



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 21 November 2006

THE PROSECUTOR

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
Case No. ICTR-98-44-T**

DECISION ON ADMISSION OF UNAMIR DOCUMENTS

Rule 89 of the Rules of Procedure and Evidence

Office of the Prosecutor:

Don Webster
Alayne Frankson-Wallace
Iain Morley
Saidou N'Dow
Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Mathieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera
Peter Robinson and Patrick Nimy Mayidika Ngimbi

INTRODUCTION

1. The proceedings in the instant case commenced on 19 September 2005. The fourth trial session started on 26 October 2006 with the continuation of the Prosecution's case. On 6 November 2006, the Defence sought the admission of 10 UNAMIR Situation Reports issued in April 1994 as Defence exhibits during the cross-examination of Prosecution Witness ALG.¹ The Prosecution objected to the admission through that witness and rather moved the Chamber to admit all the UNAMIR Situation Reports as exhibits so that they can be used as documents sent by the UNAMIR to the United Nations Head Quarters in New York and when necessary during the examination of a witness.² The Chamber decided to reserve its ruling and invited the parties to file their written submissions thereto by the following day.³ These submissions were filed by each party on 8 November 2006.⁴

2. Before addressing the specific issue of admission into evidence of the 10 UNAMIR documents, the Chamber will generally deal with the rules governing the admission of evidence.

DELIBERATIONS

Rules Governing the Admission of Evidence

3. The Defence for Nzirorera submits that authentication is the first hurdle of admissibility; then even if a document is authentic, it must be relevant before being admitted as an exhibit at the trial. In the Defence's view, the admission of exhibits should be done in connection with the testimony of witnesses.⁵ The Defence for Nzirorera also contends that "it is up to each party to determine how much evidence to present behind its documentary evidence so as to give it more weight". In its view, the Chamber should not filter the admission of authentic and relevant documents, but should determine the weight to be given to the exhibits during its deliberations after it has heard all of the evidence.

¹ T. 6 November 2006; see Documents marked for identification ID. NZ 39 to 49.

² T. 6 November 2006, p. 28.

³ T. 6 November, p. 29.

⁴ Joseph Nzirorera's Submissions Concerning the Admission of Exhibits; Prosecutor's Submission Concerning Admission of UNAMIR Documents; Soumission d'Edouard Karemera concernant l'admission des documents de la MINUAR; Mémoire de M. Ngirumpatse sur la question du versement en prevue des pièces à conviction dans le cadre des auditions de témoin.

⁵ The Defence relies, among other things, upon two decisions delivered by the International Criminal Tribunal for Former Yugoslavia in the *Prlic* (13 July 2006) and *Milutinovic* cases (10 October 2006).

4. According to Rule 89 of the Rules, the Tribunal's Rules of Procedure and Evidence govern the proceedings.⁶ The Chamber is not bound by national rules of evidence and may, in cases not otherwise provided for in the Rules, apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.⁷ The Chamber has also broad discretion under Rule 89 (C) of the Rules to admit any evidence provided on the basis of two criteria only: the evidence must be *relevant* and have *probative value*. While a Chamber always retains the competence under Rule 89(D) to request verification of the authenticity of evidence obtained out of court, "to require absolute proof of a document's authenticity before it could be admitted would be to require a far more stringent test than the standard envisioned by Sub-rule 89 (C)".⁸ According to the Appeals Chamber, 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.⁹

5. Trial Chambers of both *ad hoc* Tribunals have held that documents need not be recognized by a witness in order to have probative value.¹⁰ There is no prohibition on the admission of evidence simply on the grounds that the purported author of that evidence has not been called to testify, and Trial Chambers have permitted the admission of documentary evidence even though not submitted by or through a witness. This practice is consistent with Rule 89(A) of the Rules according to which Trial Chambers are not bound by any national

⁶ Rule 89 of the Rules reads as follows:

(A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may request verification of the authenticity of evidence obtained out of court.

⁷ Rules of Procedure and Evidence, Rules 89(A) and (B).

⁸ *Prosecutor v. Delalic and Delic*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998.

⁹ *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 7; *Prosecutor v. Georges Anderson Rutaganda*, Case No. ICTR-96-3-A, Judgement (AC), para. 33; *Prosecutor v. Delalic and Delic*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998.

¹⁰ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request to Admit United Nations Documents into Evidence under Rule 89(C) (TC), 25 May 2006, para. 4; *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, Judgement (TC), 3 March 2000, para. 35; *Prosecutor v. Kvočka et al.*, Decision on Zoran Zigic's Motion For Rescinding Confidentiality of Schedules Attached to the Indictment Decision On Exhibits (TC), 19 July 2001; *Prosecutor v. Prlic et al.*, IT-04-74-PT, Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings (TC), 28 April 2006; *Prosecutor v. Prlic et al.*, IT-04-74-T, Decision on Admission of Evidence (TC), 13 July 2006.

rules of evidence. Furthermore, as the Trial Chamber noted in the *Blaskic* Judgement, the proceedings are conducted by professional Judges who can admit a given piece of evidence and then evaluate it to determine its due weight, having regard to the circumstances in which it was obtained, its actual contents and its credibility in light of all the evidence tendered.¹¹

6. If a witness declares that he or she recognises a document, and the Trial Chamber is satisfied that the document is relevant and has probative value, it can be admitted through that witness.¹² However, where a witness states that he or she does not recognise a document that is not presented as a prior inconsistent statement of the witness, it cannot be admitted through the witness.

7. Finally, the admission into evidence does not in any way constitute a binding determination as to the authenticity or trustworthiness of the document. These are to be assessed by the Chamber at a later stage in the case when assessing the probative weight to be attached to the evidence.¹³

Admission of UNAMIR Documents

8. The Defence for Nzirorera moves the Chamber to admit 10 UNAMIR Situation reports¹⁴ through Witness ALG. It contends that these documents are authentic and relevant by some connection with the testimony of the witness. The Prosecution responds that these reports cannot be offered into evidence through Witness ALG and cannot be used to impeach the witness as he knows nothing about them. It submits that these documents, however, are relevant to the Indictment and probative of some historical background and therefore suggests preparing a comprehensive file of all relevant UNAMIR situation reports, properly indexed in chronological order, to cover the period 1 January through 19 July 1994. In the Prosecution's view, the Chamber may then determine their probative value by weighing their contents in relation to the testimony of witnesses who specifically comment on a particular

¹¹ *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, Judgement (TC), 3 March 2000, para. 35.

¹² *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, Decision on the Defence Motion For Reconsideration of the Ruling to Exclude From Evidence Authentic And Exculpatory Documentary Evidence (TC), 30 January 1998, paras. 10 and 11.

¹³ *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 7; *Prosecutor v. Georges Anderson Rutaganda*, Case No. ICTR-96-3-A, Judgement (AC), para. 33; *Prosecutor v. Delalic and Delic*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998.

¹⁴ Documents marked for identification ID. NZ 39 to 49, T. 6 November 2006.

situation report, or who comment on a particular portion of a particular situation report. The Defence for each Accused oppose the Prosecution's suggestion. They submit that each party should only tender the UNAMIR documents that are relevant to their own case and that they will choose in the context of the testimony of the Prosecution and Defence witnesses.

9. In the present case, there is no dispute that the UNAMIR Situation Reports marked for identification¹⁵ are relevant to the case and present sufficient indicia of reliability to be admissible. The Chamber, however, is not satisfied that the Defence has shown that the documents can be admitted through the witness as he did not recognise the documents and did not adopt their contents. The 10 UNAMIR Situation Reports marked for identification cannot therefore be entered through Witness ALG.

10. In the Chamber's view, UNAMIR documents could be admitted through the author of the documents, a person who knows of the documents or could speak to their contents. In that respect, the Chamber notes that both Prosecution and Defence for Nzirorera agree that the next Prosecution Witness, Frank Claeys, will be able to speak to their content and therefore to offer them into evidence.

11. The Chamber is also of the view that UNAMIR Documents could be admitted without being tendered during the examination of a witness, provided that the moving party shows, for each document, its relevancy and probative value. In that respect, it is noteworthy that Trial Chamber I in the *Bagosora et al.* case, quoted by the Defence for Nzirorera, granted the admission of official United Nations correspondence arising from the UNAMIR peacekeeping mission in Rwanda in 1994 *without being recognized by a witness*.¹⁶

12. The Prosecution's suggestion to provide the Chamber with a bundle of UNAMIR documents so that the Chamber determines which document has probative value is not appropriate. For evidence to be admissible, each party must demonstrate its relevance and probative value.

¹⁵ Marked ID. NZ 39 to 49.

¹⁶ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request to Admit United Nations Documents into Evidence under Rule 89(C) (TC), 25 May 2006, para. 4.

Guidelines for the Admission of Evidence

13. The Chamber refers to the above principles governing the admissibility of documentary evidence and directs the parties are to take them into account when presenting or objecting to the admission of such evidence.

14. The Chamber further notes that the Defence for Nzirorera is not averse to informing the Prosecution in advance of the testimony of an upcoming witness whether it intends to object to a document to be offered through that witness. The Chamber considers that the expeditiousness of the proceedings may be enhanced if such a practice be systematically adopted by the parties.

15. The Defence for Nzirorera also requests that a document which is submitted for admission but rejected by the Chamber should be marked for identification so that it can be referred to by subsequent witnesses and will be available for examination by the Appeals Chamber to determine whether the Trial Chamber erred in refusing to admit such document.

16. In the Chamber's view, there is no need to adopt a general rule that each document which are referred to in court and are not admitted should be marked for identification. The Chamber will continue to decide on a case-by-case basis when marking for identification a document will be warranted, bearing in mind the transparency of the proceedings and the interests of justice. In any event, each document marked for identification will not be admitted until the Chamber makes a ruling on admissibility, either orally or in writing, at which point it will be given an official exhibit number.

FOR THE ABOVE REASONS, THE CHAMBER

- I. DENIES** the Defence Motion to admit into evidence, through Witness ALG, 10 UNAMIR Situation Reports marked for identification ID. NZ 39 to 49;
- II. DENIES** the Prosecution's application to enter all the UNAMIR Documents into evidence;
- III. REQUESTS** the Parties to apply and take into consideration the rules governing the admission of evidence as stated above when seeking or objecting to the admission of evidence; and

IV. REQUESTS each Party to inform the opposite Party in advance of the testimony of an upcoming witness whether it intends to object to a certain exhibit to be offered through that witness.

Arusha, 21 November 2006, done in English.

Dennis C. M. Byron

Presiding Judge

Emile Francis Short

Judge

Gberdao Gustave Kam

Judge

[Seal of the Tribunal]