



ICTR-99-54-T
11-04-2011
(102409-102404)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 11 April 2011

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

Handwritten signature and date: 11 April 2011

**DECISION ON DEFENCE MOTION TO DECLARE WRITTEN STATEMENTS
ADMISSIBLE AND FOR LEAVE FOR CERTIFICATION OF THESE WRITTEN
STATEMENTS BY A PRESIDING OFFICER**

Office of the Prosecutor

Mr. Wallace Kapaya
Ms. Veronic Wright
Mr. Patrick Gabaake
Mr. Iskandar Ismail
Mr. Michael Kalisa
Ms. Faria Rekkas

Defence Counsel

Mr. Peter Herbert
Ms. Mylène Dimitri
Mr. Deogratias Sebureze
Ms. Anne-Gaëlle Denier
Ms. Chloé Gaden-Gistucci

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa, and Mparany Rajohnson (the "Chamber");

BEING SEIZED of the "Defence Motion to Declare Written Statements Admissible and for Leave for Certification of These Written Statements by a Presiding Officer", filed confidentially on 15 September 2010 (the "Defence Motion");

CONSIDERING:

- (a) The "Prosecution's Response to the Defence Motion to Declare Written Statements Admissible and for Leave for Certification of These Written Statements by a Presiding Officer", filed confidentially on 22 September 2010 (the "Prosecution Response");
- (b) The "Defence Reply to Prosecution Response to Defence Motion to Declare Written Statements Admissible and for Leave for Certification by a Presiding Officer of These Written Statements", filed on 27 September 2010 (the "Defence Reply");
- (c) The "Additional Submissions to Defence Motion to Declare Written Statements Admissible and for Leave for Certification by a Presiding Officer of These Written Statements", filed confidentially on 8 October 2010 (the "Defence Additional Submissions");
- (d) The "Prosecution's Response to Additional Submissions to Defence Motion to Declare Written Statements Admissible and for Certification of These Written Statements by a Presiding Officer", filed confidentially on 12 October 2010 (the "Prosecution Response to Additional Submissions"); and
- (e) The "Defence Reply to Prosecutor's Response to Additional Submissions to Defence Motion to Declare Written Statements Admissible and for Certification of These Written Statements by a Presiding Officer", filed on 18 October 2010 (the "Defence Reply to the Response to Additional Submissions");

CONSIDERING also the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion pursuant to Rule 92bis of the Rules.

INTRODUCTION

1. On 9 February 2010, the Chamber ordered protective measures for potential Defence witnesses.¹
2. On 15 September 2010, the Defence filed the present Motion. The Prosecution responded on 22 September 2010, and the Defence replied on 27 September 2010.²

¹ Decision on Defence Urgent Motion for Witness Protective Measures (TC), 9 February 2010, pp. 8-9.

3. On 21 October 2010, the Defence filed its Pre-Defence Brief.³

SUBMISSIONS OF THE PARTIES

Defence Motion

4. The Defence prays the Chamber to declare that the will-say statements of Witnesses DWAN-5, DWAN-52, DWAN-27, DWAN-400,⁴ DWAN-38, DWAN-135, DWAN-149 and DWAN-150 are admissible into evidence, subject to their certification by a Presiding Officer in accordance with Rule 92*bis*. It further prays the Chamber to order the Registrar to obtain certification of these statements. The Chamber should also order that protective measures cover these witnesses, and should ensure that their statements remain confidential.⁵

5. The Defence submits that the written statements concern the credibility of 9 Prosecution witnesses, and corroborate the evidence of 11 Defence witnesses who are expected to testify orally on similar facts. It also affirms that the statements do not go to the acts and conduct of the Accused as charged in the Indictment.⁶

6. The Defence acknowledges that the will-say statements do not take the form required by Rule 92*bis* since they are not signed by the witnesses. Settled jurisprudence allows the admission of unsigned written statements if they will be certified by a Presiding Officer appointed for this purpose.⁷ Additionally, the Registrar invited the Defence to move the Chamber to determine the admissibility of the statements.⁸

7. The written statements have a cumulative nature, as they will corroborate the evidence of other witnesses who have testified or will testify to similar facts. Some statements also pertain to the historical, political or military background to this case.⁹

Prosecution Response

8. The Prosecution requests that the Chamber dismiss the Motion and sanction the Defence for submitting a frivolous and vexatious motion. In the Prosecution's view, the Motion is not legally tenable on four different grounds.¹⁰

² Defence Motion, p. 1; Prosecution Response, p. 1; Defence Reply, p. 1.

³ Pre-Defence Brief, 21 October 2010.

⁴ According to a Defence filing on 26 October 2010, DWAN-400 should instead read DWAN-109. See Pre Defence Conference - follow up issues, 26 October 2010, p. 1. The Chamber will refer to this witness below as DWAN-109.

⁵ Defence Motion, paras. 17-18, 48.

⁶ *Id.*, paras. 15, 19-47.

⁷ *Id.*, para. 12, citing *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (TC), 12 September 2006 ("*Popović et al.* Decision"), para. 21; *Prosecutor v. Milan Milutinović et al.*, Decision Denying Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 *bis* (TC), 13 September 2006, para. 11; *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Decision on Defence Motion to Admit the Evidence of a Witness in the Form of a Written Statement Pursuant to Rule 92*bis* (TC), 17 January 2006 ("*Orić* Decision"); *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Prosecution's Motion for the Admission of Written Evidence Pursuant to Rule 92 *bis* of the Rules (TC), 16 January 2006 ("*Martić* Decision"), para. 11.

⁸ Defence Motion, paras. 3-4, 12, Annexes 1-2.

⁹ *Id.*, paras. 14-15, 22, 26, 30, 34, 38-39, 42, 47.

¹⁰ Prosecution Response, paras. 10, 31-32.

9. The Prosecution affirms that the Motion does not show why these witnesses cannot testify in person. Rule 92bis is an exception to the preference for live testimony, and therefore is to be invoked when a witness is unable to testify in person. Admitting statements on the basis of convenience is not within the scope of the Rule.¹¹

10. The Prosecution contends that the Motion is premature. Rule 92bis presupposes that the individuals whose statements are sought to be admitted are listed as witnesses for the party making the application. Because the Defence had not filed the brief containing the list of Defence witnesses, there is no certainty whether the mentioned people are part of this list. Furthermore, it is speculative to say that the statements will corroborate Defence evidence that has not yet been adduced.¹²

11. The Prosecution submits that the will-say statements satisfy neither the requirements of Rule 92bis, nor the jurisprudence relating to this Rule. These statements lack the necessary certification, and the Chamber should not order the Registrar to obtain it. Moreover, the statements address the acts and conduct of the Accused as charged in the Indictment in that they concern the credibility of Prosecution witnesses and describe acts and conduct of people proximate to the Accused.¹³

12. In the Prosecution's opinion, the Motion lacks reference to relevant historical, political, or military background as a basis for admission of the statements under Rule 92bis.¹⁴

Defence Reply

13. The Defence considers that a motion pursuant to Rule 92bis cannot be frivolous. Moreover, the Defence filed its Motion after the Registry suggested doing so.¹⁵

14. In the Defence's view, the justification for these statements to be admitted pursuant to Rule 92bis does not rely on convenience, but on the fact that they do not go to the acts and conduct of the Accused. The jurisprudence does not require that a party indicate the reasons why the witness cannot testify.¹⁶

15. The Motion is not premature, as the Registry asked the Defence to seek prior admission of the substance of the written statements before any certification. It was obvious that the certification process would produce the signed statements for admission. The Defence also notes that the deadline for filing its Pre-Defence Brief was 15 October 2010.¹⁷

16. The Defence disagrees that a statement impeaching the credibility of a Prosecution witness would go to the acts and conduct of the Accused. It also submits that the written statements do not describe the acts and conducts of people proximate to the Accused, but that to be relevant, they necessarily have to concern the case against him.¹⁸

¹¹ *Id.*, paras. 10-13.

¹² *Id.*, paras. 10, 14-17, 28. The Chamber notes that the Prosecution filed its response before the provision of the Pre-Defence Brief.

¹³ *Id.*, paras. 5, 10, 18-27, 30.

¹⁴ *Id.*, paras. 10, 29.

¹⁵ Defence Reply, paras. 34-39.

¹⁶ *Id.*, paras. 4-5, 8, 25. See also *id.*, paras. 6-7.

¹⁷ *Id.*, paras. 11, 15-22, 35. See also *id.*, paras. 9-10, 12-14.

¹⁸ *Id.*, paras. 23-30, 32-33.

17. The statements of DWAN-149 and DWAN-150 clearly relate to the military background in April 1994.¹⁹

DELIBERATIONS

18. As a preliminary matter, the Chamber notes that the Defence filed its Additional Submissions 11 days after its Reply. The Prosecution then filed a further Response, which was followed by another Defence Reply. The Chamber has not taken these submissions into account, and reiterates that the Parties should avoid filing multiple submissions beyond those allowed by the Rules.²⁰

19. Rule 92*bis*(A) provides, in part, that “[a] Trial Chamber may admit...the evidence of a witness in the form of a written statement in lieu of oral testimony”.

20. The Chamber observes that the statements annexed to the Defence Motion are will-say statements which appear to have been prepared by the Defence, and not statements of the witnesses themselves. The will-say statements are not signed, and as the term connotes, simply outline the witnesses’ anticipated testimonies. The Defence in fact admits that there are no written statements to speak of when it submits that “[t]he will-say statements presented in the Defence Motion reflect the exact content of the forthcoming written statements...that *will be* collected, signed and certified.”²¹ The Chamber notes that the content of the statements eventually secured from the witnesses may vary from that reflected in the will-say statements. The Appeals Chamber has held in this regard that “will-say statements have no probative value except to the extent that the witness confirms their content.”²²

21. Furthermore, Rule 92 *bis* (B) requires that the author of the written statement attach a declaration that the contents thereof are true and correct to the best of that person’s knowledge and belief. The Chamber notes that the will-say statements likewise lack any such declarations by the witnesses.

22. Rule 92 *bis* (B)(i) provides the manner by which such declaration may be certified. The Chamber notes that the Parties are not limited to securing certification by a Presiding Officer appointed by the Registrar, but may also have such declaration witnessed in accordance with the law and procedure of a State.

23. The Chamber therefore considers that the Defence Motion was improperly filed as the Defence has not submitted any written statements whose admissibility can be evaluated under Rule 92 *bis*.

24. Finally, the Chamber recalls that the witnesses and will-say statements subject of the Defence Motion continue to be covered by the protective measures earlier ordered by the Chamber. These measures remain in force until the Chamber orders otherwise.²³

¹⁹ *Id.*, para. 31.

²⁰ See, for example, Decision on Defence Motion for Reconsideration of the Decision Rendered on 28 October 2009 (TC), 15 October 2010, para. 20; Decision on Defence Motion for Second Reconsideration of Witness Protective Measures (TC), 15 July 2010, para.15.

²¹ Defence Reply, para. 21 (italics supplied).

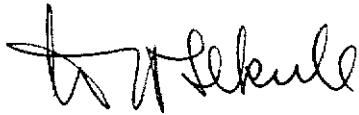
²² *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement (AC), 20 October 2010, para. 180.

²³ Decision on Defence Urgent Motion for Witness Protective Measures (TC), 9 February 2010.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion.

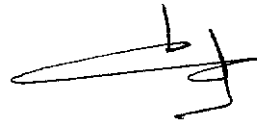
Arusha, 11 April 2011.



William H. Sekule
Presiding Judge



Solomy Balungi Bossa



Mparany Rajohnson
Judge

