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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-00-55C-T
15-03-2011
(5535-5531)

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LWAH

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 15 March 2011

THE PROSECUTOR

v.

Ildéphonse NIZEYIMANA

CASE NO. ICTR-00-55C-T

2011 MAR -15 A-11-0
JUDICIAL RECORDS/ARCHIVES
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**FURTHER DECISION ON ADMISSION
OF EVIDENCE OF DR. ALISON DES FORGES**

Office of the Prosecution:
Drew White
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Zahida Virani

Defence Counsel for Ildéphonse Nizeyimana:
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INTRODUCTION

1. On 5 October 2010 the Chamber filed the "Decision on Prosecutor's Motion to Admit Into Evidence the Report of Dr Alison Des Forges" ("First Decision"). The First Decision, *inter alia*, denied the Office of the Prosecutor's ("Prosecution") motion to admit into evidence the Alison Des Forges Butare Report of 2001 ("Butare Report"). The Chamber reasoned that admission of the Butare Report would prejudice the defence team of the accused, Ildéphonse Nizeyimana, ("Defence" and "the Accused" respectively) as Dr. Alison Des Forges ("Des Forges") is deceased, and thus not available for cross-examination.¹ By contrast, the Chamber found that transcripts of Des Forges' prior testimony in the case of *The Prosecutor v. Pauline Nyiramasuhuko et al.*² ("Butare Transcript" and "Butare Case" respectively) were admissible, reasoning that "[i]n the [Butare T]ranscript, Des Forges was subject to full cross-examination on the events related to Butare" and thus that Nizeyimana would not be prejudiced by its admission.³ The Chamber required that the Prosecution provide an edited and redacted version of the Butare Transcript to the Chamber, removing all references to the acts or conduct of the Accused.⁴
2. On 18 October 2010, the Prosecution submitted to the Chamber the redacted Butare Transcript. It also requested admission of certain additional exhibits from the Butare Case, including the Butare Report.⁵ The Prosecution submitted that since the cross-examination in the Butare Transcript made reference to the Butare Report, the latter should be admitted notwithstanding the First Decision's holding.⁶
3. On 25 February 2011, the Prosecution requested the guidance of the Chamber with respect to whether it should tender copies of the Butare Case exhibits listed in the Transcript Submission, even though these included the Butare Report.⁷ The Chamber asked that the parties attempt to resolve the issue amongst themselves.⁸

¹ First Decision, para. 5, p. 4.

² Case No. ICTR-98-42-T.

³ First Decision, para. 6.

⁴ First Decision, para. 6, p. 4.

⁵ Prosecutor's Submissions Further to the Decision of 5 October 2010 Regarding the Admission of Evidence of Dr Alison Des Forges, filed on 18 October 2010 ("Transcript Submission"), paras. 4, 6, 11.

⁶ Transcript Submission, paras. 9-11.

⁷ T. 25 February 2011, pp. 31, 32.

⁸ T. 25 February 2011, pp. 33-34.

4. On 7 March 2011, the Prosecution filed a further submission regarding the Butare Transcript.⁹ The Prosecution noted that the parties were unable to agree amongst themselves regarding the admissibility of exhibits referred to in the Butare Transcript.¹⁰ The Prosecution submitted, *inter alia*, that the Defence is out of time to challenge the Transcript Submission,¹¹ and maintains that the Butare Report "is fundamentally necessary to make sense" of Des Forges' testimony.¹² The Prosecution reasons that as the Chamber found that the cross-examination of Des Forges eliminated the possibility of prejudice to the Accused with respect to the Butare Transcript, and the Butare Report is referred to in that cross-examination, the latter is also non-prejudicial and should be admitted.¹³

5. On 7 March 2011, the Defence also filed a submission with respect to the Butare Transcript.¹⁴ The Defence asserts that "the Prosecut[ion] is trying to do indirectly what [it] could not achieve directly, that is obtain the admission of the [Butare] Report into evidence."¹⁵ The Defence suggests that the Prosecution's editing of the Butare Transcript is insufficient, resulting in the admission of irrelevant information.¹⁶ The Defence further observes that many of the redactions to the Butare Transcript made are in the cross-examination section—suggesting that this cross-examination by other lawyers in the Butare Case did not defend the interests of the Accused.¹⁷ Finally, the Defence requests leave to respond to the First Prosecution Submission.¹⁸

6. On 8 March 2011, the Prosecution filed an additional submission.¹⁹ The Prosecution, *inter alia*, reiterates that the information in the Butare Report should be admitted,²⁰ and notes that the cross-examination of Des Forges in the Butare Case was "extensive and comprehensive."²¹

⁹ Prosecutor's Submissions Further to the Oral Directions of the Trial Chamber Given on 25 February 2011 and Further to the Decision of 5 October 2010 Regarding the Admission of Evidence of Dr Alison Des Forges, filed on 7 March 2011 ("First Prosecution Submission").

¹⁰ First Prosecution Submission, para. 8.

¹¹ First Prosecution Submission, paras. 10-15.

¹² First Prosecution Submission, para. 19.

¹³ First Prosecution Submission, paras. 24-28.

¹⁴ Defence Submissions on 92 bis Admission of Evidence of Dr. Alison Des Forges, filed on 7 March 2011 ("First Defence Submission").

¹⁵ First Defence Submission, para. 3.

¹⁶ See First Defence Submission, paras. 12, 13.

¹⁷ First Defence Submission, paras. 10, 12.

¹⁸ First Defence Submission, p. 4.

¹⁹ Prosecutor's Supplementary Submissions Further to the Oral Directions of the Trial Chamber Given on 25 February 2011 and Further to the Decision of 5 October 2010 Regarding the Admission of Evidence of Dr. Alison Des Forges, filed on 8 March 2011 ("Second Prosecution Submission").

²⁰ Second Prosecution Submission, para. 13.

²¹ Second Prosecution Submission, para. 6.

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DELIBERATIONS

The Law on Admission of Statements

7. The admission of a written statement under Rule 92bis (A) of the Rules of Procedure and Evidence ("Rules") 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) of the Rules in that it is relevant and has probative value.²² Although definitive proof of the evidence's reliability and credibility is not required, a showing of *prima facie* reliability and credibility, on the basis of sufficient indicia, is required.²³ In addition to the non-exhaustive factors listed in Rule 92 bis (A) (i) and (ii) of the Rules,²⁴ the formal requirements of Rule 92 bis (B) of the Rules must also be met.

8. 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. If the Chamber permits the admission of a 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.²⁵

Preliminary Issue

9. The Chamber observes that, as noted by the Prosecution, the Defence did not respond to the Transcript Submission until after it was asked to do so during the court session on 25 February 2011—a delay of four months. In this circumstance, the Defence's unjustified delay in responding means it has lost its right to contest the Transcript Submission and the arguments contained therein, and its submissions will not be taken into account by the Chamber.²⁶

Admission of Exhibits Relevant to the Butare Transcript

²² *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, 9 March 2004 ("Bagosora Decision"), paras. 12, 13.

²³ *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.17, Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts, 29 May 2009, para. 15.

²⁴ Factors which favour admission include the fact that oral evidence has been heard on similar facts; the statement provides 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 in hearing the evidence orally; the nature and source of the evidence renders it unreliable; or the evidence's prejudicial effect outweighs its probative value. See Rule 92bis (A)(i) and (ii) of the Rules.

²⁵ Bagosora Decision, para. 16.

²⁶ See Rule 73(E) of the Rules.

10. The Chamber recalls that in the First Decision, it determined that admission of the Butare Report would be prejudicial to the Accused. The Prosecution's request that the Butare Report be admitted on the basis of its role in the Butare Transcript employs circuitous logic and is in effect a plea for "a second bite at the apple." The Chamber has not altered its view of the Butare Report's prejudicial impact and will not admit it as an exhibit. The Butare Transcript and exhibits it refers to, other than the Butare Report, will be admitted as requested by the Prosecution, with the understanding that all references to the Accused's acts or conduct are redacted.

11. In admitting the redacted Butare Transcript, the Chamber recalls that the probative value of this exhibit is cabined; "expert witness testimony is intended chiefly to provide specialized knowledge to assist the Judges in assessing the evidence evidence [...] [A]n expert witness cannot, in principle, testify himself or herself on the acts and conduct of accused persons".²⁷

FOR THESE REASONS, THE CHAMBER

ORDERS the admission of the Butare Transcript and relevant associated exhibits submitted by the Prosecution in the Transcript Submission, with the exception of the Butare Report, provided that the admitted materials are redacted to remove references to the acts or conduct of the Accused.

Arusha, 15 March 2011, done in English.


J. Gacumba Muthoga
Presiding Judge


Seon Ki Park
Judge


Robert Fremr
Judge

[Seal of the Tribunal]



²⁷ *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, para. 212.