



UNITED NATIONS
NATIONS UNIES

ICTR-00-55c-P;
05-10-2010
(3411 - 3408)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

3411
1094

OR: ENG

TRIAL CHAMBER III

Before Judges: Lee Gacuga Muthoga, *Presiding*
Seon Ki Park
Robert Fremr

Registrar: Adama Dieng

Date: 5 October 2010

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THE PROSECUTOR

v.

Ildephonse NIZEYIMANA

CASE NO. ICTR-2000-55C-PT

**DECISION ON PROSECUTOR'S MOTION TO ADMIT INTO EVIDENCE
THE REPORT OF DR ALISON DES FORGES**

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

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INTRODUCTION

1. On 30 July 2010, the Prosecution filed a motion requesting the admission of the Report of Dr Alison Des Forges¹ ("Motion"), or in the alternative her treatise or transcript pursuant to Rules 89(C) and 92 *bis*. Ildephonse Nizeyimana opposes the Motion.²

DELIBERATIONS

The Law on Admission of Statements

2. The admission of a written statement under Rule 92 *bis* (A) involves an enquiry as to whether the statement sought to be admitted goes to proof of a matter other than the acts and conduct of the Accused as charged in the Indictment and whether it satisfies Rule 89(C) in that it is relevant and has probative value.³ Although definitive proof of reliability and credibility of the evidence is not required, a showing of *prima facie* reliability and credibility, on the basis of sufficient indicia, is required.⁴ In addition, the non-exhaustive factors listed in Rule 92 *bis* (A) (i) and (ii)⁵, the formal requirements of Rule 92 *bis* (B) must also be met.

3. Even if a statement fulfils all of these requirements, the Chamber must decide whether or not to exercise its discretion to admit it, bearing in mind the overarching necessity of ensuring a fair trial. A relevant factor in the exercise of this discretion is the proximity of the Accused to the person whose acts are described in the statement. Pursuant to Rule 92 *bis* (E), if the Chamber permits the admission of the statement, it must also decide whether or not to admit it in whole or in part, and whether or not to require cross-examination of the witness. In addition to issues relating to the fairness of the trial, a relevant factor in this regard is whether

¹ Prosecutor's Motion to Admit into Evidence the Report of Dr Alison Des Forges, filed on 30 July 2010 ("Motion").

² Defence Joint Response to the Prosecutor's Motions to Admit Into Evidence the Report of Binaifer Nowrojee and Report of Dr. Alison Des Forges Pursuant to Rules 89 (C) and 92 *bis*, filed on 4 August 2010 ("Response").

³ *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Case No. ICTR-98-41-T ("*Bagosora et al.*"), Decision on Prosecutor's Motion for the Admission of Written Statement Under Rule 92 *bis* (TC), 9 March 2004, para. 12.

⁴ *The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse and Joseph Nzirorera* ("*Karemera et al.*"), Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts (AC), 29 May 2009, para. 15.

⁵ Factors which favour admission include the fact that oral evidence has been heard on similar facts; the statement provides an historical, political or military background; or the statement relates to the character of the accused. Factors weighing against admission include whether there is an overriding public interest to hear the evidence orally; its nature and source render it unreliable; or its prejudicial effect outweighs its probative value.

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the evidence relates to a live and important issue between the parties, as opposed to a peripheral one.⁶

4. Moreover, the jurisprudence of this Tribunal establishes that Rule 92 *bis* (A) impliedly requires that, for a statement to be admitted pursuant to this rule, its author must appear on the moving party's witness list.⁷

The Alison Des Forges Report, Treatise and Transcript

5. The Chamber finds that the Alison Des Forges Butare Report of 2001 ("Butare Report") and Treatise, Leave None to Tell the Story ("Treatise"), are relevant and probative as they discuss the events in Butare in 1994 as well as those who were allegedly involved in those events which are directly relevant to the charges in the Indictment. However, both the Butare Report and Treatise treat live and important issues with respect to the Prosecution's case.⁸ Since Des Forges is deceased, it would be prejudicial to the Accused to allow admission of the Butare Report or Treatise without the benefit of cross-examination.

6. The Chamber next turns to whether Alison Des Forges' transcripts of prior testimony in the *Butare* trial, including both examination and cross-examination, are admissible pursuant to Rule 92 *bis* (D). The Chamber finds that the transcript is relevant and probative as it discusses the events in Butare that took place in 1994 as well as the key persons involved in those events as is directly relevant to the charges in the Indictment. In the transcript, Des Forges was subject to full cross-examination on the events related to Butare and this militates towards admission as Ildéphonse Nizeyimana will not be prejudiced. Given the transcript's length and the discussion of the acts and conduct of the Accused, the Prosecution must provide the Chamber with the relevant portions of the transcript it wishes to admit along with the necessary redactions.

⁶ *Bagosora et al.*, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under 92 *bis*, 9 March 2004, para. 16.

⁷ *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Prosecutor's Motion for Leave to Be Authorised to Have the Affidavits Regarding the Chain of Custody of the Diary of Pauline Nyiramasuhuko Under Rule 92*bis* (TC), 14 October 2004, para. 12; *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka and Prosper Mugiraneza*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Motion and Notice Pursuant to Rule 92 *bis* (E) (TC), 17 November 2004, paras. 4-8; *Karemera et al.*, Decision on Variance of the Prosecution Witness List, 13 December 2005, para. 19; *The Prosecutor v. Rukundo*, Case No. ICTR-2001-70-T, Decision on Defence Motion to Present Additional Witnesses and to File Documentary Evidence Prior to the Close of its Case (TC), 30 November 2007, para. 12.

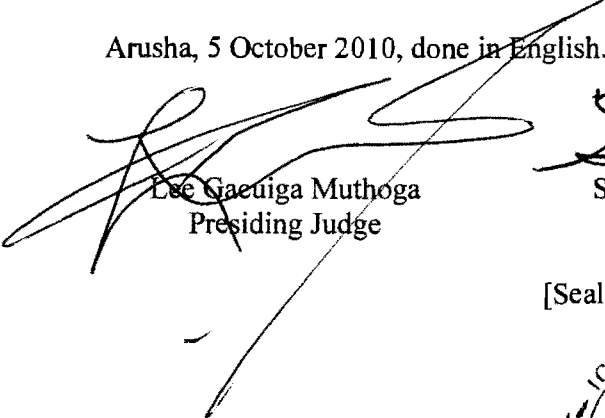
⁸ Motion, para. 12.


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FOR THE ABOVE REASONS, THE CHAMBER

- I. **DECLARES ADMISSIBLE** a portion of the Alison Des Forges transcript in the *Butare* trial on the condition that it be redacted to remove references to the acts or conduct of the Accused;
- II. **ORDERS** the Prosecution to provide the Chamber with the proposed relevant portions of the transcript and redactions by 18 October 2010; and
- III. **DENIES** the Prosecution's Motions in all other respects.

Arusha, 5 October 2010, done in English.


Lee Gatuiga Muthoga
Presiding Judge


Seon Ki Park
Judge


Robert Fremr
Judge

[Seal of the Tribunal]

