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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Or: ENG

TRIAL CHAMBER II

Before: Judge Asoka De Silva, Presiding
Judge Flavia Lattanzi
Judge Florence Rita Arrey

Registrar: Mr Adama Dieng

Date: 24 March 2005

The PROSECUTOR
v.
Tharcisse Muvunyi

Case No. ICTR-2000-55A-T

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**DECISION ON THE PROSECUTOR'S MOTION FOR ADMISSION OF
TESTIMONY OF EXPERT WITNESS**

Rules 92bis of the Rules

Office of the Prosecutor

Mr Charles Adeogun-Phillips
Ms Adesola Adeboyejo
Ms Renifa Madenga
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Defense Counsel

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[Signature]

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (the "Chamber");

BEING SEIZED of "The Prosecutor's Motion for Admission of Testimony of Expert Witness Pursuant to Rules 54, 73 and 92*bis*" filed on 2 February 2005 (the "Motion");

CONSIDERING

- (i) "Accused Tharcisse Muvunyi's Reply to the Prosecutor's Motion for Admission of Testimony of Expert Witness Pursuant to Rules 54, 73 and 92*bis*" filed on the 15 February 2005 (the "Defence Response");
- (ii) the "Prosecutor's Response to Defence Reply to its Motion for Admission of Testimony of Expert Witness Pursuant to Rules 54, 73 and 92*bis*" filed on 16 February 2005 (the "Prosecution Reply");
- (iii) "Accused Tharcisse Muvunyi's Reply to the Prosecutor's Response to the Accused's Reply to the Motion for Admission of Testimony of Expert Witness" (the "Defence Rejoinder") filed on 7 March 2005;

NOTING the Chamber's "Decision on Motion for Continuance for the Defence to Submit a Response to the Prosecutor's Motion for Admission of Testimony of Expert Witness Pursuant to Rules 54, 73 and 92 *bis* Until Monday, February 14, 2005" filed on 10 February 2005, in which the Chamber directed the Defence to submit its Response to the Prosecutor's Motion by Monday 14 February 2005;

ALSO NOTING that the Defence Response filed on 15 February 2005 appears to have been faxed on 14 February 2005 and will be considered by the Chamber in the interests of justice;

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rules 54, 73 and 92*bis* of the Rules;

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

ARGUMENTS OF THE PARTIES

The Prosecution

1. The Prosecution requests the Chamber, pursuant to Rules 54, 73 and 92*bis* of the Rules, to admit into evidence the transcript of the testimony and documentary exhibits of Evariste Ntakirutimana, a Sociolinguist, who testified as an expert in *Prosecutor v. Pauline Nyiramasuhuko et al*, Case No. ICTR-98-42-T.



2. For this purpose, the Prosecution attaches the following documents (in English and French) to its Motion:

- (i) The curriculum vitae of the proposed Expert Witness Evariste Ntakirutimana;
- (ii) A document entitled "Sociolinguistic analysis of some polysemic terms produced during the war period (1990-1994) in Rwanda";
- (iii) A document entitled "Tolerance or intransigence in Sindikubwabo's speech in Butare?";
- (iv) The transcripts of the examination-in-chief and cross-examination of Expert Witness Evariste Ntakirutimana in the proceedings *Prosecutor v. Pauline Nyiramasuhuko et al.* (13 and 14 September 2004) before this Tribunal.

3. The Prosecution asserts that the transcripts of the expert testimony and the documentary exhibits adduced into evidence through his testimony go to "proof of a matter other than the acts and conduct of the accused" according to Rule 92 *bis* (A) of the Rules, and that therefore the conditions for their admission into evidence are fulfilled.

4. The Prosecution submits that the expert witness is on the list of witnesses filed with the Pre-Trial Brief on the 25 January 2005, and will avail himself for cross-examination by the Defence during trial.

5. The Prosecution argues that this request respects the Accused's rights to cross-examine, furthers judicial economy and is in the interests of justice.

The Defence Response

6. The Defence requests that the Chamber deny the Motion or, in the alternative, that the Defence be allowed to cross-examine the proposed expert witness.

7. The Defence contests the qualification of the suggested witness as an expert under Rule 92*bis* and Rule 94*bis*.

8. The Defence complains that the Prosecution has failed to provide the tape recording of the live broadcast of President Sindikubwabo's speech, and that the Defence can therefore not verify the accuracy of the translation provided by the Prosecution.

9. The Defence furthermore argues that the Prosecutor's failure to provide all exhibits attached to the transcripts of the witness' evidence deprives the Defence of the possibility to assess the cross-examination of the expert by the Defence.

10. The Defence incorporates by reference the arguments and objections made by the Defence during the testimony of the proposed witness in the case of *Prosecution v. Pauline Nyiramasuhuko et al.*, which is still pending at trial level. The Defence therefore submits that no final decision has been rendered on the credibility and expertise of the proposed expert witness.

11. The Defence furthermore submits that the documentation submitted by the Prosecution is intended to interpret the words used by President Sindikubwabo, that the content of the President's speech is crucial for the qualification of the acts of the Accused and therefore goes directly to the acts and conduct of the Accused .

12. The Defence requests that the Motion be denied since it is contrary to the provisions of Rule 89(C) and Rule 92bis (A) (ii) of the Rules and since the prejudicial effect of its admission would outweigh the probative value.

The Prosecution Reply

13. The Prosecution submits that it inadvertently omitted to attach Exhibit P. 160 which is a CD-ROM containing the 19 April 1994 speech of President Sindikubwabo in Butare. It now attaches a copy of the CD-ROM Exhibit P 160 for disclosure to the Defence.

14. With regard to the Defence request to receive Prosecution exhibits to which the parties had referred to during cross-examination of the expert in *Prosecutor v. Nyiramasuhuko et al.*, the Prosecution submits that it is not in a position to address the Defence request as the Defence has not specified which exhibits it was referring to.

15. The Prosecution notes that while indeed the Chamber is not bound by the ruling of the Trial Chamber in the case of *Prosecutor v. Nyiramasuhuko et al.* which is still pending at trial level and has yet to be appealed, the Chamber may be guided by that Trial Chamber's Decision.

16. The Prosecution reiterates that no direct reference is made to the Accused in the expert reports that the Prosecution seeks to admit, and that it therefore does not go to proof of the direct acts and conduct of the Accused.

17. The Prosecution recalls that the expert witness is already included in the witness list and that the request is only made for the purposes of judicial economy and in the interests of justice.

The Defence Rejoinder

18. The Defence acknowledges receipt of President Sindikubwabo's speech but without any of the exhibits relied on by the Defence in cross examination whereas Rule 92 bis provides that all exhibits must be provided.



DELIBERATIONS

(i) *Qualification of Evariste Ntakirutimana as Expert Witness*

19. The Chamber notes that it clearly results from the Prosecution's witness list as well as from its Motion that the Prosecution intends to call Evariste Ntakirutimana as an expert witness. The Defence in its Response to the Motion contests the qualification of Evariste Ntakirutimana as an expert witness.

20. However, the Chamber considers it premature to decide on the qualification of the expert witness at this stage of the proceedings. Also, the Chamber does not see any need to decide on his qualification prior to rendering a decision on the admission of the transcripts of his testimony and documentary exhibits in this trial. As the Appeals Chamber found in *Rutaganda v. The Prosecutor*, a Trial Chamber may decide on the admission of a witness statement before ruling on the admission of the Witness as an expert witness.¹ In this regard, the Chamber also recalls that it is established jurisprudence of both *ad hoc* tribunals that expert witness statements and transcripts can be admitted under Rule 92bis of the Rules provided the other requirements of Rule 92bis are satisfied.²

21. The Chamber will, therefore, now proceed to the examination of the admissibility, under Rule 92bis, of the transcripts of the testimony and documentary exhibits of Evariste Ntakirutimana from the *Nyiramasuhuko* trial.

(ii) *Admissibility*

22. The Chamber recalls that pursuant to Rule 92bis (A) a Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the Accused as charged in the Indictment. Furthermore, according to Rule 92bis (D), a

¹ *Rutaganda v. The Prosecutor*, Judgement (AC), Case No. ICTR-96-3-A, 26 May 2003, para. 164: "In the instant case, the Trial Chamber clearly chose an approach that consists in having the qualifications of the persons called as experts by the Prosecution clarified during their examination-in-chief by the Prosecution and cross-examination by Counsel for the Appellant. This amounts to admitting the witness statement before having ruled on the admission of the witness as an expert. The Appeals Chamber considers that, where the Rules are silent as to the procedure for taking expert evidence at the hearing, and in accordance with the provisions of Rule 89(B) of the Rules, this approach does not appear to be contrary to the spirit of the Statute and the general principles of law, and was such as would permit a fair determination of the case".

² See *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal concerning Rule 92bis(C) (AC), 7 June 2002, para. 40; *Prosecutor v. Vidoje Blagojevic and Dragan Jokic*, Case No. IT-02-60-T, Decision on Prosecution's Motions for admission of expert statements (TC), 7 November 2003, para. 25; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion of exclusion of expert witness statement of Filip Reyntjens (TC), 28 September 2004, para. 6.

Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof a matter other than the acts and conduct of the accused.

23. The Chamber states that the testimony of the Witness solely relates to the words used by the President Sindikubwabo in his speech. This testimony could provide some clarification to the Chamber as to how certain words are to be interpreted in the context of the events of 1994; and does not make any mention of the Accused at all. The Chamber is therefore satisfied that the documentation in question does not go to proof the acts or conduct of the Accused.

24. The Chamber is also satisfied that the material in question is relevant and has probative value within the meaning of Rule 89(C). The Chamber concludes that in the instant case it is in the interest of justice to admit the said material into evidence.

(iii) Cross-Examination

25. The Chamber recalls that Rule 92 *bis* (E) prescribes that “after hearing the parties the Chamber shall decide whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.”

26. The Chamber takes note of the Defence concerns about the Witness’s credibility and its request to cross-examine the Witness. The Chamber also notes that the Prosecution does not object to the cross-examination of the Witness by the Defence.

27. In the light of the Defence concerns about the Witness’s credibility, the Chamber finds that Evariste Ntakirutimana shall be called for cross-examination. The Chamber furthermore decides that any *voire dire* examination to determine the Witness’s qualification as an Expert Witness may be made at the stage of the cross-examination.

(vi) Material Requested by the Defence

28. The Chamber considers the Defence request for the exhibits to which the Parties referred during the cross-examination of the expert in *Prosecutor v. Nyiramasuhuko et al.* and finds that the Defence has the right to obtain these exhibits from the Prosecution without undue delay, in any case not less than 21 days before the date set for the appearance of the witness for cross-examination. With regard to the Defence request to receive the tape recording of the live broadcast of President Sindikubwabo’s speech, the Chamber notes that the Prosecution has already provided a copy of the CD-ROM Exhibit P 160 containing the President’s speech as an attachment to its Reply to the Motion. Therefore the Chamber needs make no order in relation to the President’s speech.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Motion in the following terms:




The Prosecutor v. Tharcisse Muvunyi., Case No. ICTR-2000-55A-T

ORDERS that the two reports and the transcripts of the testimony of Evariste Ntakirutimana in the proceedings *Prosecutor v. Pauline Nyiramasuhuko et al*, Case No. ICTR-98-42-T, shall be admitted into evidence in the current proceedings;

ORDERS that Witness Evariste Ntakirutimana appears for cross-examination by the Defence;

ORDERS the Prosecution to provide the Defence, without undue delay, the exhibits to which the Parties referred during the cross-examination of the expert in *Prosecutor v. Nyiramasuhuko et al*; in any case this shall be done no later than 21 days before the date set for the appearance of the witness for cross-examination.

Arusha, 24 March 2005


Asoka De Silva
Presiding Judge


Flavia Lattanzi
Judge


Florence Rita Arrey
Judge

(Seal of the Tribunal)