



UNITED NATIONS
NATIONS UNIES

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

OR: ENG

TRIAL CHAMBER III

Before Judges: Lee Gacuiga Muthoga, *Presiding*
Seon Ki Park
Robert Fremr

Registrar: Adama Dieng

Date: 6 October 2010

THE PROSECUTOR

v.

Iddephonse NIZEYIMANA

CASE NO. ICTR-2000-55C-PT

**DECISION ON PROSECUTOR'S MOTION TO ADMIT INTO EVIDENCE THE
STATEMENT OF GENERAL MARCEL GATSINZI**

Rule 89(C) and 92 bis of the Rules of Procedure and Evidence

Office of the Prosecutor:

Drew White
Yasmine Chubin
Zahida Virani
Kirsten Gray

Defence Counsel for Iddephonse Nizeyimana:

John Philpot
Cainnech Lussiaà-Berdou

INTRODUCTION

1. On 9 August 2010, the Prosecution filed a motion¹ requesting the admission of a Statement of General Marcel Gatsinzi ("Gatsinzi's Statement") pursuant to Rules 89(C) and 92*bis*. The Prosecution filed a replacement Annex A to the Motion on 11 August 2010. Ildephonse Nizeyimana opposes the Motion.² On 20 August 2010, the Prosecution filed a reply to Nizeyimana's Response.³

DELIBERATIONS

The Law on Admission of Written Statements

2. The Chamber recalls that for a written statement to be admissible under Rule 92*bis*, the general requirements of relevance and probative value must be satisfied.⁴ Evidence will be considered relevant, for the purposes of Rule 89 (C), if it can be shown that a connection exists between the evidence and proof of an allegation sufficiently pleaded in the Indictment.⁵ In addition, the non-exhaustive factors listed in Rule 92 *bis* (A) (i) and (ii)⁶, the formal requirements of Rule 92 *bis* (B) must also be met.
3. Pursuant to Rule 92 *bis* (A) of the Rules, a Trial Chamber has discretion to admit evidence in the form of a written statement which goes to proof of a matter other than the acts and conduct of the accused as charged in the Indictment. The term "acts and conduct of the accused" has been interpreted by the Appeals Chamber as a plain expression which should be given its ordinary meaning: deeds and behaviour of the

¹ Prosecutor's Motion to Admit into Evidence the Statement of General Marcel Gatsinzi, filed on 9 August 2010 ("Gatsinzi Motion").

² Defence Response to the Prosecutor's Motion to Admit into Evidence the Statement of General Marcel Gatsinzi Pursuant to Rules 89 (C) and 92 *bis*, filed on 16 August 2010 ("Response").

³ Prosecutor's Reply to Defence Response to Motion to Admit into Evidence the Statement of General Marcel Gatsinzi, filed on 20 August 2010 ("Prosecutor's Reply").

⁴ *The Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for the Admission of Written Statement Under Rule 92 *bis* (TC), 9 March 2004, ("*Bagosora et al.* Decision") para. 12.

⁵ *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T Decision on Joseph Nzirorera's Motion to Admit Documents Authored by Enoch Ruhigira (TC), Decision, 26 March 2008, para. 3;

⁶ Factors which favor 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.

- accused himself and not the acts and conduct of his co-perpetrators and / or subordinates.⁷
4. In cases alleging command responsibility and where the crimes charged involve widespread criminal conduct by the alleged subordinates of the accused, it may well be those subordinates are so proximate to the accused that the evidence of their acts and conduct which the prosecution seeks to prove by a Rule 92 *bis* statement becomes sufficiently pivotal to the prosecution case that it would not be fair to the accused to permit the evidence to be given in written form.⁸
 5. As stated above, 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. The statement need to be witnessed either by a person authorised to witness such a declaration in accordance with the law and procedure of a State or by a Presiding Officer appointed by the Registrar of the Tribunal for the purpose of taking such a statement.
 6. 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 under Articles 19 and 20 of the Statute. In that regard, among the matters for consideration are whether the statement goes to the proof of a critical element of the Prosecution's case against the Accused or touches upon a live and important issue between the parties.⁹ Where the evidence is so pivotal to the prosecution case, and where the person whose acts and conduct the written statement describes is so proximate to the accused, the Chamber may decide not to admit the proposed evidence in written form.¹⁰

The Written Statement of General Gatsinzi

7. Ildephonse Nizeyimana disputes that Gatsinzi's Statement should be admitted and argues that the affidavit: (i) is linked to the acts and conduct of the Accused and

⁷ *Prosecutor v. Slobodan 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 ("*Milošević* Decision"), para. 22; *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002 ("*Galic* Decision"), para. 10; *The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse and Joseph Nzirorera*, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 *bis* of the Rules and Order for Reduction of Prosecution Witness List, 11 December 2006 ("*Karemera et al.* Decision"), para. 10.

⁸ *Galic* Decision, para. 15; *Karemera et al.* Decision, para. 16; *Bagosora et al.* Decision, para. 12.

⁹ *Karemera et al.* Decision, para. 16; *Bagosora et al.* Decision, para. 16.

¹⁰ *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 *bis*(D) and of Expert Reports Pursuant to Rule 94 *bis* (TC), 14 January 2006, para. 16; *Galic* Decision, para. 10.

therefore is highly prejudicial (ii) goes to the central question of the Accused's position, command and control (iii) allegedly could tie the Accused under Article 6(3) command responsibility and joint criminal enterprise (iv) does not meet the applicable criteria of form detailed in Rule 92 *bis* (B).

8. The Chamber finds that the affidavit does not go to proof the acts and conducts of the Accused. As discussed above, the term "acts and conduct" has been interpreted by the Appeals Chamber as a plain expression which should be given its ordinary meaning: deeds and behaviour of the Accused. Bearing that in mind, the Chamber did not find any acts or conducts of the Accused or of his alleged subordinates/co-perpetrators depicted directly in the affidavit but rather a general description of the position of the Accused and the Rules of Discipline under which he operated.
9. Weighing the factors as outlined in Rule 92 *bis* (A), the affidavit relates to relevant military background and to issues regarding the Accused's character. However, the Chamber finds that it is not cumulative in nature. General Gatsinzi was of high rank in the FAR and at the ESO and has knowledge of the FAR Rules of Discipline, positions and personnel. The Prosecution submits that the affidavit is supported by testimonies that will be presented orally which will discuss the topics specified in the affidavit, however, none of the other witnesses enumerated in the Prosecution's list of witnesses are equivalent in rank or authority to General Gatsinzi or can submit similar information which will be cumulative to the affidavit.
10. The Chamber considers that Gatsinzi's Statement goes to proof of a pivotal element of the Prosecution's case against the Accused and touches upon a live and important issue between the Parties.¹¹ The alleged superior/subordinate relationship between the Accused and the officers listed in the affidavit as his subordinates is disputed between the Parties. Establishing this connection is a central and pivotal element to the Prosecution's case, and therefore will be highly prejudicial for the Accused if it is admitted as evidence without allowing oral interrogation to be conducted. Given General Gatsinzi's rank, knowledge and nexus to the Accused, there is also an overriding public interest in the evidence being presented *viva voce*. Further, the Chamber finds that the Prosecutor has not submitted a satisfactory reason for the witness' inability to testify in person. Therefore, the Chamber denies admission of the statement.

¹¹ *Karemera et al.* Decision, para. 16; *Bagosora et al.* Decision, para. 16.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Prosecutor's motion in its entirety.

Arusha, 6 October 2010, done in English.

Lee Gacuiga Muthoga
Presiding Judge

Seon Ki Park
Judge

Robert Fremr
Judge

[Seal of the Tribunal]