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(102426-102420)

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Mwamba



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: 12 April 2011

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

SECRETARY GENERAL
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**DECISION ON DEFENCE SECOND 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 Second Motion to Declare Written Statements Admissible and for Leave for Certification of These Written Statements by a Presiding Officer (Rule 92 *bis* of the Rules of Procedure and Evidence)", filed confidentially on 4 March 2011 (the "Defence Motion");

CONSIDERING:

- (a) The "Prosecution's Response to Defence Second Motion to Declare Written Statements Admissible and for Leave for Certification of These Written Statements by a Presiding Officer – made under the provisions of Rule 92 *bis*, 54 and 73(F) of the Rules of Procedure and Evidence", filed confidentially on 9 March 2011 (the "Prosecution Response"); and
- (b) The "Defence Reply to Prosecution's Response to Defence Second Motion to Declare Written Statements Admissible and for Leave for Certification of These Written Statements by a Presiding Officer (Article Rule 92 *bis* of the Rules of Procedure and Evidence)", filed confidentially on 14 March 2011 (the "Defence Reply");

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

NOW DECIDES the Motion pursuant to Rules 92 *bis* and 89(C) of the Rules, in accordance with Article 20 of the Tribunal's Statute.

INTRODUCTION

1. On 9 February 2010, the Chamber ordered protective measures for potential Defence witnesses.¹
2. On 15 September 2010, the Defence filed confidentially a Defence Motion to Declare Written Statements Admissible and for Leave for Certification of These Written Statements by a Presiding Officer ("First Defence 92 *bis* Motion"), seeking a declaration that the will-say statements of Witnesses DWAN-5, DWAN-52, DWAN-27, DWAN-400,² 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*.³

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

² 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.

³ Defence Motion to Declare Written Statements Admissible and for Leave for Certification of These Written Statements by a Presiding Officer, 22 September 2010 ("First Defence 92*bis* Motion").

3. On 21 October 2010, the Defence filed its Pre-Defence Brief.⁴
4. In its Decision of 11 April 2011, the Chamber denied the Defence Motion to Declare Written Statements Admissible and for Leave for Certification of These Written Statements by a Presiding Officer ("first Defence Motion") concerning the will-say statements of DWAN-5, DWAN-52, DWAN-27, DWAN-400,⁵ DWAN-38, DWAN-135, DWAN-149 and DWAN-150. The Chamber considered that the will-say statements were not written statements within the purview of Rule 92 *bis* and therefore the Motion was improperly filed.⁶
5. After the Accused completed his testimony on 14 February 2011, the Chamber directed the Defence to file, before the end of the first week of March, an updated list of the witnesses that it realistically intended to call. The Chamber also reserved the right, after this list is filed, to make a determination as to the number of witnesses to be called by the Defence.⁷
6. On 28 February 2011, the Chamber issued a Scheduling Order directing the Defence, to file, no later than 4 March 2011, an updated list of the witnesses that it intended to call.⁸
7. On 4 March 2011, the Defence filed an Amended Pre-Defence Brief which includes what the Defence describes as a "chart of the 58 witnesses the Defence intends to call".⁹ The Defence also filed the present Motion on this date ("Defence Motion").

SUBMISSIONS OF THE PARTIES

Defence Motion

8. The Defence prays the Chamber to declare that the will-say statements of Witnesses DWAN-48, DWAN-57, DWAN-62, DWAN-78, DWAN-84, DWAN-85, and DWAN-154 (collectively, "subject statements") 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.¹⁰
9. The Defence submits that the written statements concern the credibility of nine Prosecution witnesses, and corroborate the evidence of ten Defence witnesses who are

⁴ Pre-Defence Brief, 21 October 2010.

⁵ 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.

⁶ Decision on Defence Motion to Declare Written Statements Admissible and for Leave for Certification of these Written Statements by a Presiding Officer (TC), 11 April 2011 ("Decision of 11 April 2011"), paras. 20-23.

⁷ T. 14 February 2011, pp. 114-116.

⁸ Scheduling Order [Pursuant to Rule 54 of the Rules of Procedure and Evidence] (TC), 28 February 2011, p. 4.

⁹ Amended Pre-Defence Brief, 4 March 2011, para. 6. The Chamber notes that the chart appears to list 59 witnesses, and that the chart "does not concern Defence witnesses for which the Defence filed two pending Motions . . . to admit their written statements pursuant to Rule 92 *bis*". *Id.*, para. 5.

¹⁰ Defence Motion, paras. 16-17, 45.



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.¹¹

10. The Defence acknowledges that the subject 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. Additionally, the Registrar invited the Defence to move the Chamber to determine the admissibility of the statements.¹²

11. The subject 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.¹³

12. Finally, the Defence requests that the will-say statements be kept confidential in order to protect the witnesses they refer to.¹⁴

Prosecution Response

13. 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 three different grounds.¹⁵

14. The Prosecution submits that the subject statements satisfy neither the requirements of Rule 92 *bis*, 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 subject statements address the acts and conduct of the Accused as charged in the Indictment as they concern his state of mind and impugn the credibility of Prosecution witnesses. Furthermore, it is speculative to say that the subject statements will corroborate Defence evidence that has not yet been adduced.¹⁶

15. The Prosecution further argues that the Defence has not presented any proof of why the Defence witnesses cannot testify in person. The Prosecution submits that Rule 92 *bis*, read together with Rules 89, 71 and 90(A), behooves the Defence to present such proof. The Prosecution adds that there is no factual or legal basis for the Defence to seek an Order from the Chamber for the Registrar to appoint a Presiding Officer to authenticate the subject statements.¹⁷

16. The Prosecution points out that the Defence amended the subject statements without notifying and therefore prejudicing the former, and that they significantly differ from the statements disclosed to the Prosecution through the Pre-Defence Brief on 22 October 2010.¹⁸

¹¹ *Id.*, paras. 21-22, 24-25, 28-29, 31-32, 34-35, 37-38, 42-43.

¹² *Id.*, para. 10.

¹³ *Id.*, paras. 13-14, 21-22, 24-25, 28-29, 31-32, 34-35, 37-38, 42-43.

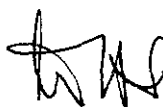
¹⁴ *Id.*, para. 17.

¹⁵ Prosecution Response, paras. 10, 31-32.

¹⁶ *Id.*, paras. 6-19.

¹⁷ *Id.*, paras. 10, 20-22.

¹⁸ *Id.*, para. 24 and related table.



Defence Reply

17. At the outset, the Defence admonishes the Prosecution for the apparently numerous formatting and citation errors in its Response. As a result thereof, the Defence urges that the Chamber exercise caution in its appreciation of the jurisprudence cited in the Prosecution Response.¹⁹

18. The Defence stresses that, contrary to the Prosecution's assertions, the subject statements do not go to prove the acts and conduct, or the state of mind, of the Accused. Citing several Trial Chamber Decisions, the Defence asserts that evidence that impeaches the testimony of, or gauges the credibility of, Prosecution witnesses, do not go to the acts and conduct of the Accused and may be admitted under Rule 92 *bis*. The testimonies of certain Prosecution witnesses which are contradicted by the subject statements do not refer to the acts and conduct of the Accused. Moreover, the will-say statement of DWAN-154 pertains to the general feasibility of travel between Kigali and Gisenyi during relevant periods, and therefore does not concern the acts and conduct of the Accused. Similarly, DWAN-57's statement merely describes an individual's house and position relative to the witness's house and that of Prosecution Witness ANAR in 1994, and provides his knowledge of the latter.²⁰

19. Rule 92 *bis* does not require a demonstration of the witness's unavailability to testify, and instead promotes judicial economy by obviating the time-consuming process of leading witnesses in court. The Defence recalls that when the Prosecution filed its own motion to admit evidence under Rule 92 *bis*, the latter did not indicate that the witnesses concerned could not testify in person.²¹

20. As regards the Prosecution's contention that the subject statements lack the necessary certification by a Presiding Officer appointed by the Registrar, the Defence submits that it is precisely through the present Motion that such certification is sought. The Defence points out that jurisprudence now provides for the admission of statements prior to their certification. The Defence reminds the Prosecution that the former was expressly directed by the Registry to seek guidance from the Chamber on the admissibility of written statements prior to requesting the Registry to appoint a Presiding Officer to certify said statements. This directive led to the First Defence 92 *bis* Motion, and the Defence necessarily followed the Registry's instructions when it filed the present Motion.²²

21. The Defence contends that its Pre-Defence Brief provides the legal and factual basis for it to contend that the subject statements will be corroborated by the testimonies of its other witnesses and therefore eligible for admission into evidence under Rule 92 *bis*.²³

¹⁹ Defence Reply, paras. 11-16.

²⁰ *Id.*, paras. 17-21, 36-52, citing *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Decision on Defence Motion for the Admission of Written Statements of Witnesses A1, A13, A14, A15, A17, A18, A20, A22, A23, A28 and A30 as Evidence in Lieu of Oral Testimony (TC), 29 April 2009 ("*Nshogoza* Trial Decision of 29 April 2009"), paras. 15, 17-19, 24-26, 30-32, 40-41, 46-51; *The Prosecutor v. Édouard Karemera, et al.*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Decision on Joseph Nzirorera's Motion to Admit Statement of Bonaventure Ubalijiro (TC), 14 April 2008 ("*Karemera et al.* Trial Decision of 14 April 2008"), para. 5; *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Admit Statements of Augustin Karara (TC), 9 July 2008, para. 13; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decisions on four Prosper Mugiraneza Motions concerning witness list (TC), 4 November 2008, paras. 22-25.

²¹ Defence Reply, paras. 23-29.

²² *Id.*, paras. 30-35.

²³ *Id.*, paras. 53-54.

22. Lastly, the Defence denies that the Prosecution will be greatly prejudiced as a result of the amendment to the subject statements. Any changes made to the subject statements are minor and are grossly mischaracterized as substantive in nature by the table found in the Prosecution Response.²⁴

DELIBERATIONS

23. The Chamber observes that the reasoning in its Decision on the first Defence Motion²⁵ applies to the present Defence Motion. Once again, the Defence seeks the admission of will-say statements that are not signed by the witnesses and merely outline their anticipated testimonies. The Appeals Chamber has held that “will-say statements have no probative value except to the extent that the witness confirms their content.”²⁶ In contrast with the first Defence Motion,²⁷ however, the Defence herein does not indicate that it will secure signed statements from the witnesses and have these duly certified in accordance with Rule 92 *bis*. The Defence appears to intend to have the will-say statements in their current form certified by the Presiding Officer appointed by the Registrar.

24. 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.

25. 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.

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

27. Finally, the Chamber again 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.²⁸

²⁴ *Id.*, paras. 66-72.

²⁵ Decision of 11 April 2011.

²⁶ *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement (AC), 20 October 2010, para. 180.


²⁷ Decision of 11 April 2011, para. 20, referring to Defence Reply, para. 21.

²⁸ Decision on Defence Urgent Motion for Witness Protective Measures (TC), 9 February 2010.

FOR THE ABOVE REASONS, THE CHAMBER


DENIES the Defence Motion.

Arusha, 12 April 2011.


William H. Sekule
Presiding Judge


Solomy B. Mungu Bossa
Judge




Mparany Rajohnson
Judge