

ICTR-00-56-T
20-03-2009
(28390-28387)

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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before Judges: Asoka de Silva, Presiding
Taghrid Hikmet
Seon Ki Park

Registrar: Adama Dieng

Date: 20 March 2009

The PROSECUTOR

v.

Augustin NDINDILYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU

Case No. ICTR-00-56-T

JUDICIAL RECORDS ARCHIVES
1 2009 MAR 20 12:01

**DECISION ON NZUWONEMEYE'S URGENT MOTION FOR ADMISSION OF CN'S
STATEMENT INTO EVIDENCE**

Office of the Prosecution:

Mr Alphonse Van
Mr Moussa Sefon
Mr Lloyd Strickland
Mr Abubacarr Tambaou
Ms Faria Rekkas

Counsel for the Defence:

Mr Gilles St-Laurent and Mr Benoît Henry for **Augustin Bizimungu**
Mr Christopher Black and Mr Vincent Lurquin for **Augustin Ndindiliyimana**
Mr Charles Taku and Ms Beth Lyons for **François-Xavier Nzuwonemeye**
Mr Fabien Segatwa and Mr Seydou Doumbia for **Innocent Sagahutu**

INTRODUCTION

1. On 22 September 2008, the Trial Chamber granted, in part, the Defence motions pertaining to the Prosecution's Rule 68 disclosure obligations and held that the Prosecution had violated its obligations in respect of several documents containing exculpatory material ("Rule 68 Decision"). Consequently, the Chamber ordered the Prosecution to immediately disclose to the Defence, in un-redacted format, all of the documents listed in the confidential annexes 2 and 3 attached to the Rule 68 Decision. The Chamber also invited the Defence teams to recall identified Prosecution Witnesses or to call additional Defence witnesses as a remedy for the Prosecution's violation.¹
2. On 4 December 2008, the Chamber granted the Defence request to call CN as an additional witness.²
3. On 9 February 2009, the Trial Chamber informed the parties that despite concerted efforts, Witnesses and Victims Support Section ("WVSS") could not locate CN and that Prosecution Witness ALN was also unavailable to travel to Arusha.³
4. On 27 February 2009, the Defence for Nzuwonemeye filed the current Motion in which it requests the Chamber to admit into evidence the exculpatory portions of CN's statement given the fact that the Defence has not been able to call CN as an additional witness or recall Prosecution witness ALN in order to cross examine him further on the basis of CN's statement.⁴

DELIBERATIONS

5. The Chamber notes that the exact whereabouts of CN are unknown despite concerted efforts by WVSS to locate him. Since CN cannot be brought before the Chamber to give direct testimony, the Chamber must consider other appropriate measures to remedy the Prosecution's violation of its Rule 68 obligations.⁵
6. The Chamber has considered the Defence request to admit CN's exculpatory statement pursuant to Rule 92*bis* of the Rules of Procedure and Evidence ("Rules"). The Defence submits that the statement should be admitted pursuant to Rule 92*bis* since it does not contravene the requirement for admissibility under Rule 92*bis* because it does not go to proof of the acts and conduct of the accused. The meaning of the term "acts and conduct of the accused as charged in the indictment" has been defined by the Appeals Chamber, which noted that the term is a plain expression and should be given its ordinary meaning:

¹ *Prosecutor v Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68 (TC), 22 September 2008.

² *Prosecutor v Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye and Bizimungu's Motions to Recall Identified Prosecution Witnesses and to Call Additional Witnesses (TC), 4 December 2008, para. 19.

³ See *Prosecutor v Ndindiliyimana et al.*, Case No. ICTR-00-56-T, *Proprio Motu* Order for Transfer of a Detained Witness and for Certain Witnesses to Testify via Video-link Pursuant to Rules 54, 90BIS, and 75 of the Rules (TC), 9 February 2009.

⁴ Nzuwonemeye Defence Very Urgent Motion for Admission of Exculpatory Portion of CN Statement, in Light of ALN and CN Absence, as Rule 68 Remedy and Pursuant to Rule 92 *bis*(A),(C) of Rules of Procedure and Evidence, filed on 27 February 2009.

⁵ See Rule 68 Decision

deeds and behavior of the accused himself and not the acts and conduct of his co-perpetrators and/or his subordinates.⁶

7. In order for written evidence to be admissible under Rule 92bis, the general requirements of relevance and probative value stipulated in Rule 89(C), must also be satisfied.⁷ Evidence will be considered relevant, for the purposes of Rule 89(C), if it can be shown that a connection exists between the evidence and proof of an allegation pleaded in the indictment.⁸ Evidence will also be considered to have probative value if it tends to prove or disprove an issue and has sufficient *indicia* of reliability.⁹ Additionally, the written evidence must also comply with the formal requirements stipulated in Rule 92bis. The exercise of the a Chamber's discretion under Rules 92bis and 89(C) must be governed by the right of the accused to a fair trial, as provided for in Articles 19 and 20 of the Statute.¹⁰
8. The Chamber is satisfied, as a preliminary step, that CN's statement meets the general requirements of relevance and probative value as provided in Rule 89(C) since CN's statement contradicts significant aspects of Prosecution witness ALN's testimony and could therefore be relevant in evaluating the credibility of witness ALN's testimony. The Chamber notes that, generally speaking, material relating to the credibility of a witness is *prima facie* relevant and has probative value.¹¹
9. The Chamber will now determine whether CN's statement satisfies the requirement for admissibility under Rule 92bis, that is whether the statement goes to proof of the acts and conduct of the accused as pleaded in the indictment. The Chamber notes that contrary to the Defence's submission that CN's statement does not go to proof of the acts and conduct of the accused, a careful appraisal of the statement indicates that the contents of CN's statement is relevant to the acts and conduct of the accused as charged in the indictment and could therefore be deemed to contravene the requirements of admissibility of a written statement provided in Rule 92bis. In particular, CN claims to have been Nzuwonemeye's driver on 6 and 7 April 1994 and gave an account of the events that led to the murder of the Belgian soldiers which contradicts significant aspects of Prosecution witness ALN's testimony on the same events. The Chamber finds that these are issues that bear a close relationship to the acts and conduct of the Accused as pleaded in the indictment.
10. The Chamber recalls its previous finding that that the accused was prejudiced by the Prosecutor's violation of his Rule 68 disclosure obligation with respect to CN's statement. The Chamber therefore gave the Accused the opportunity to recall Prosecution

⁶ *Prosecutor v. Galic*, Case No. IT-98-29-AR3.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C)(AC), 7 June 2002, Para. 10.

⁷ *Prosecutor v. Bagosora et al.*, Case No. ICTR 98-41-T, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92bis (TC), 9 March 2004, para.12

⁸ *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Defence Motions to Admit Church Records and School Records (Rule 89 (C)) (TC), 2 June 2008, para. 10

⁹ *Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 7

¹⁰ *The Prosecutor v. Bagosora et al.*, Case No. ICTR -98-41-T, Decision on Prosecutor's Motion for the Admission of Written Witness Statements under Rule 92bis (TC), 9 March 2004, para 7; *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92bis of the Rules; And Order for Reduction of Prosecution Witness List (TC), 11 December 2006, para.8

¹¹ *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T. Decision on Jerome Bicomumpaka's Confidential and Amended Motion to Admit Rwandan Judicial Records into Evidence (TC), 10 June 2008, para. 11.

witness ALN and to call CN as an additional Defence witness. However, due to the unavailability of witnesses ALN and CN to testify before the Chamber, the Accused will not be able to benefit from the remedial measures ordered by the Chamber and consequently, the prejudice caused by the Prosecutor's violation of his Rule 68 disclosure obligation will not be remedied.

11. The Chamber notes that since the remedies it ordered in its previous decision are not feasible and the fact that the evidence hearing phase of the trial has concluded, the only suitable remedy at its disposal is the admission of CN's statement. Given these factors, the Chamber is of the view that the requirements for admissibility of written evidence set out in Rule 92*bis* should be considered within the general context of the accused's right to a fair trial. The Chamber therefore opines that the Rule 92*bis* requirements for admissibility of written evidence should not be relied upon to preclude the accused from seeking to admit relevant and probative evidence in circumstances where such a request would not be necessary had the evidence been disclosed in accordance with Rule 68(A).¹² Rigid adherence to Rule 92*bis* limitations in this instance, will adversely impinge on the rights of the Accused to a fair trial.
12. Accordingly, pursuant to the Chamber's duty to ensure the rights of the accused to a fair trial and to avoid further prejudice to the accused, the Chamber deems it necessary to admit the entirety of CN's statement for the limited purpose of assessing the credibility of Prosecution witness ALN's testimony in order to redress the prejudice suffered by the Accused as a result of the Prosecutor's violation of his Rule 68 disclosure obligation.

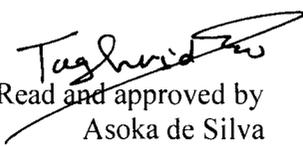
FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Defence Motion;

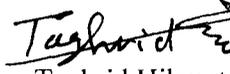
DIRECTS the Defence to file the statement with the Registry; and

DIRECTS the Registry to assign the statement a Chamber's exhibit number and place it under seal.

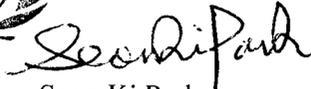
Arusha, 20 March 2009, done in English.


Read and approved by
Asoka de Silva

Presiding Judge


Taghrid Hikmet

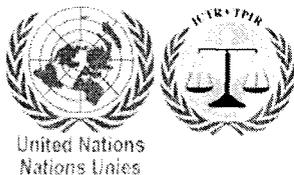
Judge


Seon Ki Park

Judge

[Seal of the Tribunal]

¹² *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR- 99-50-T, Decision on Justin Mugenzi's Motion to Admit Transcript Extracts of General Romeo Dallaire's Evidence in the Ndindiliyimana Proceedings (TC), 4 November 2008, para. 28



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input checked="" type="checkbox"/> Trial Chamber II R. N. Kouambo	<input type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Trial Chamber III A. N'Gum
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From:	<input type="checkbox"/> Chamber Hussein Mohamed Mohamud (names)	<input type="checkbox"/> Defence (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
	Case Name: The Prosecutor vs. Ndindiliyimana et al		Case Number: ICTR-00-56-T	
Dates:	Transmitted: 20/3/2009		Document's date: 20/3/2009	
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Filing Party hereby submits only the original, and **will not submit** any translated version.

Reference material is provided in annex to facilitate translation.

Target Language(s):

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CMS SHALL NOT take any action regarding translation.

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Original	in	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda
Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

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