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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 15 September 2006

The PROSECUTOR v. Arsène Shalom NTAHOBALI et al
(Case No. ICTR-97-21-T)

Joint Case No. ICTR-98-42-T

DECISION ON NTAHOBALI'S MOTION TO ADMIT KANYABASHI'S CUSTODIAL STATEMENTS

Office of the Prosecutor
Ms Silvana Arbia
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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

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

SEISED of *"Requête de Arsène Shalom Ntahobali afin de déposer la déclaration de Joseph Kanyabashi en vertu de l'article 89 C)"*, annexed to which are documents bearing K-numbers, consisting of Kanyabashi's custodial statements, filed on 26 June 2006 (the "Motion");

CONSIDERING the

i) "Prosecutor's Response to the *"Requête de Arsène Shalom Ntahobali afin de déposer la déclaration de Joseph Kanyabashi en vertu de l'article 89 C)""*, filed on 3 July 2006 (the "Prosecutor's Response");

ii) *"Réponse de Kanyabashi à la Requête de Arsène Shalom Ntahobali afin de déposer la déclaration de Joseph Kanyabashi en vertu de l'article 89 C)"*, attached to which are three annexes consisting of a report and curriculum vitae of Professor G. Stessens, an ICTY Decision and a House of Lords Judgment, filed on 3 July 2006 ("Kanyabashi's Response");

iii) *«Réplique consolidée de Arsène Shalom Ntahobali aux réponses de Joseph Kanyabashi et du Procureur à la Requête de Arsène Shalom Ntahobali afin de déposer la déclaration de Joseph Kanyabashi en vertu de l'article 89 C)»* of 10 July 2006 ("Ntahobali's Reply").

CONSIDERING the Statute of the Tribunal (the "Statute") in particular Article 19 of the Statute and the Rules of Procedure and Evidence (the "Rules"), specifically Rule 89(C) of the Rules;

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

SUBMISSIONS OF THE PARTIES

Defence for Ntahobali

1. The Defence for Ntahobali requests the admission under Rule 89(C) of the custodial statements allegedly made by Kanyabashi to Belgian authorities, upon his arrest in Belgium on 28 June 1995. Recalling Articles 19 and 20 of the Statute and Rule 89 of the Rules, the Defence submits that to exercise his right to a full defence, the Accused must have the necessary facilities and be able to use and file all exculpatory material, in particular Kanyabashi's custodial statements. The Defence argues that it cannot wait for Kanyabashi's possible testimony before tendering these documents, because there is no guarantee that he will testify.

2. The Defence claims that, in his custodial statements, Kanyabashi stated that Hutu extremists from Kigali committed the massacres at Butare, and that, apart from Captain Nizeyimana, he did not know anybody else from Butare who participated in the massacres; and those who did not like "our" prefecture came to set it alight, mentioning militiamen and

soldiers coming from Butare.[1] Finally, Kanyabashi stressed that as far as he knew, nobody disobeyed his orders.[2]

3. The Defence recalls that Kanyabashi's strategy, as highlighted in his Pre-Defence Brief, is to implicate Ntahobali.[3]

4. The Defence argues that under Rule 89 (C), evidence need only be relevant and have probative value, and that ICTY jurisprudence clearly allows indirect evidence so long as that evidence consists of prior statements.[4]

Prosecutor's Response

5. The Prosecution submits that the Motion is time-barred given that the Kanyabashi's custodial statements were disclosed in September 2001. The Prosecution argues that, if the custodial statements were exculpatory under Rule 68, Ntahobali should have used them prior or during the presentation of his evidence, but in any case before the close of his case.

6. Should the Chamber rule that the Motion is not time-barred, the Prosecution objects to it. Although it agrees with the Defence that it is not necessary to admit documents through a witness giving *viva voce* evidence, the Prosecution nonetheless argues that there are several other indicia which should inform the discretion of the Chamber as to whether to admit any document or otherwise.

7. The Prosecution argues that Kanyabashi's custodial statements are not relevant to Ntahobali's case because nowhere in the statements is Ntahobali's name mentioned to suggest either wrongdoing or innocence. Further, it is farfetched to rely on a sentence suggesting that the killings in Butare were perpetrated by people from Kigali as proof that the entirety of Kanyabashi's custodial statements isexculpatory.

8. The Prosecution submits that Ntahobali has been given every 'practicable facility' in the preparation and presentation of his defence and that therefore the non-admission of Kanyabashi's custodial statements does not in any way affect Ntahobali's rights under Articles 19 and 20. In any case, since the Chamber has given each Party an opportunity to cross-examine witnesses brought before it, Ntahobali will have ample opportunity and time to cross-examine the defence witnesses for Kanyabashi, when the time comes.

Kanyabashi's Response

9. The Defence for Kanyabashi notes that the admission of Kanyabashi's custodial statements is requested not to attack his credibility but to show the veracity of the statements made by Kanyabashi in 1995.

[1] The Motion, para. 23.
[2] The Motion, para. 24.
[3] That is, during the presentation of the Prosecution case, Nyiramasuhuko's and Ntahobali's defence cases.
[4] *See inter alia Prosecutor v. Tadic, Décision relative à la requête concernant les preuves par ouï-dire*, 5 August 1996; *Prosecutor v. Blaskic, Décision sur la requête de la Défense portant opposition de principe à la recevabilité de témoignages par ouï-dire sans conditions quant à leur fondement et à leur fiabilité*, 26 January 1998; *Prosecutor v. Stakic, Ordonnance relative aux normes régissant l'admission d'éléments de preuve*, 16 April 2002.

10. The Defence recalls that it intends to contest the admissibility of Kanyabashi's custodial statements through its expert Professor G. Stessens[5] who will explain that when Kanyabashi was interrogated by the Belgian authorities, said interrogation was conducted contrary to the requirements of Rules 42 and 43.

11. The Defence, relying on the jurisprudence from the Trihunal, the ICTY and the House of Lords, thus submits that the custodial statements cannot be admitted pursuant to Rule 89(C), because the interrogations were conducted in contravention of Articles 17 and 20 of the Statute and Rules 42 and 43 of the Rules.[6]

Ntahobali's Reply to Kanyabashi and to the Prosecutor's Responses

12. As a preliminary matter, Ntahobali submits that it filed its Reply on 10 July 2006 as the deadline for filing its reply expired on Sunday 9 July 2006.

13. In Reply to Kanyabashi's Response, Ntahobali submits that when Kanyabashi was arrested in Belgium on 28 June 1995, the Rules of Procedure and Evidence had not been adopted. The Rules were adopted on 29 June 1995, a day after Kanyabashi's arrest. Consequently, when Kanyabashi was interrogated by the Belgian authorities, adherence to Rules 42 and 43, 63, 89(C) and (D), 92 and 95 could not have been envisaged.

14. In addition, the Defence argues that the Report of Professor Stessens cannot be relied upon to demonstrate the manner in which the interviews were conducted, because said Report is not in evidence and notice of it under Rule 94*bis* has not been filed. The *Mucic* Decision[7] cited by Kanyabashi is distinguishable from the case at bar because at the time when *Mucic* was interviewed, the ICTY Rules of Procedure and Evidence had already been adopted.

15. In Reply to the Prosecution Response, Ntahobali submits that it is not sufficient for the Prosecution to read parts of the custodial statements to conclude that they are irrelevant. Rather it is necessary to read them in their entirety because they provide a context which is useful to Ntahobali's defence strategy. The Defence submits that nowhere has it relied on Rule 68 which requires a showing of 'good cause,' rather it has relied on Rule 89(C) because the custodial statements are exculpatory.

HAVING DELIBERATED

16. As a preliminary matter, the Chamber considers Ntahobali's Reply to be admissible pursuant to Rule 7 *ter*(B) of the Rules.

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[5] The Defence notes that only the Prosecution filed a notice on 20 January 2003 pursuant to Rule 94*bis* (B)(ii), ~~indicating that it will cross-examine~~ the proposed expert and that none of the co-Accused filed a notice in this regard.

[6] *Prosecutor v. Kanyabashi*, Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997, (TC) of 15 May 2006; *Prosecutor v. Bagosora et al.*, Decision on the Prosecutor's Motion for the Admission of Certain materials under Rule 89(C), (TC) of 14 October 2004; *Prosecutor v. Halilovic*, Decision on Motion for Exclusion of Statements of Accused, (TC) of 8 July 2005; Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, (AC) of 19 August 2005; *Prosecutor v. Mucic*, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, (TC) of 2 September 1997 (the "*Mucic* Decision"); *Regina Respondent v. Myers Appellants*, House of Lords, [1997] 3 W.L.R. 552; [1998] A.C. 124.

[7] The *Mucic* Decision

17. The Chamber notes that Kanyabashi does not contest that he made the custodial statements but contests the manner in which they were made and objects to the Motion.

18. Despite the provisions of Rule 89(C) that a Chamber may admit any relevant evidence which it deems to have probative value, a prior statement of a witness (including that of an Accused person) is not evidence *per se*. The Tribunal's practice has consistently been to grant the admission into evidence only of those portions of the Accused's prior statement which were used in cross-examination to test his/ her credibility.[8] The Chamber sees no reason why it should depart from its practice in the instant case.

19. The Trial Chamber takes note of the Appeals Chamber Decision that evidence may be deemed inadmissible where it is found to be so lacking in terms of the indicia of reliability, such that it is not probative.[9] In the Chamber's opinion, Kanyabashi's custodial statement as it is, does not have sufficient indicia of reliability and thus may not be admitted.

20. Accordingly, the Chamber denies the Defence Motion to admit Kanyabashi's custodial statements.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES Defence Motion to admit Kanyabashi's custodial statements.

Arusha, 15 September 2006

William H. Sekule
Presiding Judge

Arlette Ramaroson
Judge

Solomy Balungi Bossa
Judge

[Seal of the Tribunal]

[8] See in particular, the *Prosecutor v. Nyiramasuhuko et al.* ICTR-98-42-T, (TC) Decision on Kanyabashi's Oral Motion to Cross-examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997, of 15 May 2006 at para. 82

[9] *Nyiramasuhuko v. Prosecutor*, ICTR-98-42-AR73.2, (AC), Decision on Pauline Nyiramasuhuko's Appeal on Admissibility of Evidence, of 4 October 2004 at para. 7; See also the Appeals Chamber Judgment in *Musema* at para. 46