



UNITED NATIONS  
NATIONS UNIES

ICTR-00-55A-T  
28-02-2006  
(3187-3182)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

3187  
Mush

OR: ENG

**TRIAL CHAMBER II**

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

**Registrar:** Mr Adama Dieng

**Date:** 28 February 2006

Handwritten signature and date 28 Feb 2006

**THE PROSECUTOR**

**v.**

**THARCISSE MUVUNYI**

**ICTR-2000-55A-T**

**DECISION ON THE PROSECUTOR'S MOTION TO ADMIT DOCUMENTS  
TENDERED DURING THE CROSS-EXAMINATION OF DEFENCE WITNESS  
AUGUSTIN NDINDILIYIMANA**

*Rule 89 (C) of the Rules of Procedure and Evidence*

**Office of the Prosecutor**

Mr Charles Adeogun-Phillips, Senior Trial Attorney  
Ms Adesola Adeboyejo, Trial Attorney  
Ms Renifa Madenga, Trial Attorney  
Ms Memory Maposa, Assistant Trial Attorney  
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**Counsel for the Accused Person**

Mr William E. Taylor, Lead Counsel  
Ms Cynthia Cline, Legal Assistant  
Ms Véronique Pandanzyla, Legal Assistant

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**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 "The Prosecutor's Motion to Admit Documents Tendered during the Cross-Examination of Defence Witness Augustin Ndindiliyimana" filed on 31 January 2006 (the "Motion");

**HAVING RECEIVED** the "Accused's Response to the Prosecutor's Motion to Admit Documents Tendered during the Cross-Examination of Defence Witness Augustin Ndindiliyimana", filed on 13 February 2006 (the "Response");

**CONSIDERING** the Chamber's Oral Decision of 14 February 2006 granting:

- i the "Accused Tharcisse Muvunyi's Motion for Continuance or Motion for Leave to File a Defence Response out of Time, Alternatively Motion for Reconsideration of Defence Response [to] Prosecutor's Motion to Admit Documents Tendered During the Cross-Examination of Defence Witness Augustin Ndindiliyimana" filed on 9 February 2006 (the "Defence Motion"), and
- ii the "Amended Accused Tharcisse Muvunyi's Motion for Continuance or Motion for Leave to File a Defence Response out of Time Alternatively Motion for Reconsideration of Defence Response [to] Prosecutor's Motion to Admit Documents Tendered During the Cross-Examination of Defence Witness Augustin Ndindiliyimana", filed on 13 February 2006;

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

**SUBMISSIONS OF THE PARTIES**

***The Prosecution***

1. The Prosecution requests the Chamber to admit into evidence certain documents tendered and marked for identification purposes as PID1 on 7 December 2005 during the cross-examination of Defence Witness Augustin Ndindiliyimana.
2. The Prosecution submits that the first document ("Document 1"), bearing the numbers KA017090 and KA017091 for the French original (and K0284552 for the English translation), is a letter dated 12 (*sic*) April 1994<sup>1</sup> addressed to the *bourgmestre* of an unidentified *commune*. According to the Prosecution, the document bears the header "Republic of Rwanda, Ministry of Defence, Rwandan Army, Commandant Place BUT-GIK",<sup>2</sup> while the name of the Accused and the title "Lt Col, Cmd Place BUT-GIK" appear at the foot of the letter together with the alleged signature of the Accused and a seal that reads "Republique Rwandaise - ...Place Butare-Gikongoro."<sup>3</sup> The Prosecution alleges that the letter relates to the implementation of the Ministry of Defence's recommendation about the recruitment of youth for civil defence purposes. The letter also proposes a meeting for the coordination of the program at 9:00 a.m. on 26 April 1994.

<sup>1</sup> The French original bears the date of 21 April 1994 while the English translation erroneously bears the date of 12 April 1994.

<sup>2</sup> Unofficial English translation of the French original.

<sup>3</sup> The seal is partly unreadable.

3. The Prosecution asserts that the second document ("Document 2") bearing number K0026811<sup>4</sup> is almost identical to Document 1. It is dated 21 April 1994 and proposes a coordination meeting on 25 April 1994 at 9:00 a.m. According to the Prosecution, the name of the Accused and title "Lt. Col., Cmd Place BUT-GIK" also appear at the foot of the letter along with the alleged signature of the Accused and a seal that reads "Republique rwandaise – Min. de place – Butare-Gikongoro".
4. The Prosecution submits that the third document ("Document 3") contains travel passes dated 10 May 1994 authorising three separate individuals to circulate freely and that the name of the Accused and title "Lt Col Comd OPS Butare" appear under the authorisation for each of the three individuals.
5. The Prosecution alleges that Documents 1 and 2 are probative and relevant to the allegations that the Accused enjoyed a position of military power and authority in his capacity as Commander of ESO, including those specific allegations contained in paragraphs 3.21, 3.22, 3.24 and 3.26 of the Indictment. According to the Prosecution, in this position of authority, the Accused exercised control over military operations in the Butare *Préfecture* which extended to the recruitment and supervision of the training of civilians youth. The Prosecution submits that the contents of these two documents meet the necessary *prima facie* threshold that the documents are relevant and have probative value. The Prosecution submits that Document 3 is probative and *prima facie* relevant to the allegations that the Accused enjoyed a position of authority and control over the civilians within the *Préfecture* of Butare reflected by his authority to grant permission for them to travel within that *Préfecture*.
6. Relying on jurisprudence from the ICTR<sup>5</sup> and the ICTY<sup>6</sup>, the Prosecution submits that those three documents possess sufficient indicia of reliability for them to be admitted into evidence. According to the Prosecution, the information presented in Documents 1 and 2 provide clear and recognizable indicia on the face of the documents themselves while for Document 3, the name and title of the Accused appear under each of the travel authorisations. While the signature of the Accused does not appear on these authorisations, the Prosecution submits that only someone in his position possessed the requisite power in the *Préfecture* of Butare to grant such authorisation.
7. The Prosecution submits that during the proceedings of 7 December 2005 in this case, the objections raised by the Defence Counsel with regard to the recognition of the signature and the seal on the documents were made in the presence of the witness. The Prosecution alleges that the direct interruption of the witness' testimony by the Defence Counsel prevented the Prosecution from having a fair and objective opportunity to have the witness recognise the signature of the Accused on the PID1 Documents. The Prosecution

<sup>4</sup> The document tendered to the Chamber on 7 December 2005 bears the numbers K0026811 and K0026812 for the French original but the copies attached to the Motion bear numbers K0313507 and K00313508 for the same French original. The Chamber will consider the documents tendered in Court on 7 December 2005 to render its decision in the present motion.

<sup>5</sup> *Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003, para. 33; *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, para. 286.

<sup>6</sup> *The Prosecutor v. Delalić*, Case No. IT-96-21-T, "Decision on the Motion of the Prosecution for the Admissibility of Evidence", 19 January 1998, paras. 20, 31, 33; *The Prosecutor v. Blaškić*, Case No. IT-95-14, "Decision on the Defence Motion for Reconsideration of the Ruling to Exclude from Evidence Authentic and Exculpatory Documentary Evidence", 30 January 1998, paras. 10-11.

submits that such non-recusal of the witness directly tainted the ability of the witness to give an objective testimony on the PID1 Documents. The Prosecution further submits that in light of the indicia of reliability on the face of the documents themselves, it is reasonable to assume that the witness, as a former General of the Army of the Republic of Rwanda, would be familiar with these types of documents and that the said documents should therefore be admitted as evidence.

**The Defence**

8. The Defence submits that the witness to whom the documents were presented testified that the signatures on the document were not identical, the seal was incomplete on Document 1 and he could not confirm that the documents contained Muvunyi's signature as he did not know Muvunyi's signature. The Defence further submits that during the proceedings it had objected to the admission of PID1 for lack of offer or indicia of reliability and that the Prosecution has not demonstrated the reliability and probative value of those documents.
9. The Defence submits that for a document to be admitted under Rule 89 (C), the party seeking the admission of the said document should explain what the document is, why it is authentic and what it purports to be. The Defence states that the Prosecution has failed to do so in this case. It added that with respect to the only document the witness said he had seen before, the Prosecution failed to ask where the Witness had previously seen the document.
10. The Defence also submits that while there is no standard for authenticating a document, a moving party must show "sufficient indicia of reliability" to justify admission. Relying on a Decision rendered in the *Bagosora* case, the Defence alleges that to justify the admission of a document as an exhibit, evidence must be presented to show where the document was seized, the chain of custody since the seizure of the document, corroboration of the contents of the document with other evidence and the nature of the document itself, such as signatures, stamps, or even other forms of handwriting.<sup>7</sup> The Defence submits that the Prosecution has failed to provide any evidence to authenticate these documents. Moreover it submits that at any time the Prosecution could have moved for the witness to be excused from the proceedings but it did not do so.
11. The Defence further requests to be heard orally on this matter.

**HAVING DELIBERATED**

12. Rule 89 (C), gives the Chamber a broad discretion to admit evidence, including documents, which it deems relevant and of probative value. In *Bagosora et al*, it was held that relevance and probative value are threshold issues when deciding questions of admissibility and that the moving Party only needs to prove that the document has *prima facie* relevance and that it has probative value.<sup>8</sup> In *Nyiramasuhoko v. The Prosecutor*, the Appeals Chamber stated that evidence may be deemed inadmissible under Rule 89 (C) "where it is found to be so lacking in terms of indicia of reliability, such that it is not probative. ...At the stage of admissibility, only the beginning of proof that evidence is

<sup>7</sup> *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, "Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole", 13 September 2004, para. 10.

<sup>8</sup> *The Prosecutor v. Bagosora et al.*, "Decision on Admission of TAB 19 of Binder Produced in Connection with the Appearance of Witness Maxwell Nkole," 13 September 2004, para. 7.



reliable, namely, that sufficient indicia of reliability have been established, is required for evidence to be admissible.<sup>9</sup> A Trial Chamber's decision to admit evidence is a different consideration from the weight to be attached to the evidence; the latter question must be determined at the close of the case and after considering the evidence as a whole.

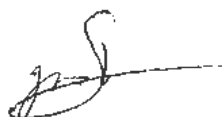
13. The Chamber considers, with respect to the admissibility of documents, that the moving Party must provide some indication of the document's authenticity such as the nature of the document, its author(s), the provenance of the document and its chain of custody from the time of seizure to its production in court. If a copy of a document is sought to be admitted, there should be some explanation about the non-availability of the original, or some confirmation that the copy sought to be tendered genuinely emanates from the original. In the Chamber's view, evidence tending to confirm some of these issues could indicate that a document is reliable and potentially of probative value.
14. The Chamber notes that Document 1 is a letter in French dated 21 April 1994 addressed to an unnamed *Bourgmestre* of Gikongoro. It purports to emanate from, and bears the name and alleged signature of the Accused in the capacity of "Comd Place, BUT-GIK."<sup>10</sup> This document conveys to the *Bourgmestre* the Defence Ministry's plan to train 10 youths from each *secteur* as part of a civil defence programme.
15. The Chamber notes that the document is an uncertified copy; no evidence has been led by the Prosecution as to the non-availability of the original letter; no evidence has been led to confirm that the signature on the document in fact matches the usual signature of the Accused. The Chamber also recalls that during his cross-examination, Witness Augustin Ndindiliyimana indicated that he could not tell if the signature on the document was that of the Accused.<sup>11</sup> The Chamber is convinced that while photocopies of documents may be admissible evidence before the Tribunal, a sufficient foundation must be laid for their admission so as to satisfy the Chamber that they are at least *prima facie* reliable. Where the moving party fails to demonstrate even "the beginning of proof that evidence is reliable", such evidence would clearly be inadmissible.<sup>12</sup> For the above reasons, the Chamber finds that Document 1 lacks the basic indications of reliability to make it admissible as evidence under the Rules.
16. The Chamber recalls the Prosecution submission that Document 2 is a letter in French dated 21 April 1994 and that it calls for a coordination meeting to be held at 9.00 a.m. on 25 April 1994. The name of the Accused, the title "Lt. Col., Cmd Place But-GIK", as well as a signature alleged to be that of the Accused, appear at the end of the letter. The Chamber observes that this document suffers from the same shortcomings pointed out with respect to Document 1. Document 2 therefore is not admissible as an exhibit because it lacks basic indicia of reliability.
17. Document 3 contains three type-written forms on which the names and identity card numbers of three individuals have been inserted by pen. At the top of each form, it is

<sup>9</sup> *Nyiramasuhuko v. The Prosecutor*, "Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence", 4 October, 2004, para. 7.

<sup>10</sup> A document dated 12 April 1994 is purported by the Prosecution to be a translation of the 21 April 1994 letter.

<sup>11</sup> Transcripts, 7 December 2005, p. 33.

<sup>12</sup> *Nyiramasuhuko v. The Prosecutor*, "Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence", 4 October, 2004, para. 7.



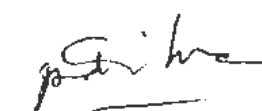
indicated "Butare le 10/5/1994". The forms do not appear to have been written on any official stationery. The following words appear at the end of each form: "Muvunyi Tharcisse Lt. Col Cmd OPS Butare". There is no signature. The Prosecution submits that the three forms are travel passes and that they are probative of the allegation that the Accused enjoyed a position of authority and control over the civilians within Butare prefecture. The Chamber finds that the mere mention of Muvunyi's name and alleged position on these documents is, without more, insufficient to establish that he prepared them or that they came from him personally or from his office. The Prosecution has not made any effort to establish the provenance of these documents, or to explain the absence of their originals. The Chamber is therefore left to speculate about these important threshold issues. Since the burden of proving admissibility lies on the moving party, the Chamber is not satisfied that the Prosecution has met that burden with respect to Document 3.

18. The Chamber recalls that in its Response, the Defence asked for oral arguments to be heard on this Motion. The Chamber is satisfied that having heard the parties in court during the course of the testimony of Defence Witness Augustin Ndindiliyimana, and having considered the written submissions from both sides, it is unnecessary to hear oral arguments on this motion.
19. For all the foregoing reasons, the Chamber finds that although Documents 1, 2 and 3 contained in PID1 appear at face value to be relevant to the present case, they cannot be admitted as exhibits because they lack *prima facie* reliability. The documents will for now remain marked for identification purposes only.

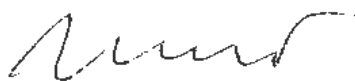
**THE CHAMBER THEREFORE**

**DENIES** the Motion in its entirety.

Arusha, 28 February 2006



Asoka de Silva  
Presiding Judge



Flavia Lattanzi  
Judge



Florence R. Arrey  
Judge

[Seal of the Tribunal]

