

168/H



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-00-55C-AR73.2

08th March 2011

{168/H – 158/H}

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Decision of: 8 March 2011

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: KEFEL KUMELIC A. A. FANDE
SIGNATURE: [Handwritten Signature] DATE: 08 March 2011

THE PROSECUTOR

v.

Ildephonse NIZEYIMANA

Case No. ICTR-00-55C-AR73.2

**DECISION ON PROSECUTOR'S INTERLOCUTORY APPEAL OF
DECISION NOT TO ADMIT MARCEL GATSINZI'S STATEMENT INTO
EVIDENCE PURSUANT TO RULE 92BIS**

Office of the Prosecutor:

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ICTR Appeals Chamber
Date: 08 March 2011
Action: R. Jumar
Copied To: Concerned Judges
S.C., L.S., A.S., P.S.

CHS, LSS [Handwritten Signature]

Counsel for Ildephonse Nizeyimana:

John Philpot
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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 (“Appeals Chamber” and “Tribunal”, respectively) is seised of the “Prosecutor’s Interlocutory Appeal Against ‘Decision on Prosecutor’s Motion to Admit into Evidence the Statement of General Marcel Gatsinzi’ Dated 6 October 2010”, filed by the Prosecution on 10 December 2010 (“Appeal”). On 20 December 2010, Ildephonse Nizeyimana (“Nizeyimana”) filed a response,¹ to which the Prosecution replied on 28 December 2010.²

A. Background

2. On 9 August 2010, the Prosecution requested that a written statement by the former Commander of the *École des sous-officiers* (“ESO”), Marcel Gatsinzi (“Gatsinzi”), describing Nizeyimana’s position in the Rwandan Armed Forces (“FAR”) in 1994, be admitted into evidence pursuant to Rules 89(C) and 92bis of the Rules of Procedure and Evidence of the Tribunal (“Rules”).³ On 6 October 2010, Trial Chamber III of the Tribunal (“Trial Chamber”) denied the Prosecution’s request to admit the Gatsinzi Statement into evidence because: (i) the evidence therein is not cumulative in nature; (ii) the admission thereof would be highly prejudicial to Nizeyimana given that it concerns a pivotal element of the Prosecution’s case and touches upon a live and important issue between the Parties; (iii) there is an overriding public interest in the evidence being presented *viva voce*; and (iv) the Prosecution did not submit a satisfactory reason for Gatsinzi’s inability to testify in person.⁴

3. On 13 October 2010, the Prosecution sought certification to appeal the Trial Chamber’s four reasons for denying admission of the Gatsinzi Statement.⁵ On 2 December 2010, the Trial Chamber certified the Prosecution’s four grounds of appeal.⁶

¹ Response to the Prosecutor’s Interlocutory Appeal against “Decision on Prosecutor’s Motion to Admit into Evidence the Statement of General Marcel Gatsinzi” dated 6 October 2010, 20 December 2010 (“Response”).

² Appellant’s Reply to Response to Prosecutor’s Interlocutory Appeal against “Decision on Prosecutor’s Motion to Admit into Evidence the Statement of General Marcel Gatsinzi” Dated 6 October 2010, 28 December 2010 (“Reply”).

³ *The Prosecutor v. Ildephonse Nizeyimana*, Case No. ICTR-00-55C-PT, Prosecutor’s Motion to Admit into Evidence the Statement of General Marcel Gatsinzi, 9 August 2010 (“Original Motion”). The statement by Marcel Gatsinzi was attached as Annex A to the Original Motion. An amended version of the statement was filed on 11 August 2010 to correct an error in the date of the statement, from April to August 2010. See *The Prosecutor v. Ildephonse Nizeyimana*, Case No. 00-55-PT, Interoffice Memorandum, Subject: “Prosecutor v Ildephonse NIZEYIMANA, Case No: ICTR-00-55-PT Affidavit of Marcel Gatsinzi signed and dated 11 August 2010”, 11 August 2010 (“Gatsinzi Statement”).

⁴ *The Prosecutor v. Ildephonse Nizeyimana*, Case No. ICTR-2000-55C-PT, Decision on Prosecutor’s Motion to Admit into Evidence the Statement of General Marcel Gatsinzi, 6 October 2010 (“Impugned Decision”), paras. 9, 10, p. 5.

⁵ *The Prosecutor v. Ildephonse Nizeyimana*, Case No. ICTR-2000-55C-PT, Application for Certification to Appeal “Decision on Prosecutor’s Motion to Admit into Evidence the Statement of General Marcel Gatsinzi”, 13 October 2010 (“Motion for Certification to Appeal”), para. 2.

4. In its Appeal, the Prosecution submits that the Trial Chamber misapplied the principles of admission under Rule 92*bis* of the Rules, and thereby erred in denying the admission of the Gatsinzi Statement.⁷ In particular, the Prosecution submits that: (i) the Gatsinzi Statement is cumulative in nature;⁸ (ii) the Gatsinzi Statement does not go to proof of a pivotal element of the Prosecution's case, and only touches upon an issue that is peripheral to the central questions to be determined;⁹ (iii) there is no overriding public interest for the evidence to be heard *viva voce*;¹⁰ and, (iv) Rule 92*bis* of the Rules requires neither the appearance in person of a witness whose statement is sought to be admitted, nor that a satisfactory reason be provided for the witness's inability to testify in person.¹¹ The Prosecution argues that the denial of admission of the Gatsinzi Statement affects its right to a fair trial and is prejudicial to the interests of justice.¹² Accordingly, the Prosecution requests the Appeals Chamber to direct that the Gatsinzi Statement be admitted into evidence.¹³

5. Nizeyimana opposes the Appeal and contends that the Prosecution has not met its burden in showing that the Trial Chamber committed a discernible error.¹⁴

B. Standard of Review

6. Decisions relating to the admission of evidence and the general conduct of trial proceedings fall within the discretion of the Trial Chamber.¹⁵ In order to successfully challenge a discretionary

⁶ *The Prosecutor v. Ildephonse Nizeyimana*, Case No. ICTR-00-55C-PT, Decision on Prosecution's Motion for Certification to Appeal Decision on Prosecutor's Motion to Admit into Evidence the Statement of General Marcel Gatsinzi, 2 December 2010, p. 4 ("The Chamber [...] CERTIFIES the following issues for appeal:

I. Whether the Trial Chamber was correct in holding that the evidence in General Gatsinzi's affidavit is not cumulative in nature because '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' and that '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.'

II. Whether the Trial Chamber was correct in holding that because General 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, admission of the affidavit 'without allowing oral interrogation to be conducted' would be highly prejudicial to the Accused.

III. Whether the Trial Chamber was correct in holding that 'there is ... an overriding public interest in the evidence [of General Gatsinzi] being presented *viva voce*.'

IV. Whether the Trial Chamber was correct in finding that 'the Prosecutor has not submitted a satisfactory reason for [General Gatsinzi's] inability to testify in person.'" (Internal citations omitted).

⁷ Appeal, para. 2.

⁸ Appeal, paras. 10-18, 22.

⁹ Appeal, paras. 23-35. *See also* Reply, paras. 10, 11.

¹⁰ Appeal, paras. 36-41. *See also* Reply, paras. 13-16.

¹¹ Appeal, paras. 42-49. *See also* Reply, paras. 17-20.

¹² Appeal, paras. 18-22, 50. *See also* Reply, para. 7.

¹³ Appeal, para. 51. *See also* Reply, para. 21.

¹⁴ Response, paras. 8, 10-23, p. 9.

¹⁵ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.17, Decision on Slobodan Praljak's Appeal of the Trial Chamber's Refusal to Decide upon Evidence Tendered Pursuant to Rule 92 *Bis*, 1 July 2010, para. 8; *The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. ICTR-97-21-AR73, Decision on "Appeal of Accused Arsène Shalom Ntahobali against the Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using

decision, a party must demonstrate that the Trial Chamber has committed a discernible error resulting in prejudice to that party.¹⁶ The Appeals Chamber will only overturn a Trial Chamber's discretionary decision where it is found to be (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.¹⁷

C. Applicable Law

7. According to Rule 89(C) of the Rules, a Chamber may admit any relevant evidence which it deems to have probative value. Rule 90(A) of the Rules provides that witnesses shall, in principle, be heard directly by Chambers, unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71 of the Rules. Rule 92bis(A) of the Rules provides that a Trial Chamber may admit, in whole or in part, written witness statements in lieu of oral testimony, as long as the evidence to be adduced does not go to proof of the acts and conduct of the accused as charged in the indictment. Rule 92bis(A) of the Rules outlines a non-exhaustive list of factors in favour of and against admitting evidence in the form of a written statement. Even where a statement meets the formal requirements of Rule 92bis of the Rules, the decision to admit that statement into evidence remains discretionary.¹⁸

D. Discussion

8. The Appeals Chamber notes that, in relevant part, the Gatsinzi Statement describes Nizeyimana as having held the rank of Captain in the FAR and the posts of Chief of Intelligence ("S2") as well as Chief Instructor and Chief of Operations ("S3") at ESO in 1994.¹⁹ It states that, in this capacity, Nizeyimana "had a big role in coordinating the day to day training and operation of ESO, including commanding over all subordinate personnel under him"²⁰ and was "required to be

Ntahobali's Statements to Prosecution Investigators in July 1997", 27 October 2006, para. 10. See also *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.16, Decision on Appeal Concerning the Severance of Matthieu Ndirumpatse, 19 June 2009 ("Karemera Decision of 19 June 2009"), para. 16; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.14, Decision on Ma[t]thieu Ndirumpatse's Appeal from the Trial Chamber Decision of 17 September 2008, 30 January 2009, para. 17; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007 ("Prlić Decision of 23 November 2007"), para. 8.

¹⁶ *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.18, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation, 18 May 2010 ("Karemera Decision of 18 May 2010"), para. 11; *Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTR-02-78-AR73, Decision on Kanyarukiga's Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents, 19 February 2010 ("Kanyarukiga Decision"), para. 9.

¹⁷ See, e.g., *Karemera Decision of 18 May 2010*, para. 11; *Kanyarukiga Decision*, para. 9; *Karemera Decision of 19 June 2009*, para. 16.

¹⁸ Rule 92bis(A) of the Rules reads: "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." (Emphasis added).

¹⁹ Gatsinzi Statement, paras. 7, 8, 11.

²⁰ Gatsinzi Statement, para. 8.

familiar with and administer the Rules of Discipline of the FAR.”²¹ The Gatsinzi Statement describes Nizeyimana as the immediate subordinate of Lieutenant Colonel Tharcisse Muvunyi, who in turn was the immediate subordinate of Gatsinzi and who acted as Commander of ESO in Gatsinzi’s absence.²² It also names individual Sub-Lieutenants as Nizeyimana’s subordinates at ESO.²³ The Gatsinzi Statement indicates that “a superior has the right and duty to enforce compliance with the general rules governing discipline by all soldiers below him in order of hierarchy, even if the soldiers are not under his operational authority.”²⁴

9. The Trial Chamber found that the Gatsinzi Statement does not go to proof of the acts and conduct of Nizeyimana or of his alleged subordinates, but rather relates to relevant military background and issues regarding Nizeyimana’s character.²⁵

1. Alleged Error in Assessing the Cumulative Nature of the Gatsinzi Statement

10. As indicated above, the Trial Chamber’s denial of admission of the Gatsinzi Statement was based in part on its finding that the evidence therein is not cumulative in nature:

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.²⁶

11. The Prosecution submits that the Trial Chamber erred in finding that the evidence in the Gatsinzi Statement was not cumulative in nature.²⁷ It argues that the question of determining whether evidence is cumulative cannot be based on the witness’s position or personal characteristics, but rather on the quantity of similar evidence that is available from other sources.²⁸ It contends that even Nizeyimana conceded that the evidence sought to be admitted was cumulative when he argued that it was so cumulative as to render its admission unnecessary.²⁹ The Prosecution submits that the Trial Chamber’s failure to provide reasons for making a finding that such evidence

²¹ Gatsinzi Statement, para. 11.

²² Gatsinzi Statement, paras. 6, 7.

²³ Gatsinzi Statement, para. 9.

²⁴ Gatsinzi Statement, para. 13.

²⁵ Impugned Decision, paras. 8, 9.

²⁶ Impugned Decision, para. 9.

²⁷ Appeal, para. 10.

²⁸ Appeal, para. 12. *See also* Appeal, paras. 14, 38.

²⁹ Appeal, para. 16. *See also* Reply, para. 6.

was not cumulative, where both Parties submitted that it is cumulative, is further indicative of error.³⁰

12. Nizeyimana responds that he is in no way opposed to the Trial Chamber's finding that the evidence is not cumulative, and that the Prosecution misrepresents his argument.³¹ He submits that the Trial Chamber has not exceeded its discretionary power in judging that the provenance of the evidence affects its nature and in turn the question of whether it is cumulative.³²

13. The Appeals Chamber notes that Rule 92bis(A)(i)(a) of the Rules provides that factors in favour of admitting evidence in the form of a written statement include, but are not limited to, circumstances in which the evidence in question is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts. The Rule thereby defines the notion of "cumulative evidence" as evidence sought to be admitted in written form which pertains to *similar facts* which have been or will be adduced in oral form.

14. In its Original Motion, the Prosecution indicated that "[t]he evidence is cumulative because other former members of the FAR will testify as to the Accused's position and duties as an officer in the FAR."³³ The Trial Chamber did not disagree with the Prosecution's submission that "the [Gatsinzi Statement] is supported by testimonies that will be presented orally which will discuss the topics specified in the [Gatsinzi Statement]".³⁴ The Trial Chamber's finding, however, that only witnesses of equivalent rank or authority to Gatsinzi could provide evidence that was cumulative to his³⁵ erroneously implies that evidence is only of a cumulative nature when witnesses give oral testimony of similar facts *and of similar weight*. In the Appeals Chamber's view, the Trial Chamber misinterpreted Rule 92bis(A)(i)(a) of the Rules as requiring the additional requirement that cumulative evidence be of similar weight and, in doing so, based its decision on an incorrect interpretation of the governing law and committed a discernible error.

2. Alleged Error in Finding that Admission of the Gatsinzi Statement Would Be Highly Prejudicial

15. The Trial Chamber's denial of admission of the Gatsinzi Statement was also based in part on its finding that its admission would be highly prejudicial to Nizeyimana given its pivotal nature:

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. The alleged superior/subordinate relationship between the Accused and the officers listed

³⁰ Appeal, para. 17.

³¹ Response, para. 11.

³² Response, paras. 11, 14.

³³ Original Motion, para. 9.

³⁴ Impugned Decision, para. 9.

³⁵ Impugned Decision, para. 9.

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.³⁶

16. The Prosecution submits that, because it does not seek to admit the Gatsinzi Statement to prove the acts and conduct of Nizeyimana's alleged subordinates, the Trial Chamber erred in law in finding that the Gatsinzi Statement goes to proof of a pivotal element in this case.³⁷ The Prosecution further submits that the Trial Chamber failed to give sufficient weight to the consideration that the Gatsinzi Statement, which describes no crime or criminal conduct, does not contain any evidence that goes to Nizeyimana's own acts or conduct that can be relied upon to establish Nizeyimana's responsibility as a superior.³⁸ The Prosecution argues that "without acts or conduct the evidence in the [Gatsinzi Statement] is miscast as 'highly prejudicial'."³⁹

17. Nizeyimana responds that the Prosecution misreads the Impugned Decision and confuses the issue of whether the proposed evidence relates to the acts and conduct of the accused with the issue of determining whether to call a witness for cross-examination.⁴⁰ Nizeyimana submits that his relationship, command, and control over subordinates is a contentious and highly pivotal element of the case against him, and that admission of the evidence, without an opportunity for him to cross-examine its author, would be severely prejudicial to him.⁴¹

18. The Appeals Chamber recalls that Rule 92*bis*(A)(ii)(b) and (c) of the Rules provides that factors against admitting evidence in the form of a written statement include whether a party objecting can demonstrate that its prejudicial effect outweighs its probative value, or whether there are any other factors which make it appropriate for the witness to attend for cross-examination. Contrary to the Prosecution's suggestion,⁴² a written statement need not necessarily go to proof of the accused's acts or conduct in order to be prejudicial, and the fact that a relevant and probative written statement does not go to proof of the accused's acts or conduct does not necessarily render it admissible.

19. The Gatsinzi Statement directly indicates that Nizeyimana was the superior of Sub-Lieutenants Jean Pierre Bizimana, Modeste Gatsinzi, Alphonse Ndayambaje, and Gakwerere.⁴³ The Appeals Chamber notes that the same Sub-Lieutenants are specifically identified in the Second Amended Indictment against Nizeyimana as having committed or participated in most of the crimes

³⁶ Impugned Decision, para. 10 (internal reference omitted).

³⁷ Appeal, paras. 23-29.

³⁸ Appeal, paras. 31, 33, 35.

³⁹ Reply, para. 11.

⁴⁰ Response, para. 16.

⁴¹ Response, paras. 17, 18, 20.

⁴² See Reply, para. 11.

⁴³ Gatsinzi Statement, para. 9.

charged therein.⁴⁴ The Appeals Chamber also notes that the Gatsinzi Statement proclaims that “[h]olding the combination of both S2 and S3 meant that Captain Nizeyimana had a big role in coordinating the day to day training and operation of ESO, *including commanding over all subordinate personnel under him.*”⁴⁵ As such, the Gatsinzi Statement effectively goes to establishing that Nizeyimana was a superior of those who are alleged in the Second Amended Indictment to have committed many of the crimes charged therein. The Appeals Chamber therefore finds that the Prosecution has not demonstrated that the Trial Chamber erred in concluding that it would be highly prejudicial to Nizeyimana to admit evidence of his superior/subordinate relationship with, and command over, individuals named as perpetrators in the Second Amended Indictment without the opportunity for cross-examination.⁴⁶

3. Alleged Error in Finding an Overriding Public Interest in Presenting the Evidence *Viva Voce*

20. The Trial Chamber’s denial of admission of the Gatsinzi Statement was further based on its finding that “[g]iven General Gatsinzi’s rank, knowledge and nexus to the Accused, there is also an overriding public interest in the evidence being presented *viva voce.*”⁴⁷

21. The Prosecution submits that the Trial Chamber was unreasonable in so finding without explaining why Gatsinzi’s rank, knowledge, and nexus to Nizeyimana were relevant to oral testimony, or explaining how the factor of an overriding public interest was satisfied.⁴⁸ The Prosecution contends that, since the matters contained in the Gatsinzi Statement are general in nature and other witnesses would testify to them, having Gatsinzi testify in person would serve no overriding public interest.⁴⁹

22. Nizeyimana responds that the Trial Chamber exercised its discretion reasonably and wisely, and that it is self-explanatory why a witness who was the superior of and closely linked to the accused, and who likely had knowledge of the context and facts at the time of the events, would

⁴⁴ See, e.g., *The Prosecutor v. Ildephonse Nizeyimana*, Case No. ICTR-00-55C-PT, Second Amended Indictment, 29 September 2010 (“Second Amended Indictment”), paras. 5-7, 10, 16-21, 23, 27, 36, 37, 39, 41-58. This was the operative indictment at the time of the Impugned Decision. Since then, the Trial Chamber ordered further corrections to the Second Amended Indictment, none of which affected the identifications of the aforementioned Sub-Lieutenants referred to herein. See *The Prosecutor v. Ildephonse Nizeyimana*, Case No. ICTR-00-55C-PT, Decision on Defence Preliminary Motion on Defects in the Indictment, dated 15 December 2010, filed 16 December 2010. The Second Amended Indictment of 29 September 2010 was accordingly re-filed, with the ordered corrections, on 17 December 2010. See *The Prosecutor v. Ildephonse Nizeyimana*, Case No. ICTR-00-55C-PT, Second Amended Indictment (Filed Pursuant to Trial Chamber Order Dated 15 December 2010), 17 December 2010.

⁴⁵ Gatsinzi Statement, para. 8 (emphasis added).

⁴⁶ Cf. *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002 (“*Galić Decision*”), para. 15.

⁴⁷ Impugned Decision, para. 10.

⁴⁸ Appeal, paras. 36, 37, 40, 41.

⁴⁹ Appeal, para. 39. See also Reply, paras. 12, 14-16.

present an overriding interest favouring public testimony.⁵⁰ He submits that Gatsinzi should testify publicly so as to clarify where he was and what he was doing at the time of the events alleged in the Second Amended Indictment, because Gatsinzi was possibly involved in and/or responsible for those events.⁵¹ Nizeyimana further contends that the evidence in the Gatsinzi Statement is not general and is strongly disputed, and therefore cannot be given in written form.⁵²

23. The Prosecution replies that Nizeyimana's claims fail to focus on the evidence in the Gatsinzi Statement, and instead focus on the possibility of other evidence.⁵³

24. The Appeals Chamber notes that Rule 92*bis* of the Rules, which was primarily intended to be used to establish "crime-base" evidence and to make trials more expeditious,⁵⁴ identifies a particular situation in which, once the provisions of the Rule are satisfied, and where the material has probative value within the meaning of Rule 89(C) of the Rules, it is, in principle, in the interests of justice to admit the evidence in written form.⁵⁵ However, where there is an overriding public interest in the evidence in question being presented orally, the Trial Chamber may take this into account as a factor against admitting the evidence in written form.⁵⁶

25. The Appeals Chamber finds that the Prosecution has not shown that the Trial Chamber erred. Although the Trial Chamber could have provided more extensive reasons justifying its conclusion that Gatsinzi's rank, knowledge, and nexus to Nizeyimana created an overriding public interest in hearing his evidence orally, the Appeals Chamber considers that the Prosecution has not demonstrated how such a conclusion was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.

4. Alleged Error in Requiring Reasons for Gatsinzi's Inability to Testify in Person

26. The Trial Chamber's denial of admission of the Gatsinzi Statement was further based, in part, on its finding that the Prosecution "has not submitted a satisfactory reason for [Gatsinzi's] inability to testify in person."⁵⁷

27. The Prosecution submits that there is no requirement with respect to Rule 92*bis* of the Rules that a satisfactory reason must be provided for a witness's inability to testify in person, and that

⁵⁰ Response, paras. 19, 21.

⁵¹ Response, para. 19.

⁵² Response, para. 20.

⁵³ Reply, para. 13.

⁵⁴ See *Galić Decision*, para. 16; *Prlić Decision* of 23 November 2007, para. 43.

⁵⁵ *Galić Decision*, para. 12.

⁵⁶ Rule 92*bis*(A)(ii)(a) of the Rules.

⁵⁷ *Impugned Decision*, para. 10.

such a consideration is irrelevant.⁵⁸ It contends that, in seeking to admit the statement in written form, the Prosecution sought to assist the Trial Chamber in ensuring the economical and expeditious use of trial time.⁵⁹

28. Nizeyimana concedes that there is no such requirement in the Rule, but submits that the Trial Chamber did not state that a satisfactory reason “must” be provided.⁶⁰ He contends that the Trial Chamber merely stated that it saw no justification for admitting the Gatsinzi Statement.⁶¹

29. The Appeals Chamber considers that the Trial Chamber’s finding that the Prosecution had not submitted a satisfactory reason for Gatsinzi’s inability to testify in person not only immediately preceded, but was also causally conjoined to the Trial Chamber’s decision to deny admission of the Gatsinzi Statement by the adverb “therefore”.⁶² The Trial Chamber thus considered the lack of justification for Gatsinzi’s inability to testify in person to constitute a factor against admitting the Gatsinzi Statement. However, nothing in Rule 92*bis* of the Rules requires the applicant to provide justifications in this respect. Moreover, nothing in the Original Motion or in any subsequent filings suggests that Gatsinzi was or purported to be unable to testify in person. There is therefore no basis for the conclusion that Gatsinzi was unable to testify, and no basis to require the Prosecution to provide a justification in this respect.

30. For these reasons, while the factors listed in Rule 92*bis*(A)(ii) of the Rules are not exhaustive, the Appeals Chamber finds that the Trial Chamber erred in considering a lack of justification for Gatsinzi’s supposed inability to testify as a factor against admitting the Gatsinzi’s Statement.

5. Conclusion

31. Although the Trial Chamber made errors in the Impugned Decision, the Appeals Chamber has found that the Trial Chamber did not err in denying admission to the Gatsinzi Statement on the bases that there is an overriding public interest to hear the Gatsinzi Statement *viva voce* and that it would be highly prejudicial to Nizeyimana to admit evidence without allowing for cross-examination. The Prosecution has not demonstrated any prejudice, and it is not necessary to overturn the Impugned Decision and order the admission of the Gatsinzi Statement.

⁵⁸ Appeal, paras. 42-45, 49.

⁵⁹ Appeal, para. 46.

⁶⁰ Response, para. 22.

⁶¹ Response, para. 22.

⁶² Impugned Decision, para. 10 (“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.” (Emphasis added)).

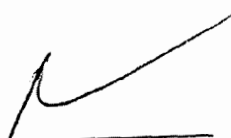
E. Disposition

32. For the foregoing reasons, the Appeals Chamber **DENIES** the Appeal.

Done in English and French, the English version being authoritative.

Done this eighth day of March 2011,
At The Hague,
The Netherlands.





Judge Patrick Robinson
Presiding

[Seal of the Tribunal]