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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Original: English

TRIAL CHAMBER III

Before: Judge Lloyd George Williams, Q.C., Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registrar: Adama Dieng

Date: 13 March 2003

THE PROSECUTOR

v.

ANDRÉ NTAGERURA et al.

CASE NO. ICTR-99-46-T

JUDICIAL RECORDS/ARCHIVES
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ICTR

Adama Dieng

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**DECISION ON THE DEFENCE MOTION FOR LEAVE TO PRESENT
EVIDENCE IN THE FORM OF A WRITTEN STATEMENT UNDER
RULE 92 *BIS***

Office of the Prosecutor:

Richard Karegyesa
Andra Mobberly
Holo Makwaia

Defence Counsel:

Benoît Henry
Hamuli Retey

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA
("TRIBUNAL")**

SITTING as Trial Chamber III, composed of Judges Lloyd G. Williams, Q.C., presiding, Yakov Ostrovsky and Pavel Dolenc ("Chamber");

BEING SEISED of the "Defence Motion for Leave to Present Evidence in the Form of a Written Statement under Rule 92 *bis* of the Rules of Procedure and Evidence" filed 16 September 2002 ("Motion");

CONSIDERING the "Prosecutor's Response to the Defence Motion of André Ntagerura to File a Witness Statement Pursuant to Rule 92 *bis* and 89(C) of the Rules of Procedure and Evidence" filed 9 October 2002;

CONSIDERING the « Réplique de la défense à la réponse du Procureur à la requête pour permission de présenter des éléments de preuve sous forme d'une déclaration écrite conformément à l'article 92 bis du règlement de procédure et de preuve » filed 2 December 2002;

NOTING that on 25 February 2003, both the Defence and Prosecution indicated that they did not wish to supplement their written submissions with oral argument;

NOW decides the matter.

DEFENCE SUBMISSIONS

1. The Defence submits that Prosecution Witness LAI stated during cross-examination that in 1993, he and others tried to ambush and kill Faustin Twagiramungu, an MDR member. The Defence also submitted that Prosecutor asserted in re-examination that the Accused ordered this ambush. The Defence re-cross-examined the witness on this allegation. Thereafter, the Defence was granted leave to meet Mr. Twagiramungu to ascertain the truth of the allegation. Twagiramungu then provided the Defence with a written statement concerning the event.

2. The Defence submits that during the presentation of its case, the Accused and other Defence witnesses denied that the aforementioned ambush occurred as alleged by Prosecution Witness LAI. The Defence also attempted to tender into evidence Twagiramungu's statement through the Accused during his examination. The Chamber refused to admit the statement because, at the time, it did not satisfy the requirements of Rule 92 *bis*.

3. The Defence submits that Twagiramungu's statement now meets the test set forth in Rule 92*bis*. The Defence emphasises that the evidence of Twagiramungu shows that he did not travel by the route described by Witness LAI. The Defence also asserts that the evidence is cumulative and goes to proof of a matter other than the acts and conduct of the Accused as charged in the indictment. The Defence also highlights that the declaration of truthfulness by the person making the statement, witnessed by an authorised person, is appended to the statement.

4. Alternatively, the Defence requests the Chamber to admit the statement under Rule 89 (C) as relevant and probative evidence given by the very person who was allegedly the target of the ambush.

5. Lastly, the Defence notes that the Prosecutor declined to corroborate Witness LAI's testimony with that of Twagiramungu, although such opportunity was available. The Defence asserts that the Prosecutor should not also have misled the Chamber concerning facts relevant to the *mens rea* of the counts of conspiracy and genocide. The Defence also emphasises that judicial economy dictates that Twagiramungu not be required to appear in court for cross-examination.

PROSECUTOR'S RESPONSE

6. The Prosecutor first contends that the Motion is inadmissible because the Chamber already decided this issue on 18 July 2002 when it declined to admit the statement for failure to meet the requirements of Rule 92 *bis*.

7. In the event the motion is admissible, the Prosecutor asserts that the written statement is not cumulative of other Defence evidence, which is mere hearsay, and that it does not satisfy Rule 92*bis*. The Prosecutor notes that the Defence should not be permitted to avoid the stringent admission requirements of Rule 92 *bis*, the *lex specialis*, by relying on the general provision of Rule 89(C). The Prosecutor asserts, nonetheless, that the statement should not be admitted as relevant evidence under Rule 89(C) because it does not relate to the charges against the Accused.

8. The Prosecutor asserts that if the Chamber admits the statement under Rule 89(C), the witness should still be required to appear for cross-examination for the sake of the best evidence rule, as the other Defence witnesses mainly gave hearsay evidence. In addition, the Prosecutor indicates that she possesses a prior statement of the witness Twagiramungu which she intends to use to test his credibility.

DEFENCE REPLY

9. In its reply filed 2 December 2002, the Defence asserts that the Prosecutor's response is inadmissible in light of the 5 day deadline set in Rule 73. In addition, the Defence reiterates its above mentioned arguments and further posits that contrary to the Prosecutor's contention, the Trial Chamber's prior ruling never intended to definitively close the issue of admitting Twagiramungu's statement.

DELIBERATIONS

Issues of admissibility

10. Dealing first with the admissibility of the Prosecutor response, the Chamber notes that Rule 73 (D) does not bar the filing of a submission after the 5 day time limit. Therefore, the only consequence the Chamber attaches to the failure to meet the deadline is that after it has lapsed, a ruling may be handed down without awaiting the belated submission. If, on the contrary, a submission is filed after the deadline but before the motion is considered, as is presently the case, such submission may still be taken into account. The Chamber therefore rejects the Defence request to bar the Prosecutor's response.



11. Turning now to the admissibility of the Motion, the Chamber recalls that on 18 July 2002, it upheld the Prosecutor's objection to the admission of Twagiramungu's statement tendered pursuant to Rule 92 *bis*. The Prosecutor's objection, at that time, was that the statement tendered was not taken according to the procedure set out in Rule 92 *bis*.

12. The Chamber finds that the Motion is admissible because new developments have occurred since the Chamber's earlier ruling justifying its reconsideration. The Defence has taken further steps to ensure that the procedure for taking the statement conforms to the requirements of Rule 92 *bis*. In particular, the Witness has made a sworn declaration of truthfulness of his statement under the penalty of perjury witnessed by an attorney.

Substance of the Motion

13. At the outset, the Chamber emphasises that the basic requirement for the admission of any evidence is relevance as set forth in Rule 89(C).

14. Rule 92 *bis* is designed to permit the admission of written witness statements in lieu of oral testimony when the evidence to be adduced does not go to the proof of the acts and conduct of the accused as charged in the indictment. A statement tendered under Rule 92 *bis*, although not touching upon the direct conduct of the accused, needs to bear some evidentiary value related to the issues at stake in order to be admitted.

15. In the instant case the Chamber observes that the issue of Twagiramungu's ambush arose during the cross-examination of Prosecution Witness LAI and that the alleged incident occurred in 1993, which is outside the temporal jurisdiction of the Tribunal. To justify its attempt to challenge the evidence put into the record during LAI's testimony, the Defence intimated that the issue might be relevant for the determination of the accused's *mens rea* in relation to genocide and conspiracy to commit genocide with which the accused Ntagerura is charged. The Prosecutor has not made this allegation and does not consider this incident to be part of her case.¹ Indeed, the Prosecutor did not elicit this particular evidence and did not charge those specific facts in the indictment. Moreover, the Prosecutor opposes the admission of the statement pursuant to Rule 89(C) on the ground of lack of relevance.

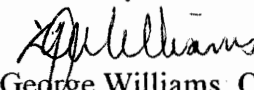
16. The Chamber finds that the statement tendered fails to address an issue relevant to the case at bar. As the evidence fails to meet the threshold requirement for admissibility under Rule 89(C), therefore the Chamber need not consider whether the statement satisfies the requirements of Rule 92 *bis*.

¹ In its reply, the Defence points out that the Prosecutor invoked the *mens rea* element and devoted a great deal of time to the Twagiramungu incident during the re-examination of witness LAI. This allegation is not however relevant to the issue under consideration.

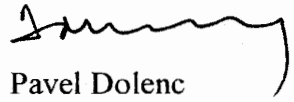
FOR THESE REASONS, THE TRIBUNAL:

DENIES the Motion.

Arusha, 13 March 2003


Lloyd George Williams, Q.C.
Judge


Yakov Ostrovsky
Judge


Pavel Dolenc
Judge

