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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

Arusha International Conference Centre

P.O.Box 6016, Arusha, Tanzania - B.P. 6016, Arusha, Tanzanie

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IN TRIAL CHAMBER III

Before: Hon. Dennis C. M. Byron, Presiding
Hon. Gberdao Gustave Kam
Hon. Vagn Joensen

Registrar: Mr. Adama Dieng

Date Filed: 01 February 2009

The PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

JUDICIAL
1 2010 FEB - 11 P 4: 10
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**Prosecutor's Response to Joseph Nzirorera's Motion to Admit the Statements of
Gratien Kabiligi**

For the Prosecutor:

Mr. Don Webster
Mr. Iain Morley
Mr. Saidou N'Dow
Ms. Gerda Visser
Ms. Sunkarie Ballah-Conteh
Mr. Takeh Sendze

For the Accused:

Ms. Dior Diagne and Mr. Moussa Félix Sow for Édouard Karemera
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ngirumpatse
Mr. Peter Robinson and Patrick Nimy Mayidika Ngimbi for Joseph Nzirorera

1. On 26 January 2010, Joseph Nzirorera filed his *Motion to Admit Statements of Gratien Kabiligi*.
2. Therein, Mr. Nzirorera requests that the Chamber admit the statement of Gratien Kabiligi pursuant to Rule 92bis of the Rules of Procedure and Evidence (hereafter "The Rules"). Mr. Nzirorera states that whereas Mr. Kabiligi had previously agreed to appear as a witness on behalf of Mr. Nzirorera, he has since withdrawn this consent so as not to jeopardize his ability to be re-settled in another country.
3. The Prosecutor hereby files his response opposing Mr. Nzirorera's application on the grounds that:
 - a) The statement that Mr. Nzirorera seeks to have admitted under Rule 92bis is prohibited by Rule 92bis(A), as it goes to proof of the acts and conduct of the Accused;
 - b) The evidence is unnecessarily cumulative;
 - c) There are factors which make it appropriate for the Witness to attend for cross-examination.

Applicable Law

4. Rule 92bis(A) provides:

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.

5. The meaning of the term "acts and conduct of the Accused as charged in the indictment" has been defined 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 behavior of the Accused himself and not the acts and conduct of his co-perpetrators and/or subordinates.¹ The purpose behind this restriction is to protect the right of the Accused to examine or have examined the witnesses against him.²

¹*Bizimungu et al.*, Decision on Casimir Bizimungu's Motion to Vary Witness List; and to Admit Evidence of Witness in Written Form in Lieu of Oral Testimony (Bizimungu 92bis Decision) (TC), 1 May 2008, Para. 17; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to have Written Statements Admitted under Rule 92bis (TC), 21 March 2002, Para. 22, *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory

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6. 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.³ Under Rule 89 (C), the Chamber has broad discretion to admit any evidence which it deems to be relevant and of probative value.⁴ The party moving for the admission of the statements bears the burden of establishing, *prima facie*, that the document is relevant and has probative value.⁵ 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.⁶ Evidence tendered before the Chamber has probative value if it tends to prove or disprove an issue and has sufficient *indicia* of reliability.⁷

Gratien Kabiligi's Statement is Prohibited by Rule 92bis(A)

7. Nzirorera has failed to mention that the statement which he seeks to have admitted makes references to the acts and conduct of the Accused Joseph Nzirorera, which is clearly prohibited by the Rules.

8. According to the case law, written statements seeking to contradict evidence that an Accused carried out certain acts have been held to relate to "proof of the acts and conduct of the Accused" for the purposes of Rule 92bis (A).⁸ Consequently, these statements cannot be admitted under Rule

Appeal Concerning Rule 92bis (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. *See also, Karemera et al*, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules; and Order for Reduction of Prosecution Witness List, 11 December 2006, Para. 11, indicating that the term, "acts and conduct of the Accused" has the same meaning in 92bis (D) as it does in 92bis (A).

² *See, Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-T, Decision on the Prosecutor's Motion to Remove from Her Witness List Five Deceased Witnesses and to admit into Evidence the Witness Statements of Four of Said Witnesses, 22 January 2008, Para. 19.

³ Bizimungu 92bis Decision, Para. 20; *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 92 bis (TC), 9 March 2004, Para. 12.

⁴ *Bizimungu et al.*, Decision on Defence Motions to Admit Church Records and School Records, (Rule 89 (C)) (Bizimungu Records Decision) (TC), 2 June 2008, Para. 9, (citations omitted).

⁵ Bizimungu Records Decision, Para. 9.

⁶ Bizimungu Records Decision, para.10.

⁷ Bizimungu Records Decision, para.10.

⁸ *Kamuhanda*, Decision on Kamuhanda's Motion to Admit into Evidence Two Statements by Witness GER in Accordance with Rules 89(C) and 92bis of the Rules of Procedure and Evidence, 20 May 2002, Para. 29 ("The Chamber notes that the statements of GER contradict the allegations made against the Accused as outlined in the Indictment against him. The Chamber considers that because of that contradiction, the said statements may be said to relate to the criminal acts and conduct of the Accused"); *Simba*, Decision on the Admission of a Written Statement (TC), 25 January 2005, Para. 5 (The statement of a witness that an Accused was not present at a massacre in which he was alleged to have participated was held to go to the acts and conduct of the Accused. "The Defence seeks to use it to

92bis or can only be admitted if appropriate redactions are made to remove all references to the acts and conduct of the Accused in relation to the indictment.

9. For example, the Prosecution asserts that the witness giving evidence about never having attended or heard of a meeting that he is said to have been present at together with Mr. Nzirorera amounts to a reference to the acts and conducts of Mr. Nzirorera, the Accused. In so far as Prosecution evidence establishes that Nzirorera participated in that particular meeting, this statement should not be admitted under the Rule.

10. The Prosecution is aware of the decision in the *Bizimungu et al.* ["Gov II"] case in which Trial Chamber II, on an exceptional basis, admitted trial transcripts from another trial under Rule 92bis where the witness made references to the acts and conduct of the Accused. In that case, however, the witness in question had already previously testified orally before Trial Chamber II in the same trial. The Prosecution acknowledges that, in clearly exceptional circumstances, Trial Chambers of this Tribunal have considered it appropriate to admit evidence in the form of written statements or prior testimony that went to the acts and conduct of the Accused.⁹ However, only very exceptional circumstances warrant such a departure from Rule 92 bis (A) where the purpose for admitting the statement could be narrowly circumscribed.¹⁰ The Prosecution asserts such circumstances do not arise in Nzirorera's current application and that Nzirorera has made no attempt to explain that his application should be granted for exceptional reasons.

support the Accused alibi that he was not present at Kaduha parish. This goes directly to proof of the acts and conduct of the Accused by corroborating to some extent his alibi"); *Bagosora et al.*, Decision on Prosecutor's Motion for Admission of Written Witness Statement (TC), 9 March 2004, Para. 16 ("[The statement sought to be admitted must satisfy] Rule 92 bis, in that it goes to proof of a matter other than the acts and conduct of the Accused as charged in the Indictment, that is, that it does not contain evidence that tends to prove or disprove the Accused's acts or conduct as charged"); *Prosecutor v. Bagosora*, Decision on Defence Motion for Admission of Statement of Witness LG-1/U-03 Under Rule 92 bis (TC), 11 December 2006, p. 4;

⁹ *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-T, Decision on Kamuhanda's Motion to Admit Into Evidence Two Statements by Witness GER (*Kamuhanda* Decision), 20 May 2003 (was originally recorded as 20 May 2002), para. 31, "It appears to this Chamber that a proper reading of Rules 89(C) and 92bis may not interfere with the Chamber's discretion in a fitting case, at the instance (*sic*) of the Accused, to admit statements of witnesses which are relevant and have probative value, even if those witnesses might be dead."; *See also Prosecutor v. Ngeze*, Case No. ICTR-99-52-T, Decision on the Defence Motion to Admit Into Evidence Prosecution Witness's Statements; Alternatively to Produce Additional Defence Witnesses (*Ngeze* Decision), 5 June 2003. Admitting one unavailable Witness's statement for the purpose of challenging the credibility of another Witness testimony based on the "particular circumstances" of the case. *See also, Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Decision on the Prosecution Motion for Admission of Witness Statements (TC), 20 May 2004, Para. 29-30, citing the above cases.

¹⁰ *See, Ngeze* Decision, Para 6. Also admitting evidence for the limited purpose of assessing credibility.

Evidence is unnecessarily cumulative

11. Further, although the Prosecution acknowledges that it weighs in favour of admitting written proof in lieu of oral evidence when such evidence is cumulative in nature, it must be underscored that the written proof must be cumulative *in relation to the oral testimony* of similar facts. To attempt to admit an excessive number of witness statements that address similar matters is clearly not in line with the fundamental objective for Rule 92bis. Additionally, parties have been cautioned not to interpret Rule 92bis as an “invitation to tender unnecessarily cumulative or repetitive evidence”¹¹. As he has conceded, Mr. Nzirorera has an ample number of witnesses whose statements have been admitted pursuant to the Rule and who address the issue of the meeting at the Kigali prefecture office in late April 1994.

E. Need for Cross-Examination

12. Should this Trial Chamber conclude that the statement is admissible, the Prosecution contends that the witness should be made available for cross examination, as set forth under Rule 92 bis(E). The Prosecution submits that when information contained in the written statement is related to a *critical and live issue* between the parties, as opposed to issues that may be considered redundant; the witness should be made available for cross examination.¹² The Prosecutor contends that prejudicial effect of admitting this statement would far outweigh its probative value if he is not given the opportunity to cross-examine the witness.

13. Statements containing information which is relevant for this Trial Chamber’s assessment of the credibility of Prosecution witnesses are considered to be critical elements of the Prosecution case. It would be appropriate for such witnesses to attend for cross-examination if their written statements are admitted under Rule 92bis.

14. It is clear that Mr. Kabiligi will not consent to appear before this Tribunal for cross-examination, otherwise he would have done so as a live witness for the Defence. The implications here are that if the Chamber were inclined to accept the admission of the statements in question, the

¹¹ *Prosecutor v. Vidoje Blagojevi*, IT-02-60-T, First Decision on Prosecution’s Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92bis, 12 June 2003. At Para 20, the Chamber states that, “one criteria used to establish whether a trial is fair is if an accused is tried without undue delay. The admission of *unnecessarily* cumulative or repetitive evidence may affect the expeditious nature of the proceedings and therefore will not be admitted”.

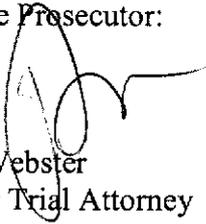
¹² See *Prosecutor v. Oric*, Case No. IT-03-68-T, Decision on Defence Motion to Admit the Evidence of a Witness in the Form of a Written Statements Pursuant to Rule 92bis.

Prosecutor would not be able to cross examine the witness. This would unfairly prejudice the Prosecutor.

WHEREFORE, the Prosecutor requests that Mr. Nzirorera's motion be denied in its entirety.

Respectfully submitted in Arusha, this 1st day of February 2010

For the Prosecutor:



Don Webster
Senior Trial Attorney



Sunkarie Ballah-Conteh
Associate Appeals Counsel



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

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I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

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Case Name:	The Prosecutor vs. Karempera et al.		Case Number: ICTR-98-44
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