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11-12-2006
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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ORIGINAL: ENGLISH

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 11 December 2006

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No.: ICTR-98-41-T

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DECISION ON DEFENCE MOTION FOR ADMISSION OF STATEMENT OF
WITNESS LG-1/U-03 UNDER RULE 92 *bis*

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid
Gregory Townsend

The Defence

Raphaël Constant
Allison Turner
Paul Skolnik
Frédéric Hivon
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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

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BEING SEIZED OF the "Motion Requesting the Trial Chamber to Admit a Statement by Deceased Witness LG-1/U-03", etc., filed jointly by the Nsengiyumva and Bagosora Defence on 16 October 2006;

CONSIDERING the Prosecution Response, filed on 26 October 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Nsengiyumva and Bagosora Defence jointly request that the Chamber admit into evidence, pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence, a statement given to the Nsengiyumva Defence team by Witness LG-1/U-03 shortly prior to his death.¹ The witness held an important post related to communications in the Rwandan Armed Forces in 1994. He came to the Tribunal in the summer of 2005 but was unable to appear due to scheduling difficulties. Before the witness could return to give his testimony, he became seriously ill. Two members of the Nsengiyumva Defence met with the witness several times in January 2006, resulting in a four-page statement signed by the witness. According to documents submitted by the Defence, the witness passed away on 10 February 2006.

2. The Prosecution opposes the admission of the statement on the basis that it goes to proof of the acts and conduct of the Accused, and that it lacks sufficient indicia of reliability to comply with the requirements of 92 *bis* (C).²

DELIBERATIONS

3. 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". Rule 92 *bis* does, however, allow a statement of a witness to be admitted into evidence in lieu of oral testimony provided that it concerns "proof of a matter other than the acts and conduct of the accused as charged in the indictment". In addition to this requirement, the Chamber must exercise its discretion, in accordance with the criteria set out in Rule 92 *bis* (A)(i) and (ii), to determine whether the statement should be admitted.³ Factors which favour admission include the fact that oral evidence has been heard on similar facts; provides an historical, political or military background; or relates to the character of the accused. Factors

¹ Motion, para. 1.

² Response, paras. 6-9.

³ *Bagosora et al.*, Decision on Admission of Statements by Deceased Witnesses (TC), 19 January 2005, para. 15; *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*, Case No. IT-98-29-A, 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").

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weighing against admission include whether there is an overriding public interest to hear the evidence orally; its nature and source render it unreliable, or its prejudicial effect outweighs its probative value. The general requirements of relevance and probative value, applicable to all types of evidence under Rule 89 (C), must also be satisfied.⁴ When a statement has been given by a person who is deceased, Rule 92 *bis* (C) permits the admission of the statement provided that the Chamber finds from the circumstances in which the statement was made and recorded that there are satisfactory indicia of its reliability.⁵

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(i) *Indicia of reliability*

4. The Prosecution asserts that the statement lacks satisfactory indicia of reliability, noting that the statement was taken in the absence of any independent and impartial person. Furthermore, the witness did not make any separate declaration that the contents of the statement are true and correct.

5. Based on the documents submitted by the Defence, the Chamber accepts that the witness is deceased and that, accordingly, Rule 92 *bis* (C) applies to the present situation.⁶ The statement does, in the Chamber's view, possess sufficient indicia of reliability to be admissible. The witness's statement was transcribed into French by the Legal Assistant of the Nsengiyumva Defence team and read back to the witness. In the first paragraph, the witness indicates that he "freely declares as follows", and the statement is signed at the end by the witness, and witnessed by Co-Counsel for Nsengiyumva and the Legal Assistant. Co-Counsel has also signed an affidavit attesting that although the witness was in pain, he was lucid throughout the interview and gave his statement freely and willingly, and in Co-Counsel's opinion, was clearly aware of what he was doing. Moreover, the information contained in the statement is consistent with the witness's previous declarations and his will-say statement.⁷

6. While it would have been preferable for the statement to have been witnessed and interpreted by persons other than those forming part of the Defence team for the Accused, the Chamber is satisfied, in light of the circumstances described above, that the statement possesses satisfactory indicia of reliability under Rule 92 *bis* (C).

(ii) *Acts and conduct of the accused*

7. The witness's statement can be divided into several sections. The first portion is an account of the background of the witness, and a general description of the organization and operation of his workplace, including an account of how messages were received from and sent to different Army units. This information describes the military background in April 1994, which is expressly mentioned as appropriate for admission under Rule 92 *bis* (A)(i)(b),

⁴ *Bagosora et al.*, Decision on Admission of Statements by Deceased Witnesses (TC), 19 January 2005, para. 15; *Bagosora et al.*, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under 92 *bis* (TC), 9 March 2004, para. 12.

⁵ *Bagosora et al.*, Decision on Admission of Statements by Deceased Witnesses (TC), 19 January 2005, para. 15; *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 Prosecution'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.

⁶ *Bagosora et al.*, Decision on Admission of Statements by Deceased Witnesses (TC), 19 January 2005, para. 15; *Galic* Decision, para. 24.

⁷ The will-say for this witness was sent to all parties by M. Constant on 25 July 2005.

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and does not relate to the acts and conduct of the Accused.⁸ Furthermore, the testimony generally repeats testimony heard previously in the case, a factor which favours admission under Rule 92 bis (A)(i)(a).⁹ This evidence is also relevant and probative, as required for admission under Rule 89 (C). Accordingly, the Chamber considers paragraphs 1 to 19 of the statement to be admissible.

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8. The character of the Accused Nsengiyumva is also described in the statement. Rule 92 bis (A)(i)(c) specifically mentions that this type of information is appropriate for admission. The Prosecution argues that the discussion of the Accused's character lacks probative value as the declarant does not describe the basis for his knowledge of the Accused. Any such deficiencies may, in the Chamber's view, be appropriately evaluated in determining the weight to be given to the statement, and do not preclude admission. Accordingly, the Chamber admits paragraphs 24 and 25 of the witness's statement into evidence.

9. Paragraphs 20 to 23 of the statement contain assertions by the witness that he did not see certain specific messages that are alleged by other witnesses to have been transmitted by the Accused in April 1994. These aspects of the witness's statement contradict testimony of Prosecution witnesses about the acts and conduct of the Accused Nsengiyumva, Bagosora and Kabiligi during this critical time-period. Statements tending to contradict evidence that the Accused carried out certain acts have been held to relate to "proof of the acts and conduct of the accused" for the purposes of 92 bis (A).¹⁰ The Chamber therefore considers that the information provided by the witness in paragraphs 20 to 23 concerns the acts and conduct of the accused, and is, therefore, inadmissible.

⁸ A similarly general account describing the Rwandan Air Force as it existed in April 1994 was admitted on this basis in *Bagosora et al.*, Decision on Admission of Statements by Deceased Witnesses (TC), 19 January 2005, para. 25.

⁹ *Bagosora et al.*, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under 92 bis (TC), 9 March 2004, para. 6.

¹⁰ *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, 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 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").

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FOR THE ABOVE REASONS, THE CHAMBER

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DECLARES paragraphs 1 to 19 and 24 to 25 of the witness's statement be admitted as evidence;

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

DENIES the Defence motion in all other respects.

Arusha, 11 December 2006

Erik Mose
Presiding Judge

Jai Ram Reddy
Judge

Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

