

ICTR-00-55C-T
(21-6-2011)
(7630-7631)

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**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: 21 June 2011

THE PROSECUTOR

v.

Ildéphonse NIZEYIMANA

CASE NO. ICTR-00-55C-T

JUDICIAL RECORDS
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**DECISION ON PROSECUTOR'S MOTION TO RECONSIDER THE DECISION ON
PROSECUTOR'S MOTION TO ADMIT EVIDENCE THE STATEMENT OF
GENERAL MARCEL GATSINZI PURSUANT TO RULES 89(C) AND 92bis**

Office of the Prosecution:
Drew White
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Cainnech Lussiaà-Berdou
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INTRODUCTION

1. The trial commenced on 17 January 2011 with the opening statements of both the Prosecution and the Defence. The Prosecution closed its case-in-chief on Friday, 25 February 2011, after having called 38 witnesses. The Defence case closed its case on 16 June 2011, after having called 38 witnesses.
2. On 9 August 2010, the Office of the Prosecutor ("Prosecution") filed the "Prosecutor's Motion to Admit into Evidence the Statement of General Marcel Gatsinzi ("Gatsinzi Motion"). The Prosecution sought to introduce into evidence an affidavit by General Marcel Gatsinzi, taken on 8 August 2010, attached thereto as Annex A.
3. On 11 August 2010, the Prosecution filed a revised affidavit correcting the signature date, thereby replacing the original affidavit in Annex A, now Annex 1 (the "Affidavit").
4. On 16 August 2010, The Defence team of the Accused, Ildéphonse Nizeyimana, ("Defence" and "the Accused" respectively), filed its response.¹ The Defence submitted that the Prosecution had not demonstrated why General Gatsinzi could not testify *viva voce*.² The Defence further argued that the Affidavit did not meet the formal requirements of Rule 92*bis* of the Rules of Procedure and Evidence ("Rules"),³ and if even it did meet the formal requirements, was highly prejudicial in content.⁴
5. On 20 August 2010, the Prosecution filed its reply.⁵ The Prosecution submitted the proper procedures had been followed pursuant to Rule 92*bis*(B) with respect to the Affidavit.⁶ Moreover, the contents of the Affidavit do not go to the acts and conduct of the Accused and therefore cannot be considered "highly prejudicial" to the Accused.⁷
6. On 6 October 2010, the Pre-Trial Chamber denied the Prosecutor's Motion to Admit into Evidence the Statement of General Gatsinzi pursuant to Rules 89(C) and Rule 92*bis* ("6 October 2010 Decision").⁸ The Chamber held that (1) the Affidavit did not go to prove the

¹ Defence Response to Prosecutor's Motion to Admit into Evidence the Statement of General Marcel Gatsinzi Pursuant to Rules 89(C) and 92 *bis* ("Response to Gatsinzi Motion"), 16 August 2010.

² Response to Gatsinzi Motion, paras. 6-9.

³ Response to Gatsinzi Motion, paras. 10-12.

⁴ Response to Gatsinzi Motion, paras. 13-14.

⁵ Prosecutor's Reply to Defence Response to Prosecutor's Motion to Admit into Evidence the Statement of General Marcel Gatsinzi Pursuant to Rules 89(C) and 92 *bis* ("Reply to Gatsinzi Motion"), 20 August 2010.

⁶ Reply to Gatsinzi Motion, paras. 11-24.

⁷ Reply to Gatsinzi Motion, paras. 25-31.

⁸ Decision on Prosecutor's Motion to Admit into Evidence the Statement of General Marcel Gatsinzi ("6 October 2010 Decision"), 6 October 2010.

acts and the conduct of the Accused,⁹ (2) the Affidavit related to relevant military background and to issues regarding the Accused's character,¹⁰ (3) the evidence was not cumulative in nature,¹¹ (4) the information contained in the Affidavit related to the alleged superior/subordinate relationship between the Accused and the officers listed in the Affidavit is a contested matter crucial to the Prosecution's case, and prejudicial to the Defence if it was not permitted to orally cross-examine General Gatszini on the contents thereof,¹² (5) there was an overriding public interest in the evidence being presented *vive voce*,¹³ and (6) the Prosecution had not sufficiently demonstrated why General Gatszini was unable to testify in person.¹⁴

7. On 13 October 2010, the Prosecution filed the "Prosecutor's Application for Certification to Appeal the 'Decision on Prosecutor's Motion to Admit into Evidence the Statement of General Marcel Gatszini'" ("Motion for Certification"). The Prosecution submitted that the Chamber erred in finding that (1) the content of the Affidavit was non-cumulative in nature,¹⁵ (2) the content of the Affidavit was highly prejudicial to the Accused,¹⁶ (3) there existed an overriding public interest in the evidence being heard *viva voce*,¹⁷ and (4) the Prosecutor was required to demonstrate a satisfactory reason for General Gatszini's inability to testify in person.¹⁸

8. On 18 October 2010, the Defence filed its response.¹⁹ The Defence submitted therein that the Prosecution's Motion for Certification did not fulfil the criteria enumerated under Rule 73(B).²⁰

9. On 25 October 2010, the Prosecution filed its reply.²¹ The Prosecution reiterated the arguments set out in its Motion for Certification, submitting that it had satisfied both requirements under Rule 73(B).²²

⁹ 6 October 2010 Decision, para. 8.

¹⁰ 6 October 2010 Decision, para. 9.

¹¹ *Ibid.*

¹² 6 October 2010 Decision, para. 10.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Motion for Certification, para. 2.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Defence Response to Prosecutor's Application for Certification to Appeal the "Decision on Prosecutor's Motion to Admit into Evidence the Statement of General Marcel Gatszini" ("Response to Motion for Certification"), 18 October 2010.

²⁰ Response to Motion for Certification, paras. 5-17.

10. On 2 December 2010, the Pre-Trial Chamber granted the Prosecution's Motion for Certification on four grounds.²³

11. On 10 December 2010, the Prosecution filed its interlocutory appeal against the 6 October Decision (the "Appeal").²⁴ On 20 December 2010, the Defence filed its response.²⁵ The Prosecution filed its reply on 28 December 2010.²⁶

12. On 8 March 2011, the Appeals Chamber denied the Prosecution's Appeal ("Appeals Chamber Decision").²⁷ The Appeals Chamber upheld two out of the four grounds that formed the basis for the Pre-Trial Chamber's denial to admit the Affidavit, namely that (1) there was an overriding public interest that General Gatsinzi's evidence be heard *viva voce*, and; (2) it would be highly prejudicial to the Accused to admit into evidence the Affidavit without allowing for cross-examination.²⁸

13. On 30 March 2011, General Gatsinzi testified in the case of the *Prosecutor v. Bagosora et al.* in the Appeals Chamber.

14. On 14 April 2011, the Defence filed a motion seeking the admittance into evidence of portions of the transcript of General Gatsinzi's testimony during the *Bagosora et al.*, proceedings of 30 March 2011 ("Transcript"), pursuant to Rule 92bis.²⁹

15. On 20 April 2011, the Prosecution responded that it did not oppose the Transcript being admitted into evidence, provided that only the relevant portions of the Transcript were included.³⁰

16. On 6 May 2011, the Chamber granted the Defence Rule 92bis Motion in part, declaring a selected portion of the Transcript was admissible.³¹

²¹ Prosecution Reply to Defence Response to Prosecutor's Application for Certification to Appeal "Decision on Prosecutor's Motion to Admit into Evidence the Statement of General Marcel Gatsinzi" ("Reply to Motion for Certification"), 25 October 2010.

²² Reply to Motion for Certification, para. 3.

²³ 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.

²⁴ Prosecutor's Interlocutory Appeal against "Decision on Prosecutor's Motion to Admit into Evidence the Statement of General Marcel Gatsinzi", 10 December 2010.

²⁵ Defence Response to Prosecutor's Interlocutory Appeal against "Decision on Prosecutor's Motion to Admit into Evidence the Statement of General Marcel Gatsinzi", 20 December 2010.

²⁶ 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", 28 December 2010.

²⁷ Decision on Prosecutor's Interlocutory Appeal of Decision Not to Admit Marcel Gatsinzi's Statement into Evidence Pursuant to Rule 92bis, 8 March 2011.

²⁸ Appeals Chamber Decision, para. 31.

²⁹ Defence Motion pursuant to Rule 92 Bis (A) and (D) for Witness Marcel Gatsinzi ("Defence Rule 92bis Motion"), 14 April 2011.

³⁰ Prosecutor's Response to Defence Motion pursuant to Rule 92bis (A) and (B) for Witness Marcel Gatsinzi, 20 April 2011, paras. 6-7, 15.

17. On 2 June 2011, the Prosecution filed the “Prosecutor’s Motion to Reconsider the Decision on Prosecutor’s Motion to admit into Evidence the Statement of General Marcel Gatsinzi pursuant to Rules 89(C) and 92bis” (“Motion for Reconsideration”). The Prosecution submits that the Chamber’s decision to admit the Transcript into evidence constitutes a “material change in circumstance”, as General Gatsinzi is now a Rule 92bis Defence witness, justifying a reconsideration of the 6 October 2010 Decision.³²

18. On 6 June 2011 the Defence filed a response opposing the Prosecution’s Motion for Reconsideration.³³ The Defence submits that (1) the Motion for Reconsideration is mislabeled, (2) the reconsideration criteria are not met, and (3) admission of the Affidavit is impossible at this stage of the trial.³⁴

19. On 13 June 2011 the Prosecution replied, reiterating the relief sought in its Motion for Reconsideration.³⁵

DELIBERATIONS

Jurisdiction

20. The Chamber notes at the outset that it is satisfied that it is properly seized of the matter before it, and can therefore decide upon the Prosecution Motion for Reconsideration without the Prosecution first directing its submission to the Appeals Chamber. The Appeals Chamber upheld the 6 October 2010 Decision, thereby returning jurisdiction over the question arising from General Gatsinzi’s admittance as a Rule 92bis Defence Witness to the Trial Chamber. Whether a change in circumstance warrants the reconsideration of the Chamber’s decision to deny the admission of the Affidavit is therefore properly brought before this Chamber.

The Law on Reconsideration

21. The Chamber recalls that it may exercise its discretion to reconsider a decision when one of the following criteria has been met: “(i) a new fact has been discovered that was

³¹ Decision on Defence Motion Pursuant to Rule 92 bis (A) and (D) for Witness Marcel Gatsinzi (“Rule 92bis Decision”), 6 May 2011.

³² Motion for Reconsideration, paras. 5, 7-10.

³³ Defence Response to Prosecutor’s Motion to Reconsider the Decision on Prosecutor’s Motion to Admit into Evidence the Statement of General Marcel Gatsinzi Pursuant to Rule 89 (C) and 92 bis (“Response to Motion for Reconsideration”), 6 June 2011.

³⁴ Response to Motion for Reconsideration, paras. 14-30.

³⁵ Reply to Defence Response to Prosecutor’s Motion to Reconsider the Decision on Prosecutor’s Motion to admit into Evidence the Statement of General Marcel Gatsinzi pursuant to Rules 89 (C) and 92 bis (Reply to Motion for Reconsideration), 13 June 2011.

not known to the Chamber at the time it made its original Decision; (ii) there has been a material change in circumstances since it made its original Decision; or (iii) there is reason to believe that its original Decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice.”³⁶ The party seeking reconsideration bears the burden of demonstrating the existence of the enumerated circumstances.³⁷

22. The Prosecution submits that the admission of General Gatsinzi as a Rule 92*bis* Defence Witness constitutes a “material change” warranting the reconsideration of the Chamber’s 6 October 2010 Decision.³⁸ Indeed, as the Defence is currently relying on Witness Gatsinzi by tendering into evidence the Transcript without hearing the Witness *viva voce*, the underlying circumstances upon which the denial of the Prosecution’s request to admit General Gatsinzi’s Affidavit are based have been “materially changed”, namely “the question of fairness and prejudice arising from the non-appearance of the witness and the absence of cross-examination.”³⁹

23. The Chamber is persuaded by the submission that the reliance by the Defence on General Gatsinzi as a Rule 92*bis* Witness constitutes a “material change in circumstances” since it rendered the 6 October 2010 Decision. The Chamber’s deliberations would have included a balance of the Defence’s reliance on General Gatsinzi as a Rule 92*bis* Witness, with the overriding public interest to hear a witness *viva voce*, and to afford the Defence the opportunity to cross-examine a witness. The Chamber accordingly finds that the Prosecution has met its burden of establishing the existence of a material change. The Chamber will thus turn to the request by the Prosecution to admit the Affidavit pursuant to Rule 92*bis*.

³⁶ *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-T, Decision on the Defence Motion for Reconsideration of the Chamber’s 13 January 2010 Decision on Video-Link Testimony (TC), 29 January 2010, para. 5; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion for Reconsideration of Decision on Joseph Nzirorera’s Motion for Inspection: Michel Bagaragaza (TC) (“Karemera Decision of 29 September 2008”), 29 September 2008, para. 4. See also *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.14, Decision on Mathieu Ndirumpatse’s Appeal from the Trial Chamber Decision of 17 September 2008 (AC), 30 January 2009, para. 13; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor’s Motion for Reconsideration of the Trial Chamber’s “Decision on Prosecutor’s Motion for Leave to Vary the Witness List Pursuant to Rule 73*bis*(E)” (TC), 15 June 2004, paras. 8-9.

³⁷ See e.g., *Prosecutor v. Nindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Prosecution’s Motion for Reconsideration of the Chamber’s Decision Dated 18 February 2009 (TC), 19 March 2009, para. 2; Karemera Decision of 29 September 2008, para. 4.

³⁸ Motion for Reconsideration, para. 5.

³⁹ Reply to Motion for Reconsideration, para. 7.

The Law on Admission of Written Statements

24. The Chamber recalls that for evidence to be admissible, Rule 89(C) of the Rules requires that it be relevant and of probative value.⁴⁰ Although definitive proof of reliability and credibility of the evidence is not required, a showing of *prima facie* reliability and credibility is necessary.⁴¹ In order for evidence to be considered relevant, the moving party must show that a connection exists between the evidence sought to be admitted and the proof of an allegation sufficiently pleaded in the indictment.⁴² To establish the probative value of the evidence, the applicant must show that the evidence tends to prove or disprove an issue.⁴³

25. The admission of a written statement under Rule 92bis(A) involves an enquiry as to whether the statement sought to be admitted goes to the proof of a matter other than the acts and conduct of the Accused as charged in the Indictment. The non-exhaustive factors listed in Rule 92bis(A)(i) and (ii) are to be evaluated.⁴⁴

26. In addition, the formal requirements of Rule 92bis(B) must be met. The statement needs to be witnessed either by a person authorised to witness such a declaration in accordance with the law and procedure of a State or by a Presiding Officer appointed by the Registrar of the Tribunal for the purpose of taking such a statement.

27. 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 as provided for in Articles 19 and 20 of the Statute.⁴⁵ In that regard, among the matters for consideration are whether the statement goes to the proof of a critical

⁴⁰ *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 92bis (TC) ("Bagosora Decision of 9 March 2004"), 9 March 2004, para. 12.

⁴¹ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.17, Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts (AC), 29 May 2009, para. 15; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ndirumpatse (TC) ("Karemera Decision of 2 November 2007"), 2 November 2007, para. 2. See also *Nyiramasuhuko v. Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 7; *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Judgement on Appeal (AC), 26 May 2003, para. 33; *Prosecutor v. Delalic et al.*, Case No. IT-96-21, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998, para. 20.

⁴² Karemera Decision of 2 November 2007, para. 2.

⁴³ *Ibid.*

⁴⁴ Rule 92bis (A)(i) delineates factors favoring admission, including 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. Rule 92bis (A) (ii) delineates factors against admission, including 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.

⁴⁵ Bagosora Decision of 9 March 2004, para. 16.

element of the prosecution's case against the accused or touches upon a live and important issue between the parties.⁴⁶ 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 not to admit the proposed evidence in written form.⁴⁷

General Gatsinzi's Affidavit

28. The Chamber notes that the Defence sought to introduce the Transcript containing General Gatsinzi's testimony in the *Bagosora et al.*, case for the limited purpose of demonstrating the existence of a contradiction in Prosecution Witness AZD's testimony.⁴⁸ More specifically, the Defence intends to use the Transcript to demonstrate the contradiction in Prosecution Witness AZD's account of the date and time upon which General Gatsinzi discovered that he was appointed army Chief of Staff.⁴⁹ The Chamber found the Transcript admissible only insofar as it relates to the credibility of Prosecution Witness AZD.⁵⁰ The evidence admitted does not go to the acts of conduct of the Accused, nor does it touch upon the contested matters contained within the Affidavit. The fact that the Defence included General Gatsinzi as a rule 92bis Witness, however, does not alleviate the independent evaluation that is to be conducted by the Chamber of the contents of the Affidavit and the intended use by the Prosecution.

29. The Appeals Chamber, in its Decision, found that the Trial Chamber had erred in concluding that the evidence contained in the Affidavit was non-cumulative by virtue of the rank of General Gatsinzi.⁵¹ In other words, the evidence need not be of "similar weight" to be found cumulative, it merely needs to correspond to similar facts introduced by other witnesses or evidence.⁵² In accordance with the Appeals Chamber's Decision, the Chamber therefore considers the Affidavit to be of a cumulative nature.

30. Secondly, the Appeals Chamber found that the Chamber did not err in concluding that the admission of the Affidavit would be highly prejudicial to the Accused, as the contents thereof go to the nature of his "superior/subordinate relationship with, and command over,

⁴⁶ *Ibid.*

⁴⁷ *Prosecutor v. Martić*, Case No. IT-95-11-T, Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 bis(D) and of Expert Reports Pursuant to Rule 94 bis (TC), 13 January 2006, para. 18; *Prosecutor v. Galic*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), 7 June 2002, para. 10.

⁴⁸ Defence Rule 92bis Motion, para. 13.

⁴⁹ *Ibid.*

⁵⁰ Rule 92bis Decision, para. 8.

⁵¹ Appeals Chamber Decision, para. 14.

⁵² *Ibid.*

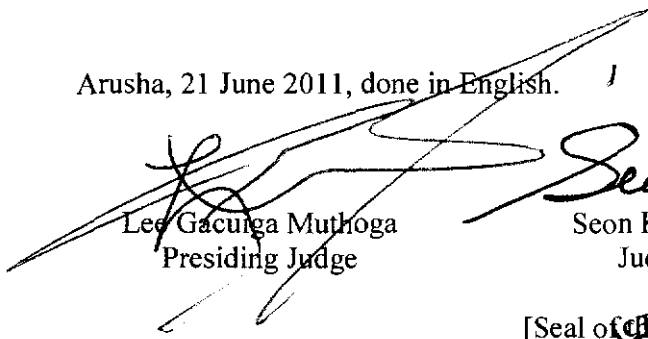
individuals named as perpetrators in the Second Amended Indictment without the opportunity for cross-examination.”⁵³ The nature and content of the Affidavit has not changed since it was first put before this Chamber. The prejudice caused by the inability to cross-examine General Gatsinzi on the contents of the Affidavit therefore remains unchanged.


31. The Chamber thus notes that when evaluating the contents of the Affidavit in accordance with Rule 92*bis*, one of the primary reasons, upheld by the Appeals Chamber, upon which basis the admission of the Affidavit was denied, remains in effect. The Affidavit, while cumulative in nature, contains evidence that goes to the proof of a matter of the acts or conducts of the Accused as charged in the Indictment. A portion of the contents of the Affidavit therefore does not meet the primary criteria enumerated in Rule 92*bis*(A), namely providing the Chamber with the discretion to “admit, in whole or in part, the evidence of a witness in the form of a written statement ... which goes to proof of a matter *other* than the acts and conduct of the accused as charged in the indictment.”⁵⁴ The Chamber accordingly declines to admit into evidence General Gatsinzi’s Affidavit.

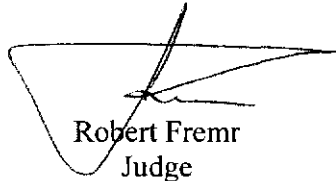
FOR THESE REASONS, THE CHAMBER

DENIES the Prosecution’s Motion for Reconsideration.

Arusha, 21 June 2011, done in English.


Lee Gacunga Muthoga
Presiding Judge


Seon Ki Park
Judge


Robert Fremr
Judge

[Seal of the Tribunal]



⁵³ Appeals Chamber Decision, para. 19.

⁵⁴ Emphasis added.