International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
19-01-2005
(23536-23526)

23536
S. Nkusa

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 19 January 2005

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON ADMISSION OF STATEMENTS OF DECEASED WITNESSES

The Prosecution
Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence
Raphaël Constant
Paul Skolnik
René Saint-Léger
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"),

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Prosecution's "Motion to Admit Into Evidence the Statements of Various Deceased Witnesses", filed on 15 October 2004;

CONSIDERING the "Declinatory Objection", "Objection", and "Response", filed by the Defence for Ntabakuze on 14 October 2004, 22 October 2004 and 2 November 2004, respectively; the "Response" filed by the Defence for Nsengiyumva on 25 October 2004; the "Notice of Objection" filed by the Defence for Kabiligi on 28 October 2004; the Prosecution "Partial Response to Ntabakuze and Bagosora Defence Replies", filed on 11 November 2004; and the oral arguments of the parties on 14 October 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 14 October 2004, the Prosecution declared its intention to file a motion for the admission into evidence of the statements of deceased witnesses, and that it would "like to rest the case at this time subject to the filing of a motion at the end of the day tomorrow at 5 o'clock."[1] All Defence teams objected that the motion was untimely and procedurally improper. After argument, the Chamber reserved its decision. On 15 October 2004, at 2.18 p.m., the Prosecution filed the motion requesting the admission of the statements of fifteen deceased persons.

2. The Defence for Kabiligi has requested an extension of the time-limit for filing a response to the present motion, arguing that the Registrar's decision of 26 October 2004 to withdraw the legal aid assignment of Lead Counsel has impaired its ability to respond to various motions.[2] Under Rule 92 *bis* (E) of the Rules of Procedure and Evidence ("the Rules"), an opposing party has seven days to respond to a motion to introduce statements under Rule 92 *bis*. As the motion was communicated to the Kabiligi Defence on 19 October 2004, the last day on which to respond was 26 October 2004. For that reason, the Registrar's decision had no impact on the ability of the Kabiligi Defence to respond and, accordingly, the request for extension of time is denied.

SUBMISSIONS

(i) Objections to the Motion as Untimely

3. The Defence argues that the motion is untimely and should be declared "moot *ab initio*". It asserts that the Prosecution was ordered to close its case by 15 October 2004 and that, accordingly, Prosecution evidence cannot be received after that date. In light of the time-limits prescribed in the Rules for filing a response to the motion, the Chamber could not possibly render a decision authorizing the admission of statements of the deceased witnesses until after the 15 October 2004 deadline. The Defence further argues that the deceased witnesses did not appear on the Prosecution's final witness list of 17 June 2004 and that no motion has been made for their addition. The Defence is prejudiced by this late attempt to add evidence to the Prosecution case because it has been deprived of the opportunity to conduct cross-examinations knowing that these witness statements might be part of the

[1] T. 14 October 2004 pp. 12, 41.
[2] Defence for Kabiligi's Request for Extension of Time Limit, etc., 5 November 2004.

Prosecution case. The Prosecution's previous intimations that it might file a motion for admission of the statements of deceased witnesses did not constitute satisfactory notice that the motion would be filed. If the statements were to be admitted, the work program of Defence teams, predicated as it is upon the completion of the Prosecution case on 15 October 2004, would be disrupted.

4. The Prosecution argues that it previously gave notice of its intention to file the present motion on many occasions, both orally during status conferences and in writing. The Defence cannot be taken by surprise nor does the Defence suffer any prejudice as a result of the admission of these statements. Indeed, the jurisprudence of the ICTY and ICTR suggests that such motions should be filed at the end of the Prosecution case to allow the Chamber to assess the extent to which the statements corroborate live testimony, which is a criterion of admissibility. These persons need not have appeared on the witness list, the purpose of which is to circumscribe in-court testimony, not preclude admission of statements by written procedure. This interpretation is supported by the language of Rule 73 *bis* and the Chamber's previous decisions, which define witnesses as persons whom the Prosecution "intends to call". This reading is also supported by the language of Rule 92 *bis* (C) which refers to the admission of statements of deceased "persons", not "witnesses". In the alternative, the Prosecution seeks leave to amend its witness list to include the deceased witnesses.

(ii) Admissibility of the Witness Statements Tendered

5. The Prosecution seeks the admission of the statements of fifteen persons known by the pseudonyms AA, AJ, AU, CA, CP, CZ, DAG, DQ, EL, GH, OAO, OE, OJ, QZ and WD.[3] The Prosecution relies on Rules 89 (C), 90 (A) and 92 *bis* for the proposition that statements of deceased persons are admissible. It accepts that the conditions set forth in Rule 92 *bis* (C) for the admission of statements of deceased persons are subject to the conditions and criteria set forth in Rule 92 *bis* (A), in particular that the statements concern matters "other than the acts and conduct of the accused". That condition is said to be satisfied in respect of the statements of nine of the fifteen witnesses: AA, AU, CA, CP, CZ, EL, GH, OAO, and QZ.[4] The Prosecution concedes that the statements of the remaining six witnesses, AJ, DAG, DQ, OE, OJ, and WD, concern in part the acts and conduct of the Accused, but does not distinguish the admissible from the inadmissible portions. The Prosecution asks the Chamber to define and disregard the inadmissible content, and admit the remainder.

6. The Prosecution makes extensive reference to jurisprudence pre-dating Rule 92 *bis*, arguing that the statements of the deceased have probative value under Rule 89 (C) and should, therefore, be admissible. The implication, though never expressly stated, appears to be that the statements should be admissible under Rule 89 (C), independent of the requirements of Rule 92 *bis*.

7. The Defence for Ntabakuze argues that the requirements of relevance, probative value and reliability inherent in Rule 89 (C) are general requirements which supplement the specific mechanism for admission of statements of deceased persons set forth in Rule 92 *bis*. The statements are of "trifling" probative value and are "cumulative to the extent of being pointlessly repetitive". The minor probative value of the evidence is outweighed by the

[3] The Prosecution motion occasionally refers to "sixteen witnesses" and includes Witness OAM on its list several times. These references appear to be erroneous and inadvertent. The statements of Witness OAM are not annexed to the motion, nor is Witness OAM listed in the "Relief Sought" section of the motion. Prosecution Motion, paras. 36, 47, 48, 51.

[4] Witness OAM is mistakenly included amongst the witnesses whose statements do not go to the acts and conduct of the Accused. Accordingly, of the fifteen witnesses who are properly part of the motion, the number whose statements are characterized as not going to the acts and conduct of the Accused is nine, not ten, as asserted in the motion. Prosecution Motion, para. 49.

unreliability inherent in testimony given without cross-examination. Objection is also made to the request to have the Chamber distinguish the admissible from inadmissible portions of the statements. The moving party bears the burden of identifying the statements which it wishes to tender for admission. The Ntabakuze Defence questions the reliability of some of the specific statements because of erroneous pages (EL); misidentification of two different persons as a single witness (DAG); missing identification number on a death certificate (AU); absence of corroboration with live testimony (GH); and failure to properly explain the relevance or content of a witness statement (WD).

8. The Defence for Nsengiyumva agrees with the Prosecution concession that the statements of Witnesses OJ and OE concern the acts and conduct of the Accused. It claims that Witness OAO's statement also refers to the acts and conduct of the Accused Nsengiyumva, albeit in the form of hearsay evidence. There is also reference to criminal acts by one Munyagishari, over whom the Prosecution has alleged that the Accused had command responsibility. Accordingly, the statement should be considered inadmissible.

9. The Defence for Bagosora examines each statement in detail and variously questions their reliability, relevance or references to the acts and conduct of the Accused. This detailed analysis shall be considered below in respect of individual statements where necessary.

DELIBERATIONS

(i) Timeliness of the Motion

10. The Defence argues that the present motion, filed on 15 October 2004, is untimely because it could not possibly have been decided by the Chamber before the deadline for the close of the Prosecution case, said to be 15 October 2004. The Prosecution counters that it has repeatedly given notice of its intention to file the motion, and that it is, in fact, appropriate to file such a motion at the very end of its case.

11. The argument of the Defence is predicated on the assertion that 15 October 2004 was the absolute deadline for the reception of evidence as part of the Prosecution case. Heavy emphasis is placed on the submission of Prosecution counsel during a status conference that "we'd be prepared to live or die with respect to that particular time frame" in estimating that it would "complete[]" its witnesses no later than 30 September 2004.[5] The Presiding Judge responded: "And the Prosecution may well finish by the end of September, but the Chamber will reserve time until Friday the 15th of October. But that's the end, and that's where we all, to use Mr. White's expression, 'Live and die with it'". While it is certainly clear that no further court-time would be scheduled for hearing the Prosecution case, there is no suggestion that the Prosecution would be precluded from filing a motion for the admission of evidence by written procedure. Accordingly, the Chamber finds that the Prosecution was not barred from filing the motion immediately before the close of its case.

12. The Defence has already submitted motions for acquittal under Rule 98 *bis*, which must be filed within seven days of the close of the Prosecution case. By the present decision, all or part of four witness statements shall be admitted into evidence as part of the Prosecution case. The Defence is entitled to make supplemental filings on that additional evidence within seven days of receipt of this decision. In light of the limited scope and importance of the evidence admitted hereunder, the Chamber rejects the Defence argument that preparations for its case will be unduly disrupted.

[5] T. 13 July 2004 p. 9.

13. Persons whose statements are tendered for admission by written procedure alone need not appear on a witness list. The purpose of Rule 73 *bis*, under which the Chamber has authority to require the filing of a witness list, is to circumscribe in-court testimony. This includes witnesses who may be called for cross-examination under Rule 92 *bis*. Persons who are deceased, however, can never be "called" to testify, as that term is used in Rule 73 *bis*. Accordingly, the absence of these individuals from the witness list does not preclude the filing of the motion, or the admission of their written statements.

(ii) Admissibility

(a) Applicable Principles

14. Rule 89 (C) provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value". This discretion is guided in respect of testimonial evidence by Rule 90 (A), which requires that "[w]itnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided by Rule 71". An exception to the principle of direct testimony is Rule 92 *bis*, which provides detailed standards for admission of "Proof of Facts Other Than By Oral Evidence":

> **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.

...

(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.

15. The detailed standards set out in Rule 92 *bis*, combined with the general requirement in Rule 90 (A) that testimony be given orally, indicate that testimonial statements can be admitted into evidence only through Rule 92 *bis*.[6] A condition for admission of all or part of a

[6] This Chamber previously rejected a motion to admit a statement under Rule 89 (C) independently of Rule 92 *bis*, distinguishing a decision of the ICTY Appeals Chamber. The Chamber noted that the Appeals Chamber relied on Rule 89 (F) of the ICTY Rules, permitting the admission of a witness's written statement "where the interests of justice allow", which has no counterpart in the Rules of this Tribunal. Further, the general rule set out in Rule 90 (A), that witnesses "shall, in principle, be heard directly by the Chambers", has been removed from the ICTY Rules. T. 20 November 2003 p. 15; *Muhimana*, Decision on the Prosecution Motion for Admission of Witness Statements (Rule 89 (C) and 92 *bis*) (TC), 20 May 2004, paras. 23-28; *Nyiramasuhuko et al.*, 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 (TC), 22 January 2003, para. 20

statement is that it concerns "proof of a matter other than the acts and conduct of the accused charged in the indictment". Once that threshold is met, the Chamber must exercise its discretion to admit the statements in light of the criteria for and against admission, set out in 92 *bis* (A)(i) and (ii), respectively.[7] Where an accused is charged with command responsibility, evidence should be excluded as a matter of discretion if the evidence concerns the acts of a proximate subordinate from which the guilt of the accused could be readily inferred.[8] Rule 92 *bis* (C) specifically addresses statements of deceased witnesses, providing that, where the Chamber is satisfied on the balance of probabilities that a witness is dead or has disappeared, the formalities required by subsection (B) are replaced by the more general standard that the statement must have "satisfactory *indicia* of reliability".[9] The general requirements of relevance and probative value, applicable to all types of evidence under Rule 89 (C), must also be satisfied.[10]

(b) Acts and Conduct of the Accused

16. The Prosecution concedes that the statements of six of the deceased witnesses (AJ, DAG, DQ, OE, OJ and WD) do, in part, concern the acts and conduct of the Accused. It argues, however, that redaction of the statements would make them difficult to comprehend and, therefore, that the statements should simply be "admitted unredacted with the understanding that the judges will identify and disregard the information that may go towards the acts and conduct of the accused as charged in the indictment".

17. Rule 92 *bis* (A) states that the Chamber may "admit, in whole or in part, the evidence of a witness ... which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment". This wording implies that evidence which concerns the acts and conduct of the Accused is inadmissible, but that other parts of a statement which do not concern the acts and conduct of an accused may be admitted. The Chamber has no discretion to follow the procedure suggested by the Prosecution, namely, to admit inadmissible evidence subject to an "understanding" that inadmissible portions will be ignored. Indeed, the suggested procedure is contrary to the very concept of "admissibility". While a Chamber is always free to disregard information which is unreliable or irrelevant, the purpose of rules of admissibility, including Rule 92 *bis*, is to provide a preliminary threshold for the exclusion of irrelevant, unreliable or otherwise improper information. Conditional admission would, in

---

("the 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*"). Cf. *Milosevic*, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements (AC), 30 September 2003.

[7] *Muhimana*, Decision on the Prosecution Motion for Admission of Witness Statements (Rule 89 (C) and 92 *bis*) (TC), 20 May 2004, para. 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"); *Galic*, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002, para. 24 ("*Galic* Decision") ("Rule 92 *bis* (C), however, does not provide a separate and self-contained method of producing evidence in written form in lieu of oral testimony").

[8] *Galic* Decision, para. 16 ("However, Rule 92 *bis* was primarily intended to be used to establish what has now become known as 'crime-base' evidence, rather than the acts and conduct of what may be described as the accused's immediately proximate subordinates – that is, subordinates of the accused of whose conduct it would be easy to infer that he knew or had reason to know"); *Bagosora et al.*, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 *bis* (TC), 9 March 2004, para. 14.

[9] *Galic* Decision, para. 24 ("Both in form and in 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)"); *Muhimana*, Decision on the Prosecution Motion for Admission of Witness Statements (Rule 89 (C) and 92 *bis*) (TC), 20 May 2004, para. 26; *Nyiramasuhuko et al.*, 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 (TC), 22 January 2003, para. 21.

[10] *Bagosora et al.*, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 *bis* (TC), 9 March 2004, para. 12.

effect, destroy the preliminary threshold, leaving all parties in doubt as to which portions of the statements were properly before the Chamber as evidence, and which portions were not. The proposed procedure of conditional admission of the six statements is, accordingly, rejected.

18. The Chamber may admit those parts of the six statements which do comply with Rule 92 *bis* (A). In the present case, however, the Prosecution has failed to identify which portions of the statements it considers admissible. The statements of five of the six witnesses (AJ, DQ, OE, OJ and WD) arguably contain extensive references to the acts and conduct of the Accused. In the absence of submissions, the Chamber is not in a position to distinguish the admissible from inadmissible portions of the statements. Accordingly, the statements must be treated as inadmissible *in toto*. In contrast, the statement of Witness DAG contains only isolated and brief references which arguably pertain to the acts and conduct of the Accused. There are three fleeting references to the Accused Bagosora and one to the Accused Nsengiyumva.[11] Despite the absence of submissions, the Chamber is able to identify the portions of the statement which go to the acts and conduct of the Accused, and shall consider more fully below whether the remainder of the statement should be admitted under Rule 92 *bis*.

19. The Defence submits that the statements of Witnesses EL and OAO make explicit reference to the acts and conduct of the Accused as charged in the Indictments. Witness EL describes at some length the participation of the Accused Bagosora in a meeting at the Ministry of Defence on the morning of 7 April 1994, corresponding to allegations in paragraphs 6.4 and 6.8 of the Bagosora Indictment.[12] The statement of Witness OAO alleges that the Accused Nsengiyumva encouraged the killing and raping described in her statement.[13] These matters are inadmissible under Rule 92 *bis* (A). In light of the potential importance of the inadmissible portion to the whole, and in the absence of submissions justifying admission of the balance of the statements, the Chamber declines to admit any portion of these statements.

(c) Acts and Conduct of Proximate Subordinates

20. Several witness statements, though not describing the acts and conduct of the Accused themselves, offer evidence of actions of subordinates or of individuals who are alleged by the Prosecution to have been acting on the direct orders of the Accused. Witness CP's statement offers incriminating testimony concerning the actions of soldiers of the Paracommando Battalion, alleged to be under the command of the Accused Ntabakuze.[14] Witness CA describes the killing by soldiers of Augustin Maharangari, the general manager of the *Banque Rwandaise de Développement*, and members of his family by soldiers. Paragraph 6.49 of the

---

[11] The four references are: (1) a paragraph beginning "After the government shifted" at the bottom of p. 5 of the statement; (2) a sentence beginning "several missions" on page 6; (3) a line making reference to "the FAR Chief of Army Staff" on page 4; and (4) a sentence making reference to the Accused Nsengiyumva on page 4. In addition to the statement of Witness DAG dated 14 May 1999, there is another statement dated 25 February 2001 by a person with an identical name. It is apparent from the contents thereof and the identification information that these are, in fact, two different persons. Appendix B to the motion and the Prosecution Pre-trial Brief indicate that Witness DAG is, in fact, the person who gave the statement dated 14 May 1999. The other statement appears to have been inadvertently appended to the motion.

[12] Statement of Witness EL, 27 December 1994, pp. K0676580 – K0676582.

[13] Statement of Witness OAO, 30 April 1998, p. 3 (English).

[14] Statement of Witness CP, (CP-1), p. 2 (English) ("I saw nine soldiers of the paracommando battalion and the Presidential Guard and a civilian who was apparently guiding them. He was holding a list of names. It was the list of names of people to be killed. They went to the house of another neighbour, threw grenades and forced the door of the house open by firing at it. They killed the occupants of the house and left on foot").

Bagosora Indictment alleges that the Accused attempted to order this killing.[15] The statements of Witnesses DAG and CP recount the killing of UNAMIR soldiers on 7 April 1994 at Camp Kigali. Count 5 of the Bagosora Indictment imputes responsibility for these killings to the Accused. By virtue of the alleged position of the Accused Ntabakuze as commanding officer of the Paracommando soldiers, or by virtue of the direct orders or responsibility imputed to the Accused Bagosora, the evidence in these statements describes highly incriminating conduct of proximate subordinates of the Accused, and must be deemed inadmissible under Rule 92 *bis*.

21. The statement of Witness GH describes the involvement of soldiers in an attack on Kigabagaba Mosque in Kigali. Though the soldiers are not expressly identified as subordinates of the Accused, or as having acted on the orders of the Accused, each of the Indictments mentions the incident at Kigabagaba Mosque as a basis for the superior responsibility of the Accused.[16] Accordingly, the evidence concerns the acts and conduct of proximate subordinates of the Accused and is, therefore, inadmissible.

(d) Descriptions Not Concerning the Acts and Conduct of the Accused Or Their Proximate Subordinates

22. The statements of Witnesses AA, AU and CZ also describe the criminal conduct of soldiers, or people who may have appeared to be soldiers. With a single exception, however, these statements do not concern incriminating acts and conduct of soldiers who are alleged to be proximate subordinates of the Accused. Witness AA describes the actions of soldiers of the Huye Battalion in Nyamirambo, on Mount Kigali, and of Presidential Guard soldiers at a roadblock in Gisenyi. Nothing in the statement or the Indictment suggests that any of the Accused were directly superior, or gave orders, to these soldiers. While the Indictment may well allege, as suggested by the Defence for Bagosora, that the Accused is criminally responsible as a superior for the acts described in Witness AA's statement, none of the perpetrators of those acts are proximate subordinates whose actions could lead readily to an inference of guilt. The nature of the relationship between the soldiers described in Witness AA's statement and the Accused remains to be established by other evidence. The only exception is the suggestion on page 5 that "all army units had received a telegramme from the army headquarters asking them to get assistance from the *Interahamwe* and the population in order to eliminate all the enemies".[17] Paragraph 6.35 of the Bagosora Indictment mentions the issuance of such a telegram from the General Staff, implying the direct responsibility of the Accused. That event must be understood as attributed by the Prosecution to the Accused himself, or to a proximate subordinate. In either case, the substance of the sentence is inadmissible. With that exception, the criteria set out in Rule 92 *bis* (A) favour admission of the statement. There are no references to acts or conduct of proximate subordinates; the acts described are cumulative of testimony already heard; and they are relevant as background information and have probative value.[18]

23. Witness AU's statement describes the distribution of weapons at the General Headquarters of the Army to *conseillers de secteur* in Kigali Prefecture, on the instructions of

---

[15] Paragraph 6.49 of the Indictment, though not naming the victim, states: "On 8 April 1994, Colonel Théoneste Bagosora communicated by radio with the *Préfet* of Kigali, Tharcisse Renzaho, to make sure that the manager of the *Banque Rwandaise de Développement* had been 'liquidated'. Tharcisse Renzaho replied in the affirmative."

[16] Events at Kigabagaba Mosque, described in paragraph 6.39 of the Kabiligi/Ntabakuze Indictment, are said to be the basis for criminal responsibility under Art. 6 (3) of the Statute in Counts 1, 2, 3, 4, 5, 7, 8 and 9 of that Indictment.

[17] Statement of Witness AA, 6 December 1997, p. 5 (English).

[18] The presence and actions of soldiers is described in Nyamirambo on 7 April is described, for example, by Witnesses A, CE and XXJ.

the Prefect, Tharcisse Renzaho. The Defence for Bagosora objects that this evidence "directly implicates" the Accused, who is alleged in paragraph 5.1 of the Indictment to have conspired with Renzaho. However, as described by the Appeals Chamber in *Galic*, the actions of a co-conspirator are not necessarily inadmissible under Rule 92 *bis* when they are not indicative of the Accused's participation in a joint criminal enterprise, or of the fact that he shared the requisite intent for the crime.[19] Further, the statement does not suggest that the weapons were distributed for the criminal purpose alleged in paragraphs 5.1 and 6.48 of the Bagosora Indictment, or that Renzaho's criminal intent (which could arguably be inferred from subsequent conduct described in the statement) was shared by the Accused. The statement does not otherwise describe the actions of soldiers, but does describe the role of civilian authorities in killings of Tutsi in Kigali Prefecture. In these circumstances, the statement provides only background evidence of a type which has already been placed before the Chamber, is relevant, and has probative value. Accordingly, the statement is admissible under Rule 92 *bis*.

24. The statement of Witness CZ describes the killing and pursuit of Tutsi by soldiers of the Presidential Guard and militiamen in or near Kigali. The witness also saw individuals at a roadblock in "paratrooper uniforms". The incidents in question are not specifically mentioned in the Indictment and there is no other suggestion that the perpetrators of the criminal conduct were proximate subordinates of the Accused. The reference to individuals in "paratrooper uniforms" without more detail is ambiguous and does not show that they were soldiers of the Paracommando Battalion under the command of the Accused Ntabakuze. In any event, there is no evidence in the statement of criminal acts by the individuals wearing the paratrooper outfits. The evidence thus constitutes background information concerning the atmosphere in Kigali in April 1994 and is, in that sense, cumulative with evidence already admitted. It is also, to that limited extent, relevant to the charges in the Indictments. The statement is admissible.

25. Witness DAG's statement contains a section describing the Rwandan air force as it existed in April 1994. This information is manifestly unrelated to the inadmissible evidence described above (para. 19) and illuminates the military background of events in April 1994, which is expressly mentioned as appropriate for admission under Rule 92 *bis* (A)(i)(b). The information is relevant and is contained in a statement with sufficient indicia of reliability. Accordingly, the Chamber will admit as evidence pages 3 and 4 of the statement of Witness DAG, up to the heading "Civilian Authorities".

(e) Irrelevant Evidence

26. The statements of Witness QZ primarily concern the alleged acts and conduct of Pauline and Shalom Nyiramasuhuko, and make no reference to soldiers of the Rwandan Army. The Prosecution has failed to identify, and the Chamber is unable to discern, the relevance of the statements to the Accused in the present case. Accordingly, the statements are inadmissible.

FOR THE ABOVE REASONS, THE CHAMBER

DECLARES the French and English versions of the statements of Witnesses AA, AU and CZ to be admitted in their entirety, with the exception of the sentence in the statement of Witness AA containing the words "all army units had received a telegramme from army headquarters", which is declared inadmissible;

[19] *Galic* Decision, para. 10.

DECLARES pages three and four of the English version of the statement of Witness DAG, up to the heading "Civilian Authorities", and the French version thereof, to be admitted;

REQUESTS the Registry to ensure that the admitted documents are marked and assigned exhibit numbers;

DECLARES that the Defence has seven days from receipt of the present decision to file supplemental submissions under Rule 98*bis*, if any, in respect of the statements admitted hereunder;

DENIES the Prosecution motion in all other respects;

DENIES the Kabiligi request for an extension of time to respond to the present motion.

Arusha, 19 January 2005

Erik Møse	Jai Ram Reddy	Sergei Alekseevich Egorov
Presiding Judge	Judge	Judge

[Seal of the Tribunal]