



ICTR-98-42-T
(26-08-05)
(11468-11464)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

11468
Amwamp

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramarason
Judge Solomy Balungi Bossa

Registrar: Mr Adama Dieng

Date: 26 August 2005

JUDICIAL ARCHIVES
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The PROSECUTOR

v.

Pauline NYIRAMASUHUKO and Arsène Shalom NTAHOBALI

Case No. ICTR-97-21-T
Joint Case No. ICTR-98-42-T

DECISION ON THE DEFENCE NOTICE TO ENTER INTO EVIDENCE THE REPORT OF
THE INVESTIGATOR RALPH LAKE
(Article 92bis, Rules of Procedure and Evidence)

Office of the Prosecutor

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Defence Counsel for Nsabimana

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Defence Counsel for Nteziryayo

Mr Titinga Frédéric Pacere, Mr Richard Perras

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Kamaroson and Judge Solomy Balungi Bossa (the “Chamber”);

BEING SEIZED of the Defence for Ntahobali’s “Requête et Notification de Arsène Shalom Ntahobali de son Intention de Verser au dossier le rapport de l’enquêteur Ralph Lake en lieu et place de son témoignage”, filed on 3 August 2005 (the “Motion”);

HAVING RECEIVED:

1. The “Prosecutor’s response to notice of Arsène Shalom Ntahobali to enter into evidendce (*sic*) the report of investigator Ralph Lake pursuant to Article 92 of the Rules of Procedure and Evidence”, filed on 9 August 2005” (the “Prosecutor’s Response”);
2. The “Réponse de Joseph Kanyabashi á la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier les déclarations écrites de témoin et les transcriptions de leur témoignage dans un procès au TPIR en lieu et place de leur témoignage ”, filed on 9 August 2005 (“Kanyabashi’s First Response”);
3. The “Réplique sur la réponse du Procureur à la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier les déclarations écrites de témoins et les transcriptions de leur témoignage dans un procès au TPIR en lieu et place de leur témoignage et réplique à la réponse du Procureur sur la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier le rapport de l’enquêteur Ralph Lake en lieu et place de son témoignage et amendement auxdites requêtes et notifications”, filed on 15 August 2005 (the “Reply”);
4. The “Réponse de Joseph Kanyabashi a la replique sur la réponse du Procureur à la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier les déclarations écrites de témoins et les transcriptions de leur témoignage dans un procès au TPIR en lieu et place de leur témoignage et réplique à la réponse du Procureur sur la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier le rapport de l’enquêteur Ralph Lake en lieu et place de son témoignage et amendement aux dites requêtes et notifications”, filed on 22 August 2005(the “Kanyabashi’s second Response”);

CONSIDERING the provisions of the Statute of the Tribunal (the “Statute”), in particular Articles 19 and 20 of the Statute, and the Rules of Procedure and Evidence (the “Rules”), in particular Rule 92*bis*;

NOW DECIDES the matter, pursuant to Rule 73(A) of the Rules, on the basis of the written submissions of the Parties.

SUBMISSIONS BY THE PARTIES

Defence for Ntahobali

1. The Defence for Ntahobali submits that the report and photographs of Ralph Lake are of pertinent evidential value to these proceedings.¹
2. The Defence for Ntahobali argues that the photographs and the report go to the proof of a matter other than the acts and conduct of the Accused. The Defence seeks their admittance in lieu of Ralph

¹ The Motion, para. 4.

Lake's testimony to enlighten the Chamber as to the locations in which certain crimes are alleged to have taken place.²

3. In the alternative, the Defence for Ntahobali seeks leave for Ralph Lake to testify before the Chamber.³
4. The Defence for Ntahobali attaches, in the Annex, the witness statement for Ralph Lake and the Index to the Photographic Supplement prepared for the Butare Trial team during August 2000.

The Prosecutor's Response

5. The Prosecutor argues that the Defence for Ntahobali have failed to establish how the proposed Witness Ralph Lake fits within the requisite criteria of Rule 92bis. Neither, the Prosecutor submits, has the Defence for Ntahobali demonstrated what matter would be proved by admission of the report by Ralph Lake. On this basis, the Prosecutor moves the Chamber to deny the Defence Motion.
6. The Prosecutor argues that the report and supplemental photographs do not satisfy the requisite criteria under Rule 92bis. He argues that, apart from the Defence for Ntahobali's opinion, there is no demonstration that the report goes to the proof of a matter other than the acts and conduct of the Accused, draws the Chamber's attention to the fact that the witness statement of Ralph Lake has not been attested to or signed by the proposed witness, and notes that the report does not satisfy any of the exceptions contained within Rule 92bis (C) or sub-section (D).⁴
7. Further the Prosecutor submits that the report by Ralph Lake is, in any case, rendered superfluous considering the photographs entered into evidence by Prosecution Witness Ghandi Shukry. The Prosecutor objects to the use of the report and corresponding photographs if their purpose is to contradict the evidence of Ghandi Shukry. The Prosecutor invites the Chamber to exercise its discretion and visit the sites in question.⁵
8. The Prosecutor takes issue with the late stage in which this application has been made considering the Defence for Ntahobali has been in possession of the said report and photographs from 13 June 2001. He argues that Rule 92bis is only applicable to statements that have "just become available" and the Defence for Ntahobali should provide an explanation as why they did not seek to use the report prior to this occasion.⁶
9. The Prosecutor submits that there is no option available under Rule 92bis to permit the alternative the Defence for Ntahobali seeks, namely to call Ralph Lake for cross-examination, particularly considering the Defence for Ntahobali has failed to invoke the provisions of Rule 98 which provides for a Trial Chamber to summon a witness.⁷
10. Should the Chamber choose to admit the report, the Prosecutor poses no objections to the admissibility of the photographs of Ralph Lake, but only to the merit of the photographs themselves.⁸

Defence for Kanyabashi's Responses

11. In his response, the Defence for Kanyabashi argues that the request to admit the report and photographs of Ralph Lake into evidence does not comply with the requirements of Rule 92bis. The

² *Ibid.*, paras. 5-6.

³ *Ibid.*, para. 7.

⁴ Prosecutor's Response, para. 5.

⁵ *Ibid.*, para. 6.

⁶ *Ibid.*, para 7.

⁷ *Ibid.*, para 8.

⁸ *Ibid.*, para 9.



Defence for Kanyabashi moves the Chamber to dismiss the Motion both for the tendering of the report into evidence and the alternative request to call Ralph Lake as a witness for cross-examination under Rule 92bis.⁹

12. The Defence for Ntahobali notes that the Defence for Ntahobali acknowledges that the report and photographs are inadmissible under Rule 92bis at paragraphs 38-41 of its Reply. However, the Defence for Kanyabashi takes issue with the reliance by the Ntahobali Defence on Rule 89 (C) in this Reply. Whilst it is of the view that the Defence for Ntahobali should properly seek leave to vary its witness list to have this witness added, the Defence for Kanyabashi objects to the Ntahobali Defence seeking leave to call a witness for cross-examination that it has included in its list of witnesses, when there is nothing to indicate that this is a hostile witness.¹⁰

Defence for Ntahobali's Reply

13. The Defence for Ntahobali affirms that proposed Witness Ralph Lake does not meet the requisite criteria under Rule 92bis. It submits that because the said report was communicated to the Defence in 2000, there was no requirement to obtain a statement of truth as required by Rule 92bis. It was the Defence for Ntahobali's assumption that the Prosecutor would not object to a report compiled by an investigator in his Office.¹¹
14. The Defence for Ntahobali submits in reply that in spite of the number of photographs Prosecution Witness Ghandi Shukry has filed, the Ralph Lake report is more precise, in particular in relation to photographs 11 and 13, which are allegedly the ruins of the Accused Nyiramasuhuko's former residence.¹² Furthermore, the Defence for Ntahobali submits that the photographs of Ralph Lake are much closer to the period in the Indictment than those taken by Ghandi Shukry.
15. The Defence for Ntahobali argues that despite the fact that it has had the report of Ralph Lake in its possession since 2001, the failure to use it is attributed to Orders of the Chamber. The Defence for Ntahobali states that it has attempted to use the report in the cross-examination of both Prosecution witnesses and for the Nyiramasuhuko Defence but has been prevented from doing so by the Chamber.¹³
16. The Defence for Ntahobali submits that should the Chamber find that Ralph Lake does not meet the requisite criteria of Rule 92bis, it amends its notice and motion and seeks leave to admit the said report and photographs under Rule 89(C).¹⁴
17. In the alternative, should the Chamber conclude that the Ralph Lake report and photographs do not qualify under both Rules 89 and 92bis, the Defence for Ntahobali amends the Motion and moves the Chamber to submit Ralph Lake to cross-examination under Rule 98.¹⁵

DELIBERATIONS

18. The Chamber recalls its Decision of 26 August 2005 in connection with the modification of the Defence for Ntahobali's witness list, where it granted the Defence for Ntahobali Motion to call Ralph Lake as an additional witness to testify specifically to the location of the Accused's residence/house.

⁹ Kanyabashi's Second Response, 22 August 2005, paras.23-26.

¹⁰ *Ibid.*, paras 16 – 25.

¹¹ The Reply, paras. 38-41.

¹² *Ibid.*, paras. 28-31.

¹³ *Ibid.*, paras. 32 – 39.

¹⁴ *Ibid.*, paras. 40 – 46. The Defence for Ntahobali relies on: *Nyiramasuhuko et al.*, Decision on the Prosecutor's Motion to Remove from her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of Said Witnesses, 22 January 2003, para. 19; *Muhimana*, Decision on the Prosecution Motion for Admission of Witness Statements, 20 May 2004, para. 20.

¹⁵ *Ibid.*, para 46.

19. Notwithstanding the Chamber's Decision of 26 August 2005, the evidence of a witness in the form of a written statement may be admitted, in lieu of oral testimony, if the statement satisfies the conditions laid out in Rule 92*bis*. Taking these criteria into consideration, the Chamber finds that this Motion would not have satisfied the requirements of Rule 92*bis*. Furthermore, the Chamber takes note that the Defence for Ntahobali accepts that the Ralph Lake report and photographs do not meet the necessary conditions under Rule 92*bis*.
20. For the above reasons, the Chamber denies this Motion in its entirety.

THE CHAMBER HEREBY DENIES THE MOTION.

Arusha, 26 August 2005



William Sekule
Presiding Judge



Arlette Ramaroson
Judge



Solomy Balungi Bossa
Judge

