



UNITED NATIONS
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Adama Dieng

Date: 24 June 2010

JUDICIAL RECORDS/ARCHIVES
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J. G. M. S.

THE PROSECUTOR

v.

Jean-Baptiste GATETE

Case No. ICTR-2000-61-T

**DECISION ON DEFENCE AND PROSECUTION MOTIONS
FOR ADMISSION OF WRITTEN STATEMENTS
AND DEFENCE MOTION TO POSTPONE FILING OF CLOSING BRIEFS**

Rules 73 bis, 73 ter, 89 (C) and 92 bis of the Rules of Procedure and Evidence

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For the Accused:

Marie-Pierre Poulain
Kate Gibson

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INTRODUCTION

1. The trial in this case commenced on 20 October 2009.¹ The Prosecution and Defence cases closed on 16 November 2009 and 29 March 2010, respectively. Closing Briefs are due on 25 June 2010 and closing arguments are scheduled to be heard on 2, and if need be, 3 August 2010.²
2. The Defence filed a Motion on 13 May 2010, seeking to admit seven written statements into evidence or, in the alternative, to allow further oral testimony before the Chamber.³ The Prosecution filed a Response on 17 May 2010, submitting that, should the statements be admitted, it, too, should be permitted to admit statements in response.⁴ The Defence replied on 24 May 2010 and the Prosecution filed a Rejoinder to the Defence Reply on 26 May 2010.⁵
3. The Prosecution filed a Motion on 18 June 2010, requesting that the Chamber admit five Prosecution witness statements in response to the Defence statements tendered on 13 May 2010.⁶ The Defence filed a Response on 23 June 2010.⁷
4. On 21 June 2010, the Defence moved to postpone the filing of the Closing Briefs.⁸ The Prosecution filed a Response the same day, indicating that it did not oppose a short, mutual variance of the filing date.⁹

DISCUSSION

Preliminary Matter

5. The Defence submits that the Chamber should consider the Motion notwithstanding the closure of the Defence case on 29 March 2010 due to the fundamental significance of the issue of witness intimidation, which arose, for the most part, after the close of evidence.¹⁰
6. The Chamber notes the Defence correspondence of 22 March 2010, indicating that the Defence had become aware of certain instances of interference from Prosecution witnesses in Defence testimony in the trial and that it intended to file a motion following a further assessment of the issue.¹¹ The Chamber recalls that it may exercise its discretion to admit

¹ *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-PT, Scheduling Order, 30 September 2009.

² Interoffice Memorandum from Judge Muthoga to Mr. Constant Hometownu filed on 7 May 2010.

³ Defence Motion for the Admission into Evidence of Statements or, in the alternative, the Admission of Further Oral Testimony, 13 May 2010 ("Defence Motion"), para. 39.

⁴ Prosecutor's Response to the Defence Motion for the Admission into Evidence of Statements, 17 May 2010 ("Prosecution Response"), para. 2.

⁵ Reply to Prosecution Response to the Defence Motion for the Admission into Evidence of Statements or, in the alternative, the Admission of Further Oral Testimony, 24 May 2010 ("Defence Reply"); Rejoinder to Defence Reply to Prosecution Response to the Defence Motion for the Admission into Evidence of Statements or, in the alternative, for the Admission of Further Oral Testimony, 26 May 2010 ("Prosecution Rejoinder").

⁶ Prosecution Motion to Admit Statements in Reply to Defence Motion for the Admission into Evidence of Statements, 18 June 2010 ("Prosecution Motion").

⁷ Defence Reply, 23 June 2010.

⁸ Defence Urgent Motion for the Postponement of the Closing Brief, 21 June 2010.

⁹ Prosecution Response to Defence Urgent Motion for the Postponement of the Closing Brief, 21 June 2010.

¹⁰ Defence Motion, para. 14. See also Defence Reply, para. 17.

¹¹ Ex Parte Letter from Gatete Defence to the Chamber, 22 March 2010.



evidence where the circumstances warrant such admission. It will therefore proceed to consider the Defence Motion.

Law on Admission of Evidence Pursuant to Rule 89 (C)

7. Rule 89 (C) of the Rules of Procedure and Evidence (the “Rules”) provides that a Chamber “may admit any relevant evidence which it deems to have probative value.” The Chamber therefore has broad discretion when assessing the admissibility of evidence.¹² The onus is on the moving party to establish the *prima facie* relevance and probative value of the evidence for which admission is sought.¹³

Law on Admission of Written Statements Pursuant to Rule 92 bis

8. Pursuant to Rule 92 *bis* (A), a Trial Chamber has discretion to 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.¹⁴ Once a Chamber is satisfied that (i) the material tendered is relevant to proof of a matter other than the acts and conduct of the accused as charged in the indictment, and (ii) the written statement meets the formal requirements of Rule 92 *bis* (B), it may exercise its discretion to admit the statements.¹⁵

9. The Appeals Chamber has specifically held that a party cannot tender, under Rule 89 (C), a written statement of a prospective witness taken by an investigator as a way of avoiding the requirements of Rule 92 *bis*.¹⁶ In order for a statement to be admissible under Rule 92 *bis*, the general requirements of relevance and probative value, applicable to all types of evidence under Rule 89 (C), must also be satisfied.¹⁷

10. Lastly, pursuant to Rule 92 *bis* (E), a party seeking to adduce a written statement shall give fourteen days’ notice to the opposing party, who may object within seven days. This provision also bestows a further discretionary power upon the Chamber to admit a witness statement in whole or in part, and to require the witness to appear for cross-examination.¹⁸

¹² *Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence (AC), 4 October 2004, (“*Nyiramasuhuko* Appeals Decision of 4 October 2004”), para. 7; *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu’s Urgent Motion for the Exclusion of the Report and Testimony of Déo Sebahire Mbonyinkebe (Rule 89 (C)), 2 September 2005 (“*Bizimungu* Decision of 2 September 2005”), para. 10.

¹³ *Bizimungu* Decision of 10 June 2008, para. 5; *Karempera* Decision of 26 March 2008, para. 3.

¹⁴ Rule 92 *bis* is entitled “Proof of Facts Other Than by Oral Evidence”.

¹⁵ *Bizimungu et al.*, Decision on Four Prosper Mugiraneza Motions concerning Witness List, 4 November 2008, para. 15.

¹⁶ *The Prosecutor v. Galić*, Case No. IT-98-29-AR73-2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002 (“*Galić* Decision”), para. 31.

¹⁷ *Bizimungu* Decision on the Prosecutor’s Motion and Notice Pursuant to Rule 92 *bis* (E), para. 20; *Bagosora et al.*, Decision on Admission of Statements of Deceased Witnesses (TC), 19 January 2005, para. 15; *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. See also *Galić* Decision, para. 31 (“By analogy, Rule 92 *bis* is the *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) ...”).

¹⁸ *Bizimungu et al.*, Decision on Casimir Bizimungu’s Motion to Vary Witness List; and to Admit Evidence of Witness in Written Form in Lieu of Oral Testimony (TC), 1 May 2008 (“*Bizimungu* Decision of 1 May 2008”), para. 19.

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Defence Motion

11. The Defence submits that the tendered statements of four of its witnesses “show a clear pattern of intimidation by Prosecution Witnesses” and thereby affect the credibility of those Prosecution witnesses.¹⁹ The Defence argues that, since such material relates to the credibility of a witness and “indirectly contradict[s] prosecution evidence”, it is *prima facie* relevant and probative for purposes of admission into evidence under Rule 89 (C).²⁰ According to the Defence, some of the statements, are also admissible under Rule 89 (C) because they allege general intimidation and threats by local authorities, specifically against those who have testified in favour of the Accused.²¹

12. The Defence submits that the seven above-mentioned written statements, signed by each witness and countersigned by a member of the Defence team, show sufficient indicia of reliability to be admitted pursuant to Rule 89 (C).²² In the alternative, the Defence requests that it be allowed to take the statements in accordance with the provisions of Rule 92 *bis* (B) and that the statements be admitted under Rule 92 *bis* (A) as relating to the relevant political background and to proof of a matter other than the acts and conducts of the Accused as charged in the Indictment.²³ As a last alternative, the Defence requests the recall of two witnesses and to call for the first time the remaining five to give further oral testimony.²⁴

13. The Prosecution does not object to admitting the statements as exhibits under Rule 89 (C), if it, too, is allowed to file statements in response, after conducting its own investigations on the matter.²⁵ The Prosecution submits that, in light of the schedule for filing of the Closing Briefs, admission under Rule 89 (C) is the preferred option.²⁶

Prosecution Motion

14. The Prosecution requests the admission of five statements that it submits address issues raised by the statements tendered in the Defence Motion. The Prosecution cites Rules 73 and 89 (C) as a basis for its Motion.

Admissibility of Witness Statements under Rule 89 (C)

15. The Defence and Prosecution are seeking to enter into evidence written statements in lieu of oral testimony. The Chamber recalls that Rule 92 *bis* provides specific procedure for the admission of such statements.²⁷ A party cannot circumvent these requirements by seeking

¹⁹ Defence Motion, para. 31, and Annexes 1-4. See items 1 and 2 of the Confidential Annex attached to this Decision.

²⁰ Defence Motion, paras. 23 and 31.

²¹ See item 3 of the Confidential Annex attached to this Decision.

²² Defence Motion, para. 33.

²³ Defence Motion, paras. 34-35.

²⁴ Defence Motion, paras. 36-37. See item 4 of the Confidential Annex attached to this Decision.

²⁵ Prosecution Response, para. 2. See also Prosecution Rejoinder, para. 2.

²⁶ Prosecution Response, paras. 3-4.

²⁷ *The Prosecutor v. Bagosora et al.*, Decision on Admission of Statement of Kabiligi Witness under Rule 89 (C), 14 February 2007, para. 3, citing *Bagosora et al.*, Decision on Admission of Statements of Deceased Witnesses, 19 January 2005, para. 15; *Bagosora et al.*, Decision on Defence Motion for Admission of Statement of Witness LG-1/U-03 Under Rule 92 *bis* (TC), 11 December 2006, para. 3. See also *The Prosecutor v.*



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to admit statements pursuant to the general requirements of Rule 89 (C).²⁸ Accordingly, the Rules do not allow the Chamber to admit witness statements in lieu of oral testimony unless the requirements of Rule 92 *bis* are satisfied. The Chamber therefore turns to consider whether these requirements are met.

Admissibility of the Witness Statements under Rule 92 bis

16. It is well established that, for a statement to be admitted pursuant to Rule 92 *bis*, the witness must appear on the moving party's witness list.²⁹ The Chamber observes that five of the seven statements sought to be admitted by the Defence were made by persons who appeared on the Defence Witness List in this case. Two of the makers of the other statements, however, have never appeared on that list.³⁰

17. Three of the statements tendered by the Prosecution are from persons who were on the Prosecution Witness List.³¹ Two other statements are from persons who were not witnesses in the Prosecution case, namely, Albert Ruberanziza and Protais Karemera Gahirwa.

18. In addition, the Chamber recalls that, for the purposes of admission of written statements pursuant to Rule 92 *bis*, the formal requirements of Rule 92 *bis* (B) must also be met.³² The tendered Defence and Prosecution statements were witnessed neither by a person "authorised to witness such a declaration in accordance with the law and procedure of a State", nor by a "Presiding Officer appointed by the Registrar of the Tribunal" for the purpose of taking such a statement.

19. Moreover, the person witnessing the declaration must verify in writing the date and place of the declaration and also that the person making the statement: (i) is the person identified in that statement; (ii) stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct; and (iii) 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.

20. The statements annexed to the Defence and Prosecution Motions consequently do not meet the formal requirements of Rule 92 *bis* (B), and no showing has been made that the declarants have died or are otherwise unavailable, under Rule 92 *bis* (C). The Chamber finds that, in the absence of these formalities, the documents are not admissible.

Hormisdas Nsengimana, Case No. ICTR-2001-69-I, Oral Decision on the Defence Request to Use a Document During the Testimony of Defence Witness Marie Goretti Uwingabire, 2 July 2008, p. 3.

²⁸ *Bagosora et al.*, Decision on Admission of Statement of Kabiligi Witness under Rule 89 (C), 14 February 2007, para. 4.

²⁹ *Bizimungu et al.*, Decision on the Prosecutor's Motion and Notice Pursuant to Rule 92 *bis* (E) (TC), 17 November 2004, paras. 4-8. See also *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Admit Statement of Gratién Kabiligi (TC), 4 February 2010, para. 4, citing *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 92 *bis* (TC), 14 October 2004, para. 12; *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.

³⁰ See item 5 of the Confidential Annex attached to this Decision.

³¹ See items 2 and 6 of the Confidential Annex attached to this Decision.

³² See *supra* para. 8.



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Hearing of Further Testimony

21. With respect to the Defence request to hear further testimony, the Chamber notes that the Defence Motion indicates the possibility of obtaining statements that meet the requirements of Rule 92 *bis* (B). Accordingly, the Chamber need not consider whether recall, which should be granted only in the most compelling of circumstances and would require re-opening the case, would be appropriate in this instance.³³

Extension of Time to File Closing Briefs

22. The Chamber notes that, because the tendered statements cannot be admitted under the Rules, the Parties need not address any additional evidence in their Closing Briefs, and the Chamber does not consider that extension of time for their filing is necessary.

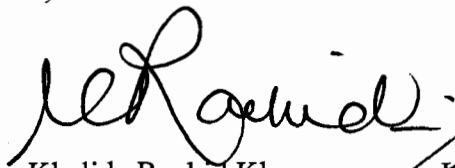
FOR THESE REASONS the Chamber

DENIES the Defence Motion to admit its tendered statements or to re-call witnesses and call additional witnesses;

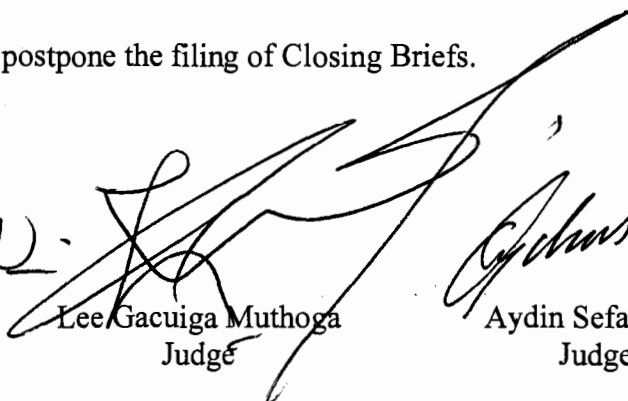
DENIES the Prosecution Motion to admit its tendered statements; and

DENIES the Defence Motion to postpone the filing of Closing Briefs.

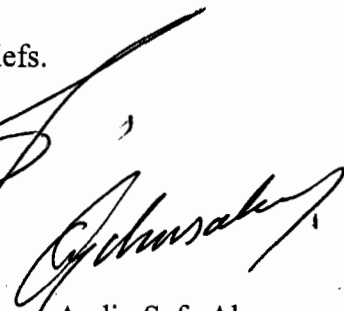
Arusha, 24 June 2010



Khalida Rachid Khan
Presiding Judge



Lee Gacuiga Muthoga
Judge



Aydin Sefa Akay
Judge

[Seal of the Tribunal]



³³ *Bizimungu* Decision of 5 June 2008, para. 10 citing *Bagosora et al.*, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination (TC), 19 September 2005, para. 2. For example, where the further evidence to be given is of significant probative value, and not of a cumulative nature.