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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: 20 October 2010

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JUDICIAL PANEL ON APPEALS
ICTR

THE PROSECUTOR

v.

Ildephonse NIZEYIMANA

CASE NO. ICTR-2000-55C-PT

DECISION ON PROSECUTOR'S MOTION TO ADMIT INTO EVIDENCE THE
STATEMENTS OF SIX DECEASED WITNESSES

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

Office of the Prosecutor:

Drew White
Kirsten Gray
Yasmine Chubin
Zahida Virani
Astou Mbow

Defence Counsel for Ildephonse Nizeyimana:

John Philpot
Cainnech Lussiaà-Berdou
Myriam Bouazdi

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INTRODUCTION

1. On 9 August 2010, the Prosecution filed a motion requesting the admission of the statements of six deceased witnesses pursuant to Rules 89 (C) and 92 *bis* (C) ("Motion").¹ Ildephonse Nizeyimana opposes the Motion.²

DELIBERATIONS

The Law on Admission of Statements

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.³ 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.⁴ The Chamber must consider the non-exhaustive factors listed in Rule 92 *bis* (A) (i) and (ii)⁵. Pursuant to Rule 92 *bis* (C), the Chamber may admit a statement of a deceased person not in the form prescribed in Rule 92 *bis* (B) where the Chamber is so satisfied on a balance of probabilities that the person is deceased and finds from the circumstances in which the statement was made and recorded that there are satisfactory *indicia* of reliability.

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. 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. In addition to issues relating to the fairness of the trial, a relevant factor in this regard is whether the

¹ Prosecutor's Motion to Admit into Evidence the Statements of Six Deceased Witnesses, filed on 9 August 2010 ("Motion"); Prosecutor's Reply to Defence Response to Motion to Admit Into Evidence the Statements of Six Deceased Witnesses, filed on 23 August 2010.

² Defence Response to the Prosecutor's Motion to Admit Into Evidence the Statements of Six Deceased Witnesses Pursuant to Rules 89 (C) and 92 *bis*, filed on 16 August 2010 ("Response").

³ *The Prosecutor v. Théoneste Bagosora, Gratién 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.

⁴ *The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse 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.

⁵ 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.

evidence relates to a live and important issue between the parties, as opposed to a peripheral one.⁶

4. The Chamber must also consider whether to admit the statement if it discusses the acts or conduct of subordinates or co-perpetrators of the Accused. The Appeals Chamber in *Galić* stated that 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 to exercise its discretion not to admit the evidence in written form.⁷

5. Moreover, 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.⁸

The Statements of Six Deceased Witnesses

6. Ildephonse Nizeyimana argues that many of the statements are not relevant or reliable,⁹ go to the acts and conduct of the Accused¹⁰ and do not meet the form requirements.¹¹ The Chamber will review each statement below in consideration of the arguments raised. In his Response, Nizeyimana also requested the opportunity to make further submissions with respect to further redactions should statements be admitted. However, the Chamber considers that Nizeyimana should have made those submissions with his original Response. Therefore, the Chamber has reviewed the statements and, where appropriate, has indicated what additional text should be redacted below.

7. As a preliminary matter, Ildephonse Nizeyimana disputes the reliability of statements from Witnesses ZAE, ZAP, ZAR and ZBE on the grounds that they were taken by Rwandan local judicial authorities and that those authorities are not necessarily to be trusted as a

⁶ *Bagosora et al.*, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under 92 *bis* (TC), 9 March 2004, para. 16.

⁷ *The Prosecutor v. Stanislav Galić*, IT-98-89.AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis* (C) (AC), 7 June 2002, para. 13.

⁸ *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; *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; *Karemura et al.*, Decision on Variance of the Prosecution Witness List (TC), 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.

⁹ Motion, paras. 6, 7.

¹⁰ Motion, para. 8.

¹¹ Motion, para. 9.

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guarantor of due process and fundamental rights.¹² The Chamber notes that some of the statements were taken by Belgian Magistrates as part of an international rogatory commission and others were taken by Rwandan government authorities. The Chamber considers that Nizeyimana has not demonstrated that the statements are not voluntary, truthful and trustworthy.

Statement of Prosecution Witness GFL

8. Ildephonse Nizeyimana contends that this statement should not be admitted as: (i) it has no relevance once the last paragraph which details the acts and conduct of the Accused are redacted; and (ii) GFL was a convict detained in a Rwandese jail which renders his credibility questionable.¹³

9. The Chamber finds the statement relevant and probative. Paragraphs other than the last (which discusses the acts and conduct of the Accused and is redacted by the Prosecution in Annex C to the Motion) discuss the establishment of roadblocks and are relevant to the case. The Chamber also finds that there are sufficient *indicia* of reliability as the statement was taken by an ICTR investigator and is signed and dated by its author. The fact that GFL was a convict in a Rwandan jail goes to the consideration of weight, which the Chamber will assess at the end of the presentation of the evidence. Therefore, the Chamber declares the statement admissible subject to the redactions contained in Annex C to the Motion.

Statement of Prosecution Witness RA

10. The Chamber notes that RA's death certificate has not been filed as proof of death pursuant to Rule 92 *bis* (C). The Chamber will only consider admitting the statement once a copy of the official death certificate has been filed. Therefore, the Chamber does not admit the statement.

Statement of Prosecution Witness ZAE

11. Ildephonse Nizeyimana contends that this statement should not be admitted as: (i) it is mostly concerned with the acts and conduct of the Accused as well as Vincent Ntezimana and Alphonse Higaniro, two alleged co-perpetrators in the joint criminal enterprise ("JCE"); (ii) the statement is unreliable because it is coming from the Rwandan Ministry of Justice and was taken while the witness was jailed therefore he could have been subject to pressure; and

¹² Response, para. 10.

¹³ Response, paras. 13, 14.

(iii) the rogatory commission who heard the witness was held in the context of a case against an alleged close friend and co-perpetrator of Nizeyimana, Vincent Ntezimana.¹⁴

12. The Chamber finds that in addition to those redactions proposed by the Prosecution in Annex C to the Motion, certain other paragraphs need to be redacted because they pertain to the acts and conduct of the Accused or discuss the acts and conduct of subordinates or superiors that are pivotal to the Prosecution's case and proximate to the Accused. These paragraphs are listed in Annex A attached to this Decision. The text not noted for redaction in Annex A regarding Ntezimana and Higaniro is not so pivotal to the Prosecution's case and proximate to the Accused to render them prejudicial to Ildephonse Nizeyimana. The Chamber finds that the statement has sufficient *indicia* of reliability to be admitted as it is sworn, signed and dated by the witness before the international rogatory commission. The fact that ZAE was in a Rwandan jail goes to the consideration of weight, which the Chamber will assess at the end of the presentation of the evidence. The Chamber therefore declares the statement admissible subject to the redactions contained in Annex A to this Decision and those proposed by the Prosecution in Annex C to the Motion.

Statement of Prosecution Witness ZAP

13. Ildephonse Nizeyimana contends that this statement should not be admitted as: (i) it corroborates a large number of other witnesses listed to testify on the same crime and live testimonies should be privileged over Rule 92 *bis* statements; (ii) the statement describes important events and proximate alleged subordinates to the Accused and all references to ESO and any soldier should be redacted as the Prosecution alleges that the Accused had command and control over soldiers in the area; and (iii) the evidence adduced would require cross-examination which is not possible.¹⁵

14. The Chamber notes that the statement is cumulative in nature and that other witnesses are scheduled to testify regarding the crime and this is a factor that militates towards admission under Rule 92 *bis* (A)(i). The statement does discuss the events surrounding the death of Rosalie Gicanda as described in paragraph 23 of the Indictment. However, the description of these events including the alleged subordinates is not so proximate nor is the event so pivotal to the Prosecution's case to render the statement inadmissible.

¹⁴ Response, paras. 16-18.

¹⁵ Response, para. 19.

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15. The Chamber recalls that the rules specifically allow for statements to be admitted if given by persons who are deceased pursuant to Rule 92 *bis* (C). The admission of these statements does not afford for cross-examination and the Chamber has taken this into account in deciding whether the admission of the statement would be prejudicial to the Accused. In this case, the Chamber does not find that there is any prejudice in admitting the statement of ZAP without the possibility of cross-examination as other witnesses will be called to testify who will be cross-examined on the issue. Lastly, the Chamber notes that a copy of the original signed statement by ZAP was not included in Annex C to the Motion. The Chamber admits the statement of ZAP subject to submission of a copy of the original signed statement.

Statement of Prosecution Witness ZAR

16. Ildephonse Nizeyimana alleges that this statement should not be admitted as: (i) many elements pertain to the acts and conduct of the Accused or his alleged subordinates or co-perpetrators; and (ii) the evidence adduced would require cross-examination which is not possible.¹⁶

17. The Chamber notes that ZAR's statement does discuss the acts and conduct of Dr. Kageruka who is mentioned in paragraph 23 of the Indictment in the context of the events at Rosalie Gicanda's house. However, Dr. Kageruka is not portrayed as a subordinate of the Accused in the Indictment. Reviewing the statement, the Chamber finds that the statement is not so proximate to the Accused nor is the event so pivotal to the Prosecution's case to render the statement inadmissible. Further, the Chamber does not find that there is any prejudice in admitting the statement of ZAR without the possibility of cross-examination. Lastly, the Chamber notes that a copy of the original signed statement by ZAR was not included in Annex C to the Motion. The Chamber admits the statement of ZAR subject to submission of a copy of the original signed statement.

Statement of Prosecution Witness ZBE

18. Ildephonse Nizeyimana argues that this statement should not be admitted as: (i) many elements pertain to the acts and conduct of the Accused or his alleged subordinates or co-perpetrators and if all the elements were redacted the statement would not be relevant; and (ii) the evidence adduced would require cross-examination which is not possible.¹⁷

¹⁶ Response, para. 20.

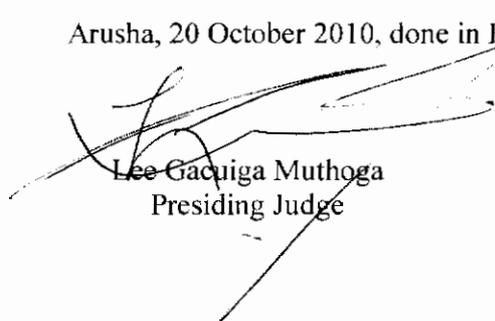
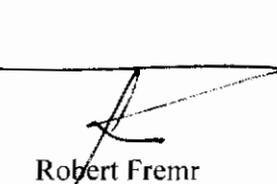
¹⁷ Response, para. 21.

19. The Chamber finds that much of the discussion of Vincent Ntezimana in the statement should be redacted. The elements discussed are directly related to important events described in the Indictment and are very proximate to the Accused as Ntezimana is listed as part of the alleged JCE and in substantive paragraphs of the Indictment as allegedly acting together with the Accused. The Chamber has listed the further required redactions in Annex A to this Decision. However, the Chamber finds that those sections not marked for redaction are still relevant and probative as they discuss the situation in Butare in 1994 as well as other alleged actors in the region. Finally, the Chamber does not find that there is any prejudice in admitting the statement of ZBE without the possibility of cross-examination. Therefore, the Chamber declares the statement admissible, subject to the redactions proposed by the Prosecution in Annex C to the Motion and those contained in Annex A to this Decision.

FOR THE ABOVE REASONS, THE CHAMBER

- I. **DECLARES ADMISSIBLE** the statement of Prosecution Witness GFL, subject to the redactions proposed by the Prosecution in Annex C to the Motion;
- II. **DECLARES ADMISSIBLE** the statement of Prosecution Witnesses ZAE and ZBE, subject to the redactions proposed by the Prosecution in Annex C to the Motion and the further redactions in Annex A of this Decision;
- III. **DECLARES ADMISSIBLE** the statement of Prosecution Witness ZAP, subject to the redactions proposed by the Prosecution in Annex C to the Motion and the submission of a copy of the original signed statement;
- IV. **DECLARES ADMISSIBLE** the statement of Prosecution Witness ZAR, subject to the redactions proposed by the Prosecution in Annex C to the Motion and the submission of a copy of the original signed statement; and
- V. **DENIES** the Prosecution's Motion in all other respects.

Arusha, 20 October 2010, done in English.

		
Lee Gacugi Muthoga Presiding Judge	Seon Ki Park Judge	Robert Fremr Judge
	[Seal of the Tribunal]	