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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Mr. Adama Dieng

Date: 29 September 2009

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THE PROSECUTOR
v.
DOMINIQUE NTAWUKULILYAYO

Case No. ICTR-05-82-T

**DECISION ON DEFENCE MOTION TO ADMIT THE STATEMENT AND REPORT
OF MR. VINCENT CHAUCHARD**

Rules 89 (C) and 92bis of the Rules of Procedure and Evidence

Office of the Prosecutor:
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INTRODUCTION

1. On 10 September 2009, the Defence filed a motion seeking admission of the statement of Mr. Vincent Chauchard, in lieu of oral testimony pursuant to Rule 92bis of the Rules of Procedure and Evidence (“Rules”).¹
2. The Defence further seeks admission of a report written by Mr. Vincent Chauchard and which appears on the Defence list of proposed exhibits filed on 7 August 2009.²
3. The Prosecution did not respond to the Motion.

DISCUSSION

Law Relating to Admission of a Statement in Lieu of Oral Testimony

4. Rule 92bis (A) of the Rules bestows a discretionary power upon a Trial Chamber to admit, in whole or in part, the evidence of a witness in the form of a written statement, in lieu of oral testimony, on the condition that it goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.³
5. The meaning of the term “acts and conduct of the accused as charged in the indictment” has been construed by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), which noted that the term is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused himself and not the acts and conduct of his co-perpetrators and/or subordinates.⁴
6. Once a Chamber is satisfied that the threshold requirement of Rule 92bis – that the material sought to be admitted goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment – has been met, and it is satisfied that the written statement adheres to certain formal requirements as mandated by Rule 92bis (B), its

¹ *Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, “Requête de la Défense pour l’admission des éléments de preuve sous la forme d’une déclaration écrite,” 10 September 2009 (“Motion”). Mr. Chauchard appears on the Defence list of witnesses.

² Procès-verbal de constat de la SCP Merle, Chauchard, Chertin, Huissiers de Justice associés à Montpellier en France, ayant pour objet le site Internet du collectif des parties civiles pour le Rwanda (CPCR) (the Official report by SCP Merle, Chauchard, Chertin; Huissiers de Justice in Montpellier, France, with respect to the Internet site of the Collectif des parties civiles du Rwanda) which is listed as Exhibit No. 5 in the Defence list of proposed exhibits, Annex B to the Defence “Mémoire Préalable de la Défense Fondé sur l’Article 73 ter du Règlement de Procédure et de Preuve”, 7 August 2009.

³ Rule 92bis of the Rules, entitled “Proof of Facts Other than by Oral Evidence”, provides that [a] Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.

⁴ *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution’s Request to have Written Statements Admitted Under Rule 92 bis (TC), 21 March 2002, para. 22, cited in *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C) (AC), 7 June 2002, fn. 28, in support of the Appeals Chamber’s statement of principle, at paragraph 10 of its Decision, that the term “acts and conduct of the accused as charged in the indictment” does not refer to the acts and conduct of others for which the accused is charged in the indictment with responsibility.

discretion to admit the statement is enlivened. In the exercise of this discretion, a Chamber is guided by the criteria for and against admission, set out in Rule 92bis (A) (i) and (ii), respectively, which are non-exhaustive lists.⁵

7. In addition, in order for a statement to be admissible under Rule 92bis, the general requirements of relevance and probative value, applicable to all types of evidence under Rule 89 (C), must also be satisfied. The party moving for the admission of the documents bears the burden of establishing *prima facie* that the document is relevant and has probative value.⁶ 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 sufficiently pleaded in the indictment.⁷ Evidence tendered before the Chamber has probative value if it tends to prove or disprove an issue and has sufficient indicia of reliability.⁸

8. Furthermore, the exercise of a Chamber's discretion under Rule 92bis must be governed by the right of the accused to a fair trial, as provided for in Articles 19 and 20 of the Statute.

Description of the Material sought to be Admitted

9. The Defence seeks to admit the statement of Mr. Vincent Chauchard, who is an associate bailiff residing in France.⁹ Mr. Chauchard states that he has authority to exercise functions on behalf of the Government to draw up public documents and is based at the

⁵ The non-exhaustive list of factors in favour of admission under Rule 92bis (A) (i) are that the evidence is: (a) of a cumulative nature; (b) relates to relevant historical, political or military background; (c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates; (d) concerns the impact of crimes upon victims; (e) relates to issues of the character of the accused; (f) relates to factors to be taken into account in determining sentence. Factors against admission under Rule 92bis (A) (ii) include whether: (a) there is an overriding public interest in the evidence in question being presented orally; (b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or (c) there are any other factors which make it appropriate for the witness to attend for cross-examination.

⁶ *Prosecutor v Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Deo Sebahire Mbonyinkebe (Rule 89 (C)) (TC), 2 September 2005 (the "*Bizimungu Decision*"), paras. 14-15; *Prosecutor v. Edouard Karamera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Admit Documents Authored by Enoch Ruhigira (TC), 26 March, 2008 (the "*Karamera Decision*"), para. 3 (citing *Prosecutor v. Theoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Bagosora Motion to Exclude Photocopies of Agenda (TC), 11 April 2007); *Bagosora et al.*, Decision on Request to Admit United Nations Documents Into Evidence Under Rule 89 (C) (TC), 25 May 2006, para. 2.

⁷ *Karamera Decision*, para. 3 (citing *Prosecutor v. Pauline Nyiramasuhuko and Arsene Shalom Ntahobali*, Case No. ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsene Shalom Ntahobali on the "Decision on Defence urgent Motion to Declare Part of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), July 2004).

⁸ *Karamera Decision*, para. 3 (citing *Karamera et al.*, Case No. ICTR-94-44, Decision on the Prosecution Motion for Admission into Evidence of Post Arrest Interviews (TC)); *Bizimungu Decision*, para. 14; *Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC) 4 October 2004 para. 7; *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, Decision on Appeal Regarding Statement of a Deceased Witness (AC), 21 July 2000 (the "*Kordic Decision*"), para. 24. In *Kordic*, the Appeals Chamber considered whether the unsworn, out-of-court statement of a deceased witness which had not been subjected to cross-examination should have been admitted into evidence as the only proof that the accused was at a particular place at a certain time. The Chamber held that the evidence was inadmissible because it was not sufficiently reliable.

⁹ He is described in the Motion and his statement as "*huissier de justice associé.*"

headquarters of N. Merle V. Chauchard & N. Chertin in France. He was sworn in by the Montpellier High Court on 19 November 1992.¹⁰

10. In his statement, Mr. Chauchard further states that at the request of the Defence, he conducted research on the internet website of the “*Collectif des Parties Civiles du Rwanda*”¹¹ (“CPCR”), and prepared an official report on the website dated 8 January 2009 (“Report”).¹² Mr. Chauchard attests that the Report contains a description of the type of material, techniques and methods used to access and assess the website. He further states that under French law, he is competent to make the findings set out in his Report and to have weight attached to such findings. Mr. Chauchard’s statement is dated 7 September 2009, signed and stamped with his seal.¹³

11. Mr. Chauchard’s Report, which the Defence also seeks to admit as an exhibit,¹⁴ states that he was requested by the Defence to analyse the contents of the CPCR’s website. According to the Report, the Accused’s name is mentioned on the website and states that the CPCR provides financial support to plaintiffs from the Gisagara area who wish to bring a civil action against the Accused. The Report also includes a description of how Mr. Chauchard accessed and assessed the CPCR website and shows snapshots of web pages.

Whether the Material should be Admitted

12. The Defence submits that Mr. Chauchard’s statement certifies that he has accessed the CPCR website, which is accessible to the public, and made screenshots of the website. The Defence acknowledges that Mr. Chauchard is not the author or designer of the website and that he makes no comment on its content.

13. According to the Defence, Mr. Chauchard’s Report is relevant to the evidence of Prosecution Witness AXY who testified on 20 May 2009. The Defence submits that a photograph of Witness AXY appears on the site and the Defence seeks to establish that Witness AXY is supported financially by the CPCR. In addition, the Defence submits that Witness AXY lied during her testimony when she denied the existence of the CPCR. Accordingly, the Defence asserts that the Report affects the credibility of Witness AXY.

14. The Chamber notes that Mr. Chauchard’s statement has been signed and executed in accordance with Rule 92bis (B) and its content does not relate to the acts or conduct of the Accused as charged in the Indictment. Rather, the statement attests to how his Report on the CPCR’s website was produced, which the Defence submits relates to the credibility of Prosecution Witness AXY. The Chamber observes, therefore, that its discretion to admit, or not, has been enlivened in the circumstances of this case.

15. In determining whether to exercise its discretion to admit, the Chamber has considered the non-exhaustive factors for and against admission under Rules 92bis (A) (i) and (ii) and

¹⁰ Motion, para. 6 and annexed to Mr. Chauchard’s statement is the “Journal Officiel de la Republique Francaise” and “Prestation de Serment” which records Mr. Chauchard’s swearing in as “Huissier de Justice”.

¹¹ The Federation of Rwandan and Civil Associations.

¹² See *supra* fn. 2.

¹³ The Chamber notes that the final page of the statement is dated 7 September 2007 but the first two pages of the statement are dated 7 September 2009 and the Defence Motion refers to the statement as being dated 7 September 2009.

¹⁴ See *supra* fn. 2.



notes that none of these factors are relevant in the present case.¹⁵ However, in deciding whether to exercise its discretion to admit, the Chamber must also consider whether the statement is relevant and of probative value under Rule 89 (C). Accordingly, the Chamber will now turn to address whether the general requirements for admission under Rule 89 (C) have been met.

16. Mr. Chauchard’s statement attests to how he produced his Report on the CPR website. The purpose of the statement is to admit the Report as an exhibit. Therefore, in order to determine whether Mr. Chauchard’s statement meets the requirements of Rule 89 (C), the Chamber must first consider whether the content of the Report is relevant and of probative value.

17. With regard to the Defence submission that the Report is relevant to the credibility of Prosecution Witness AXY, the Chamber recalls this Witness’ testimony on 20 May 2009 and notes that during cross-examination, she did not expressly deny the existence of the CPR. Rather, Witness AXY was asked whether she knew the “association of civil parties, survivors of Gisagara”, which was described as:

“a union or federation organised in France seeking to buy cows for the most needy survivors in Gisagara. And the partner association on the ground is called Umurashiga”¹⁶

Witness AXY responded that information was available to her that some survivors had received cows, but she was “not familiar with the framework in which that happened”, and “did not know that there was an association in charge of distributing cows to those people.”¹⁷ Witness AXY further stated that she was not one of those Gisagara survivors who received a cow from that association.¹⁸ The Witness was not asked whether she received any other form of support. In view of Witness AXY’s testimony, the Chamber does not consider that Mr. Chauchard’s Report is relevant to showing that the Witness lied during her testimony by denying the existence of the CPR or that she received support from the organisation.

18. Additionally, while the Chamber considers that the alleged content of the website, namely, that the CPR is an organisation which has and/or is supporting genocide survivors from Gisagara, including Witness AXY, may be relevant to her credibility, the Chamber finds that the Report produced by Mr. Chauchard does not meet the threshold requirements of Rule 89 (C). In this regard, the Chamber notes that Mr. Chauchard is not the author of the website, and has no involvement with the CPR. He cannot therefore vouch for the correctness or accuracy of the contents of the website. Accordingly, his Report cannot go towards proving the contents of the website and thus does not assist the Chamber in determining whether the information contained on the website, particularly in relation to Witness AXY, is authentic. The Chamber therefore finds that the Defence has failed to establish that the Report is *prima facie* relevant and of probative value under Rule 89 (C).

19. Accordingly, Mr. Chauchard’s statement, which also does not aver that the contents of the website are true but simply attests to the authenticity of his Report, is also of no assistance to the Chamber when assessing the credibility of Witness AXY. The statement therefore fails

¹⁵ See *supra* fn. 5.
¹⁶ T. 20 May 2009, p. 16.
¹⁷ *Ibid.*
¹⁸ *Ibid.*

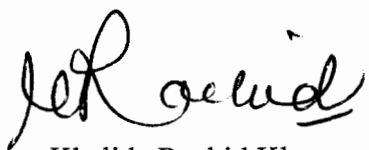
to meet the general requirements of relevance and probative value under Rule 89 (C). The Chamber thus declines to exercise its discretion in favour of admission under Rule 92*bis* (A).

FOR THESE REASONS

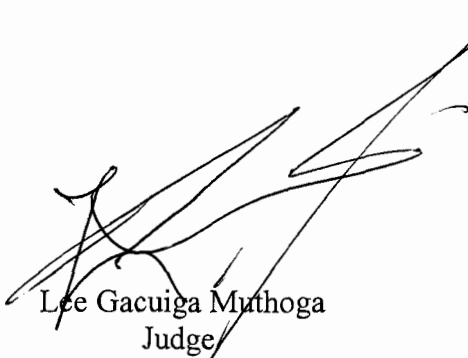
THE CHAMBER

DENIES the Defence Motion in its entirety.

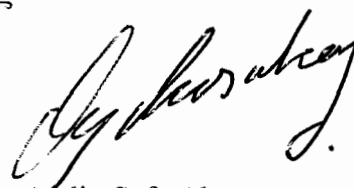
29 September 2009



Khalida Rachid Khan
Presiding Judge



Lee Gacuiya Muthoga
Judge



Aydın Sefa Akay
Judge

[Seal of the Tribunal]

