



UNITED NATIONS  
NATIONS UNIES

ICTR-00-55C-PT  
06-10-2010  
(3515 - 3512)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

3515  
UNH

OR: ENG

**TRIAL CHAMBER III**

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

**Registrar:** Adama Dieng

**Date:** 6 October 2010

JUDICIAL RECORDS/ARCHIVES  
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P-37

**THE PROSECUTOR**

v.

**Ildephonse NIZEYIMANA**

**CASE NO. ICTR-2000-55C-PT**

**DECISION ON PROSECUTOR'S MOTION TO ADMIT INTO EVIDENCE THE  
TAPE TRANSCRIPT OF LT. COL. THARCISSE MUVUNYI**

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

**Office of the Prosecutor:**

Drew White  
Kirsten Gray  
Yasmine Chubin  
Zahida Virani  
Astou Mbow

**Defence Counsel for Ildephonse Nizeyimana:**

John Philpot  
Cainnech Lussiaà-Berdou  
Myriam Bouazdi

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## INTRODUCTION

1. On 9 August 2010, the Prosecution filed a motion requesting the admission of the tape transcripts of Lieutenant Colonel Tharcisse Muvunyi ("Motion")<sup>1</sup>. Ildephonse Nizeyimana opposes the Motion.<sup>2</sup> On 16 August 2010, Nizeyimana filed a motion for an extension of time to reply to the Motion ("Extension of Time Motion").<sup>3</sup> Due to the urgency of the request, the previous Chamber granted the Extension of Time Motion via letter to the Parties.<sup>4</sup>

## DELIBERATIONS

2. As a preliminary matter, the Chamber considers that Ildephonse Nizeyimana filed his Response in time pursuant to the previous Chamber's granting of an extension of time.

### *The Law on Admission of Written Statements*

3. 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.<sup>5</sup> 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.<sup>6</sup> In addition, the non-exhaustive factors listed in Rule 92 *bis* (A) (i) and (ii)<sup>7</sup>, the formal requirements of Rule 92 *bis* (B) must also be met.

4. 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 overriding 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

<sup>1</sup> Prosecutor's Motion to Admit into Evidence the Tape Transcripts of Lt. Col. Tharcisse Muvunyi, filed on 9 August 2010 ("Motion"). Prosecution's Reply to Defense Response to Motion to Admit into Evidence the Tape Transcripts of Lt. Col. Tharcisse Muvunyi, filed on 23 August 2010 ("Reply").

<sup>2</sup> Defence Corrigendum to Defence Response to the Prosecutor's Motions to Admit Into Evidence the Tape Transcript of Lt. Col. Tharcisse Muvunyi Pursuant to Rules 89 (C) and 92 *bis*, filed on 17 August 2010 ("Response").

<sup>3</sup> Defence Motion for Extension of Time, filed on 16 August 2010.

<sup>4</sup> E-mail from Will Paterson, Associate Legal Officer to the Parties, 17 August 2010.

<sup>5</sup> *The Prosecutor v. Théoneste Bagosora, Gratién 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.

<sup>6</sup> *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.

<sup>7</sup> 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.



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 the evidence relates to a live and important issue between the parties, as opposed to a peripheral one.<sup>8</sup>

5. Moreover, the jurisprudence of this Tribunal establishes that Rule 92 *bis* (A) impliedly requires that, for a written statement to be admitted pursuant to this rule, its author must appear on the moving party's witness list.<sup>9</sup>

*The Muvunyi Tape Transcripts*

6. The Prosecution requests that the Muvunyi Transcript be admitted as evidence pursuant to Rules 92 *bis* (A) and (C).<sup>10</sup> The Prosecution contends that the Muvunyi Transcripts are relevant to the present case by explaining the causes and effects of the conflict in Butare that culminated in the April through July events in 1994.<sup>11</sup>

7. The Chamber notes that the Prosecution did not sufficiently demonstrate whether the transcripts comply with Rule 92 *bis* requirements. In particular, the Chamber does not find that the Muvunyi Transcript is a "written statement" as required by Rules 92 *bis* (A) and (C). Further, the Prosecution has not demonstrated that Muvunyi cannot testify orally as required by Rule 92 *bis* (C). Turning to whether the Muvunyi Transcript fits the form requirements for admission pursuant to Rule 92 *bis* (B), the Chamber finds that the transcript does not include any attestation from Muvunyi with respect to the truth of its contents. Nor is there any certification provided by an officer appointed by the Registrar or a person authorised to witness such a declaration in accordance with the law and procedure of a State.

8. Furthermore, the Chamber has serious reservations regarding the circumstances in which the transcripts were taken. ICTR investigators interviewed Muvunyi prior to the Prosecution indicting him; Muvunyi was being interviewed in London, England where he sought to stay after leaving Rwanda and he knew that his cooperation with the Tribunal

<sup>8</sup> *Bagosora et al.*, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under 92 *bis*, 9 March 2004, para. 16.

<sup>9</sup> *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.

<sup>10</sup> Motion, para. 17.

<sup>11</sup> Motion, para. 18.



3512

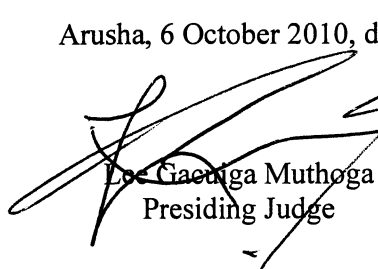
would be communicated to the British authorities.<sup>12</sup> Therefore, the circumstances surrounding the taking of the transcripts lead the Chamber to find that, not only do the transcripts not meet the form requirements of Rule 92 *bis*, even if admitted, they would have very little probative value. Finally, the Chamber is concerned that the transcripts, if admitted into evidence, would be unfair to Muvunyi who has an appeal that is still pending before this Tribunal.

9. Therefore, the Chamber denies admission of the Muvunyi Transcripts pursuant to Rules 92 *bis* and 89(C).

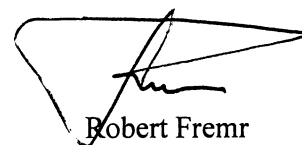
**FOR THE ABOVE REASONS, THE CHAMBER**

**DISMISSES** the Prosecution's Motion.

Arusha, 6 October 2010, done in English.

  
Joe Gacuga Muthoga  
Presiding Judge

  
Seon Ki Park  
Judge

  
Robert Fremr  
Judge

[Seal of the Tribunal]



<sup>12</sup> Motion, Annex A, p. 2.



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