



ICTR-99-54A-T  
(21-05-03)  
(1325-1318)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

1325  
Mwamp

OR: ENG

**TRIAL CHAMBER II**

**Before:** Judge William H. Sekule, Presiding  
Judge Winston C. Matanzima Maqutu  
Judge Arlette Ramaroson

**Registrar:** Adama Dieng

**Date:** 20 May 2002

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**The PROSECUTOR**  
v.  
**Jean de Dieu KAMUHANDA**

**Case No. ICTR-99-54A-T**

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**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**

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the “Tribunal”),

**SITTING** as Trial Chamber II composed of Judges William H. Sekule, Presiding, Winston C. Matanzima Maqutu and Arlette Ramaroson (the “Chamber”);

**BEING SEIZED** of the “Motion for Admission into Evidence of Two Statements by Witness GER in Accordance With Rules 89(C) and 92 *bis* of the Rules of Procedure and Evidence,” attached to which are six (6) documents, all of which were filed on 23 January 2003 (the “Motion”);<sup>1</sup>

**HAVING RECEIVED AND CONSIDERED** the “Prosecutor’s Response to Defence Motion for Admission into Evidence of Two Statements by Witness GER in Accordance With Rules 89(C) and 92 *bis* of the Rules of Procedure and Evidence,” filed on 3 March 2003 (the “Prosecutor’s Response”); AND The “Conclusions en réplique aux fins d’admission des dépositions de GER à titre d’éléments de preuve. – Art. 89 C et 92 bis du règlements de procédure et de preuve,” filed on 3 April 2003 (the “Defence Reply”);

**CONSIDERING** the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), in particular Rules 89(C) and 92*bis* of the Rules;

**NOW DECIDES** the Motion on the basis of the written briefs as filed by the Parties pursuant to Rule 73(A) of the Rules.

## **SUBMISSIONS OF THE PARTIES**

### *Defence Submissions*

1. The Defence requests that the Chamber admit into evidence, pursuant to Rules 89(C) and 92*bis* of the Rules, two statements of a deceased Witness GER, who was Pastor at the Gikomero Protestant Parish in April 1994. The Defence submits that one of the two statements is Witness GER’s signed statement of 15 March 2000 made to the investigators of the Prosecution (the “Statement of 15 March 2000”). The second statement for which the Defence requests admission into evidence is a statement, which Witness GER made to the Rwandan Authorities.

2. The Defence submits that in the Indictment at paras. 6.44, 6.45 and 6.46, the Accused is alleged to have participated in the perpetration of the massacres at the Protestant Parish located in Gikomero Commune. Prosecution witnesses have testified that, on that day, the Accused spoke to Witness GER just before the attack commenced. The Defence submits that in the Statement of 15 March 2000, Witness GER describes the attack of 12 April 1994 at the Protestant Parish, stating that, although he knew the Accused, he never saw nor spoke to him on that day. Furthermore, the Defence submits that in the statement made to the Rwandan Authorities, while Witness GER related the events of April 1994, he did not make mention of the Accused. The Defence submits that following the making of these statements Witness GER died, making it impossible for the court to hear him.

<sup>1</sup> See the attachments, which are; (i) The signed statement dated 15 March 2000, in English, of Witness GER to the investigators of the Prosecution; (ii) The Official French translation of statement of GER of 15 March 2000; (iii) Transcript of the hearing of Witness GER in Kinyarwanda by the Office of the Public Prosecutor, Kigali, dated 7 October 1996; (iv) The Unofficial French translation of the transcript of 7 October 1996; (v) The Unofficial English translation of the transcript of 7 October 1996; and (vi) The Letter from the Chief Public Prosecutor at the Supreme Court of Rwanda

3. The Defence argues that by using their unfettered discretion to determine the relevancy and probative value of the evidence, the Judges may admit Witness GER's statements pursuant to Rule 89(C) of the Rules. The Defence argues that the two statements meet the admissibility standards laid out in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY"). The Defence submits that the statements are relevant because therein the Witness relates the conduct of the attack on the Gikomero Protestant Parish and the fact that he did not see the Accused during the attack. Furthermore, the Defence submits that the said statements tend to corroborate the Accused's case that he did not go to Gikomero after 6 April 1994. Similarly, the statements corroborate the testimonies of Defence Witnesses GPR, GPT, GPK, GPC and GPB all of whom were Gikomero inhabitants, present on the day of the attack.

4. Furthermore, the Defence submits that the statements are admissible pursuant to Rule 92bis of the Rules, particularly as sub-Rule (C) provides for the admission of a statement of a person who has died. The Defence submits that it has complied with the requirements for admission of statements prescribed under Rule 92bis of the Rules. The Defence has given the Prosecution 14 days notice that it intends to request the admission of the two statements as prescribed under sub-Rule (E.) The Defence also argues that the statements of Witness GER corroborate the testimonies of Defence Witnesses GPR, GPT, GPK, GPC and GPB as prescribed under sub-Rule (A)(i)(a). In order to satisfy the requirements of sub-Rule (B), the Defence indicates the avowal by Witness GER in his Statement of 15 March 2000 that all that is stated is true and correct. Furthermore, the Defence submits that in order to satisfy sub-Rule (B)(i)(a), an investigator of the Prosecution witnessed the statement of 15 March 2000 and a senior police officer witnessed the statement made before the Rwandan Authorities.

5. The Defence submits that the two statements do meet the requirements of reliability laid out in the jurisprudence of the ICTY in the *Milosovic* Appeals Chamber Decision of 30 September 2002. The Defence submits that since it was the Prosecution who disclosed to it the Statement of 15 March 2000 in November 2001, then the Prosecution cannot now challenge its authenticity. The other statement was disclosed to the Defence by the Chief Public Prosecutor at the Supreme Court of Rwanda as indicated in the Letter from the Chief Public Prosecutor at the Supreme Court of Rwanda attached to the Motion, therefore its authenticity cannot be challenged either. The Defence submits that both statements were made before judicial authorities and signed by Witness GER.

#### *Prosecutor's Response*

6. The Prosecution draws the attention of the Chamber to the interplay of Rules 89(C) and 92bis of the Rules. The Prosecution calls upon the cardinal rule of statutory interpretation that where there are general and specific statutory provisions on a point, the specific rule will operate and govern in preference to the general one. In essence, the Prosecution argues that the specific Rule 92bis of the Rules should apply in determining the Motion.

7. The Prosecution further draws the attention of the Chamber to sub-Rule (A) of Rule 92bis of the Rules, which, in its operative part prescribes, "[w]hich goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment." The Prosecution relies on the jurisprudence of the ICTY in the *Galic* Appeals Chamber Decision



of 7 June 2002, which it submits settled the definitive interpretation of Rule 92 *bis* of the Rules.<sup>2</sup>

8. The Prosecution submits that the Chamber should take into consideration the context and character of the statements of Witness GER, which the Prosecution argues, were taken at the time when said witness was being investigated by the prosecuting authorities in Rwanda under allegations of perpetration of the genocide. The Prosecution argues that Witness GER at the time would make self-serving statements in order to absolve himself and avoid self-incrimination and incriminating the Accused who is well-known to him. For example, in the statements, Witness GER states that he did not know the identity of the *Interahamwe* killers and that the Accused was not present at the venue of the massacre, but the Prosecution submits that Defence Witness GPK contradicts him and testified that Witness GER knew the names of the attackers.

9. The Prosecution argues that, in breach of Rule 92*bis* of the Rules, the statements of Witness GER go to the acts or omissions and conduct of the accused by suggesting that he was not at the scene of the massacre as set out in the indictment against the Accused. Because the statements fail the main test under sub-Rule (A) of Rule 92*bis* of the Rules, the Prosecution argues that they should not be admitted under Rule 92*bis* of the Rules.

10. Apart from its reliance on the *Galic* Appeals Chamber Decision of 7 June 2002, the Prosecution relies on the *Nyiramasuhuko* Decision of 22 January 2003, to ensure the disposal of the Motion.<sup>3</sup>

#### *Defence Reply*

11. The Defence reiterates its submissions in the Motion and emphasises its request that the Chamber admit into evidence the statements of GER pursuant to Rules 89(C) and 92*bis* of the Rules.

12. The Defence argues that the Prosecution has wrongly analysed the two statements of GER. The Defence argues that the two statements do not relate to the acts and conduct of the accused as charged in the indictment, rather they dispute the acts and conduct of the accused as alleged in the indictment. The Defence relies on the Appeal Chamber Decision of 7 June 2001 in *Galic*, which was relied upon by the *Nyiramasuhuko* Decision of 22 January 2003. The afore-mentioned *Galic* Decision stated at para. 10 that Rule 92*bis* of the Rules, "[e]xcludes any written statement which goes to proof of any act or conduct of the Accused upon which the Prosecution relies to establish that the Accused committed any of the crimes charged himself or that he planned, instigated or ordered the crimes charged [...]" The Defence notes that in the ICTY "Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92*bis*," of 21 March 2002 in *Prosecutor v. Milosevic*, the Trial Chamber noted at para. 5 that it had discretion under Rule 92*bis* to admit, "[t]he evidence of a witness in written form, which does not relate to acts and conduct of the accused as charged in the indictment."

<sup>2</sup> See "Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C)," of 7 June 2002 in *Prosecutor v. Stanislav Galic*.

<sup>3</sup> See "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 the Said Witnesses," of 22 January 2003 in *Prosecutor v. Nyiramasuhuko et al.* (the "*Nyiramasuhuko* Decision of 22 January 2003")

13. In the instant case, witness GER simply states that he knew the Accused and that he did not see the latter during the attack at the Parish. The Defence argues that the statements are admissible because they relate to the behaviour of the witness and not that of the Accused.

14. The Defence further recalls the ICTY Decision in *Milosevic* of 21 March 2002, where the Chamber opined at para 22 that, “[t]he phrase ‘acts and conduct of the accused’ in Rule 92bis is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused. It should not be extended by fanciful interpretation [...]” In effect, the Defence argues that in his statement of 15 March 2000, GER is only relating his own actions and what he himself witnessed at the Protestant Parish of Gikomero on 12 April 1994 but not the acts and conduct of the accused. Rather GER relates that he did not see the Accused there on that day.

15. The Defence recalls that almost all Prosecution and Defence witnesses made reference to witness GER being at the Gikomero Protestant Parish on 12 April 1994. The Defence points out that since GER knew the Accused before the events of 12 April 1994 and that his statement was disclosed to the Defence by the Prosecution pursuant to Rule 66 of the Rules, the two statements may be admitted under both Rules 89(C) and 92 bis of the Rules.

16. The Defence notes the ICTY “Decision on Prosecution’s Application to Admit Transcripts under Rule 92bis” of 23 May 2001 in *Prosecutor v. Sikirica*, which stated that, “Rule 92bis(D) does not supplant or modify the general requirements for admissibility of evidence set out in sub-Rules 89(C) and (D), [...] These requirements must be met in any case.” The Defence argues that the Chamber should decide that the two statements may be admissible under both Rule 89(C) and Rule 92bis of the Rules.

17. The Defence dismisses the Prosecution argument that the two statements of GER were self-serving in order to absolve him and to avoid self-incrimination and incriminating the Accused given the fact that the statements were taken at a time when he was being investigated for genocide. The Defence submits that when the statement of 15 March 2000 was taken, GER was no longer under investigation by the Rwanda authorities. Although the statement of GER made to the Rwandan authorities was taken when GER was detained, the Defence notes that neither the statement itself nor the questions posed by the Prosecutor General of Rwanda mention the Accused.

18. It is the Defence’s argument that the Chamber finds that the statements of GER are relevant and probative and that the interests of justice demand that they be admitted in the case of the Accused.

## HAVING DELIBERATED

### *Regarding the Late Filing of the Prosecutor’s Response and its Admittance*

19. As a preliminary matter, the Chamber notes that the Motion was filed in French on 23 January 2003. Subsequently the Motion was translated into English and filed on 13 February 2003 and then served on the Prosecution on 14 February 2003.<sup>4</sup> Following the direction of

<sup>4</sup> See Proof of Service of the “Motion for Admission into Evidence of two Statements by Witness GER in Accordance with Rules 89(C) and 92 bis of the Rules of Procedure and Evidence,” of 13 February 2003 from R. Kouambo of the Court Management Section of the Registry.



the Chamber through the Court Management Section of the Registry, the Prosecution was obliged to have filed its Response to the English translation of the Motion five (5) days following its notification. Since the Prosecution was served with the said notification on 14 February 2003, it should have filed its response by 24 February 2003.

20. The Prosecution in fact filed its Response on 3 March 2003, one week after the time it was obliged to have made such a filing. The Chamber observes that the Prosecution has never requested an extension of time within which to file its Response neither has it, in its Response, argued good cause why it has filed its Response late. It is the Chamber's opinion that the Prosecution has clearly disobeyed the Chamber's direction to file a Response five (5) days after notice of the French translation of the Motion.

21. Accordingly, the Chamber, although it admits the untimely filed Prosecutor's Response, it finds such disregard for its instructions unacceptable, and requires greater diligence from the Prosecution with regard to the timeous filing of written submissions.

*Regarding the Admissibility of the Statements pursuant to Rules 89(C) and 92bis of the Rules*

22. The Chamber notes that the Defence seeks the admission into evidence of two statements of deceased Witness GER pursuant to Rules 89(C) and 92bis of the Rules. On a similar issue, the Chamber recalls the *Nyiramasuhuko* Decision of 22 January 2003 which relied upon the jurisprudence of the ICTY in the *Galic* Appeals Chamber Decision of 7 June 2002, and found that, "[t]he general requirement under Rule 89 that admissible evidence be relevant and probative applies in addition to, and not in lieu of, the more specific provisions of Rule 92 bis."<sup>5</sup> More specifically, the Chamber found that, "[a]ny statement admitted under the provisions of Rule 92 bis must first comply with the threshold requirement of Rule 92bis (A) that the evidence go to proof of a matter other than the conduct of the accused as charged in the indictment."<sup>6</sup> On that basis, the Chamber shall first consider the admissibility of the two statements pursuant to the specific provisions of Rule 92bis of the Rules.

23. The Chamber notes that the Defence seeks the admission of the two statements under Rule 92bis (C) of the Rules because witness GER is deceased. Rule 92bis(C) provides:

"A written statement not in the form prescribed by paragraph (B) may nevertheless be admissible if made by a person who has subsequently died, or by a person who can no longer with reasonable diligence be traced, or by a person who is by reason of bodily or mental condition unable to testify orally, if the Trial Chamber;

- (i) is so satisfied on a balance of probabilities; and
- (ii) finds from the circumstances in which the statement was made and recorded that there are satisfactory *indicia* of its reliability."

24. At the outset, the Chamber notes that the death of witness GER is not in dispute.

25. The Chamber notes that in the *Galic* Appeal Chamber Decision, the Judges ruled that "Rule 92bis(C) of the Rules does not provide a separate and self-contained method of producing evidence in written form in lieu of oral testimony. Both in form and in substance,

<sup>5</sup> See the *Nyiramasuhuko* Decision of 22 January 2003, at para. 20.

<sup>6</sup> *Ibid* para. 21

Rule 92bis(C) merely excuses the necessary absence of the declaration required by Rule 92bis(B) for written statements to become admissible under Rule 92bis(A).”

26. In accordance with the jurisprudence of the Appeals Chamber in the *Galic* Decision, the Chamber shall first consider whether the two statements meet the threshold requirements under sub-Rule (A) of said Rule, namely 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.*”  
[Emphasis added.]

27. In the instant case, after having read the statements of GER, the Chamber notes that, the two statements essentially relate to the events that occurred during the massacres that allegedly occurred on 12 April 1994 at the Gikomero Protestant Parish. The Chamber notes that according to the statements, Witness GER who was Pastor at that Parish in April 1994 was present on the day of the massacres. In his Statement of 15 March 2000, Witness GER states, “I do know a person by the name of KAMUHANDA, he was a minister in the government at the time. At no time did I see or speak to him on the day of the killings in my parish. Indeed no one from the vehicles that arrived prior to the killings spoke to me at all.” Furthermore, the Chamber notes that, while relating the events that occurred in April 1994, GER did not mention Kamuhanda in the other statement he made before the Rwandan Authorities.

28. The Chamber notes that while GER relates what occurred at the Protestant Parish on 12 April 2003, the Indictment against the Accused alleges differently. Paragraph 6.45 of the said indictment reads as follows;

“Furthermore, Jean de Dieu Kamuhanda personally led attacks of soldiers and Interahamwe against Tutsi refugees in Kigali-Rural prefecture, notably on or about April 12<sup>th</sup> at the parish church and adjoining school in Gikomero. On that occasion Jean de Dieu Kamuhanda arrived at the school with a group of soldiers and Interahamwe armed with firearms and grenades. He directed the militia into the courtyard of the school compound and gave them the order to attack. The soldiers and Interahamwe attacked the refugees. Several thousand persons were killed.”

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 considered as relating to the criminal acts and conduct of the Accused. The Chamber recalls in this connection that Rule 92bis(A) gives it the discretion to allow the admission of a statement which goes to “[p]roof of a matter *other than* the acts and conduct of the accused as charged in the indictment.”  
[Emphasis added.]

30. At the heart of the matter here is the need to avoid prejudice to the accused person, and to ensure within the meaning of Article 19(1), “[f]ull respect for the rights of the accused.” In admitting evidence in the course of a trial, the Chamber must avoid prejudice to the accused - mindful of the provisions of Articles 19(1) and 20(2) of the Statute which stress the need to ensure a fair trial for the accused. It is with this object in view that the ICTY Appeals Chamber in the *Galic* Decision, applying Rule 89(C) and Rule 92bis together, denied the Motion of the Prosecution to admit statements of deceased witnesses, which would

have gone to prove acts and conduct with which the Accused is charged. To avoid prejudice to the accused, a similar motion by the Prosecution was dismissed by this Chamber in its *Nyiramasuhuko* Decision of 22 January 2003.

31. It appears to this Chamber that a proper reading of Rules 89(C) and 92*bis* may not interfere with the Chamber's discretion in a fitting case, at the instance of the accused, to admit statements of witnesses which are relevant and have probative value, even if those witnesses might be dead. The Chamber is therefore of the view that in the specific circumstances of this case, it is in the interests of justice to admit the two statements of witness GER.

32. The Chamber notes that the circumstances under which the statements were made and recorded have satisfactory indicia of reliability, and they are relevant. Both statements were signed and their authenticity has not been challenged by the Prosecution. The question of weight may be addressed and assessed at a later stage.

**FOR THE ABOVE REASONS, THE TRIBUNAL**

**GRANTS** the Defence's request and admits the two statements of Deceased Witness GER.

Arusha, 20 May 2002



William H. Sekule  
Presiding Judge



Winston C. M. Maqutu  
Judge



Seal of the Tribunal



Arlette Ramaroson  
Judge