UNITED NATIONS
NATIONS UNIES

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

OR: ENG

**TRIAL CHAMBER II**

**Before Judges:** Asoka de Silva, Presiding
Taghrid Hikmet
Seon Ki Park

**Registrar:** Adama Dieng

**Date:** 12 April 2011

**The PROSECUTOR**
**v.**
**Augustin NDINDILIYIMANA**
**Augustin BIZIMUNGU**
**François-Xavier NZUWONEMEYE**
**Innocent SAGAHUTU**

*Case No. ICTR-00-56-T*

# DECISION ON THE ADMISSION OF WRITTEN STATEMENTS DISCLOSED BY THE PROSECUTOR PURSUANT TO RULE 68(A) OF THE RULES OF PROCEDURE AND EVIDENCE (with strictly confidential annex)

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Mr. Fabien Segatwa and Mr. Seydou Doumbia **for Innocent Sagahutu**

## INTRODUCTION

1. On 22 September 2008, the Chamber ruled that the Prosecutor had violated his disclosure obligations under Rule 68 of the Rules of Procedure and Evidence ("Rules") with respect to a large number of documents that were in his possession. The Chamber found that those documents fell within Rule 68(A) as "material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the Accused or affect the credibility of Prosecution evidence." Accordingly, the Chamber ordered the Prosecution to immediately disclose the relevant documents to the Defence.[1]

2. Following the Prosecutor's disclosure of the exculpatory statements, the Defence filed a written motion on 6 October 2008 in which it requested the Chamber to allow the Defence to call some of the authors of the statements as witnesses, to recall some of the Prosecution witnesses in order to cross-examine them on the basis of the newly disclosed statements, and to admit those statements into evidence.[2]

3. On 4 December 2008, the Chamber issued a decision in which it addressed the above requests.[3]

## DELIBERATIONS

4. The Chamber recalls that in its decision of 4 December 2008, it granted the Defence request to call some of the authors of the exculpatory statements disclosed by the Prosecution pursuant to its decision of 22 September 2008, as well as the Defence request to recall some of the Prosecution witnesses so that they could be cross-examined on the basis of those statements.[4] However, the Chamber denied the Defence request to admit into evidence the newly disclosed exculpatory statements. The Chamber reasoned that since it availed the Defence with an opportunity to call additional witnesses and recall some of the Prosecution witnesses, it was unnecessary at that stage to admit those statements into evidence as requested by the Defence.

5. The Chamber notes that the majority of the authors of those statements were for a number of reasons unavailable to testify before the Chamber. The Defence therefore failed to benefit from the remedial measures ordered by the Chamber to negate the considerable prejudice caused to the Accused as a result of the Prosecutor's violation of his disclosure obligation pursuant to Rule 68(A) of the Rules. In these circumstances, it is the Chamber's view that a failure to consider the exculpatory statements when assessing the allegations against the Accused would be antithetical to the interests of justice and prejudicial to the Accused's right to a fair trial, as provided for in Articles 19 and 20 of the Statute.

6. At this stage, the Chamber notes that the only suitable remedy available to it to rectify the prejudice suffered by the Accused is the admission into evidence of the twelve exculpatory statements contained in the strictly confidential annex to this decision.

7. The Chamber notes that in order for a written statement to be admitted into evidence, it must satisfy the general requirements of relevance and probative value stipulated in Rule

[1] Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations pursuant to Rule 68, 22 September 2008.
[2] Augustin Ndindiliyimana's Motion to Recall Prosecutor (sic) Witnesses Against him and to Call 12 More Witnesses for the Defence, filed on 6 October 2008,
[3] Decision on Ndindiliyimana's Motion to Recall Identified Prosecution Witnesses and to Call Additional Witnesses. Dated 4 December 2008 ("Witness Recall Decision").
[4] Witness Recall Decision.

89(C) and must also satisfy the requirements of Rule 92 *bis*, which governs the admission of written statements tendered into evidence in lieu of oral evidence.[5] The Chamber further notes that, while Rules 92 *bis* and 89(C) provide the formal requirements for the admission of written witness statements in lieu of oral evidence, the ultimate determination as to whether such statements should be admitted must be made in light of the overarching "necessity of ensuring a fair trial as provided for in Articles 19 and 20 of the Statute."[6] The Chamber recalls that Trial Chambers are tasked under Article 19 with the duty of conducting a fair and expeditious trial "with full respect for the rights of the Accused and due regard for the protection of victims and witnesses", and guided under Article 20 by the necessity of respecting the Accused's right to a public and fair trial.[7]

8. Evidence will be considered to be relevant if a connection exists between such evidence and proof of an allegation pleaded in the Indictment. Evidence will be deemed to have probative value if it tends to prove, or disprove, an issue and has sufficient *indicia* of reliability.[8] The Chamber notes that material relating to the credibility of witnesses is *prima facie* relevant and probative.[9] The Chamber is satisfied that, as a preliminary step, the exculpatory statements identified above satisfy the general requirements of relevance and probative value as provided in Rule 89(C).

9. The Chamber will now determine whether the admission of the above statements complies with the criteria for the admissibility of written statements set forth in Rule 92 *bis* of the Rules. Rule 92 *bis* states that "[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 the proof of a matter other than the acts and conduct of the accused as charged in the indictment."[10] The text of Rule 92 *bis* provides a non-exhaustive list of factors relevant to the determination of whether to admit such a statement as well as the requirements for admission.[11]

10. At the outset, the Chamber notes that the above statements allude to issues that bear a close relationship to the acts and conduct of the Accused as pleaded in the Indictment and may therefore be deemed to contravene the requirements of Rule 92 *bis*. However, given the gravity of the prejudice suffered by the Accused as a result of the Prosecutor's violation of his Rule 68 disclosure obligation and the fact that the Defence was unable to benefit from the remedial measures ordered by the Chamber to redress the prejudicial consequences of the Prosecutor's conduct, the Chamber is of the considered opinion that Rule 92 *bis*, "which usually functions to protect the accused, should not be relied upon to prevent the Defence from admitting relevant and probative evidence in circumstances where such request would

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[5] *The Prosecutor v. Serugendo*, Case No. ICTR-2005-84-I, Decision on Defence Motion for the Admission of Written Witness Statements under Rule 92*bis* (TC), 1 June 2006, para. 3 ("1 June 2006 *Serugendo* Decision")
[6] *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92*bis* (TC), 9 March 2004, para. 7; *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92bis of the Rules; And Order for Reduction of Prosecution Witness List, 11 December 2006, para. 8; 1 June 2006 *Serugendo* Decision, para. 5;
[7] Statute of the International Criminal Tribunal for Rwanda, Articles 19 and 20.
[8] *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Defence Motions for the Admission of Testimony Given by Prosecution Witness GFA Before the *Karemera et al*. Chamber (TC), 26 September 2008, para. 13.
[9] *Bizimungu et al.*, Decision on Jerome Bicamumpaka's Confidential and Amended Motion to Admit Rwandan Judicial Records into Evidence (TC), 10 June 2008, para. 11.
[10] Rules of Procedure and Evidence, Rule 92*bis* (A)
[11] Rules of Procedure and Evidence, Rule 92*bis* (A) – (E).

not be necessary had the evidence been disclosed in accordance with Rule 68(A)."[12] The Chamber further observes that "the Rule 92 *bis* limitations must be considered within the general context of the Accused's right to a fair trial under Articles 19 and 20 of the Statute, and at the heart of the matter, to avoid prejudice to the Accused."[13] Bearing these insights in mind, the Chamber finds that a rigid adherence to the limitations of Rule 92 *bis* in this instance would adversely impinge on the right of the Accused to a fair trial. The Chamber will therefore admit these statements into evidence despite the fact that they allude to the acts and conduct of the Accused.

11. Since Rules 89(C) and 92 *bis* do not militate against the Chamber's discretion to admit into evidence the exculpatory materials contained in the strictly confidential annex to this decision, the Chamber will admit them into evidence in order to ameliorate the prejudice suffered by the Accused Ndindiliyimana.

**FOR THE ABOVE REASONS, THE CHAMBER**

**ADMITS** into evidence the twelve documents contained in the strictly confidential annex to this decision, which are to be kept under seal;

**DIRECTS** the Registrar to assign appropriate exhibit numbers to the aforementioned documents, forthwith**.**

Arusha, 12 April 2011, done in English.

Read and approved by

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| Asoka de Silva | Taghrid Hikmet | Seon Ki Park |
| Presiding Judge | Judge | Judge |

[Seal of the Tribunal]

[12] *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Justin Mugenzi's Motion to Admit Transcript Extracts of General Romeo Dallaire's Evidence in the Ndindiliyimana Proceedings, 4 November 2008, para. 28 ("4 November 2008 *Bizimungu* Decision"), para. 28.

[13] 4 November 2008 *Bizimungu* Decision; *The Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-T, Decision on Kamuhanda's Motion to Admit Into Evidence Two Statements by Witness GER in Accordance With Rules 89(C) and 92*bis* of the Rules of Procedure and Evidence, para. 31 (stating that "a proper reading of Rules 89(C) and 92bis may not interfere with the Chamber's discretion in a fitting case, at the instance of the accused, to admit statements of witnesses which are relevant and have probative value…").