



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

IC12-95-1B-T  
20-S-2004  
(1254-1245)

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**TRIAL CHAMBER III**

**Before:** Judge Khalida Rachid Khan, Presiding  
Judge Lee Gacuga Muthoga  
Judge Emile Francis Short

**Registrar:** Mr. Adama Dieng

**Date:** 20 May 2004

**The PROSECUTOR**  
v.  
**Mika MUHIMANA**

*Case No. ICTR-95-1B-T*

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JUDICIAL RECORDS DIVISION  
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**DECISION ON THE PROSECUTION MOTION  
FOR ADMISSION OF WITNESS STATEMENTS (RULES 89(C) AND 92 bis)**

**Office of the Prosecutor:**

Mr. Charles Adeogun-Phillips  
Mr. Wallace Kapaya  
Mr. Peter Tafah  
Ms. Renifa Madenga  
Ms. Florida Kabasinga  
Ms. Maymuchka Lauriston

**Counsel for the Defence:**

Professor Nyabirungu Mwene Songa  
Mr. Kazadi Kabimba

[Signature]

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

**SITTING** as Trial Chamber III, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the “Chamber”);

**BEING SEIZED** of the Prosecution “Motion for Admission of Witness Statements” filed on 10 March 2004 (the “Motion”);

**NOTING** the “*Réponse de la défense a la requête du Procureur en admission de déclarations de témoins*” filed on 5 April 2004 (the “Response”);

**HAVING CONSIDERED** the Parties’ oral arguments heard in court on 28 April 2004;

**RECALLING** the Oral Decision rendered in court on 28 April 2004 whereby the Chamber denied the Motion;

**NOW ISSUES** the written reasons for its ruling.

**INTRODUCTION**

- 1. The Prosecution sought to admit into evidence the written statements of three witnesses (AS-K, AL-K, and BA-K) in lieu of oral testimony, pursuant to Rule 89(C) and Rule 92 *bis* (C) of the Rules of Procedure and Evidence<sup>1</sup>.

***Submissions of the Prosecution***

- 2. The Prosecution brought the present Motion before the Chamber, as three witnesses (AS-K, AL-K and BA-K) whom they would have had testify to elements of the Indictment are unavailable to do so. The Prosecution submitted that Witnesses AS-K and AL-K died after their statements were taken. The Prosecution evidenced their deaths by production of death certificates before the Chamber.<sup>2</sup> The authenticity of these certificates remains unchallenged by the Defence. According to the Prosecution, Witness BA-K is unavailable to testify as he has moved to an area of the Democratic Republic of Congo that could generally be considered as dangerous and where the Witness could not be reached. He should thus be regarded as untraceable. This proposition also remains unchallenged by the Defence.
- 3. The Prosecution acknowledged that each witness statement it sought to have admitted goes towards proving the acts and conduct of the Accused as charged in the Indictment. Indeed, in the submission of the Prosecution, this is the very reason why the statements would be useful. The Prosecution identified that the

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<sup>1</sup> Unless otherwise stated, all references to Rules relate to the Rules of Procedure and Evidence.  
<sup>2</sup> The death certificate of Witness AS-K, dated 19 February 2004, evidences that she died on 4 September 2002; that of Witness AL-K, dated 19 February 2004, evidences that she died on 14 July 1998.

statement of Witness AS-K speaks to paragraph 6(C) of the Indictment; that of Witness AL-K speaks to the activities of the Accused at his residence and thereabouts, and also to the involvement of the Accused in a joint criminal enterprise with certain named individuals; that of Witness BA-K speaks to paragraph 5(C) of the Indictment.

4. The Prosecution conceded that since the statements go to proof of the acts and conduct of the Accused as charged in the Indictment, they could not be admitted under Rule 92 *bis* (A).
5. The first argument of the Prosecution is that since the specified witnesses are either dead or untraceable, their statements could be admitted under Rule 92 *bis* (C) read in isolation from Rule 92 *bis* (A) and (B). In effect, the Prosecution urged the Chamber to ignore Rule 92 *bis* (A), which states clearly that a Trial Chamber may not admit evidence which goes towards proving the acts and conduct of the Accused as charged in the Indictment.
6. The second argument of the Prosecution, in the alternative, is that Rule 92 *bis* should be interpreted in such a way that it reads harmoniously with Rule 89(C), and that such an interpretation would lead the Chamber to the conclusion that Rule 92 *bis* (A) is incompatible with the overall spirit of the Rules, prejudices the rights of the Prosecution, and should in effect be ignored in the present case.
7. The third argument of the Prosecution is that the principle of "equality of arms" demands that the Chamber should interpret the provisions of Rule 6 (C), which stipulate that *an amendment shall enter into force immediately after it is adopted, but shall not operate to prejudice the right of the accused in any pending case*, in such a way that it also applies to a situation where the Prosecution suffers prejudice, and not the Accused only.<sup>3</sup> Furthermore, the restrictions contained in Rule 92 *bis* (A) should not preclude the admission of the statements, since Rule 92 *bis* was only enacted by the Plenary on 6 July 2002, a date well after the time when the statements were taken by its investigators during 1996 and 1999. Such an interpretation would mean that the remaining operative Rule by which the Chamber should judge the admissibility of the statements is Rule 89 (C), which states that the Chamber *may admit any relevant evidence it deems to have probative value*.
8. To this end, the Prosecution contended that the witness statements of the unavailable witnesses, which admittedly go to "proof of the acts and conduct of the Accused as charged in the Indictment" are admissible pursuant to Rule 89 (C) by the Chamber because they are relevant and of probative value.<sup>4</sup> The Prosecution asserted that such admission would cause no prejudice to the

<sup>3</sup> Transcript of 28 April 2004, p. 3

<sup>4</sup> Transcript of 28 April 2004, p. 3; Prosecutor's Motion of 10 March 2004, pp.2, 4-8, paras. 4, 8, 10 ; BA-K's statement was recorded by the ICTR Investigators on 16 December 1999, AL-K's was recorded on 19 September 1996 and AS-K recorded on 16 November 1999

Accused, since the statements were disclosed to the Defence in December 2000, and thus it has had adequate time to prepare.

- 9. The final argument of the Prosecution, in the alternative, is that should the Chamber not admit the statements in whole, the Chamber should sever and admit only those parts of the statements that relate, "to proof of a matter *other* than the acts and conduct of the accused as charged in the Indictment."<sup>5</sup>

**Submissions of the Defence**

- 10. In general terms, the Defence argued that the Prosecution had failed to meet the requirements of Rule 92 *bis* (A), which requires that the written statements go "to proof of a matter other than the acts and conduct of the Accused as charged in the Indictment."
- 11. In response to the Prosecution's first argument, the Defence contended that Rule 92 *bis* must be read as a whole, and that parts of the Rule should not be read in isolation. It contended that part (A) of the Rule was the "umbrella" for the whole Rule.<sup>6</sup>
- 12. In response to the Prosecution's second argument, the Defence submitted that the legal maxim *lex specialis derogat generali* is applicable, and that the provisions of Rule 92 *bis* being *lex specialis* override the more general provisions of Rule 89(C).<sup>7</sup>
- 13. The Defence countered the third argument of the Prosecution by submitting that, pursuant to Rule 6(C), an amendment takes immediate effect. The exception applies to completed cases. Thus, new proceedings and proceedings underway, such as the present case, are immediately subject to the new rule.<sup>8</sup>
- 14. Finally, the Defence objected to the severance and admission of those parts of the witness statements, which go to proof of a matter other than the acts and conduct of the Accused as charged in the Indictment. The Defence further observed that this request was not part of the original motion filed with the Registry.

**DELIBERATIONS**

- 15. The issue for determination arises essentially from the Parties' different interpretations of the interplay between Rules 89(C) and 92 *bis*.

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<sup>5</sup> T. 28 April 2004, p. 11.  
<sup>6</sup> T. 28 April 2004, p. 13.  
<sup>7</sup> T. 28 April 2004, p. 12.  
<sup>8</sup> T. 28 April 2004, p. 12.

16. Rule 89, which is the general Rule, provides as follows:

**Rule 89: General Provisions**

- (A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.
- (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
- (C) A Chamber may admit any relevant evidence which it deems to have probative value.
- (D) A Chamber may request verification of the authenticity of evidence obtained out of court.

17. Rule 92 *bis* of the Rules provides as follows:

**Rule 92 *bis*: Proof of Facts Other Than by Oral Evidence**

- (A) 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.
  - (i) Factors in favour of admitting evidence in the form of a written statement include, but are not limited to, circumstances in which the evidence in question:
    - (a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
    - (b) relates to relevant historical, political or military background;
    - (c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the Indictment relates;
    - (d) concerns the impact of crimes upon victims;
    - (e) relates to issues of the character of the accused; or
    - (f) relates to factors to be taken into account in determining sentence.
  - (ii) Factors against admitting evidence in the form of a written statement include whether:
    - (a) there is an overriding public interest in the evidence in question being presented orally;
    - (b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or
    - (c) there are any other factors which make it appropriate for the witness to attend for cross-examination.
- (B) A written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and
  - (i) the declaration is witnessed by:
    - (a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or
    - (b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and
  - (ii) the person witnessing the declaration verifies in writing:
    - (a) that the person making the statement is the person identified in the said statement;
    - (b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct;

- (c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and
- (d) the date and place of the declaration.

The declaration shall be attached to the written statement presented to the Trial Chamber.

(C) 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.

(D) A Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused.

(E) Subject to any order of the Trial Chamber to the contrary, a party seeking to adduce a written statement or transcript shall give fourteen days notice to the opposing party, who may within seven days object. The Trial Chamber shall decide, after hearing the parties, whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.

18. Rule 92 *bis* (A) provides that the 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.* The Chamber recalls the Prosecution's acknowledgement, in both its written submission and its oral presentation that the statements of Witnesses AS-K, AL-K and BA-K go to proof of the acts and conduct of the Accused as charged in the Indictment.<sup>9</sup> The Chamber's own analysis of the statements confirms this admission.

19. The admission of such evidence would clearly be in contravention of Rule 92 *bis* (A). The simple fact that a witness has died, and therefore cannot be called to testify, does not render the statement of that witness admissible. Indeed, the opposite scenario applies, and if the evidence therein goes to proof of the acts and conduct of the accused as charged in the Indictment, the statement will be inadmissible in lieu of oral testimony.

20. In *Nyiramasuhuko et al*, Trial Chamber II was of the opinion that any statement admitted under the provision of Rule 92 *bis* must first comply with the threshold requirement of Rule 92 *bis* (A), that is, that the evidence goes to proof of a matter *other* than the acts and conduct of the accused as charged in the Indictment.<sup>10</sup> The Chamber observed that should the statements in question have been admitted into evidence, the result would have been a situation whereby the witness's credibility

<sup>9</sup> T. 28 April 2004, p. 3.

<sup>10</sup> *The Prosecutor v. Elie Ndayabanje, The Prosecutor v Joseph Kanyabashi; The Prosecutor v. Pauline Nyiramasuhuko & Arsene Shalom Ntahobali; The Prosecutor v. Sylvain & Alphonse Nteziryayo*, Case No. ICTR-98-42-T, Decision on The Prosecutor's Motion to remove from her Witness List Five Witnesses and To Admit Into Evidence the witness Statements of Four of the Said Witnesses, 22 January 2003, para. 21

could not be tested by the Defence through cross-examination. The Motion was denied.<sup>11</sup>

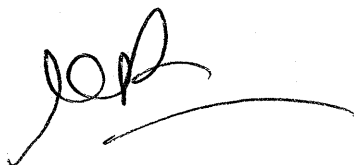
- 21. The Chamber finds in the present case that, as the Prosecution readily acknowledges, the chapeau requirement stipulated by Rule 92 bis (A), has not been met. Consequently, since the threshold described above has not been met, the Chamber does not need to consider beyond this point further factors in favour of admission under Rule 92 bis (A).
- 22. On the issue of severability of portions of the statement, an issue belatedly and reluctantly proffered by the Prosecution in the course of arguments, the Chamber views this late application as an afterthought, since it was not included in the written submissions. Moreover, the Prosecution required prompting by the Chamber to state whether it wished to have severed and admitted those portions of the statements that go to "proof of a matter *other* than the acts and conduct of the accused as charged in the Indictment." The Prosecution was unable to clearly delineate the relevant portions of the statements that go to "proof of a matter *other* than the acts and conduct of the accused as charged in the Indictment," pursuant to Rule 92 bis (A). Consequently, it became unnecessary to decide the issue.

***Whether the Chamber may apply Rule 89(C) and Rule 92 bis (C) to the exclusion of Rule 92 bis (A)***

- 23. As regards the interpretation of these Rules, the Chamber is of the view that Rule 89 (C) provides the authority to admit any evidence that the Chamber considers to be relevant and to have probative value. Rule 92 bis provides an exception to the general provision in Rule 90(A) that witnesses shall, in principle, be heard directly by the Chambers. Specifically, it prescribes the circumstances under which 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.
- 24. In the application of the Rules, the Chamber remains vigilant that nothing should derogate from the right of the Accused "to examine or have examined the witness against him or her" as provided in Article 20(4) (e) of the Statute, the lack of which may cause prejudice to the Accused. This right of the Accused is fundamental, and can only be taken away by express statutory provision. Thus, it is clear that the provisions of Rule 89(C) do not provide an avenue whereby evidence can be introduced without according the Accused the right to test it through cross-examination. Rule 92 bis was clearly not intended to derogate from that right.
- 25. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) stated in *Galic* that Rule 92 bis (C) does "not provide a separate and self-contained method of producing evidence in written form in lieu of oral testimony."<sup>12</sup> The Appeals Chamber went further to state that "both in

<sup>11</sup> *Nyiramasuhuko et al.*, Decision, para 23

<sup>12</sup> *The Prosecutor v. Galic*, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), 7 June 2002



form and substance, Rule 92 *bis* (C) merely excuses the necessary absence of the declaration required by Rule 92 *bis* (B) for written statements to become admissible under Rule 92 *bis* (A).<sup>13</sup> The Chamber associates itself with the reasoning quoted from the ICTY Appeals Chamber in *Galic* on this issue.

26. Thus, the Chamber finds that although Rule 92 *bis* (C) provides for the specific situation where a witness has died or is untraceable, it remains part of Rule 92 *bis* as a whole, and the conditions laid down in Rule 92 *bis* (A) for admissibility remain valid as the umbrella section of the whole provision.
27. The Chamber has carefully considered the argument advanced by the Prosecution that Rule 92 *bis* (A) is inconsistent with the letter and spirit of Rule 89 (C). The Chamber is unable to accept this interpretation. The principle *lex specialis derogat generali*, or the principle of “speciality” reflects “[...] a principle laid down in general international law and in many national criminal systems,”<sup>14</sup> and is equally applicable in the interpretation of the ICTR Rules of Procedure and Evidence. The rationale behind this principle was discussed by a Trial Chamber of the ICTY in the *Kupreskic et al.* Judgment, where it was indicated that “if an action is legally regulated both by a general provision and by a specific one, the latter prevails as most appropriate, being more specifically directed towards that action. Particularly in the case of discrepancy between the two provisions, it would be logical to assume that the law-making body intended to give pride of place to the provision governing the action more directly and in greater detail.”<sup>15</sup>
28. Additionally, the jurisprudence of the Appeals Chamber is clear on this issue. In *Galic* it was held that “Rule 92 *bis* is the *lex specialis*, which takes the admissibility of written statements of prospective witnesses and transcripts of evidence out of the scope of the *lex generalis* of Rule 89(C).”<sup>16</sup> However, Rule 89(C) still constitutes that basic rule regulating the admission of evidence which applies in addition to and not instead of the more specific provisions contained in Rule 92 *bis*. The principle was upheld and restated by the Appeals Chamber in *Milosevic* when it held that, where Rule 92 *bis* is applicable, the requirements of Rule 92 *bis* must be met by the Prosecutor in order for the Trial Chamber to admit the evidence, pursuant to Rule 89.<sup>17</sup> Thence, evidence must, pursuant to Rule 89, be relevant and of probative value to be admissible under Rule 92 *bis* (A).

<sup>13</sup> *ibid.*, Para. 24

<sup>14</sup> Archibold, *International Criminal Courts (Practice, Procedure and Evidence)* (2003), p.101, para.5-47.

<sup>15</sup> *The Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Osipovic, Dragan Papic, Vladimir Santic, also known as “Vlado”, CASE no. IT-95-16-T, Judgment (TC), 14 January 2000, paras.683-684.*

<sup>16</sup> *Prosecutor v Galic*, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), Case No IT-98-29-AR73.2, 7 June 2002, para. 31 (hereinafter “*Galic*”).

<sup>17</sup> *Milosevic*, Decision on Interlocutory Appeal on The Admissibility of Evidence-in - Chief in the form of Written Statements, 30 September 2003, pp. 4-5, para. 9; See also *The Prosecutor v. Bagosora, Gratién Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Case No. ICTR-98-41-T, Decision on the Prosecutor’s motion for the Admission of written Witness Statements under Rule 92 *bis* (TC), 9 March 2004, para. 16.



*The relevant date regulating the admission of statements in lieu of oral testimony*

29. The Chamber rejects the Prosecutor's submission that Rule 6 (C) should be applied in such a manner as not to prejudice its rights. The rule was intended to ensure that it did not operate to prejudice the rights of the Accused in any pending case and did not extend to the Prosecutor. Furthermore, the Chamber also finds no merit in the Prosecution's contention that the crucial date to be considered for the admissibility of a statement is the date on which the statement was taken. Since 6 July 2002, when Rule 92 *bis* was promulgated, any party wishing to submit a written statement in lieu of the oral testimony must do so under Rule 92 *bis*. Exceptionally, the Tribunal has, in some specific instances, departed from this norm and admitted the written statements.<sup>18</sup>
30. Furthermore, the Chamber notes the bounds of discretion placed on Rule 89 (C) by Rule 89 (B), which stipulates that "in cases not otherwise provided for in this section, a Chamber shall apply rules of evidence which best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law." Discretion under Rule 89 (C) should be exercised in harmony with the Statute and other Rules to the greatest extent possible. To this end, in addition to relevancy and the requirement that evidence be of probative value, pursuant to Rule 89 (C), the rights of the Accused stipulated in Articles 19(1) and 20 (4) (e) of the Statute must be respected.

**Conclusion**

31. Consequently, on the facts of the present case, the Chamber rejects the Prosecution's application to admit the written statements either in whole or in part.

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<sup>18</sup> See *The Prosecutor v. Jean de Dieu Kamuhanda*, Decision on Kamuhanda's Motion to admit into evidence Two Statements by witness GER in accordance with Rules 89(C) and 92 *bis* of the Rules of Procedure and Evidence (TC) of 20 May 2002. Trial Chamber II admitted two witness statements for witness GER in the interests of Justice and held 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." para. 31. See also *Kamuhanda*, Judgment (TC), 22 January 2003, para. 475. In *The Prosecutor v. Hassan Ngeze et al*, ICTR-99-52-T, Decision on the Defence Motion to Admit into Evidence Prosecution Witness's Statements etc, 5 June 2003 Trial Chamber I, admitted the statement of Witness AER "in so far as they contradict the evidence of Witness AES." The Chamber stated that the statements would not go to proof of the truth of the contents in them; See para. 6.



**FOR THE ABOVE REASONS, THE TRIAL CHAMBER**

**DENIES** the Motion in its entirety.

Arusha, 20 May 2004

  
Khalida Rachid Khan  
Presiding Judge

  
Lee Gacuga Muthoga  
Judge

  
Emile Francis Short  
Judge

