



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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ICTR-99-50-T

4-11-2008

(29490-29483)

OR: ENG

TRIAL CHAMBER II

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuga Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 4 November 2008

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THE PROSECUTOR
v.
CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

**DECISIONS ON FOUR PROSPER MUGIRANEZA MOTIONS
CONCERNING WITNESS LIST**

Rule 92 bis of the Rules of Procedure and Evidence

Office of the Prosecutor:

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Mr. Tom Moran and Ms. Cynthia Cline for Prosper Mugiraneza

INTRODUCTION

1. This Decision will address four outstanding motions brought by the Defence for Prosper Mugiraneza (the "Defence"), all of which concern the finalisation of his Witness List.

2. On 3 March 2008, the Defence moved to have certain written witness statements admitted into evidence in lieu of oral testimony, pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence.¹ On 11 June 2008, the Chamber issued a Decision granting that motion in part.² As is relevant here, the Rule 92 *bis* Decision denied the Defence's motion in respect of the written statements of Witnesses RWH,³ RWM,⁴ BGG,⁵ BGA,⁶ RWR,⁷ and RDR.⁸

3. On 13 June 2008, a Status Conference was held during which the Defence informed the Chamber that it would seek reconsideration of certain portions of the Rule 92 *bis* Decision.⁹ During the course of that Status Conference, the Defence and the Prosecution reached a consensual resolution, with the Chamber's approval, whereby the Defence would be permitted to admit Rule 92 *bis* written statements for Witnesses RWR, RDR, RWY-A, and RWM.¹⁰ The Parties did not reach any such settlement concerning the written statements of Witnesses RWH, BGG, or BGA.

4. Notwithstanding this verbal agreement, the Defence moved on the same day for reconsideration of the portions of the Rule 92 *bis* Decision that denied admission of the written statements of Witnesses RWII, RWM, BGG, and BGA.¹¹

5. The Defence also brought a second motion, similarly filed on 13 June 2008, seeking to vary its witness list to call Witnesses RWR and RDR to testify orally.¹²

6. The Prosecution objects to both of these motions. Concerning the June Motion for Reconsideration, the Prosecution, while not objecting to admitting Witness RWM's written statement, argues that the Chamber should otherwise deny the Motion because the Defence fails to demonstrate either a clear error of reasoning or any special circumstances warranting

¹ *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, "Prosper Mugiraneza's [Confidential] Preliminary Motion for Admission of Statements Taken Pursuant to Rule 98 (*sic*) bis", filed by the Defence for Prosper Mugiraneza on 3 March 2008.

² *Bizimungu et al.*, Confidential Decision on Prosper Mugiraneza's Motion to Admit Evidence of Witnesses in Written Form in Lieu of Oral Testimony; And Order for Reduction of Witness List (TC), 11 June 2008 (the "Rule 92 bis Decision").

³ *Id.*, para. 35.

⁴ *Id.*, fn. 1.

⁵ *Id.*, para. 44.

⁶ *Id.*, para. 47.

⁷ *Id.*, paras. 78-79.

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⁹ T. 13 June 2008, pp. 2-15.

¹⁰ See *Id.* p. 7, lines 4-28.

11 "Prosper Mugiranca's Motion to Reconsider Denial of Admission of Written Statements of Witnesses RWH, RWM, BGG, and BGA", filed by the Defence for Prosper Mugiranca on 13 June 2008 (the "June Motion for Reconsideration").

¹² “Prosper Mugiraneza’s Motion (sic) Vary Witness List to Call Witnesses RWR and RDR to Testify Orally”, filed by the Defence for Prosper Mugiraneza on 13 June 2008 (the “RWR/RDR Motion”).

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reconsideration.¹³ Concerning the RWR/RDR Motion, the Prosecutor asserts that it is frivolous, as both sides already agreed at the Status Conference held *the same day as the Motion was filed* to admit the two Witnesses' written statements under Rule 92 *bis*, as opposed to requiring oral testimony.

7. On 12 August 2008, the Defence moved to admit the written statement of Witness RWY-A pursuant to Rule 92 *bis*.¹⁴ The Prosecutor, noting that it had already agreed to this form of relief during the 13 June 2008 Status Conference, does not object.¹⁵

DELIBERATIONS

A. June Motion for Reconsideration

8. The Defence seeks reconsideration of the Chamber's earlier refusal to admit the written statements of Witnesses RWM, RWH, BGG, and BGA pursuant to Rule 92 *bis*.

Law on Reconsideration

9. The Rules of Procedure and Evidence are silent on the standards a Chamber shall apply to a motion for reconsideration. However, the jurisprudence of the Tribunal provides that the Chamber has an inherent power to reverse or revise a prior decision where new material circumstances have arisen that did not exist at the time of the original decision, or where the decision was erroneous, and one of the parties suffered some prejudice or injustice as a result.¹⁶ The party seeking reconsideration bears the burden of demonstrating the special circumstances warranting such relief.

Application of Law on Reconsideration to June Motion for Reconsideration

10. In relation to Witnesses RWH, BGG, and BGA, the Defence has failed to demonstrate any material new circumstances, or that the Rule 92 *bis* Decision was erroneous and that there was prejudice as a result. The Defence argues that the Chamber relied upon certain erroneous factual assumptions that warrant reconsideration of the Decision. With respect to each of Witnesses RWH,¹⁷ BGG,¹⁸ and BGA,¹⁹ the Chamber disagrees with this contention.

¹³ "Prosecutor's Response to Prosper Mugiraneza's Motion to Reconsider Denial of Admission of Written Statements of Witnesses RWH, RWM, BGG, and BGA", filed by the Prosecutor on 17 June 2008.

¹⁴ "Prosper Mugiraneza's Motion to Admit Written Statement of Witness RWY-A Pursuant to Rule 92 *bis*", filed by the Defence for Prosper Mugiraneza on 12 August 2008 (the RWY-A Motion).

¹⁵ "Prosecutor's Response to Prosper Mugiraneza's Motion to Admit Written Statement of Witness RWY-A Pursuant to Rule 92 *bis*", filed by the Prosecutor on 13 August 2008.

¹⁶ *Bizimungu et al.*, Decision on Defence Motion to Reconsider Order of 2 June Denying Admission of Church and School Records, 23 July 2008, para. 4; *Bizimungu et al.*, Decision on Casimir Bizimungu's Motion in Reconsideration of the Trial Chamber's Decision dated February 8, 2007, in Relation to Condition (B) Requested by the United States Government (TC), 26 April 2007, para. 7; *Karamera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Second Motion for Reconsideration of Sanctions, 8 November 2007, para. 6; *Karamera et al.*, Case No. ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karamera et al.*, Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure, 31 October 2005, para. 3; *Karamera et al.*, Decision on Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness, 11 October 2005, para. 8 (citations omitted).

¹⁷ The Defence asserts that the Chamber erroneously assumed that Witness RWH's statement was to be used to impeach Prosecution Witness GJW on the specific matter of whether GJW heard the Accused make certain



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Additionally, recalling the jurisprudence cited above,²⁰ the Chamber finds that none of the alleged errors were determinative to the Decision's final outcomes, nor has it been shown that any injustice was suffered as a result.

11. In relation to Witness RWM, the Chamber recalls that it explicitly did not consider the merits of whether to admit the written statement of Witness RWM, because the statement was never circulated to the Chamber by the Registry.²¹ Following the 13 June 2008 Status Conference, the Court Management Section properly circulated the Rule 92 bis statement of Witness RWM to the Chamber.

12. The Chamber considers that the written statement in question now being properly before it constitutes a new material circumstance for the purposes of the law on reconsideration. It will therefore now consider the statement of RWM in light of the jurisprudence on Rule 92 bis.

Law on Admission of Written Statements - Rule 92 bis

13. Rule 92 bis (A) of the Rules bestows a discretionary power upon a Trial Chamber to admit, in whole or in part, the evidence of a witness in the form of a written statement, in lieu of oral testimony, on the condition that it goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.²²

14. The meaning of the term "acts and conduct of the accused as charged in the indictment" has been defined by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), which noted that the term is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused himself and not the acts and conduct of his co-perpetrators and/or subordinates.²³

remarks following the baptism of one of Colonel Rwagafilita's children. Instead, the Defence argues that RWJ's statement is meant to impeach a different part of GJW's testimony involving the Accused's wife's employment. The Defence believes that this alleged error requires reconsideration of the Decision. See June Motion for Reconsideration at paras. 2-4. The Chamber disagrees. It is quite clear from the Rule 92 bis Decision that the Chamber understood that the Defence sought to admit RWJ's witness statement for this latter purpose and considered the statement accordingly. However, the Chamber found that the statement failed to satisfy Rule 89 (C) and thus refused to admit it into evidence. See Rule 92 bis Decision at paras. 33-35. The Defence fails to present new material circumstances or explain how this determination was erroneous.

¹⁸ The Defence asserts that BGG's written statement should have been admitted because another witness, GJW, testified that one of Colonel Rwagafilita's children was baptized at the diocese and that, since BGG was a priest at the diocese, "it is unlikely that one of the colonel's children could have been baptized 'at the diocese' without BGG knowing it." See June Motion for Reconsideration at para. 7. This argument, which hinges on conjecture and speculation, fails to present new material circumstances or to explain how the Chamber's earlier determination was erroneous.

¹⁹ In the Rule 92 bis Decision, the Chamber found that BGA's written statement is "brief, gives little detail of the searches conducted, and fails to attach any documentation substantiating the findings of the Witness." See Rule 92 bis Decision at para. 47. The Defence fails to either present new material circumstances or to explain how this determination was erroneous.

²⁰ See *supra*, fn. 16.

²¹ See Rule 92 bis Decision, fn. 1.

²² Rule 92bis of the Rules, entitled "Proof of Facts Other than by Oral Evidence", provides 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.

²³ *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to have Written Statements Admitted Under Rule 92 bis (TC), 21 March 2002, para. 22, cited in *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C) (AC), 7 June 2002, fn. 28, in support of

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B. The RWR/RDR Motion

19. In the Rule 92 *bis* Decision, the Chamber denied the Defence's motion to admit written statements from Witnesses RWR and RDR.²⁷

20. The Defence now seeks to call RWR and RDR to testify orally concerning whether there was military training of militias in the Mpanga area.²⁸ The Prosecutor objects, noting that during the 13 June 2008 Status Conference he agreed to permit the Defence to file the Witnesses' written statements pursuant to Rule 92 *bis*, as the Defence had originally sought.²⁹

21. In light of the agreement reached between the Prosecutor and the Defence at the Status Conference, the Chamber considers it to be in the interests of justice and conservation of judicial resources to admit the Witnesses' written statements pursuant to Rule 92 *bis*. The Defence's motion to vary its witness list to call the Witnesses to testify orally is therefore denied.

C. The RWY-A Motion

22. The Defence moves to admit the written statement of Witness RWY-A, pursuant to Rule 92 *bis*. The statement in question involves the condition of the roads between Kigali and Kibungo *Préfecture*, and specifically the Witness's belief that such roads were inaccessible on or after 7 April 1994 due to fighting between the government and the RPF. The Defence asserts that this statement is relevant, as it sheds light on whether Prosper Mugiraneza could have travelled from Kigali to Kibungo *Préfecture* after the death of the President on 6 April 1994.³⁰ The Prosecutor does not object to the admission of RWY-A's statement.³¹

Application of Law on Rule 92 bis to the RWY-A Motion

23. The Chamber initially notes that Witness RWY-A's written statement was not among those that the Chamber considered in its earlier Rule 92 *bis* Decision.

24. The Chamber recalls the law and jurisprudence on admission of written statements pursuant to Rule 92 *bis*.³² The Chamber observes that the statement has been duly executed, as required by Rule 92 *bis* (B) of the Rules.

25. The Chamber has reviewed the substance of the statement and finds that none of the testimony concerns the acts and conduct of the Accused as charged in the Indictment. The written statement also meets the more general requirements of Rule 89 (C) since it seeks to contradict Prosecution evidence.

26. The Chamber therefore considers that it is within its discretion to admit RWY-A's written statement. In these circumstances, in light of the consensual agreement reached with

²⁷ Rule 92 *bis* Decision, paras. 78-79.

²⁸ RWR/RDR Motion, para. 1.

²⁹ T. 13 June 2008, p. 7, lines 4-12.

³⁰ RWY-A Motion, para. 3.

³¹ "Prosecutor's Response to Prosper Mugiraneza's Motion to Admit Written Statement of Witness RWY-A Pursuant to Rule 92 *bis*", filed by the Prosecutor on 13 August 2008, para. 2.

³² See *supra*, paras. 13-16.



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the Prosecutor at the 13 June 2008 Status Conference,³³ and considering that one of the purposes behind Rule 92 *bis* is to promote judicial economy, the Chamber finds that a positive exercise of its discretion is warranted, such that the Witness's written statement shall be admitted into evidence. Furthermore, the Chamber does not consider that there are any particular circumstances requiring the Witness to appear for cross-examination.

D. February Motion for Reconsideration

27. The Defence moves for reconsideration of a 20 February 2008 Decision³⁴ in which the Chamber ordered, *inter alia*, that the Defence substantially reduce the number of witnesses on its Amended Witness List of 24 January 2008.³⁵ The Defence argues that such a mandatory reduction would result in disparate treatment among the different Accused, would unfairly prejudice Prosper Mugiraneza's rights to a fair trial, and would create a conflict of interest between Prosper Mugiraneza and his counsel.

28. The Prosecutor does not object to the relief sought, but merely instructs the Chamber in its response that adjudicating the Motion is within the Chamber's discretion.³⁶

29. The adjudication of the three motions above, as well as the completion of the evidence phase of the trial, has now fully determined the extent to which there is a legal basis to present the testimony, either written or orally, for all of Prosper Mugiraneza's proposed Witnesses. The Chamber recalls that Prosper Mugiraneza presented some 46 witnesses to testify orally before the Chamber over 47 trial days, accounting for approximately 241 hours and 40 minutes of court time. In addition, the Chamber admitted the written statements of some 21 witnesses pursuant to Rule 92 *bis*, including those admitted by virtue of this Decision.

30. The Chamber finds that the Defence's Motion of 20 February is now moot.

FOR THESE REASONS, the Chamber

GRANTS the Defence's RWY-A Motion; and

GRANTS the Defence's June Motion for Reconsideration, in part; and

ADMITS the written statements of Witnesses RWR, RDR, RWM, and RWY-A pursuant to Rule 92 *bis*; and

³³ See T. 13 June 2008, p. 7, lines 14-16.

³⁴ *Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion for Leave to File Documents Out of Time and Order for Further Reduction of Witness Lists (TC), 20 February 2008.

³⁵ "Prosper Mugiraneza's Motion for (sic) to Reconsider the Trial Chamber's Decision of 20 February 2008 and for Other Appropriate Relief", filed by the Defence for Prosper Mugiraneza on 22 February 2008 (the "February Motion for Reconsideration").

³⁶ "Prosecutor's Response Mugiraneza's Motion for Reconsideration of Trial Chamber's Decision of 22 February 2008 and Other Appropriate Measures", filed by the Prosecutor on 26 February 2008, para. 4.



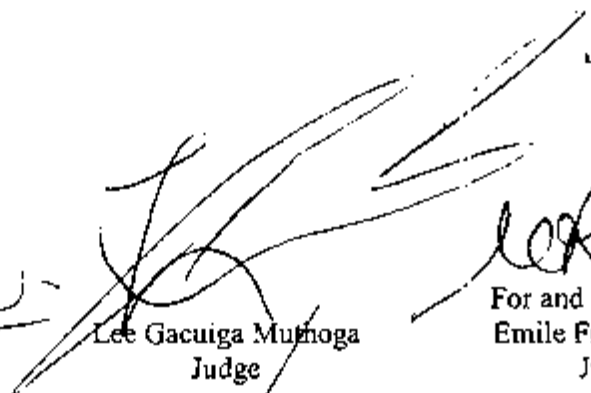
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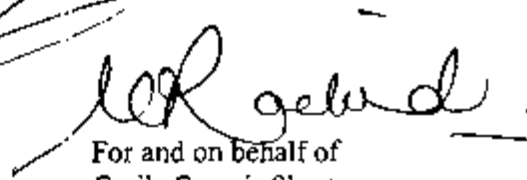
DECLINES the June Motion for Reconsideration, and the RDR/RWR Motion in all other respects; and

DECLARES the Defence's February Motion for Reconsideration moot.

Arusha, 4 November 2008


Khalida Rachid Khan
Presiding Judge


Lee Gacuiga Muthoga
Judge


For and on behalf of
Emile Francis Short
Judge

