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NATIONS UNIES

ICTR-99-50-T
18-11-2008
(30570-30566)
International Criminal Tribunal for Rwanda
Tribunal pénal International pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 18 November 2008

THE PROSECUTOR
v.
CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

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**DECISION ON PROSECUTOR'S MOTION TO ADMIT EXTRACTS FROM
GENERAL ROMEO DALLAIRE'S BOOK, "SHAKE HANDS WITH THE DEVIL"**

Rule 89 (C) of the Rules of Procedure and Evidence

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30569

INTRODUCTION

1. On 4 November 2008, this Chamber issued a Decision admitting into evidence a transcript extract from General Romeo Dallaire's testimony on 23 November 2006 in the *Ndindiliyamana* proceedings.¹ The transcript extract stated, *inter alia*, that there were "soft line hutu ... who were more reconciliatory" and referred to Mugenzi as "one of those – in the midst of all this debate" who was in the "forefront" of finding "a resolution" to an "absolutely near impossible impasse"²
2. On 10 November 2008, the Prosecution filed a Motion seeking the admission of an excerpt from General Dallaire's book, "Shake Hands with the Devil."³ The relevant portion of the book states, *inter alia*, that Mugenzi was an extremist and had joined the "Hutu Power" group.⁴
3. On 11 November 2008, the Defence filed a Response opposing the Motion.⁵

DISCUSSION

Law on Admission of Evidence

4. The Chamber has broad discretion under Rule 89 (C) to admit any evidence which it deems to be relevant and probative. The moving party bears the burden of demonstrating, *prima facie*, that the material for which admission is sought is relevant and of probative value.⁶
5. For the purposes of Rule 89 (C), evidence will be considered relevant where there is a nexus between the evidence and proof of an allegation sufficiently pleaded in the indictment. Evidence has probative value if it tends to prove, or disprove, an issue and has sufficient *indicia* of reliability.⁷ *Indicia* of reliability include: the authorship of the document; whether it is an original or a copy; the place from which the document was obtained in conjunction with

¹ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-I, Decision on Justin Mugenzi's Motion to Admit Transcript Extracts from General Romeo Dallaire's Evidence in the *Ndindiliyamana* Proceedings, 4 November 2008 ("Decision of 4 November 2008"). The material admitted into evidence is from *Prosecutor v. Ndindiliyamana et al.*, Case No. ICTR-00-65-T and is pp. 56 - 58 of the Transcript of 23 November 2006. It has since been assigned Exhibit Number 2D120.

² *Ndindiliyamana et al.*, T. 23 November 2006 p. 57, l. 26 to l. 34.

³ *Bizimungu et al.*, Prosecution's Motion in Relation to the Decision on Justin Mugenzi's Motion to Admit Transcript Extracts of General Romeo Dallaire's Evidence (sic) in the *Ndindiliyamana* Proceedings, 10 November 2008 ("Motion").

⁴ Motion, Annex A is pp. 133 and 140 of "Shake Hands with the Devil."

⁵ *Bizimungu et al.*, Justin Mugenzi's Response to the Prosecutor's Motion in Relation to the Decision on Justin Mugenzi's Motion to Admit Transcript Extracts of General Romeo Dallaire's Evidence (sic) in the *Ndindiliyamana* Proceedings, 11 November 2008.

⁶ *Bizimungu et al.*, Decision on Jerome Bicamumpaka's Confidential and Amended Motion to Admit Rwandan Judicial Records Into Evidence, 10 June 2008, paras 4 -5 (citations omitted); *Bizimungu et al.*, Decision on Justin Mugenzi's Motion to Admit Into Evidence the Transcripts from the Munyakazi Referral Hearing, 23 July 2008, paras. 9-10 (citations omitted).

⁷ *Ibid.*



2

its chain of custody; whether its contents are supported by other evidence; and the nature of the document itself, such as signatures, stamps, or the form of the handwriting.⁸

6. Further, when exercising its discretion to admit evidence, the Chamber must be governed by the right of the accused to a fair trial, as provided for in Articles 19 and 20 of the Statute.⁹

Material Sought to be Admitted

7. The Prosecution seeks to admit pages 133 and 140 of General Dallaire's book, in which Mugenzi is described as an extremist "who had joined the shadowy group that called itself Le Power, or Hutu Power."¹⁰ The passage further provides that Mugenzi had "split the PL and now headed the extremist, or Power, wing..." and controlled "many of the hard-liners inside the PL, so getting him onside was crucial if the impasse was to be resolved.... Mugenzi and his wing presented a much greater danger to Rwanda if they remained outside the process and continued to flirt with volatile elements such as the *Interahamwe*."¹¹

Whether the Material should be Admitted under Rule 89 (C)

8. The Prosecution submits that the transcript extract, admitted into evidence by the Chamber's Decision of 4 November 2008, is based on General Dallaire's book, "Shake Hands with the Devil." It is submitted that the aforementioned pages from General Dallaire's book place his testimony in the *Ndindiliyimana* proceedings in its proper context.

9. The Defence submits, *inter alia*, that General Dallaire's book was written years prior to his evidence in the *Ndindiliyimana* proceedings, and the Chamber cannot, therefore, know whether General Dallaire held the same views as expressed in his book. The Defence further submits that the Chamber's Decision of 4 November 2008 was issued due to the Prosecution's breach of its disclosure obligations, which had deprived the Mugenzi Defence of the opportunity to call and examine General Dallaire as a witness. Accordingly, the Defence asserts that the Prosecution should not now be allowed to benefit from its failure to disclose.

10. The Chamber will address the Defence submissions in light of Rule 89 (C). The Chamber will proceed to address first, whether the material sought to be admitted is relevant and probative and second, whether it should exercise its discretion to admit.

⁸ *Prosecutor v. Édouard Karemera, Mathieu Ndirumpitse and Joseph Nzirorera*, Case No. ICTR-98-44-T, Decision on Oral Motions by Édouard Karemera and the Prosecution to Admit Certain Documents into Evidence (TC), 29 May 2008; *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 (TC), 13 September 2004, para. 9; and *Bagosora et al.*, Decision on request to Admit United Nations Documents into Evidence Under Rule 89(C) (TC), 25 May 2006, para. 4 (and sources cited therein).

⁹ *Bizimungu et al.*, Decision on Defence Motions for the Admission of Testimony Given by Prosecution Witness GFA before the *Karemera et al.* Chamber, 26 September 2008, paras. 10 - 11; *Bizimungu et al.*, Confidential Decision of Prosper Mugiraneza's Motion to Admit Evidence of Witnesses in Written Form in Lieu of Oral Testimony; and Order for Reduction of Witness List, dated 11 June 2008, paras. 9-10; *Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 bis (TC), 9 March 2004, para. 12.

¹⁰ "Shake Hands with the Devil" p. 133.

¹¹ *Ibid.*, p. 140. "PL" refers to the Liberal Party.

30567

Is the material relevant and probative?

11. The Chamber finds that the material is relevant as it relates to an allegation in the Indictment, namely, that Mugenzi was a member of the Hutu Power faction of the Liberal Party.¹² Further, it is of probative value as it tends to disprove the issue of whether Mugenzi was “one of those” who was “soft line Hutu” as stated in the transcript extract from General Dallaire’s testimony in the *Ndindiliyimana* proceedings. Additionally, the Chamber is satisfied that it has sufficient *indicia* of reliability as it is a copy of a recognised published book.

Are there additional considerations which would militate against a positive exercise of the Chamber’s discretion to admit?

12. The Chamber notes the Defence submission that General Dallaire’s book was written years prior to his testimony in the *Ndindiliyimana* proceedings. However, this is a matter for the Chamber to consider when determining the weight to be attached to the document, which is an assessment conducted by the Chamber at a later stage.¹³ For present purposes, the Chamber need only be satisfied that the document is, *prima facie*, relevant and probative under Rule 89 (C), and that there are no additional considerations militating against the Chamber’s positive exercise of its discretion to admit.¹⁴

13. With respect to the Defence submission that the Prosecution should not be allowed to benefit from its own wrongdoing, the Chamber notes that its Decision of 4 November 2008 was an exception to the Rule 92*bis* limitation because of the Prosecution’s failure to discharge its disclosure obligations under Rule 68.¹⁵ The Chamber had regard for Mugenzi’s fair trial rights and the need to avoid further prejudice.¹⁶

14. With respect to the Chamber’s discretion to admit, the Chamber notes that the Prosecution seeks admission of the material for the purpose of placing General Dallaire’s testimony, from the *Ndindiliyimana* proceedings, in its wider context. The Chamber considers that admission solely for this purpose would assist the Chamber in determining the weight to be attached to the transcript extract. The Chamber notes that it will not use the extract for the purpose of determining any allegations contained in the Indictment, such that Mugenzi will not suffer prejudice, nor have his fair trial rights compromised. Accordingly, the Chamber decides to admit the relevant pages from General Dallaire’s book, for the sole purpose of

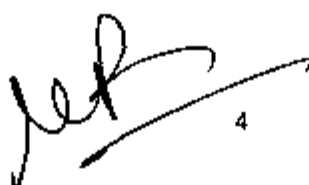
¹² Indictment, para. 4.7.

¹³ *The Prosecutor v Nyiramasuhuko et al*, Appeal Decision, Case No. ICTR-98-42-A, 04 October 2004, paras. 6, 7.

¹⁴ *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41, Decision on Ntabakuze Motion to Deposit Certain United Nations Documents, 19 March 2007, paras. 2,3.

¹⁵ Rule 92*bis* (D) provides that a Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused. In the Decision of 4 November 2008, the Chamber decided that the Rule 92*bis* limitation should not apply where the Prosecution had failed to discharge its disclosure obligation and where the accused had suffered prejudice. The transcript extract was admitted notwithstanding that it was relevant to the acts and conduct of the accused but was admitted in order to avoid any further prejudice being suffered by Mugenzi. See Decision of 4 November 2008, paras. 26–28.

¹⁶ *Ibid.*



4

30566

assisting the Chamber in determining the weight to be attached to the transcript extract from his testimony in the *Ndindiliyimana* proceedings.


FOR THESE REASONS, the Chamber,

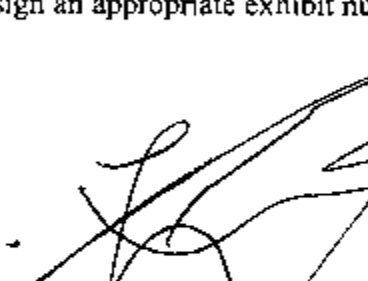
GRANTS the Prosecution Motion in its entirety; and

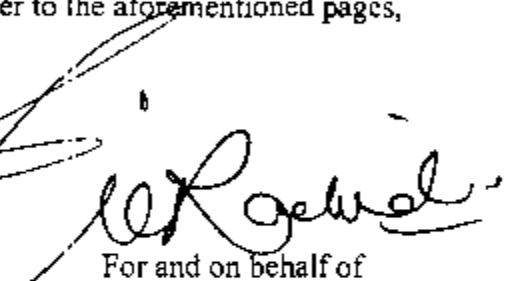
ADMITs into evidence, pursuant to Rule 89 (C) of the Rules, and for the sole purpose of providing context to Defence Exhibit 2D120, pages 133 and 140 from General Dallaire's book "Shake Hands with the Devil", which appear as Annex A to the "Prosecutor's Motion in Relation to the Decision on Justin Mugenzi's Motion to Admit Transcript Extracts of General Dallaire's Evidence [sic] in the *Ndindiliyimana* Proceedings" filed on 10 November 2008; and

DIRECTS the Registry to assign an appropriate exhibit number to the aforementioned pages, forthwith

Arusha, 8 November 2008


Khalida Rachid Khan
Presiding Judge


Lee Gacuiga Muchoga
Judge


For and on behalf of
Emile Francis Short
Judge

