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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Sergei Alekseevich Egorov
Judge Florence Rita Arrey

Registrar: Adama Dieng

Date: 3 March 2009

THE PROSECUTOR

v.

Ephrem SETAKO

Case No. ICTR-04-81-T

DECISION ON DEFENCE MOTION FOR ADMISSION OF EVIDENCE

The Prosecution
Ifeoma Ojemeni Okali
Simba Mawere
Christiana Fomenky

The Defence
Lennox Hinds
Cainnech Lussiaà-Berdou

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Florence Rita Arrey;

BEING SEIZED OF the Defence motion for admission of evidence, filed on 16 February 2009;

CONSIDERING the Prosecution response, filed on 23 February 2009;

HEREBY DECIDES the motion.

INTRODUCTION

1. The first part of the Prosecution case lasted from 25 August to 26 September 2008. The second segment commenced on 16 February 2009 and is almost completed. Witness SON testified for the Prosecution on 24 and 25 September 2008. During cross-examination, he was asked why he did not mention Setako when he testified in *Prosecutor v. Tharcisse Renzaho* – a previous trial before this Chamber. The witness explained that he was prevented from doing so. The Setako Defence now seeks the admission of an extract of the transcripts in the *Renzaho* case in order to contradict this explanation. It submits that the transcripts could not be tendered before the proceedings ended on 26 September 2008.[1]

2. The Prosecution opposes the request. The witness was cross-examined extensively. The Defence wants to tender, five months after his testimony in *Setako*, transcripts that were disclosed to it already in July 2008, long before he testified in *Renzaho*. The Defence has failed to provide a proper foundation for admission. Furthermore, transcripts are strictly speaking not evidence.[2]

DELIBERATIONS

3. It is established practice that a party may confront a witness with documents for impeachment purposes, thereby seeking to cast doubt on his or her credibility. Such material may subsequently be admitted into evidence, usually under Rule 89 (C) of the Rules of Procedure and Evidence, which provides that the Chamber "may admit any relevant evidence which it deems to have probative value".[3]

4. The Defence seeks to tender a portion of the transcript of Witness SON's testimony in the *Renzaho* case. The Chamber has on several occasions allowed transcripts to be entered as exhibits for contextual purposes.[4] Even though portions of the transcripts have been read into the record, it may be useful to see them in context.

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[1] Defence Motion for Admission of Evidence (Rule 89 (C)), etc., filed on 16 February 2009, paras. 1-4, 14-15.
[2] Response, paras. 4-11.
[3] *See*, for instance, *Prosecutor v. Bagosora et al.*, Decision on Bagosora Motion to Admit Documents (TC), 21 March 2007, para. 4; *Prosecutor v. Bagosora et al.*, Decision on Bagosora Defence Request for Admission of Documents (TC), 21 March 2007, para. 3; *Prosecutor v. Bagosora et al.*, Decision on Request to Admit United Nations Documents into Evidence under Rule 89 (C) (TC), 25 May 2006, para. 2.
[4] In the present case, this has been done, for instance, with respect to Prosecution Exhibit 33 (Transcripts of 3 October 2001 pp. 24-25 and 4 October 2001 p. 54 in the *Kajelijeli* case) and Defence Exhibit 50 (Transcripts of 19 May 2005 in the *Ndindiliyimana et al.* case).

5. In the present case, the Defence sought to impeach the credibility of the witness by pointing out that he had neither referred to Setako in a previous statement nor in the *Renzaho* trial. The witness explained that he was prevented from doing so in that trial because he was interrupted by the presiding judge.[5] According to the Defence, the *Renzaho* transcripts show that this explanation is not credible.[6] However, the Defence did not use these transcripts when cross-examining the witness in *Setako* and has not provided any convincing explanation why it did not do so. Consequently, they cannot be admitted for contextual purposes.

6. The Defence has not pointed to any other basis for admitting the document.[7] Consequently, the motion is denied. The Chamber recalls, however, that transcripts from trial proceedings form part of the Tribunal's judicial records. Nothing prevents the Defence from referring to the transcripts of Witness SON's testimony in the *Renzaho* trial in connection with its closing arguments in the *Setako* case.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 3 March 2009.

Erik Møse	Sergei Alekseevich Egorov	Florence Rita Arrey
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

[5] T. 25 September 2008 pp. 24, 36, 45-46.
[6] *Prosecutor v. Tharcisse Renzaho*, T. 29 January 2007 p. 21.
[7] Under Rule 92 *bis* (D) of the Rules, the Chamber may admit transcripts given by a witness in other proceedings before the Tribunal but only if it goes to proof of a matter other than the acts and conduct of the accused. *See e.g. Prosecutor v. Tharcisse Renzaho*, Decision on Defence Motion to Admit Documents (TC), 12 February 2008, para. 3.