

ICTR-98-44-T
29-6-2009
(46356-46350)

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-T

IN TRIAL CHAMBER No. 3

Before: Judge Dennis C.M. Byron, Presiding
Judge G. Gustave Kam
Judge Vagn Joensen

Registrar: Mr. Adama Dieng

Date Filed: 29 June 2009

THE PROSECUTOR

v.

JOSEPH NZIRORERA

Office of the
Prosecutor
ICTR

JOSEPH NZIRORERA'S MOTION TO ADMIT STATEMENTS AND
TESTIMONY OF RPF INSIDER WITNESSES PURSUANT TO RULE 92 *BIS*

The Office of the Prosecutor:

Mr. Don Webster
Mr. Saidou N'Dow
Mr. Arif Virani

Defence Counsel:

Mr. Peter Robinson
Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ndirumpatse

1. Joseph Nzirorera respectfully moves, pursuant to Rule 92 *bis* (C), to admit the written statements to the Office of the Prosecutor of 4 RPF insiders, and to admit the testimony of an 5th RPF insider pursuant to Rule 92 *bis* (D). Mr. Nzirorera hereby amends his witness list to include the 5 witnesses.¹

2. On 24 October 2008, the Trial Chamber ordered Mr. Nzirorera to make all of his Rule 92 *bis* applications in a single motion and to thereafter show good cause for any subsequent application.² Good cause exists for the instant application because the prosecution had violated Rule 68 by failing to disclose the identifying information of the witnesses in sufficient time. Efforts by WVSS to locate the witnesses continued until 1 June 2009, when it informed Mr. Nzirorera that the witnesses could not be located.

3. No prejudice has been caused to the prosecution or the Chamber as the original Rule 92 *bis* motion, filed some 8 months ago, has not yet been decided.

4. Rule 92 *bis* (C) provides that:

“A written statement not in the form prescribed by paragraph (B) may nevertheless be admissible if made by a person who has subsequently died, or by a person who can no longer with reasonable diligence be traced, or by a person who is by reason of bodily or mental condition unable to testify orally, if the Trial Chamber:

- (i) is so satisfied on a balance of probabilities; and
- (ii) finds from the circumstances in which the statement was made and recorded that there are satisfactory *indicia* of its reliability.”

5. Rule 92 *bis* (D) provides that:

¹ The statements of the 4 witnesses are submitted with this motion as Confidential Annexes 129-33. The testimony of the 5th witness was submitted as Confidential Annex A to *Reply Brief: Joseph Nzirorera's 16th Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Testimony of RPF Insiders* (14 April 2009).

² *Order to Joseph Nzirorera to Reduce his Witness List* (24 October 2008)

“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.”

6. It is undisputable that the statements and testimony of the 5 witnesses do not go to the acts and conduct of the accused in this case. Therefore, the statements fall within the criteria of Rule 92 *bis*. It remains only for Trial Chamber to exercise its discretion whether to admit the statements and testimony, taking into account the factors enumerated in Rule 92 *bis*, as well as their relevance and probative value pursuant to Rule 89(C).³

Unavailability

7. The identities of the 4 RPF insiders whose statements are sought to be admitted pursuant to Rule 92 *bis* (C) were not disclosed to the defence in violation of Rule 68.⁴ When their identities were finally disclosed pursuant to orders of the Trial Chamber, the Chamber ordered that the WVSS facilitate interviews of these witnesses by Mr. Nzirorera's defence team.⁵ On 1 June 2009, WVSS reported that it was unable to locate any of the 7 witnesses.⁶ Likewise, Mr. Nzirorera's own efforts to locate the witnesses with the paltry information supplied by the Office of the Prosecutor have proved fruitless.⁷

³ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecutor's Motion for the Admission of Transcripts Under Rule 92 bis* (21 May 2004);

⁴ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution* (20 October 2006); *Decision on Prosecutor's Rule 68(D) Application and Joseph Nzirorera's 12th Notice of Rule 68 Violation* (26 March 2009)

⁵ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution* (20 October 2006); *Decision on the Prosecutor's Motion to be Relieved of the Obligation to Disclose the Identities of Certain Witnesses* (2 November 2007); *Decision on Prosecutor's Rule 68(D) Application and Joseph Nzirorera's 12th Notice of Rule 68 Violation* (26 March 2009)

⁶ See letter from WVSS attached as Confidential Annex A to this motion.

⁷ Following *Decision on Joseph Nzirorera's Motion for Modification on Disclosure of RPF Witnesses* (8 April 2008)

8. Therefore, the 4 RPF insiders can no longer, with reasonable diligence, be traced within the meaning of Rule 92 *bis* (C).

9. The 5th RPF insider was located, and in fact has testified as witness ALPHA-1 in the *Ndindiyimana* trial. His testimony from that case is offered for admission pursuant to Rule 89(D), which does not require a showing of unavailability.

Reliability

10. Each of the statements was duly taken by a trained investigator of the Office of the Prosecutor and signed by the witness. The testimony of ALPHA-1 was subject to cross-examination by the prosecution. Therefore, the evidence is sufficiently reliable to be admitted pursuant to Rule 92 *bis* (C) and (D).

Relevance and Probative Value

11. This and other Trial Chambers have already held that statements and testimony concerning infiltration of the Interahamwe by the RPF “technicians” in Kigali during 1993-94 was relevant and had probative value when finding that the material should have been disclosed to the defence pursuant to Rule 68.⁸ That is the content of the 4 statements and 1 transcript that Mr. Nzirorera seeks to offer into evidence. Therefore, the relevance and probative value of that evidence has been established.

⁸ *Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008) at para. 10; *Prosecutor v Ndindiyimana et al*, No. ICTR-00-56-T, *Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68* (22 September 2008) at para. 27; *Decision on Prosecutor's Rule 68(D) Application and Joseph Nzirorera's 12th Notice of Rule 68 Violation* (26 March 2009)

Statements to be Admitted Pursuant to Rule 92 bis (C):**R217**

14. The statement from Witness R217 asserts that during 1993 and early 1994, the RPF “technicians” engaged in political assassinations in Kigali.⁹

R223

15. The statement from Witness R223 also indicates that the RPF technicians committed political assassinations in Kigali in 1993-94 which were attributed to the MRND and Interahamwe.¹⁰

R289

16. The statement of Witness R289 also indicates that the RPF “technicians” committed political assassinations in Kigali in 1993-94 which were attributed to the MRND and Interahamwe. It further indicates that the RPF “technicians” were trained to destabilize the Habyarimana regime by committing acts of war and killing RPF opponents. This statement also declares that the technicians detonated a bomb at the Kigali bus station. Furthermore, it indicates the successful infiltration of the *Interahamwe* roadblocks. This statement asserts that the technicians committed killings at the Kigali roadblock while acting as *Interahamwe*. It further notes that the technicians sometimes wore RGF uniforms during their operations.¹¹

R297

17. The statement of Witness R297 also indicates that the RPF technicians committed political assassinations and bombings in Kigali in 1993-94.¹²

⁹ The statement is Confidential Annex 129. See page 222.

¹⁰ The statement is Confidential Annex 130, see page 228

¹¹ The statement is Confidential Annex 131, see last page)

¹² The statement is Confidential Annex 132, see pages 1 and 4

Testimony to be Admitted Pursuant to Rule 92 bis (D):**ALPHA-1**

19. In his testimony, Witness ALPHA-1 described meeting at which the RPF planned political assassinations to be carried out by the RPF technicians. ALPHA-1 testified that blame for the technicians' assassinations was attributed to the *Interahamwe* and the Habyarimana regime. He also described how the technicians were entrusted with the task of placing bombs in taxis and bus stations to destabilize the MRND and Habyarimana regime, and that the RPF technicians wore uniforms that were similar to those of the RGF.¹³

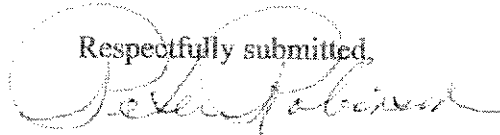
20. Therefore each of these statements are relevant and have probative value because they refute allegations that the MRND and *Interahamwe* were responsible for these killings and indicate that some "Interahamwe" were not under the control of Mr. Nzirorera.

Conclusion

21. Mr. Nzirorera has fulfilled the requirements of 92 bis (C) because the 4 RPF insider witnesses are unavailable, their statements go to prove a matter other than the acts and conduct of the accused and they are reliable, relevant and probative. Furthermore, Mr. Nzirorera has met all requirements of Rule 92 bis (D) in that ALPHA-1's testimony goes to prove a matter other than the acts and conduct of the Accused and is relevant and probative. Therefore, these statements and transcript of testimony should be admitted into evidence pursuant to Rule 92 bis.

¹³ The transcript of the testimony is Confidential Annex A to *Reply Brief: Joseph Nzirorera's 16th Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Testimony of RPF Insiders* (14 April 2009).

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera

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¹⁴ The contribution of Legal Intern Nicole Rangel of McGeorge Law School at University of the Pacific (USA) to the research and drafting of this motion is gratefully acknowledged.

