



ICTR-98-44A-T  
1.7.2003  
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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

## TRIAL CHAMBER II

**Before:** Judge William H. Sekule, Presiding  
Judge Winston C. Matanzima Maqutu  
Judge Arlette Ramaroson

**Registrar:** Adama Dieng

**Date:** 1 July 2003

The PROSECUTOR  
v.  
Juvenal KAJELIJELI

Case No. ICTR-99-44A-T

2003 JUL -1 P 5:43  
ICTR  
JUDICIAL RECORDS/ARCHIVES

### DECISION ON KAJELIJELI'S REQUEST TO ADMIT INTO EVIDENCE THE STATEMENTS OF GAO

**Office of the Prosecutor**  
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Lennox Hinds  
Nkeyi Makanyi Bompaka

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

**SITTING** as Trial Chamber II composed of Judges William H. Sekule, Presiding, Winston C. Matanzima Maqutu and Arlette Ramaroson (the "Chamber");

**BEING SEIZED** of Kajelijeli's "Notice of Leave to File Extremely Urgent Motion to Admit into Evidence GAO's Statement pursuant to Rule 92bis," attached to which are Appendix 1 to 7 filed on 30 May 2003 and a translation into English and French of the contents of Appendix 2 filed on 11 June 2003 (the "Motion");

**HAVING RECEIVED AND CONSIDERED** the "Prosecutor's Response to Defence Extremely Urgent Motion to Admit into Evidence GAO's Statement pursuant to Rule 92bis," filed on 5 June 2003 (the "Prosecutor's Response"); **AND** The "Defence Reply to Prosecutor's Response to Defence Extremely Urgent Motion to Admit into Evidence GAO's Statement pursuant to Rule 92bis," filed on 6 June 2003 (the "Defence Reply");


**CONSIDERING** the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 92bis of the Rules;

**NOW DECIDES** the Motion solely on the basis of the written briefs filed by the Parties pursuant to Rule 73(A) of the Rules.

#### **SUBMISSIONS OF THE PARTIES**

##### *Defence Submissions*

1. The Defence submits that after the Chamber directed the Prosecution to make arrangements for the Defence to make photographic copies of the fingerprints of Prosecution Witness GAO, it did so and sent them to Mr. Arthur F. Hagenlocher who is a fingerprint expert. Mr. Hagenlocher was instructed to compare the said photographic copy of the fingerprints in Defence Exhibits marked 8c, 8d, 8e and 8f for identification, which are Prosecution Witness GAO's statements with photographs of known fingerprints of GAO in his statement of 7 May 1999.
2. On 27 May 2003, Mr. Hagenlocher rendered his expert opinion which establishes that the statements marked Exhibits 8c, 8d and 8e for identification whose ownership Prosecution Witness GAO denied actually bore said witness' fingerprints.
3. The Defence submits that after reviewing the contents of Exhibits 8c, 8d and 8e for identification, it found that these statements contradict Prosecution Witness GAO's testimony, in the following manner:
  - a. That initially, Witness GAO admitted that all the statements were his and later he denied that some of them were his, for example he denied that parts of his confessional statement of 2 February 1999 (Exhibit c) was his;
  - b. That Witness GAO testified that he pleaded guilty before Mr. Kajelijeli was arrested and transferred to the Tribunal when his confession of 2 February 1999 contradicts this as it was made only after Mr. Kajelijeli was arrested;
  - c. That in his confession, Witness GAO never mentioned seeing Mr. Kajelijeli on 7 April 1994, rather, the individual that he claimed who incited him and



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others at Byangabo that morning was "a soldier" whose identity was later confirmed to be Lieutenant Mburuburengero by several Defence witnesses;

- d. That there was no mention of the Court of Appeals in GAO's confession of 2 February 1999 or of Mr. Kajelijeli's involvement therein;
- e. That whereas in his statement of 25 May 1999 made to the Rwanda Authorities (Exhibit 8e for identification), Witness GAO never made mention of Mr. Kajelijeli's involvement in the attack on the Court of Appeal when he was asked to name those that were involved in the attack contrasted to his testimony before the Tribunal where he mentions him;
- f. That in none of his statements made to the Rwanda Authorities did Witness GAO mention the setting up of a committee to sell Tutsi properties and land as contrasted from his testimony.

4. The Defence submits that the said statements are critical to its defence and thus, in the interests of justice, it requests that the Chamber admit into evidence the Exhibits marked 8d and 8e for identification pursuant to Rule 92bis. Furthermore, the Defence seeks to have the expert report of Mr. Hagenlocher admitted into evidence because it confirms the ownership of the fingerprint on Exhibits marked 8d and 8e for identification as belonging to Prosecution Witness GAO.

5. The Defence argues that once Exhibits marked 8d and 8e for identification are admitted into evidence, it intends to use them to impeach the credibility of Prosecution Witness GAO in its Closing Brief, which is due for filing on 7 July 2003.

#### *Prosecutor's Response*

6. The Prosecution opposes the Motion, challenging the expertise of Mr. Hagenlocher because it is not satisfied with the 'means' which Mr. Hagenlocher used to make his findings, in particular because Mr. Hagenlocher has never looked at the original of the statements made by Prosecution Witness GAO. The Prosecution further objects, because it has not been provided with an opportunity to cross-examine Mr. Hagenlocher on his competence as a fingerprint expert.

7. The Prosecution argues that the Defence has had sufficient opportunity to cross-examine Prosecution Witness GAO as to his credit in respect of Exhibits marked 8d and 8e for identification.

8. Finally, the Prosecution prays that the Chamber dismiss the Motion in its entirety for being frivolous and an abuse of court process and to sanction the Defence for such conduct.

#### *Defence Reply*

9. In its Reply, the Defence recalls the three reasons upon which the Prosecution relies in objection to the Motion and submits that:

- a. With regard to the Prosecution objection as to the 'means' by which Mr. Hagenlocher came to his conclusions, the Defence argues that following Witness GAO's testimony that the fingerprints on the Exhibits marked 8d and 8e for identification were not his, the Defence took steps to verify the authenticity of said fingerprints. The Defence argues that since the

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Prosecution knew that the Defence claimed that the two documents were authentic, the Prosecution should have retained her own to forensic expert to substantiate GAO's contention that the statements were not his. The Defence argues that the Prosecution does not provide the Chamber with any factual or legal basis as to why it challenges the expertise of Mr. Hagenlocher.<sup>1</sup>

- b. Regarding the Prosecution objection that it has not been given the opportunity to cross-examine Mr. Hagenlocher on his competence as a fingerprint expert, the Defence draws the attention of the Chamber to Rule 92bis(E) that it is the Chamber's discretion whether to require the witness to appear for cross-examination.
- c. With regard to the Prosecution contention that the Defence have had ample opportunity to cross-examine Prosecution Witness GAO as to his credit in respect of Exhibits marked 8d and 8e for identification, the Defence draws the attention of the Chamber to the testimony of Prosecution Witness GAO given during cross-examination on 28 November 2001. The Defence argues that it was not able to cross-examine Prosecution Witness GAO as to the contents of the said exhibits because he denied knowledge and ownership of them.

10. The Defence submits that Exhibits marked 8d and 8e for identification go to the credibility of Prosecution Witness GAO rather than 'the acts and conduct of the accused as charged in the indictment.' Furthermore, the Defence notes that the Prosecution has not proffered any arguments against admitting the evidence as set forth in Rule 92bis(A)(ii).

11. The Defence thus maintains its request and prays that the Chamber dismiss the Prosecution's objections as being without merit.

#### HAVING DELIBERATED

12. The issue before the Chamber is whether or not to admit Exhibits marked 8d and 8e, for identification following the report of the fingerprint expert Mr. Hagenlocher.

13. As a preliminary matter, the Chamber recalls that when Witness GAO was recalled for cross-examination by the Defence in November 2001, the following documents were admitted into evidence: Statement dated 18 April 1997 (exhibit 8a); Statement dated 22 May 1997 (exhibit 8b); Statement dated 2 February 1992 which was meant to have been dated 2 February 1999 (exhibit 8c). During that time, the following three documents were not admitted but were marked for identification purposes: Statement dated 18 February 1999 (exhibit 8d); Statement dated 25 May 1999 (exhibit 8e) and Statement dated 19 October 1999 (exhibit 8f). All of these documents were placed under seal because they contained the personal particulars of Witness GAO who is a protected witness.<sup>2</sup>

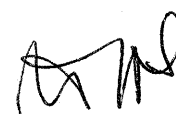
14. The Chamber recalls the history behind the admission of Exhibits marked 8d and 8e for identification, when on 26 November 2001, Prosecution Witness GAO admitted that the fingerprints on said documents were his<sup>3</sup> and then on 28 November 2001, he said they were not his.<sup>4</sup> The Chamber notes that, in an effort to authenticate the fingerprints on the said two documents, the Defence requested the Chamber to order the verification of the two

<sup>1</sup> See Defence Reply of 6 June 2003 at para. 1.

<sup>2</sup> See the List of Exhibits in this Case as compiled by the Registry

<sup>3</sup> See transcript of 26 November 2001 at page 46 and 47 and 52

<sup>4</sup> See transcript of 28 November 2001 at page 46 and 48



documents' authenticity, which it denied.<sup>5</sup> Thereafter, following extensive correspondences between the Parties that the Prosecution furnish the Defence with the originals of the statements of Witness GAO and the Prosecutions refusal to do so because *inter alia* Witness GAO is a protected witness, the Defence sought the assistance of the Chamber to compel the Prosecution to facilitate them to take photographs of the fingerprints on the original statements of Witness GAO.<sup>6</sup> This Defence request was granted.<sup>7</sup>

15. The Chamber notes that the Prosecution was aware that the Defence intended to authenticate the two documents of Prosecution Witness GAO and since the originals of the statements of Witness GAO were in the custody of the Prosecution, the Defence could not be penalised for the Prosecution's inability (for any reason) to provide such originals to the Defence.

16. In fact, the Defence seeks to have Exhibits marked 8d and 8e, for identification admitted because it submits, they contradict the testimony of Witness GAO. The Chamber is of the opinion that the two documents may be admitted to impeach the credibility of Witness GAO only with regard to those alleged contradictions that are outlined at para. 3 above. The Chamber notes that exhibit 8c has been admitted as an exhibit and therefore it cannot be a subject matter of this Motion.

17. Given this background and in the circumstances of this case, the Chamber decides to use its discretion and admits Exhibit marked 8d and 8e for identification pursuant to Rule 89(C) without calling Mr. Hagenlocher for cross-examination.

18. The Chamber thus directs the Registry to formally admit into evidence as Defence exhibits, Exhibit marked 8d for identification as Exhibit 8d and Exhibit marked 8e for identification as Exhibit 8e. The Chamber further directs the Registry to admit into evidence the expert report of Mr. Hagenlocher as Exhibit 8g. The Chamber directs the Registry to immediately inform the Parties and the Chamber accordingly.

19. Noting that the Prosecution has already filed its closing brief, the Chamber directs it to make any submissions it may have with regard to Exhibit 8d, 8e and 8g, when making its closing arguments, if it so wishes.

20. The Chamber further directs the Defence to make any submissions it may have with regard to Exhibit 8d, 8e and 8g, when making its closing arguments if it does not have sufficient time to deal with the same in the Closing Brief which is to be filed on 7 July 2003.

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<sup>5</sup> See "Decision on the Defence Motion for Verification of the Authenticity of Evidence Obtained out of Court (Rule 89(D))," of 11 April 2002.

<sup>6</sup> See "Notice of Extremely Urgent Motion to Compel Prosecutor to Facilitate the Defence to take Photographs of Original Documents in her Custody," filed by Kajelijeli on 27 March 2003.

<sup>7</sup> See "Decision on Kajelijeli's Motion to Compel the Prosecutor to Facilitate the Defence to Take Photographs of Original Documents in Her Custody Containing GAO's Fingerprints and GDD's Signatures," of 1 May 2003

**FOR THE ABOVE REASONS, THE TRIBUNAL**

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**GRANTS** the Defence request, and; admits into evidence as Defence exhibits Exhibit marked 8d and 8e for identification and the expert Report of Mr. Hagenlocher; and

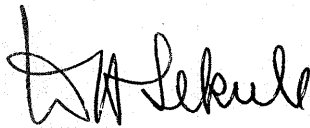
**DIRECTS** the Registry to:

- I Mark Exhibit 8d for identification as Exhibit 8d and Exhibit 8e for identification as Exhibit 8e; and
- II Mark the expert report of Mr. Hagenlocher as Exhibit 8g; and
- III Immediately inform the Parties and the Chamber accordingly; and

**DIRECTS** the Prosecution to make any submissions it may have with regard to Exhibit 8d, 8e and 8g, when making its closing arguments, if it so wishes.

**DIRECTS** the Defence to make any submissions it may have with regard to Exhibit 8d, 8e and 8g, when making its closing arguments if it does not have sufficient time to deal with the same in the Closing Brief which is to be filed on 7 July 2003.

Arusha, 1 July 2003



William H. Sekule  
Presiding Judge



Winston C. Matanzima Maqutu  
Judge



Arlette Ramaroson  
Judge

