to provide directly to a single judge designated by the Trial Chamber a copy of a photograph of the Accused, Emmanuel Rukundo, and photographs of no less than five other men of about the same age and physical appearance as Rukundo. The Prosecution further seeks that this single judge, *in camera*, supervise and approve the composition of a photograph identification board. In the alternative, the Prosecutor seeks any other order that allows the Prosecutor to conduct photograph identification.
2. In support of her motion, the Prosecutor invokes Rule 39, which concerns the role of the Prosecutor in conducting investigations. The Prosecutor also asserts that her position is supported by Rule 54, which provides that a party may request a Judge or the Trial Chamber "to issue such orders . . . as may be necessary for an investigation or for the preparation or conduct of the trial" and Rule 73, which allows a party to seek an appropriate ruling or relief from the Trial Chamber.
3. The Prosecutor submits that she does not have a photograph of the Accused, but notes that the Registrar does have such a photograph. The Prosecutor also submits that the Registry has the necessary equipment to take the photographs of five other men of similar age and appearance as the Accused.
4. The Prosecutor would like to use the photographs of the Accused and the five other men to create a photo array. The Prosecutor then proposes to use this six picture photo array during its on-going investigations to test the ability of existing and potential witnesses to identify the Accused. The Prosecutor would like a single judge designated by the Trial Chamber to supervise the preparation of this photo array and approve it.
5. The Prosecutor asserts that she will show the approved photo array to witnesses who have indicated that they saw the Accused during the course of acts alleged in the Indictment. The Prosecutor asserts that she will memorialise the identification process and subsequently disclose the results to the Defence.

6. The Prosecutor asserts that “[t]he approval of the photograph identification show up board by a Judge, the prior reading of an admonition to the witness, the use of six photographs, and the memorialising of the identification in a written report are procedural safeguards to protect the rights of the Accused.”
7. The Prosecutor submits that such an identification would be relevant and probative evidence and would provide the Chamber with “more than an in-court identification”.
8. The Registrar indicated that he would not provide a copy of the Accused’s photograph or the photographs of others to the Prosecutor without an order from the Trial Chamber. As a result, the Prosecutor has filed her motion.

**FINDINGS:**

9. The Trial Chamber has carefully considered the submissions of the Prosecutor and the representations of the Registrar.
10. The Prosecutor’s proposal essentially cedes a degree of her responsibility to investigate and ultimately establish the identity of the Accused at trial to the Registry. The Trial Chamber notes that the nature of the assistance that the Prosecutor seeks would require the Registry to actively participate and control an important aspect of her ongoing investigations. The Registry is being asked to furnish a photo of the Accused that was taken originally for administrative purposes. In addition, the Registry is being asked to provide five other photographs of men of similar age and physical appearance. This would require Registry personnel to seek out other individuals and to exercise their judgement as to whether the selected individuals share a likeness with the Accused. The Trial Chamber is then being asked to approve this photo array *in camera* for the Prosecutor’s use during investigations.
11. The Trial Chamber does not find any basis in either the Statute or the Rules for the order that the Prosecutor seeks concerning the Registry. The Chamber rather supports the position of the Registrar that he is not under an obligation to assist the Prosecutor in providing evidence to prove any fact in issue before the Tribunal relating to the identity of the Accused as the one who committed the alleged crime.
12. The Rules and the Statute are clear that the conduct of investigations is the sole responsibility of the Prosecutor. Article 15 provides that the “Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law”. Article 15 further indicates that this is an independent function that should be free from influence.
13. The Registry is responsible for the “administration and servicing” of the Tribunal. A review of the duties of Registrar provided for in the Statute and Rules reveals that the Registry’s assistance to both parties and Chambers is of an administrative, ministerial, and logistical nature. For example, the Registrar is tasked with, *inter alia*, serving as a “channel of communication”, preparing minutes at the Tribunal’s plenary meetings and the sittings of the Chambers, recording the particulars of each case, and facilitating the availability of counsel for the Accused. These functions highlight the impartial role of the Registry in the conduct of the Tribunal’s affairs. In contrast to the

traditional and impartial duties normally performed by the Registry, the Prosecution wants to involve it in the sensitive task of photographing the Accused and deciding who shares his likeness so that the Prosecutor may test her witnesses and prove the Accused's identity in what has been termed "more than an in court identification".

14. The Prosecutor has based its motion on Rules 39, 54, 68, and 73. The Chamber does not find that any of these rules support the Prosecutor's position.
15. Rule 73 only provides for the right of a party to apply for an appropriate ruling or relief. This Rule also emphasises that motions, which are made under it, should not be "frivolous or an abuse of process".
16. Rule 39(ii) clearly indicates that it is the Prosecutor who must "take all measures deemed necessary for the purpose of investigation and to support the prosecution at trial".
17. Even though Rule 39 (iii) also allows the Prosecutor to "seek, to that end, assistance" and Rule 39 (iv) allows her to "request" orders, the Trial Chamber simply cannot accept that the language of this rule justifies involving the Registry in a matter that likely exceeds its mandate and compromises its neutral administrative function.
18. Furthermore, under both Rules 39 (iv) and 54, the Trial Chamber should only grant those requests that it finds "necessary". Thus, even if the Registry's "administering and servicing" function could be interpreted to include the requested assistance, the Trial Chamber nonetheless is not of the opinion that the requested measures are necessary.
19. The Trial Chamber notes that simply because the Registrar has a photo of the Accused and photographic equipment does not justify shifting the Prosecutor's independent duty to conduct investigations onto the Registrar. The Prosecutor's staff includes investigators, and the Trial Chamber is confident that the Prosecutor has sufficient resources to locate or obtain photographs of the Accused and five other individuals.
20. The Trial Chamber also emphasises that the impartiality of the Registry would be compromised by requiring the Registrar to provide photos taken for administrative purposes and to involve him in an activity so closely related to the discharge of an element of the Prosecutor's burden of proof at trial. The Trial Chamber likewise does not find it appropriate to supervise and approve the preparation of a photo array to be used for similar ends.
21. Even if its principal request is not granted, the Prosecution nonetheless seeks an order authorising it to conduct photo identification. The Chamber recalls that Trial Chamber II in a decision on a similar motion stated that "the proposed identification procedure would lead to an identification that is completed outside of Court. In the Chamber's view, this will not be in the interest of justice and might prejudice the right of the Accused to a fair trial."<sup>1</sup>

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<sup>1</sup> Decision on the Prosecutor's Motion for an Order to the Registrar to Furnish the Prosecutor with A Copy of the Photograph of the Accused, *Prosecutor v. Kamuhanda*, ICTR-99-54A-T, Tr. Ch., 1 Feb. 2002, at para. 14.

22. Notwithstanding, it is not the role of the Chamber to advise the Prosecutor on a particular strategy for conducting her investigation or prosecution given her independence and the wide latitude to take "all measures deemed necessary" pursuant to Rule 39 (ii). Thus, the Trial Chamber will refrain from placing its imprimatur of approval on a particular investigation or trial strategy involving the Prosecutor's burden to prove beyond a reasonable doubt the identification of the Accused as a participant in the acts alleged in the Indictment.

**THE TRIBUNAL THEREFORE:**

23. **DENIES** the Prosecutor Motion to Order the Registrar to Provide Photographs of the Accused for Purposes of Identification.

Arusha, 25 October 2002



Yakov Ostrovsky

Judge

[Seal of the Tribunal]