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22-11-2007  
7323-7319

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Zulu  
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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

1994-2001  
1994-2001

OR: ENG

**Before:** Judge Inés Mónica Weiberg de Roca, Presiding  
Judge Khalida Rachid Khan  
Judge Lee Gacuga Mubega

**Registrar:** Adama Dieng

**Date:** 22 November 2007

THE PROSECUTOR

v.

Protégé ZIGIRANYIRAZO

Case No. ICTR-2001-73-T

22 NOV 2007 11:19  
SECRETARY GENERAL'S OFFICE

**DECISION ON MOTIONS TO ADMIT WRITTEN STATEMENTS OF WITNESSES  
JOSHUA ABDUL RUZIBIZA, RW2, AND RW3**

*Rule 92 bis of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Wallace Kapaya  
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**Defence Counsel:**

John Philpot  
Peter Zadiuk

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INTRODUCTION

1. The Defence seeks the admittance into evidence of the written statements of witnesses Joshua Abdul Ruzibiza, RW2, and RW3 pursuant to Rule 92 bis of the Rules of Procedure and Evidence. The Prosecution opposes the Defence Motions, arguing, *inter alia*, that Ruzibiza's testimony contradicts the Defence case and that the Defence has not shown that RW2 and RW3 are unavailable.<sup>2</sup> The Defence replied to the Prosecution Responses, arguing that Ruzibiza's testimony squarely supports the Defence and that it has made reasonable efforts to locate witnesses RW2 and RW3.<sup>3</sup>

DISCUSSION

*Confidential Filing of Public Documents*

2. As a preliminary matter, the Defence submits that the Prosecution's Ruzibiza Response was improperly filed as confidential because the statement the Defence seeks to admit is a transcript of Mr Ruzibiza's public testimony before this Tribunal in the *Bagosora et al* proceedings.<sup>4</sup> The Chamber reiterates its concern about confidential filings that ought to have been filed publicly. As the Chamber has noted in the past, "the transparency of the proceedings is served by the filing of public documents ... Confidential filing should be reserved for exceptional circumstances - for instance, where the protection of a witness is at stake."<sup>5</sup> Mr Ruzibiza testified in his own name and in open session in the *Bagosora et al* proceedings. Therefore, the Ruzibiza Response should have been filed as a public document.

*Law on Admissibility of Witness Statements*

3. Pursuant to Rule 89 (C), "A Chamber may admit any relevant evidence which it deems to have probative value." Rule 90 (A) provides further guidance to Trial Chambers with regard to witness testimony, which "shall, in principle, be heard directly by the Chambers". Rule 92 bis provides the exception to this principle, allowing for the admission of written statements of witnesses provided that the statements concern "proof of a matter other than the acts and conduct of the accused as charged in the indictment" and that they are accompanied by a declaration meeting criteria outlined in Rule 92 bis (B) or otherwise possess sufficient *indicia* of reliability. The Appeals Chamber describes

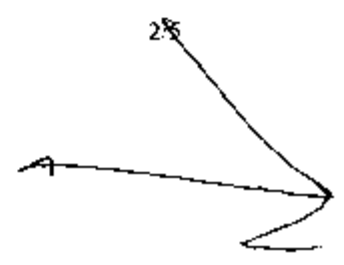
<sup>1</sup> Notice under Rule 92 Bis (A), (B) and (D) RPP RE Witness Joshua Abdul Ruzibiza, filed 21 September 2007 ("Ruzibiza Motion"); Notice under Rule 92 Bis (A), (B) and (C) RPP re Witnesses RW2 and RW3 (Confidential), filed 27 September 2007 ("RW2 and RW3 Motion") (collectively, "Defence Motions").

<sup>2</sup> Prosecutor's Response to the Defence Motion Under Rule 92 Bis (A), (B), and (D) of the Rules of Procedure and Evidence RE Witness Joshua Abdul Ruzibiza (Confidential), filed 28 September 2007 ("Ruzibiza Response"), Prosecutor's Response to the Defence Motion under Rule 92 Bis (A), (B), and (C) of the Rules of Procedure and Evidence RE Witnesses RW2 and RW3 (Confidential), filed 3 October 2007 ("RW2 and RW3 Response") (collectively, "Prosecution Responses").

<sup>3</sup> Reply to Prosecutor's Response to Defence Notice under Rule 92 Bis (A), (B), and (D) RPP RE Witness Joshua Abdul Ruzibiza, filed 1 October 2007 ("Ruzibiza Reply"); Defence Reply to Prosecutor's Response to Defence Notice Under Rule 92 Bis (A), (B) and (C) RPP Re Witnesses RW2 and RW3 (Confidential), filed 8 October 2007 ("RW2 & RW3 Reply") (collectively, the "Defence Replies").

<sup>4</sup> Ruzibiza Reply, para. 13.

<sup>5</sup> Order for Transfer of Detained Witnesses (TC), 1 March 2007, para. 5.



Rule 92 bis as a "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), although the general propositions which are implicit in Rule 89(C) - that evidence is admissible only if it is relevant and that it is relevant only if it has probative value - remain applicable to Rule 92bis."<sup>6</sup> Therefore, in order to be admitted under Rule 92 bis, written statements must also comply with the relevance and probative value requirements of Rule 89 (C).

Admissibility of Statement of Joshua Abdul Ruzibiza

4. The Defence submits that Mr Ruzibiza's testimony from the *Bagosora et al* proceedings should be admitted pursuant to Rule 92 bis (D), which authorises a Chamber to "admit a transcript of evidence given by a witness in proceedings before the Tribunal", because it contradicts the Prosecution's case on the charge of conspiracy to commit genocide. According to the Defence, Mr Ruzibiza's evidence will show that the armed wing of the Rwandan Patriotic Front (RPF) was responsible for the assassination of the President, and that this act "provoked" the genocide. The Defence argues that because the genocide was triggered by the RPF, there could not have been a conspiracy to eliminate the Tutsi, because this required a "plan to implement the plan." The Defence seems to suggest that the RPF is, therefore, responsible for the whole of the catastrophic violence which took place between April and July 1994.

5. The Chamber is of the view that Mr Ruzibiza's evidence does not tend to disprove elements of the Prosecution case in this trial. The conspiracy charge does not include the assassination of President Habyarimana, or any of the specific massacres which Mr Ruzibiza attributes to the RPF. Moreover, the law of conspiracy does not require a trigger or, in the words of the Defence, a "plan to implement the plan." Pursuant to the jurisprudence of the Tribunal, conspiracy to commit genocide is defined as an agreement between two or more persons to commit genocide.<sup>7</sup> The *actus reus* is entering into an agreement with the common objective of committing genocide, and the *mens rea* is the intent to enter into such an agreement. As an inchoate offence, conspiracy to commit genocide is complete at the moment of agreement regardless of whether the common objective is ultimately achieved.<sup>8</sup> Although evidence of specific details of an agreement to commit genocide would undoubtedly assist the Prosecution in making a case for conspiracy, the law does not require that the Prosecution prove such details.

6. In brief, the Prosecution's conspiracy case consists of allegations that:

- (i) the Accused played a prominent role within the informal networks of power then prominent in Rwandan society, namely the *Akazu* and the Zero Network, which were hostile to the Tutsi and which played a role in facilitating and planning the elimination of the Tutsi;

<sup>6</sup> *Prosecutor v. Galic*, Case No. IT-98-29-AR73, Decision on Interlocutory Appeal Concerning Rule 92bis(C) (AC), 7 June 2002, para. 31.

<sup>7</sup> *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgement and Sentence (TC), 27 January 2000, para. 191.

<sup>8</sup> *Musema*, Judgement (TC), para. 194.

- (ii) that the Accused attended and participated in meetings where anti-Tutsi sentiments were expressed and plans to exterminate the Tutsi were developed; and
- (iii) that the Accused played a prominent role in establishing the *Interahamwe* in collaboration with specifically alleged co-conspirators and others.

Evidence that the RPF was responsible for the assassination of President Habyarimana and involved in crimes of its own does not make these allegations less likely, or otherwise mitigate the potential responsibility of the Accused. The Chamber concludes that the Defence has failed to demonstrate how Mr Ruzibiza's testimony would assist in disproving any element of the conspiracy charge, or how it could justify or excuse the alleged conduct of the Accused.<sup>9</sup>

7. Rule 92 bis (A)(i)(b) states that where a written statement of a witness contains evidence which "relates to relevant historical, political or military background," this factor weighs in favour of its admittance into evidence. Even where a statement meets the formal requirements of Rule 92 bis, the decision to admit that statement into evidence remains discretionary. While evidence of the identity of the assassins of President Habyarimana and of the RPF's crimes against civilians may be of general historical significance, the Chamber is of the view that detailed evidence on such collateral matters would not assist it in resolving the core issues of this trial and will not exercise its discretion to admit Mr Ruzibiza's testimony.

*Admissibility of Statements of RW2 and RW3*

8. The Defence seeks to admit the statements of Witnesses RW2 and RW3 pursuant to Rule 92 bis (C), which authorises the admittance into evidence of witness statements made by persons who the Chamber is satisfied are unable to testify because they have subsequently died, cannot be located with reasonable diligence, or are not of sufficient mental or bodily condition to testify orally. In order to be admitted, such statements must have been made and recorded under circumstances that satisfy the Chamber that there are satisfactory *indicia* of their reliability.

9. The statements in question were disclosed to the Defence by the Prosecution in July 2005.<sup>10</sup> Witness ATM testified in these proceedings on 16 February 2006.<sup>11</sup> The Defence now seeks to introduce these statements pursuant to Rule 92 bis for the sole purpose of impeaching ATM's credibility. In the Chamber's view, the appropriate procedure would have been to confront Witness ATM with these documents during

<sup>9</sup> See *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Requests for Disclosure and Investigations Concerning the Assassination of President Habyarimana (TC), 17 October 2006, para. 2 (citing *Bagosora et al.*, Decision on Request for Subpoenas of United Nations Officials (TC), 6 October 2006, paras. 12-18).

<sup>10</sup> E-mail from Jane Mukangira of the OTP to the Chamber, dated 21 November 2007; e-mail from Defence Counsel John Philpot to the Chamber, dated 21 November 2007 (Mr Philpot suggests that the statements were received approximately ten (10) days after they were filed by the Prosecution, which may mean they were not received until August 2005).

<sup>11</sup> T. 16 February 2006.

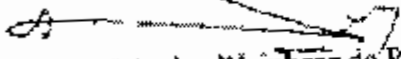


cross-examination, and the Defence offers no reason for its failure to do so. Admitting the statements now would deny ATM the opportunity to address the issues raised in the statements, and deny the Prosecution the opportunity to re-examine ATM regarding their contents. The Chamber concludes that the prejudicial effect of admitting the statements at this stage outweighs their potential probative value.


**FOR THE FOREGOING REASONS, THE CHAMBER**

**DENIES** the Defence Motions.

Anish 22 November 2007.

  
Inés Mónica Weinberg de Rosa  
Presiding Judge

  
Khalida Rzead Khan  
Judge

  
L. García Múñoz  
Judge

[Seal of the Tribunal]

