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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Byron, Presiding  
Gberdao Gustave Kam  
Vagn Joensen

**Registrar:** Adama Dieng

**Date:** 4 February 2010

**THE PROSECUTOR**

v.

**Édouard KAREMERA  
Matthieu NGIRUMPATSE  
Joseph NZIRORERA**

*Case No. ICTR-98-44-T*

JUDICIAL RECORDS ARCHIVES  
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**DECISION ON JOSEPH NZIRORERA'S MOTION TO ADMIT STATEMENT OF  
GRATIEN KABILIGI**

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

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## INTRODUCTION

1. In a motion filed on 26 January 2010, Joseph Nzirorera seeks to have a written statement from Gratien Kabiligi admitted pursuant to Rule 92 *bis* (A) of the Rules of Procedure and Evidence ("Rules").<sup>1</sup> The Prosecution opposes the motion.

## DELIBERATIONS

2. The admission of a written statement under Rule 92 *bis* (A) involves an enquiry as to whether the statement sought to be admitted goes to proof of a matter other than the acts and conduct of the Accused as charged in the Indictment and whether it satisfies Rule 89(C) in that it is relevant and has probative value.<sup>2</sup> Although definitive proof of reliability and credibility of the evidence is not required, a showing of *prima facie* reliability and credibility, on the basis of sufficient indicia, is required.<sup>3</sup> In addition, the non-exhaustive factors listed in Rule 92 *bis* (A) (i) and (ii)<sup>4</sup>, the formal requirements of Rule 92 *bis* (B) must also be met.

3. Even if a statement fulfils all of these requirements, the Chamber must decide whether or not to exercise its discretion to admit it, bearing in mind the overarching necessity of ensuring a fair trial. A relevant factor in the exercise of this discretion is the proximity of the Accused to the person whose acts are described in the statement. Pursuant to Rule 92 *bis* (E), if the Chamber permits the admission of the statement, it must also decide whether or not to admit it in whole or in part, and whether or not to require cross-examination of the witness. In addition to issues relating to the fairness of the trial, a relevant factor in this regard is whether the evidence relates to a live and important issue between the parties, as opposed to a peripheral one.<sup>5</sup>

<sup>1</sup> Joseph Nzirorera's Motion to Admit Statement of Gratien Kabiligi, filed on 26 January 2010 ("Motion").

<sup>2</sup> *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Case No. ICTR-98-41-T ("*Bagosora et al.*"), Decision on Prosecutor's Motion for the Admission of Written Statement Under Rule 92 *bis* (TC), 9 March 2004, para. 12.

<sup>3</sup> *The Prosecutor v. Édouard Karemera, Matthieu Ndirumpatse and Joseph Nzirorera* ("*Karemera, et al.*"), Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts (AC), 29 May 2009, para. 15.

<sup>4</sup> Factors which favour admission include the fact that oral evidence has been heard on similar facts; the statement provides an historical, political or military background; or the statement relates to the character of the accused. Factors 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.

<sup>5</sup> *Bagosora et al.*, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under 92 *bis*, 9 March 2004, para. 16.

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4. The jurisprudence of this Tribunal establishes that Rule 92 bis (A) impliedly requires that, for a statement to be admitted pursuant to this rule, its author must appear on the moving party's witness list.<sup>6</sup> Gratien Kabiligi is listed as a witness of Joseph Nzirorera.<sup>7</sup>

5. The Chamber recalls that, on 24 October 2008, it ordered Joseph Nzirorera to file a consolidated motion pursuant Rule 92 bis and, further, indicated that fees for additional filings would be denied unless good cause is shown.<sup>8</sup> Nzirorera asserts that at the time he filed his Omnibus Rule 92 bis motion, Gratien Kabiligi had agreed to testify as a live witness<sup>9</sup> but that, since his acquittal by this Tribunal, he has been unable to find a country in which to resettle and has been advised against testifying by his Counsel, as doing so may harm his chances of locating one.<sup>10</sup> Consequently, the Chamber considers that good cause has been shown to file this motion.

6. The Prosecution argues that: (i) it is improper to admit the statement pursuant to Rule 92 bis as it concerns "proof of acts of the accused"<sup>11</sup>; (ii) the evidence contained in the statement is unnecessarily cumulative<sup>12</sup>; and (iii) there is a need for cross-examination of the witness<sup>13</sup>.

7. With respect to the first argument, Prosecution witness UB testified that Gratien Kabiligi and Joseph Nzirorera attended a meeting at the Kigali *préfecture* office in "late April 1994."<sup>14</sup> In his written statement, Kabiligi states that he never attended or heard of such a meeting. With certain exceptions, which are inapplicable in this instance,<sup>15</sup> a statement that a person did not attend a particular meeting at which an accused is alleged to have also attended does not go to the acts and conduct of that accused, wherefore, such a statement may

<sup>6</sup> *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Prosecutor's Motion for Leave to Be Authorised to Have the Affidavits Regarding the Chain of Custody of the Diary of Pauline Nyiramasuhuko Under Rule 92bis (TC), 14 October 2004, para. 12; *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka and Prosper Mugiraneza*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Motion and Notice Pursuant to Rule 92 bis (E) (TC), 17 November 2004, paras. 4-8; *Karemera et al.*, Decision on Variance of the Prosecution Witness List, 13 December 2005, para. 19; *The Prosecutor v. Rukundo*, Case No. ICTR-2001-70-T, Decision on Defence Motion to Present Additional Witnesses and to File Documentary Evidence Prior to the Close of its Case (TC), 30 November 2007, para. 12.

<sup>7</sup> Joseph Nzirorera's Confidential Final Witness List, 16 October 2009.

<sup>8</sup> *Karemera et al.*, Order to Joseph Nzirorera to Reduce his Witness List, 24 October 2008.

<sup>9</sup> Motion, para. 7.

<sup>10</sup> Ibid, para. 8.

<sup>11</sup> Prosecutor's Response to Joseph Nzirorera's Motion to Admit the Statements of Gratien Kabiligi, filed on 1 February 2010 ("Response"), paras. 7-10.

<sup>12</sup> Response, para. 11.

<sup>13</sup> Response, paras. 12-14.

<sup>14</sup> Idem.

<sup>15</sup> See e.g., *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Admission of Written Statements and Witness Testimony (TC) ("Decision on Written Statements"), 15 July 2009, para. 9.

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be admitted under Rule 92 *bis*.<sup>16</sup> With respect to the second argument, the Chamber agrees with the Prosecution that the statement is cumulative in nature as oral evidence has, and will be, heard on this issue and as three statements concerning the non-attendance of witnesses at the same meeting have already been admitted pursuant to Rule 92*bis*. This factor weighs in favour of admitting the statement. Lastly, although the Chamber considers the statement to be relevant and of probative value, in that it addresses issues raised by the evidence adduced by the Prosecution in its case-in-chief, the issues addressed are peripheral as between the Parties and consequently decides not to call Kabiligi for cross-examination.

**FOR THESE REASONS, THE CHAMBER**


**GRANTS** Joseph Nzirorera's Motion;

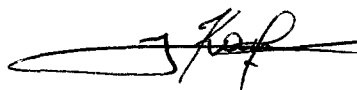
**DECLARES ADMISSIBLE**, subject to the disclosure of the identifying information of its author and its certification pursuant to Rule 92 *bis* (B) of the Rules, the entirety of the statement of Gratien Kabiligi;

**ORDERS** Joseph Nzirorera to disclose to the other Parties all identifying information for Gratien Kabiligi; and

**ORDERS** Joseph Nzirorera to obtain certification, as prescribed by Rule 92 *bis* (B), of the uncertified statement of Gratien Kabiligi.

Arusha, 04 February 2010, done in English.

  
Dennis C. M. Byron  
Presiding Judge

  
Gberdao Gustave Kam  
Judge

  
Vagn Joensen  
Judge

[Seal of the Tribunal]



<sup>16</sup> *Karemera et. al.*, Decision on Written Statements, paras. 56-57, 100-101; *Karemera et. al.*, Decision on Joseph Nzirorera's Motion to Admit Statement of Bonaventure Ubalijoro, 14 April 2008.