

ICTR-98-44D-T
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda



UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 30 June 2011

THE PROSECUTOR

v.

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

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**DECISION ON MOTION TO ADMIT TRANSCRIPTS
FROM THE BIZIMUNGU 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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Defence Counsel
Vincent Courcelle-Labrousse
Philippe Larochelle

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INTRODUCTION

1. On 3 May 2011, the Defence filed a motion seeking to admit into evidence pursuant to Rules 92 *bis* (D) and 89(C) of the Rules of Procedure and Evidence (“Rules”), excerpted transcripts of the trial proceedings in the case of *Prosecutor v. Bizimungu et al.* before this Tribunal (“Motion”).¹
2. On 9 May 2011, the Prosecution filed a response opposing the Defence Motion (“Response”).²
3. The Defence did not file a reply.

SUBMISSIONS OF THE PARTIES

Defence Motion

4. On 25 May 2005, Prosecution Witness CNAA testified in *Bizimungu* under the pseudonym GKJ. According to the Defence, during that testimony he referred to the “enemy” as “RPF soldiers” during the events of 1994.³ In contrast, during his testimony in the instant proceedings, he stated that “[t]he enemy was the Tutsi.”⁴ Thus, the Defence contends that Witness CNAA’s contradictory definitions of the term “enemy” in *Bizimungu* and the instant trial⁵ undermines his credibility as a witness.⁶ Therefore the Trial Chamber should admit the *Bizimungu* transcripts pursuant to Rule 92 *bis* (D) and 89 (C) as being relevant and probative in assessing the testimony of CNAA.⁷ For these reasons, the Defence requests the admission of pages 18 to 25 of the English transcript of 25 May 2005 in the *Bizimungu* case.

Prosecution Response

5. 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*;⁹ 2) the Defence did not comply

¹ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Motion to Admit Transcripts from the *Bizimungu et al.* Case, 3 May 2011.

² *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor’s Response to Nzabonimana’s Motion to Admit Transcripts from the *Bizimungu et al.* Case, 9 May 2011.

³ Motion, paras. 2, 14-15, citing *Prosecutor v. Bizimungu et al.*, Transcript of 25 May 2005, pp. 25-27.

⁴ Motion, paras. 2, 15 citing *Prosecutor v. Callixte Nzabonimana*, Transcript of 15 December 2019, pp. 57-58.

⁵ Motion, para. 17.

⁶ Motion, paras. 2-3, 13.

⁷ Motion, paras. 16 & 19.

⁸ Motion, para. 19.

⁹ Response, para. 2 i.

with the notice provisions of Rule 92 *bis* (E);¹⁰ and 3) the Defence “did not act with due diligence”.¹¹

6. Regarding the first argument that the transcripts do not meet the threshold requirement of Rule 92 *bis* (D), the Prosecution asserts that the portions of the *Bizimungu* transcripts the Defence seeks to admit impermissibly go to the acts and conduct of the accused as alleged in paragraphs 31, 34, 35, 37 and 44 of the Indictment. According to the Prosecution, a common theme throughout the Indictment is that the Accused is alleged to have referred to the Tutsi as the “enemy”.¹²
7. As to the second argument, the Prosecution claims that the Defence failed to provide fourteen days notice of its intent to adduce the transcripts in question, in contravention of Rule 92 *bis* (E). This technical violation, argues the Prosecution, voids the Defence’s attempt to adduce the transcripts in question.¹³
8. With respect to the third argument that the Defence failed to act with due diligence, the Prosecution recalls that on 10 February 2009 it disclosed to the Defence several transcripts of its witnesses including Witness CNAA.¹⁴ The Prosecution notes that whilst giving testimony on 14-16 December 2009, Witness CNAA was cross-examined by the Defence on his prior testimonies before this Tribunal, and he was specifically cross-examined on his testimony in *Bizimungu* in respect of the definition of “enemy” which he gave during a prior radio interview.¹⁵ The Prosecution further notes that although the Defence touched upon the issue pertaining to the definition of “enemy” it failed to explore it further, and thus should not be allowed to do so now after the close of its case.¹⁶
9. Furthermore, according to the Prosecution, there are no contradictions in the testimony of Witness CNAA in *Bizimungu* and the instant case because the definition of “enemy” must be understood in the context in which it was used.¹⁷ The Prosecution notes that because of the double meaning of the words which were used during the genocide, the transcript is

¹⁰ Response, paras. 2 .ii.

¹¹ Response, para. 2 .iii.

¹² Response, paras. 32-40.

¹³ Response, paras. 16-17.

¹⁴ Response, para. 19.

¹⁵ Response, paras. 21-24.

¹⁶ Response, paras. 25-31.

¹⁷ Response, paras. 41-42.

subject to varying interpretations and as such cannot be used to challenge the credibility of the witness without giving the witness the opportunity to respond.¹⁸

DELIBERATIONS

Applicable Law

10. 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.¹⁹ 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.²⁰

11. Under Rule 92 *bis* (E), the Chamber has the discretion to admit, in whole or in part, the evidence of a witness in the form of a transcript *in lieu* of oral testimony, and to decide whether or not to require the witness to appear for cross-examination.²¹

12. 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”.²² As the Appeals Chamber of the ICTY has

¹⁸ Response, para. 44.

¹⁹ *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.

²⁰ *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.

²¹ *Karemera et al.*, Decision on Admission of Transcript of Prior Testimony of Antonius Maria Lucassen (TC), 15 November 2005, para. 4.

²² *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.

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 *bis*”.²³ 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”.²⁴

Analysis

Whether the Transcripts are Admissible

13. The Chamber notes that the Defence seeks admission of the *Bizimungu* transcripts to assess the credibility of Witness CNAA in the instant proceedings. The Chamber further notes that the transcript sought for admission relates to a radio interview of Witness CNAA where he had stated *inter alia* that:

“We were requesting those who have moved from their areas to come back. There were young men who I saw at Gahogo who were not afraid of the fighting, and we believe that all people who were not strong should come and join the army and support the army to defeat the enemy.”

When the witness was further asked “Sir, who is the enemy?”; he responded “here I meant the RPF soldiers.”²⁵

14. Having reviewed the transcript relating to the testimony of Witness CNAA in the *Bizimungu* case attached to the Motion,²⁶ the Chamber observes that the witness made no specific mention of the Accused Nzabonimana or linked him to the events he referred to therein. Therefore, the Chamber finds that the threshold criterion of Rule 92 *bis* (D) is satisfied insofar as the testimony does not go to acts or conduct of the Accused as charged in the present Indictment.

15. However, the Chamber notes that the Defence does not contest the Prosecution contention that it disclosed the *Bizimungu* transcripts to the Defence on 10 February 2009. Thus, it is

²³ *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.

²⁴ *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.

²⁵ *Bizimungu et al.* Transcript of 25 May 2005, pp. 24-25.

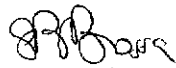
²⁶ See Annex A to the Motion.

of the view that the Defence had the opportunity to cross-examine the witness on his radio interview when he testified at trial in this case on 15 – 16 December 2009. The Chamber notes that the Defence provides no explanation as to why it elected not to cross-examine witness CNAA on this issue at that time. Accordingly, the Chamber denies the Defence request to admit the *Bizimungu* transcripts at issue pursuant to Rules 92 *bis* (D) and 89 (C).

FOR THESE REASONS, THE TRIAL CHAMBER

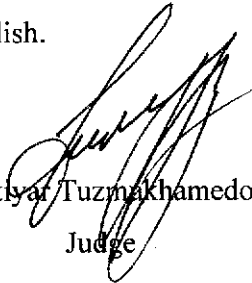
DENIES the Motion in its entirety.

Arusha, 30 June 2011, done in English.



Solomy Balungi Bossa

Presiding Judge



Bakhtiyar Tuzmakhamedov

Judge



Mparany Rajohnson

Judge

[Seal of the Tribunal]

