



ICTR-99-54A-T
10-02-2003
(1077-1072)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 10 February 2003

JUDICIAL RECORDS ARCHIVES
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The PROSECUTOR
v.
Jean de Dieu KAMUHANDA

Case No. ICTR-99-54A-T

DECISION ON KAMUHANDA'S MOTION TO ADMIT EVIDENCE PURSUANT TO
RULE 89 OF THE RULES OF PROCEDURE AND EVIDENCE

Office of the Prosecutor

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

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Winston C. Matanzima Maqutu and Arlette Ramaroson (the “Chamber”);

BEING SEIZED of:

- (i) the “Motion to Admit Evidence Rule 89 of the Rules of Procedure and Evidence,” filed on 14 August 2002 (the “Motion”);
- (ii) the “Prosecutor’s Response to Defence Motion to Admit Evidence (Rule 89 of the Rules of Procedure and Evidence) and Prosecutor’s Application for Subpoena to Issue (Rule 54 of the Rules of Procedure and Evidence,)” filed on 31 October 2002 (the “Prosecutor’s Response”);
- (iii) the “*Conclusions en réplique aux fins d’admission d’éléments de preuve et aux fins de citation de témoin,*” filed on 25 November 2002 (the “Defence Reply”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), in particular Rules 54, 71, 89, 90(A) and 92 *bis* of the Rules;

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

SUBMISSIONS OF THE PARTIES

Defence Submissions

1. The Defence requests that the Chamber admit into evidence as an exhibit pursuant to Rule 89(C) of the Rules the deposition/ statement of Defence Witness ALA made on 9 August 2002 to support the Alibi of the Accused. The Defence submits that the said witness has refused to give evidence in court because he feels his security is not guaranteed following the Prosecution’s contact with his wife and him absent prior notification to the Defence, in breach of the order for protective measures. The Defence thus obtained a written statement from this witness, which corroborates the Alibi of the Accused.

2. In support of its request, the Defence cites jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (the “ICTY;”)

“[t]he two criteria for admissibility are relevance and probative value – pursuant to Sub-rule 89(C) of the Rules, apply whether the testimony is direct or hearsay [...] The Trial Chamber therefore considers that the admissibility of hearsay evidence may not be subject to any prohibition in principle since the proceedings are conducted before professional Judges who possess the necessary ability to begin by hearing hearsay evidence and then to evaluate it so that they may make a ruling as to its relevance and probative value.”¹

¹ See the Decision of 21 January 1998 in *the Prosecutor v. Blaskic* (the *Blaskic* Decision;) the “Decision on the Motion of the Prosecution for the Admissibility of Evidence,” of 19 January 1998 in *the Prosecutor v. Delalic* (the *Delalic* Decision) and the “Decision on the Prosecutor’s Appeal on Admissibility of Evidence,” of 16 February 1999 in the *Aleksovski* Appeal Chamber Decision (the *Aleksovski* Appeal Chamber Decision)

Prosecution Response

3. In objection to the Motion, the Prosecution submits that pursuant to Rule 90(A) of the Rules, witnesses are, in principle, obliged to be heard directly by the Chamber unless a Chamber has ordered that a witness be heard by means of a deposition as provided for in Rule 71 of the Rules. The Prosecution argues that the document attached to the Motion, which the Defence submits is a deposition, does not fulfil the criteria by which a deposition is obtained and therefore, does not qualify as a deposition.

4. The Prosecution submits that Rule 89 of the Rules does not apply in the instant case and argues that the Defence could have filed a Motion under Rule 54 of the Rules to summon Defence Witness ALA. In effect, the Prosecution applies for a subpoena, to issue either through the Defence or *proprio motu* through the appropriate organs of the Tribunal to compel this witness to appear before the Chamber. The Prosecution submits that the Chamber should invoke the same orders issued in the "Decision on the Extremely Urgent Motion to Summon a Witness Pursuant to Rule 54," of 20 August 2002, in the present case.

Defence Reply

5. Regarding the Prosecution's submission that witnesses should, in principle, be heard, pursuant to Rule 90(A) of the Rules, and that the only derogation is a deposition made pursuant to Rule 71, the Defence argues that this submission is erroneous and must fail. The Defence quotes the opinion of *Aleksovski* Appeals Chamber that, "[n]othing in Rule 90(A) fetters the discretion of a Trial Chamber to admit evidence under Rule 89(C)."² Furthermore, the Defence has requested the admission of Witness ALA's statement pursuant to Rule 89(C) of the Rules and has not requested a deposition under Rule 71 of the Rules.

6. The Defence emphasises that the statement/ deposition of Defence Witness ALA should be admitted as an exhibit, pursuant to Rule 89(C) of the Rules, and objects to the Prosecutor's request that the said witness be compelled to testify before the Chamber, pursuant to Rule 54 of the Rules.

HAVING DELIBERATED

7. The Chamber will consider whether the document annexed to the Motion is a deposition or a statement and whether said document can be admitted under Rule 89(C) of the Rules and if not, whether Witness ALA should be summoned, pursuant to Rule 54 of the Rules, to appear and give oral testimony.

Whether the Document Annexed to the Motion is a Deposition or a Statement

8. The Chamber notes that "depositions" are provided for under Rule 71 of the Rules. Sub-Rule (A) of said Rule reads, "[a]t the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial, and appoint, for that purpose, a Presiding Officer."

9. In the instant case, the Chamber notes the use by the Defence of the words "statement" and "deposition" interchangeably.³ The Chamber also notes the Defence

² The *Aleksovski* Appeals Chamber Decision, para 17

³ The Defence uses the French terms "déposition," "attestation écrite" and "déclaration" in its original Motion.

submission that it does not request a deposition of Witness ALA, under Rule 71 of the Rules. Accordingly, the Chamber does not consider the document attached to the Motion as a deposition within the meaning of Rule 71 of the Rules. Rather, the Chamber deems it to be a written statement, as it contains a narration of the events between 6 and 18 April 1994 in support of the Accused's Alibi, a date, the name and the signature of the witness.

Whether the Statement Should be Admitted under Rule 89(C) of the Rules

10. The Defence requests that the written statement of Witness ALA be admitted under Rule 89(C) of the Rules. The said Rule provides that "A Chamber may admit any relevant evidence which it deems to have probative value." Also, the jurisprudence of the ICTY, specifically in the *Aleksovski* Appeals Chamber Decision, has held that:

"Trial Chambers have a broad discretion under Rule 89(C) to admit relevant hearsay evidence. Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful, and trustworthy, as appropriate; and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose, or as Judge Stephen described it, the probative value of a hearsay statement will depend upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is "first-hand" or more removed, are also relevant to the probative value of the evidence [...]"⁴

11. The Chamber reminds the Defence of Rule 92***bis*** of the Rules, which provides:

Rule 92 *bis*: Proof of Facts Other Than by Oral Evidence

(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 [...]

12. The Chamber notes the interpretation of the equivalent Rule 92 *bis* of the ICTY Rules in the *Galic* Appeals Chamber Decision, which was quoted in its recent Decision of 22 January 2003 in the *Nyiramasuhuko et al.* Case that found that, "[t]he general requirement under Rule 89 that admissible evidence be relevant and probative applies in addition to, and not in lieu of, the more specific provisions of Rule 92 *bis* of the Rules."⁵

13. Rule 6(C) of the Rules provides that "An amendment shall enter into force immediately after it is adopted, but shall not operate to prejudice the rights of the accused in any pending case." In the instant case, the Chamber notes that since the Motion was filed on 14 August 2002, the Accused will not be prejudiced if Rule 92 *bis* of the Rules, which was adopted by the Tribunal on 6 July 2002, is applied.

⁴ See the *Aleksovski* Appeals Chamber Decision, paras. 15 and 16.

⁵ See "Decision on the Prosecutor's Motion to Remove from her Witness List Five Deceased Witnesses and to Admit into Evidence the Witness Statement of Four of Said Witnesses," of 22 January 2003 in *The Prosecutor v. Nyiramasuhuko, et al.*, para. 20; "Decision on Interlocutory Appeal Concerning Rule 92 *bis*" of 7 June 2002 in *the Prosecutor v. Galic* (the *Galic* Decision) at para. 31

14. Furthermore, the Chamber considers the Defence submissions as to why Witness ALA cannot testify in Arusha. The Defence submits that Witness ALA has refused to travel to Arusha to testify because he fears for his life following the breach by the Prosecution of the Decision on the Protection of Defence Witnesses.⁶ The Defence argues that the Accused should not be denied the evidence of said witness as a result of the Prosecution's breach of the above-mentioned Order.

15. The Chamber notes that under the above-mentioned Decision, the Defence was granted a measure that, "[r]equires the Prosecutor and her representatives who are acting under her instructions to notify the Defence of any request for contacting the Defence witnesses, [so that] the Defence shall make arrangements for such contact."

16. In the instant case, the Prosecution allegedly contacted Witness ALA without giving prior notice of such contact to the Defence, thus causing the witness to fear for his safety if he were to travel to Arusha to testify. The Chamber is of the opinion that the Prosecution's failure to notify the Defence constitutes a procedural breach since the Prosecution was not prohibited *per se* from contacting the witness. On the basis of the information provided by the Defence, the Chamber finds that such procedural breach does not affect the protective measures granted to the Defence on behalf of Witness ALA were he to travel to Arusha to testify.

17. Furthermore, under Rule 90(A) of the Rules it is provided that, "[w]itnesses shall in principle, be heard directly by the Chambers [...]". In the instant case, the Defence has not provided the Chamber with sufficient reasons why Witness ALA should not be heard directly. Accordingly the Chamber directs the Defence to take the necessary measures to ensure the appearance of Witness ALA before the Tribunal.

18. On these grounds the Chamber dismisses the Defence request to admit the written statement of Witness ALA pursuant to Rule 89(C) of the Rules. Likewise, the Chamber dismisses the Prosecution's request under Rule 54 of the Rules for issuance of a subpoena by the Tribunal.

⁶ See "Decision on Jean De Dieu Kamuhanda's Motion for Protective Measure for Defence Witnesses," of 22 March 2001.

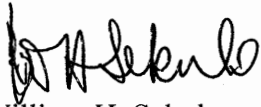
FOR THE ABOVE REASONS, THE TRIBUNAL

DISMISSES the Defence request to admit the written statement of Witness ALA pursuant to Rule 89(C) of the Rules;

DIRECTS the Defence to take the necessary measures to ensure the appearance of Witness ALA before the Tribunal;

DISMISSES the Prosecution's request under Rule 54 of the Rules for issuance of a subpoena by the Tribunal.

Arusha, 10 February 2003



William H. Sekule
Presiding Judge



Winston C. Matanzima Maqutu
Judge



Arlette Ramarason
Judge

