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: 26 April 2006

THE PROSECUTOR
vs.
THARCISSE MUVUNYI

ICTR-2000-55A-T

DECISION ON THE PROSECUTOR'S MOTION PURSUANT TO TRIAL CHAMBER'S DIRECTIVES OF 7 DECEMBER 2005 FOR THE VERIFICATION OF THE AUTHENTICITY OF EVIDENCE OBTAINED OUT OF COURT PURSUANT TO RULES 89 (C) & (D)

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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 Prosecutor's "Motion pursuant to Trial Chamber's Directives of 7 December 2005 for the Verification of the Authenticity of Evidence Obtained out of Court Pursuant to Rules 89 (C) & (D)" filed on 30 March 2006 (the "Motion");

HAVING RECEIVED AND CONSIDERED:

(i) "Tharcisse Muvunyi's Reply (*sic*) to Prosecutor's Motion Pursuant to Trial Chamber's Directives of 7 December 2005 for Verification of the Authenticity of Evidence Obtained out of Court Pursuant to Rules 89 (C) & D" filed on 7 April 2006 (the "Response");

(ii) "Muvunyi's Objections to the Prosecutor's Request for a Handwriting Expert and Request for Cross-examination", filed on 18 April 2006;

(iii) "Prosecutor's Response to Accused's Objections to the Prosecutor's Request for a Handwriting Expert and Request for Cross-Examination" filed on 20 April 2006;

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rules 89 (C) and (D) of the Rules;

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

INTRODUCTION

1. On 7 December 2005, during the cross-examination of Defence Witness Augustin Ndindiliyimana, the Prosecution attempted to tender a set of documents that purportedly bore the signature of the Accused, Tharcisse Muvunyi, in the capacity of "*Commandant de Place, Butare-Gikongoro.*" The Defence objected on the ground that the documents lacked basic indicia of reliability, and were therefore inadmissible. The Chamber ruled that because the Witness indicated that he had not seen the documents before, and that he was not familiar with the seal or the signature on the said documents, they were inadmissible as exhibits, but would be marked for identification purposes only. They were accordingly marked as "PID1". The Chamber further indicated that the Prosecution could prove the authenticity of the documents at a later stage by calling witnesses.[1]

2. On 31 January 2006, the Prosecution filed a motion to admit the documents marked as "PID1" on the grounds that they were relevant and probative of certain

allegations in the Indictment, and that they possessed sufficient indicia of reliability to be admissible as evidence.

3. On 28 February 2006, the Chamber rendered a Decision denying the Prosecution motion in its entirety on the basis that the documents contained in "PID1" were not *prima facie* reliable to be admissible under the Rules, and that they will remain marked for identification purposes only.

SUBMISSIONS OF THE PARTIES

The Prosecution

4. The Prosecution relies on Rules 89(C) and (D), and further argues that the Motion is filed pursuant to the Trial Chamber's directive of 7 December 2005 to prove the authenticity of the "PID1" documents by calling additional witnesses. The Prosecutor further argues that even if the only issue for the Trial Chamber's consideration was whether or not Witness Augustin Ndindiliyimana recognised the documents on the PID1 documents, it will still be necessary to call the handwriting expert as a rebuttal witness.[2]

5. The Prosecution asserts that by copy of this Motion, it gives notice of its intention to call a handwriting expert in the name of Mr. Antipas Nyanjwa, and seeks leave to call him to testify to the authenticity of the said documents. The Prosecution submits that if admitted, the handwriting expert will testify regarding the signatures and handwriting on the PID1 documents, having compared them to other similar documents authored by the Accused and obtained from the material seized from him following his arrest in the United Kingdom.

6. The Prosecution has attached the *curriculum vitae* of Mr. Nyanjwa which shows that he received his Bachelor of Arts Degree from Kurukshetra University (India) in 1993, and a Master of Arts Degree in Criminology and Forensic Science from the University of Sagar (India) in 1994. According to the documents submitted by the Prosecution, between 1998 and 2001, Mr. Nyanjwa completed several short-term post-graduate training courses including a seminar on "Questioned Documents" dealing with both handwritten and non-handwritten documents, a course on analysis of forged documents, and a familiarization course on forensic document examination. Since 1996, he has worked as a Forensic Document Examiner for the Kenyan Police Force. It is further asserted that Mr. Nyanjwa is an admitted expert and has given expert evidence before the Tribunal, but there is no indication of the case or cases in which he has testified.

The Defence

7. The Defence objects to the Prosecution Motion on the following three main grounds: (i) that it would be inappropriate to allow the Prosecution to re-open its case-in-chief at this stage of the proceedings; (ii) that the evidence sought to be introduced does

not qualify as rebuttal evidence; and (iii) that granting the Motion would violate the right of the Accused to a trial without undue delay under Article 20 of the Statute.

8. Relying on the ICTY Trial Chamber Decision in the *Celebici* case, the Defence argues that in order to be granted leave to re-open its case-in-chief, the Prosecution must demonstrate that the evidence it seeks to introduce was previously unavailable to it physically, and could not have been obtained with the exercise of due diligence. According to the Defence submission, the Prosecution has failed to meet this burden and, therefore, admitting the proposed evidence would secure an unfair tactical advantage for the Prosecution.

9. With respect to rebuttal evidence, the Defence argues that the essence of the presentation of evidence in rebuttal is to call evidence to refute a particular piece of evidence which has been adduced by the Defence, and is therefore limited to matters that arise directly and specifically out of Defence evidence. The Defence submits that Trial Chambers are generally reluctant to grant leave to adduce rebuttal evidence where the object of such evidence is to fill gaps in the Prosecution case, or merely to allow the Prosecution to call additional evidence to meet contradictory Defence evidence.

10. Furthermore, the Defence argues that the order of presentation of evidence in Rule 85 presumes that the Prosecution will present its evidence to prove the Accused's guilt, followed by the presentation of evidence to meet the Prosecutor's evidence. According to the Defence submission, while the Prosecution may in certain circumstances be allowed to call further evidence, this is exceptional and cannot be done merely to reinforce evidence already brought or to call evidence previously deemed unnecessary.

11. The Defence submits that nothing Defence Witness Augustin Ndindiliyimana said during his cross-examination on 7 December 2005 with respect to the PID1 documents, would justify the calling of a hand-writing expert as a rebuttal witness.

12. The Defence asserts that if the proposed handwriting expert is allowed to testify for the Prosecution, it would have to find and retain a handwriting expert to examine the questioned documents, and subsequently, testify on behalf of the Defence. Since this process could, according to the Defence, take months, the right of the Accused to a trial without undue delay would be violated.

13. The Defence also objects to the use of any documents or material seized from the Accused at the time of his arrest in the United Kingdom as a basis for comparison with the questioned documents.

14. Finally, the Defence submits that the Prosecution Motion is frivolous and should be dismissed.

HAVING DELIBERATED

15. The Chamber notes the provisions of Rule 89 (C) and (D) of the Rules, and is mindful of the jurisprudence of the Tribunal to the effect that in exercising its discretion to admit evidence under Rule 89, it must consider the relevance and probative value of the proposed evidence. These must be weighed against the potential prejudice that may be occasioned to the accused person by admitting the evidence. Where, in the Chambers' assessment, the prejudicial effect of the proposed evidence is likely to outweigh its probative value, they would generally exercise their discretion against admitting such evidence.[3]

16. The Chamber notes that the Prosecution seeks to call the proposed handwriting expert to prove the authenticity of a set of three documents contained in PID1.

- 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." The document conveys to the *Bourgmestre* the Defence Ministry's plan to train 10 youths from each *secteur* as part of a civil defence programme.
- Document 2 is a letter in French dated 21 April 1994 and calling for a coordination meeting to be held at 9.00a.m. on 25 April 1994. Appearing on the document are 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.
- Document 3 contains three type-written forms on which the names and identity card numbers of three individuals have been inserted by hand. At the top of each form, it is indicated "Butare le 10/5/1994." At the end of each form, it is written "Muvunyi Tharcisse, Lt Col Cmd OPS Butare."

17. The Chamber recalls that on 7 December 2005, the Prosecution attempted to tender these documents through Defence Witness Augustin Ndindiliyimana who indicated that he could not tell if the signatures on the PID1 documents were those of the Accused, and could not recognise the stamps on the documents. The Chamber ruled that the documents be marked for identification purposes only. The Prosecution now seeks to introduce the evidence of a proposed handwriting expert, Antipas Nyanjwa, to prove that the signatures on the PID1 documents were in fact those of the Accused. The question before the Chamber therefore is whether, considering all the circumstances, it would be appropriate to allow the Prosecution to call this handwriting expert for the limited purpose of proving that the documents contained in PID1 are authentic and that they bear the signature of the Accused.

18. The Chamber recalls the provisions of Rule 85 which outline the order of presentation of evidence before the Tribunal. In the Chamber's view, Rule 85 envisages that the Prosecution, as accuser, should present all evidence which is available to it, and which it considers relevant to proof of the allegations against the Accused, during the presentation of its own case. That way, the Accused is afforded a fair opportunity to answer the Prosecution evidence when he presents evidence in his defence. According to the ICTY Trial Chamber in the *Celebici* case, "there is the principle that matters

probative of the Defendant's guilt should be adduced as part of the case of the Prosecution."[4]

19. Despite this general principle, the Chamber notes that in exercising its discretion to admit evidence under Rule 89(C), it must seek to receive all evidence that is relevant to the discovery of the truth about the allegations in the Indictment without causing substantial prejudice to the rights of the Accused. Where some prejudice may result from the exercise of its discretion, the Chamber must consider and adopt such procedural mechanisms that exist in the context of a criminal trial, as may be necessary to cure the prejudice and ensure that a fair trial ensues.

20. The Chamber has closely examined the PID1 documents and concludes, after careful consideration, that hearing evidence relating to these documents will further the Chamber's overall objective of discovering the truth about the allegations made against the Accused in this case.

21. The Chamber is mindful of the late stage of the proceedings. Nonetheless, it is the Chamber's view that the essence of the Motion touches upon the allegation that the Accused was *commandant de place* for Butare and Gikongoro. This allegation is not a new one, and the Defence has, during the presentation of its case, led evidence to contradict it. However, the Chamber is satisfied that the Defence could, in the interests of justice, be given the opportunity to call evidence to contradict or otherwise challenge the evidence of the proposed handwriting expert.

22. Having decided that evidence tending to verify the authenticity of the PID1 documents is admissible in the overall interests of justice, the Chamber must now pronounce itself on the qualifications of the proposed handwriting expert, Antipas Nyanjwa. The Chamber notes that pursuant to Rule 94 *bis*, Defence objects to the qualifications of the proposed handwriting expert and indicates its intention to cross-examine him if he takes the witness stand. The Chamber has carefully considered Mr. Nyanjwa's academic and professional qualifications, his experience in forensic document examination both in his native country and as an admitted handwriting expert before the Tribunal, as well as his expert report.[5] The Chamber is satisfied that by virtue of Mr. Nyanjwa's specialised knowledge, skill, training and experience, he can assist the Chamber in determining the authenticity of the signatures on the PID1 documents.

23. The Chamber notes the Defence objection that documents seized from the Accused at the time of his arrest in the United Kingdom should not be used for the purposes of comparison with the disputed signatures contained in PID1. The Defence argues that the Warrant of Arrest and Order for Transfer of the Accused dated 2 February 2000[6] did not authorise seizure of any materials from the Accused. As a result, argues the Defence, the documents seized from the Accused when he was arrested in the United Kingdom in 2000 were illegally seized and cannot be utilised by the Chamber for the purpose of comparing with other disputed documents.

23. The Chamber notes the decision of the ICTY Appeals Chamber in *Stakic* where the Defence argued that certain documents seized from the Accused at the time of his arrest were illegally obtained and therefore should be excluded. The Defence further argued that admitting the documents would violate the fair trial rights of the Accused. The Appeals Chamber held that Rule 39 of the ICTY Rules empowers the Prosecutor to collect evidence and conduct on-site investigations, and that the Defence had failed to establish that in the circumstances of the case, the search and seizure were illegal under the Rules or international law.[7] The Chamber agrees with the ICTY Appeals Chamber that the Defence must show that the search and seizure as a result of which the documents were obtained were tainted with illegality either under the Tribunal's Rules or at international law.

24. In addition, the Chamber notes that the arrest and transfer of persons accused before the Tribunal involves the application of both international and domestic law. This is envisaged by Article 28 of the Tribunal's Statute which requires States to cooperate with the Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. It is the Chamber's view that while the Warrant of Arrest and Order for Transfer of the Accused was issued by an International Tribunal, its actual execution had to take place with the cooperation of States and also under the provisions of the domestic law. The domestic law of the United Kingdom, where the Accused was arrested, provides sufficient grounds for search and seizure of materials either during the course of an arrest or after an arrest has been made.[8]

25. The Chamber is therefore satisfied on the basis of Rule 39 of the Tribunal's Rules, as well as the provisions of English law cited above, that a sufficient legal basis existed for the seizure of materials from the Accused at the time of his arrest, and for their subsequent use in proceedings before this Tribunal. The Defence submission on this issue therefore lacks merit and is dismissed.

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the motion and hereby **ORDERS** that:

1. The proposed handwriting expert, Antipas Nyanjwa, shall testify on 8 or 9 May 2006;
2. The Defence shall, if it so desires, file a Motion to call a witness in rejoinder to contradict or otherwise challenge the evidence of the above-named Prosecution witness;
3. The said Defence witness in rejoinder shall, if the Motion is granted, testify on 1 and 2 June 2006.

Arusha, 26 April 2006

Asoka de Silva	Flavia Lattanzi	Florence R. Arrey
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

[1] T. 7 December 2005, p. 34.

[2] "Prosecutor's Response to Accused's Objections to the Prosecutor's request for a Handwriting Expert and Request for Cross-Examination", filed on 20 April 2006, para. 3.

[3] *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, "Decision on the Prosecutor's Motion to Admit Documents Tendered During the Cross-Examination of Defence Witness Augustin Ndindiliyimana", 28 February 2006; *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; *Nyiramasuhuko v. The Prosecutor*, "Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence", A.C., 4 October 2004.

[4] *Prosecutor v. Zelnil Delalic et al* ("Celebici case"), "Decision on the Prosecutor's Alternative request to Reopen the Prosecutor's Case", 19 August 1998, para 18.

[5] The Chamber notes that Mr. Nyanjwa has testified as a handwriting expert before the Tribunal on at least two previous occasions. See *Prosecutor v. Nyiramasuhuko et al.*, "Decision on Prosecutor's Motion for Leave to Add a Handwriting Expert to His Witness List", 14 October 2004; and *Prosecutor v. Bagosora et al.*, "Decision on the Prosecution Motion to Recall Witness Nyanjwa", 29 September 2004.

[6] *The Prosecutor v. Tharcisse Muvunyi, Idelphonse Nizeyimana, Idelphonse Hategikimana*, "Warrant of Arrest and Order for Transfer and Detention", 2 February 2000.

[7] *Prosecutor v. Milomir Stakic*, "Decision", 10 October 2002, A.C.

[8] See Police and Criminal Evidence Act, 1984.

Section 17 (1) (a) provides *inter alia*, that "… a constable may enter and search any premises for the purpose (a) of executing a warrant of arrest issued in connection with or arising out of criminal proceedings; …"

Section 18 (1) provides in relevant part that "… a constable may enter and search any premises occupied or controlled by a person who is under arrest for an arrestable offence, if he has reasonable grounds for suspecting that there is on the premises evidence … that relates (a) to that offence; or (b) to some other arrestable offence which is connected with or similar to that offence.

(2) A constable may seize and retain anything for which he may search under subsection (1) above."