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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-44D-T
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OR: ENG

TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Bakhtiyar Tuzmukhamedov
Mparany Rajohnson

Registrar: Adama Dieng

Date: 10 May 2011

THE PROSECUTOR

v.

Callixte NZABONIMANA
Case No. ICTR-98-44D-T

2011 MAY 10 P 11:00
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**DECISION ON MOTION TO ADMIT TRANSCRIPTS
FROM THE KAREMERA ET AL. CASE**
(Rules 92 bis (D) and 89 (C) of the Rules of Procedure and Evidence)

Office of the Prosecutor

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INTRODUCTION

1. On 15 April 2011, the Defence filed a motion in which it sought to admit, pursuant to Rule 92 bis (D) of the Rules of Procedure and Evidence ("Rules"), excerpted transcripts of the trial proceedings in the case of *Prosecutor v. Karemera* before this Tribunal into the evidentiary record of the present proceedings ("Motion").¹
2. On 20 April 2011, the Prosecution filed a response opposing the Defence Motion ("Response").²

SUBMISSIONS OF THE PARTIES

Motion

3. The Defence seeks to adduce excerpts from the *Karemera* trial transcript pertaining to the testimony of Prosecution witness CNAB, who was also anticipated to testify for the Prosecution before this Trial Chamber but ultimately never did so. According to the Defence, these excerpts demonstrate that CNAB's testimony "completely contradicts" the evidence proffered by Prosecution witness CNAA in this trial with respect to paragraph 26 of the Indictment. That paragraph alleges that on or about 18 April 1994, the Accused held a meeting at Murambi Trading Centre, in which he ordered the killing of certain *Bourgmestres* of Gitarama *préfecture* and other local officials who were opposed to the slaughter of Tutsis.³
4. With regard to the specifics of the alleged contradiction, the Defence avers that whereas "CNAA testified [in the present trial] that... Callixte Nzabonimana took the floor at [the] meeting...to say that anyone who was working for the administration who would show any support to the Tutsi would be seen as an enemy",⁴ witness CNAB testified in *Karemera* "that Callixte Nzabonimana never took the floor during that meeting".⁵ This irreconcilability, reasons the Defence, "go[es] towards disproving the allegations made by Prosecution witness CNAA in the present proceedings"⁶ and thus "severely affect[s]

¹ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Motion to Admit Transcripts from the Karemera Et Al. Case, 15 April 2011.

² *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Motion to Admit Transcripts from the Karemera Et Al. Case, 20 April 2011.

³ Motion, paras. 1-5.

⁴ Motion, para. 2.

⁵ Motion, para. 11.

⁶ Motion, para. 12.

Prosecution witness CNAA's credibility in the whole present proceedings".⁷ For these reasons, the transcripts sought to be adduced are "relevant and probative"⁸ in accordance with Rule 89 (C).

5. As to the admissibility of the transcripts under Rule 92 *bis* (D), while the Defence concedes "that they were related to the acts and conduct of the accused", it argues that they should nevertheless be admitted because "the said evidence raise[s] significant concerns about a witness [sic] credibility",⁹ and cites several precedents in support of the proposition that the admissibility limitations imposed by the Rule "must be considered within the general context of the accused [sic] right to a fair trial under Articles 19 and 20 of the Statute".¹⁰

Response

6. As a primary argument, the Prosecution objects to the Defence request to admit the transcripts in question on the grounds that: 1) the reasons provided by the Defence in its Motion do not meet the legal threshold for admission of transcripts under Rule 92 *bis* (D) because the content of the transcripts goes to acts and conduct of the Accused as charged in the Indictment;¹¹ 2) the Defence did not comply with the requirement of providing adequate notice of its intent to produce the transcripts as required by Rule 92 *bis* (E);¹² and 3) the Defence "did not act with due diligence" since the transcripts were in its possession for over two years.¹³ In the alternative, the Prosecution submits that the Trial Chamber should admit the entire testimony of witness CNAB regarding the meeting at Murambi on 18 April 1994, so that "the portion of the transcript [may] be put in context".¹⁴
7. As to whether the Defence satisfied the specific threshold requirement on the admissibility of transcripts under Rule 92 *bis* (D), the Prosecution distinguishes the precedents advanced in the Motion as wholly inapposite to the present circumstances,¹⁵ concluding that "no such special circumstances exist in the instant case as to warrant admissions that goes to the acts and conduct of accused [sic] as charged in the indictment".¹⁶

⁷ Motion, para. 14.

⁸ Motion, para. 12.

⁹ Motion, para. 15.

¹⁰ Motion, para. 10.

¹¹ Response, paras. 2, 26-41.

¹² Response, paras. 2, 4-6.

¹³ Response, paras. 2, 54-55.

¹⁴ Response, paras. 3, 57-58.

¹⁵ Response, paras. 30-40.

¹⁶ Response, para. 41.

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8. As an adjunct point, the Prosecution notes that the Defence filed its Motion publicly without redacting the name of witness CNAB, and therefore requests “the Trial Chamber to order the Defence Motion to be filed as Confidential or to have the name of Witness CNAB redacted from the said Motion”.¹⁷

DELIBERATIONS

Applicable Law

9. 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.

This provision “bestows a discretionary power” upon the Trial Chamber to admit as evidence transcripts of other proceedings before the Tribunal, so long as the matters addressed therein go to proof of a matter other than the acts and conduct of the accused as charged in the indictment.¹⁸ As the Appeals Chamber of the ICTY has affirmed, the term “acts and conduct of the accused as charged in the indictment” is “a plain expression and should be given its ordinary meaning”; namely, deeds and behaviour of the accused himself—including evidence of the accused’s state of mind—but not the acts and conduct of his co-perpetrators or subordinates.¹⁹

10. Rule 89 (C) states that “[a] Chamber may admit any relevant evidence which it deems to have probative value.” This Rule provides the Trial Chamber with “broad discretion when assessing the admissibility of evidence”.²⁰ As the Appeals Chamber of the ICTY has remarked, “[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

¹⁷ Response, paras. 7-10.

¹⁸ *Prosecutor v. 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, para. 9.

¹⁹ *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), 7 June 2002, para. 11 and fn 28; citing with approval *Prosecutor v. Milošević*, IT-02-54-T, Decision on Prosecution’s Request to have Written Statements Admitted Under Rule 92 bis, 21 March 2002, para. 22. See also *Prosecutor v. Nshogoza*, ICTR-07-91-T, Decision on Defence Motion for the Admission of Written Statements of Witnesses A1, A13, A14, A15, A17, A18, A20, A22, A23, A26, A28 and A30 as Evidence *In Lieu* of Oral Testimony, 29 April 2009, para. 6; *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Prosecutor’s Motion for the Admission of Written Witness Statements under Rule 92 bis, 9 March 2004, para. 13.

²⁰ *Prosecutor v. Gatete*, ICTR-2000-61-T, Decision on Defence and Prosecution Motions for Admission of Written Statements and Defence Motion to Postpone Filing of Closing Briefs, 24 June 2010, para. 7; citing, *inter alia*, *Nyiramasuhuko v. Prosecutor*, ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence, 4 October 2004, para. 7.

bis".²¹ Thus, "[i]n order for a statement to be admissible under Rule 92 bis, the general requirements of relevance and probative value, applicable to all types of evidence under Rule 89 (C), must also be satisfied".²²

Analysis

Whether the Transcripts are Admissible

11. While the Defence concedes that the transcripts it seeks to adduce contain material that goes to acts and conduct of the Accused as charged in paragraph 26 of the *Indictment*, it tersely invokes precedents from the *Bizimungu*, *Kamuhanda* and *Ngeze* cases for the unelaborated proposition that "in particular circumstances, Trial Chambers of this Tribunal have admitted evidence which went to the acts and conduct of the accused".²³ However, as the Prosecution comprehensively demonstrates in its Response,²⁴ these precedents are readily distinguishable from the present circumstances.

12. For instance, in *Bizimungu*, a witness, who had testified under oath in the *Karemera* proceedings that he had perjured himself before the *Bizimungu* Trial Chamber, subsequently absconded to whereabouts unknown when compelled to testify as to his recantation before that Chamber.²⁵ Given this extraordinary set of circumstances, wherein a witness who could not longer be located "had admitted to lying before this Chamber in the course of testimony before another Chamber",²⁶ the Chamber in *Bizimungu* elected to safeguard the Accused's right to a fair trial where the Accused had no other mechanism by which to bring such highly probative evidence before the Chamber.²⁷ Moreover, in *Kamuhanda*, the Trial Chamber admitted exculpatory statements from a deponent who had died before the Defence was able to secure his attendance at trial.²⁸ Thus, "in the specific circumstances of [that] case", the Chamber found it to be in the interests of justice to admit the statements.²⁹ Finally, in *Ngeze*, the Trial Chamber had previously precluded the Defence from adducing statements

²¹ *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-T, 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. 20; citing *Galić*, para. 31.

²² *Bizimungu*, Decision on Defence Motions for the Admission of Testimony Given by Prosecution Witness GFA before the Karemera Et Al Chamber, 26 September 2008, para. 11 ("Bizimungu 26 September 2008 Decision"); *Bagosora*, para. 12.

²³ Motion, para. 10.

²⁴ Response, paras. 30-41.

²⁵ *Bizimungu* 26 September 2008 Decision, paras. 1-5, 7.

²⁶ *Bizimungu* 26 September 2008 Decision, para. 28.

²⁷ *Bizimungu* 26 September 2008 Decision, paras. 25-28.

²⁸ *Prosecutor v. Kamuhanda*, ICTR-99-54A-T, Decision on Kamuhanda's Motion to Admit into Evidence Two Statements by Witness GER in Accordance with Rules 89 (C) and 92bis of the Rules of Procedure and Evidence, paras. 1-2, 27-29.

²⁹ *Kamuhanda*, paras. 29-31.

from prospective Prosecution witness AER during the testimony of Prosecution witness AES, reasoning at the time that “the statements should be dealt with during the testimony of witness AER”.³⁰ However, when “[w]itness AER never testified, and the Ngeze Defence could not secure her appearance as a witness”,³¹ the Chamber ruled that fairness required the Defence be allowed to adduce statements of AER to contradict the testimony of AES.

13. In the instant Motion, the Defence has not averred any factual circumstances remotely approaching the types of highly exceptional scenarios outlined above. For these reasons, the Trial Chamber shall give effect to the imperative threshold requirement that statements sought to be adduced under Rule 92 *bis* (D) may not touch upon the acts and conduct of the Accused as charged in the Indictment. Consequently, the Defence’s attempt to adduce transcripts from the *Karemera* proceedings that clearly violate this criterion must fail, and therefore the Trial Chamber need not address the other objections raised by the Prosecution in opposition to the adduction of the said transcripts.

Misconduct of Counsel

14. The Defence does not deny that it disclosed the name of a protected Prosecution witness in the Motion it filed publicly before the Tribunal, nor does it present any excuses or apologies (for example, by way of filing a Reply, which it elected not to do) for its conduct. Rule 75 (F) (i) stipulates that “[o]nce protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal... such protective measures: (i) shall continue to have effect... unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule”. Consequently, it is trite law that the mere fact that a party to certain proceedings has declined to call a witness at trial does not automatically extinguish the protective measures afforded that witness.
15. As Rule 77 makes abundantly clear, violating the protective measures imposed by a Trial Chamber is an extremely serious matter that is punishable as criminal contempt of the Tribunal. While the Chamber does not feel that such stern sanctions are warranted in the present circumstances, it nevertheless concludes that the actions of the Defence are contrary to the interests of justice and sufficiently serious to warrant formal sanction pursuant to Rule 46 (A). Recalling that the Defence has received numerous Rule 46 (A) warnings with

³⁰ *Prosecutor v. Ngeze*, ICTR-99-52-T, Decision on the Defence Motion to Admit into Evidence Prosecution Witness’s Statements; Alternatively to Produce Additional Defence Witnesses, 5 June 2003, para. 5.

³¹ *Ngeze*, para. 1.

respect to both its in-court behaviour and written pleadings throughout the course of these proceedings, the Chamber is not satisfied that a further warning would be adequate given the gravity of the conduct at issue. The Trial Chamber therefore sanctions the Defence by denying all fees payable in relation to all work performed in preparing the instant Motion.

FOR THESE REASONS, THE TRIAL CHAMBER

DENIES the Motion;

DIRECTS the Registry to re-classify the Defence Motion as Confidential;

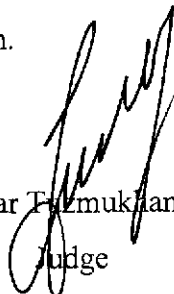
SANCTIONS the Defence in accordance with Rule 46 (A); and

DIRECTS the Registry to deny fees to the Defence team in relation to all work performed in relation to the preparation of the present Motion.

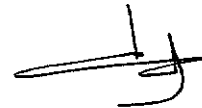
Arusha, 10 May 2011, done in English.



Solomy Balungi Bossa
Presiding Judge



Bakhtiyar Tulmukhamedov
Judge



Mparany Rajohnson
Judge

