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ICTR-01-76-T
31-01-2005
(3223-3218)



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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S. Muna

OR: ENG

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Sergei Alekseevich Egorov
Judge Dennis C. M. Byron

Registrar: Adama Dieng

Date: 31 January 2005

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THE PROSECUTOR

v.

Aloys SIMBA

Case No. ICTR-01-76-T

DECISION ON THE ADMISSION OF PROSECUTION EXHIBITS 27 AND 28

Office of the Prosecutor:

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”);

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

BEING SEIZED OF the Defence’s request for interpretation of an oral decision, made on 11 November 2004; the Defence’s “Requête en extrême urgence de la defense en vue de la vérification de l’authenticité et de la pertinence des pièces P27 et P28 de l’accusation et leur exclusion subséquente pour irrecevabilité”, filed on 12 November 2004; and the Defence “Motion for Leave to Appeal, Pursuant to Rule 72 (B)(ii), the Trial Chamber’s Oral Decision, 11 October 2004, on Admissibility of Prosecution Exhibits 27 and 28 and Defence Notice of Appeal, Pursuant to Rule 108”, filed on 17 November 2004;

CONSIDERING the Prosecution’s “Response to Defence Motion Seeking an Order to Verify the Authenticity and Probative Value of Exhibits P27 and P28”, filed on 17 November 2004; the Defence’s reply, filed 19 November 2004; and the Prosecution’s “Response to the Defence Motion Requesting Certification to Appeal Trial Chamber Oral Decision Regarding the Admission of Exhibits P27 and P28”, filed on 22 November 2004;

HAVING HEARD the parties on 8, 9, and 11 November 2004;

HEREBY DECIDES the motions and the request for certification.

INTRODUCTION

1. The Defence has made three separate requests in connection with the Chamber’s oral decision delivered on 11 November 2004 overruling an earlier objection to the admission of Prosecution Exhibits 27 and 28. The Chamber has considered these requests together, given the similarity of their procedural history and of the legal issues presented.
2. On 8 November 2004, the Chamber admitted Prosecution Exhibits 27 and 28 during the testimony of the investigator.¹ According to the investigator, Exhibit 27 purports to be a handwritten list of people who received firearms in Nyarusange sector. The document is dated 5 June 1994 and is illegibly signed by an unknown alternate *conseiller* of the bourgmestre of Nyabisindu commune in Butare. Exhibit 28 is a handwritten document by an unknown author bearing similar serial numbers as the weapons mentioned in Exhibit 27. The investigator stated that these documents were relevant to his previous testimony about the Accused’s involvement in recruitment, training of militia, and distribution of firearms in Gikongoro and neighbouring Butare prefectures.
3. The Defence sought an adjournment to prepare for cross-examination, arguing that the Prosecution had only provided copies of Exhibits 27 and 28 to the Defence that morning.² The Prosecution conceded that it had not previously indicated that the documents would be introduced by the investigator, but stated that the documents had been seized from the Accused

¹ T. 8 November 2004 pp. 19-20.

² *Id.* at pp. 39-43, 46.

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at the time of his arrest and were disclosed on 23 October 2003. The Chamber granted the Defence's request to adjourn the proceedings until the next morning.

4. The Defence raised its first objection to Exhibits 27 and 28 at the commencement of the proceedings on 9 November 2004.³ On 11 November 2004, the Chamber issued an oral decision overruling the Defence's objections to the admission of Exhibits 27 and 28.⁴ After the delivery of the decision, the Defence expressed its intention to appeal and later orally requested an interpretation. In particular, the Defence wanted to know if the Chamber's decision implied that the exhibits were seized from the Accused, or whether it indicated that exhibits tendered by the Prosecution need not be subject to prior notice in accord with Rule 73 *bis* (B)(v).⁵ On 12 November 2004, the Defence filed a written motion requesting authentication of the exhibits as well as their exclusion. On 17 November 2004, the Defence filed a request for certification to appeal the oral decision on the admissibility of Prosecution Exhibits 27 and 28.

SUBMISSIONS

5. The Defence's oral and written submissions raise three principal points related to Prosecution Exhibits 27 and 28, namely insufficient notice under Rule 73 *bis* (B)(v); their lack of relevance to the Indictment; and their questionable reliability. As an overarching issue going to each point, the Defence disputes that the documents were seized from the Accused at the time of his arrest. Given their questionable provenance, the Defence asks for the authentication of the documents pursuant to Rule 89 (D) and their exclusion under Rule 95. As the Chamber's admission of the exhibits may directly affect the outcome of the proceedings, the Defence also submits that the requirement for certification of the oral decision of 11 November 2004 has been met.

6. The Prosecution does not allege that the Accused is the author of the disputed documents and adds that it has no knowledge of the authors. Rather, it submits that they were found on the Accused at the time of arrest and are therefore probative of the procurement and distribution of weapons used to commit the crimes. In its submission, the Prosecution recounts and documents the exhibits' chain of custody from seizure to final disclosure to the Accused. The Prosecution asserts that the exhibits satisfy the minimal threshold for reliability and that the Defence failed to timely object to their admission.

³ T. 9 November 2004 pp. 3-4, 34, 52-55.

⁴ T. 11 November 2004 p. 15 ("In addition, during the testimony of the investigator on 8 November, the Prosecution tendered two documents relating to an alleged distribution of weapons, which were admitted and marked as Exhibits 27 and 28. The Defence raised no objection at the time of their admission. Before commencing cross-examination the next day, the Defence objected to the admission of these documents, arguing that they were irrelevant because the Accused had not been charged with distributing weapons. It was also argued that the documents did not comply with Rule 73 *bis* (B)(v), that they did not emanate from the Accused, and appeared to bear a date when the RPF controlled the relevant area. The Chamber recalls that an objection to an exhibit should normally be made at the time it's tendered for admission. Nonetheless, the Chamber notes that the indictment does refer to distribution of weapons. In addition, evidence of a particular distribution of weapons, even if not pleaded in the indictment, may still be relevant to proving other allegations. Rule 73 *bis* (B)(v) has not been violated because the Prosecution disclosed to the Defence well before trial all relevant documents relating to the testimony of its investigator. The Defence points relating to the author of the documents and the date they bear go to the credibility and reliability of the exhibits, not their admissibility. Therefore, this objection is overruled.")

⁵ T. 11 November 2004 p. 7 (status conference).

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DELIBERATIONS

7. At the outset, the Chamber will address the Defence's request for interpretation of the Chamber's oral decision as well as its motion for authentication and exclusion of Prosecution Exhibits 27 and 28.

8. The Chamber admitted Prosecution Exhibits 27 and 28 into evidence on 8 November 2004. At the time of admission, the Defence had the opportunity to object, but did not. The Defence has not since admission advanced any ground sufficient to warrant the reconsideration of the Chamber's initial decision to admit Exhibits 27 and 28 into evidence. The Defence's present challenges, like its previous ones, focus on the lack of notice under Rule 73 *bis* (B)(v) and the exhibits' lack of relevance and reliability.

9. The Chamber has broad discretion under Rule 89 (C) to admit any relevant evidence which it deems to have probative value. According to the Prosecution, Exhibits 27 and 28 refer to the distribution of firearms and, therefore, are generally relevant or useful as background to allegations of weapons distribution in the Indictment. The Defence has asserted that the disputed exhibits are not relevant because the Indictment does not specifically refer to the distribution of weapons in Nyabisindu commune. The Chamber recalls that, according to Appeals Chamber case law, evidence may be relevant and admissible even if the event it refers to is not specifically pleaded in the Indictment.⁶ The Defence has pointed out that the disputed exhibits lack relevance because the Accused did not author them, and that they bear a date when the RPF allegedly controlled the area. These arguments go to possible evidentiary weight to be accorded to the exhibits at the end of the case, and not admissibility, which is a different consideration.

10. The Defence also questions the provenance of these exhibits, pointing to the fact that the author is unknown, the signature illegible, and the seizure disputed. The Appeals Chamber has described the legal situation as follows:

Evidence may be deemed inadmissible where it is found to be so lacking in terms of the indicia of reliability, such that it is not probative. Thus, at the stage of admissibility, only the beginning of proof that evidence is reliable, namely, that sufficient indicia of reliability have been established, is required for evidence to be admissible.⁷

11. The Chamber considers that Exhibits 27 and 28 bear sufficient indicia of reliability to meet this threshold standard for admissibility. Exhibit 27 has an official seal and identifies its author by title as the alternate *conseiller* of the bourgmestre of Nyabisindu commune (the name is illegible). The admission of Exhibit 28 is more questionable. It does not have a signature, official

⁶ *Kupreskic*, Judgement (AC), para. 88 (the Prosecution has an obligation "to state the material facts underpinning the charges in the Indictment, but not the evidence by which such material facts are to be proven"); *Nyiramasuhuko*, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 12 ("[T]he failure to specifically plead certain allegations in the Indictment does not necessarily render the evidence inadmissible. The Trial Chamber has the discretion under Rule 89(C) to admit any evidence which it deems to have probative value, to the extent that it may be relevant to the proof of other allegations specifically pleaded in the Indictment.").

⁷ *Nyiramasuhuko*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 7.

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seal, or geographical identification. However, it does contain four figures which bear resemblance to the alleged serial numbers of guns contained in Exhibit 27 and may therefore be relevant. The Chamber maintains its position of 8 November 2004, confirmed in its oral decision of 11 November 2004. It is noted that the Defence disputes the seizure of the documents from the Accused. Furthermore, it is recalled that the documents are not being attributed to the Accused and are only claimed to be generally relevant to the Indictment. Consequently, the questions related to the disputed seizure do not arise, and the Chamber has not found it necessary to take a position on it at this stage.⁸ Under the circumstances, the Chamber sees no need to order further authentication under Rule 89 (D). In view of Rule 41 (B), the Chamber has not found any misconduct on the part of the Prosecution. The admission of Exhibits 27 and 28 does not violate Rule 95. The Accused's lack of familiarity with the documents and their disputed seizure go to possible evidentiary weight to be accorded to the documents at the end of the case, and not the initial question of admissibility.⁹

12. The Appeals Chamber has repeatedly emphasised that "[a]dmissibility of evidence should not be confused with the assessment of weight to be accorded to that evidence".¹⁰ Due note must be taken of this important distinction and the very different standards of assessment which apply at each stage. The Chamber will fully consider the Defence arguments concerning the relevance and the reliability of Exhibits 27 and 28 in determining their evidentiary value, if any, at the end of the case.

13. With respect to timely notice, Rule 73 *bis* (B)(v) provides that the Chamber may order the Prosecution to file a list of the exhibits it intends to offer before the date set for trial. This provision, like others under Rule 73 *bis*, is designed to provide the Defence with advance notice of the evidence to be led against the Accused at trial. The Prosecution concedes that the Defence did not receive notice before trial that it would introduce the disputed exhibits. In the Chamber's view, the fact that the Prosecution tenders an exhibit which does not feature on its list submitted in conformity with Rule 73 *bis* (B)(v) does not preclude its admission into evidence. The Tribunal's practice reflects that a party is not exclusively bound by its initial list submitted at the pre-trial stage.

14. When a party objects based on lack of notice, the principal consideration in assessing whether to admit the exhibit is generally whether the Defence had sufficient time to review it given the circumstances.¹¹ The Defence acknowledges that the Prosecution disclosed the two

⁸ The Chamber recalls that the Prosecution raised the issue of seizure only in connection with the issue of notice in relation to Rule 73 *bis* (b)(v). The Chamber has not found it necessary to consider the issue of seizure in the disposition of that issue (*see infra* paras. 14-15).

⁹ The Chamber notes that this is the same approach that it has taken in previous cases where objections concerning authenticity and chain of custody have been made after admission. *See Bagosora et al.*, Decision on Ntabakuze Defence Motion for the Exclusion from All Consideration of Dallaire Telegram of 11 January 1994 (Exhibit P32) Until Such Time as a Chain of Custody Can be Established (TC), 16 February 2004, paras. 2-3.

¹⁰ *Ntahobali and Nyiramasuhuko*, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), 2 July 2004, para. 15.

¹¹ *Ndayambaje et al.*, Decision on Prosecutor's Motion to Modify Her List of Exhibits (TC), 14 December 2001, paras. 16-17. Considerations relevant to the admission of evidence based on will-say statements may be a useful guide, for example, the materiality of the evidence, whether it is new information, and the prejudice to the Defence. *Simba*, Decision on the Admissibility of Evidence of Witness KDD (TC), 1 November 2004, paras. 11-15.

disputed exhibits before trial.¹² They therefore were not entirely new to the Defence. More importantly, however, the Chamber granted the Defence's specific request for a one day adjournment based on lack of notice in relation to Exhibits 27 and 28. The Chamber finds that this adjournment was sufficient to cure any possible prejudice, particularly given the nature of the exhibits.

15. The Chamber will now consider the Defence's request for certification to appeal the oral decision of 11 November 2004. Pursuant to Rule 73 (B), certification to appeal may only be granted where the appeal "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

16. The Defence has disputed the authenticity, reliability, and admissibility of Exhibits 27 and 28. The Chamber does not consider that these issues merit certification under Rule 73 (B). The Appeals Chamber has stated that "it is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of the trial; it is not for the Appeals Chamber to assume this responsibility".¹³ The Chamber's decision on the admission of Exhibits 27 and 28 as well as its consideration of their relevance and provenance and the appropriate remedy for any insufficient notice under Rule 73 *bis* (B)(v) are routine matters squarely within its discretion. Consequently, the request for certification is denied.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motions and the request for certification.

Arusha, 31 January 2005



Erik Møse
Presiding Judge



Sergei Alekseevich Egorov
Judge



Dennis C. M. Byron
Judge

(Seal of the Tribunal)



¹² T. 9 November 2004 pp. 54-55 ("Mr. President: And since you refer to disclosure, is it disputed that they were disclosed in October 2003. Mr. Alao: On the date indicated by the Prosecutor, the Defence cannot remember having received such documents. However, my co-counsel has just told me that on the CD-ROM received recently that these documents are on that CD-ROM.").

¹³ *Nyiramasuhuko*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5.