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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Bakhtiyar Tuzmukhamedov
Mparany Rajohnson

Registrar: Adama Dieng

Date: 13 July 2011

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THE PROSECUTOR

v.

Callixte NZABONIMANA
Case No. ICTR-98-44D-T

DECISION ON NZABONIMANA'S SECOND MOTION FOR THE ADMISSION OF WRITTEN WITNESS STATEMENTS

(Rules 73 ter (E), 89 (C) and 92 bis of the Rules of Procedure and Evidence)

Office of the Prosecutor
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INTRODUCTION

1. On 21 April 2011, the Defence filed a motion seeking to adduce a number of written witness statements pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence ("Rules"), and for leave to vary its witness list under Rule 73 *ter* (E) so as to include the authors of the documents it seeks to tender ("Motion").[1]

2. On 26 April 2011, the Prosecution filed a request for an extension of time to respond to the Defence Motion, citing, *inter alia*, the significant volume of the documents to be analysed as well as the need to obtain translations of certain statements from French to English.[2]

3. On 3 May 2011, the Defence filed a response to the Prosecution's request for an extension of time in which it did not oppose the requested extension.[3]

4. On 4 May 2011, the Trial Chamber issued a decision granting the Prosecution an extension of time to respond to the Defence Motion until 30 May 2011.[4]

5. On 27 May 2011, the Defence filed a corrigendum in which it "correct[ed] certain errors" contained in several paragraphs of its Motion.[5]

6. On 30 May 2011, the Prosecution filed its response to the Defence Motion ("Response").[6]

7. The Defence did not file a reply to the Prosecution Response.

SUBMISSIONS OF THE PARTIES

Motion

Admission of Documents

8. In the instant Motion, "the Defence seeks: (i) the admission into evidence of documentary evidence in the form of 12 witness statements *stricto sensu*, 1 article, and 1 report pursuant

[1] *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Second Motion for the Admission of Written Witness Statements, 21 April 2011.
[2] *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Urgent Motion for Extension of Time to Respond to Nzabonimana's Second Motion for the Admission of Written Statements, 26 April 2011.
[3] *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Response to "Prosecutor's Urgent Motion for Extension of Time to Respond to Nzabonimana's Second Motion for the Admission of Written Statements", 26 April 2011.
[4] *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Prosecution Motion for Extension of Time to Respond to Second Defence Motion for Admission of Written Statements, 4 May 2011.
[5] *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Corrigendum to "Nzabonimana's Second Motion for the Admission of Written Witness Statements", dated 21 April 2011, 27 May 2011.
[6] *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Second Motion for the Admission of Written Witness Statements, 30 May 2011.

to Rules 89 (C) and 92*bis* of the RPE; and (ii) the incidental variation of its witness list to include the authors of the [said] documents".[7] Specifically, the Defence seeks admission of: 1) factual statements relating to the case against the Accused by Defence Witnesses T22,[8] T60,[9] T85,[10] T115,[11] T43,[12] T11,[13] T44,[14] T171,[15] T93,[16] and T10[17]; 2) statements provided by Prosecution Witness CNAL during the course of a collateral *amicus curiae* investigation;[18] 3) a scholarly article on the socio-political history of Rwanda by one Professor Filip Reyntjens;[19] 4) a statement authored by putative Defence expert witness Dr. Susan Thomson;[20] and 5) an article co-authored by four former high-ranking members of the Rwandan government, chronicling "the RPF's governance strategies" and "the lack of independence of the [Rwandan] judiciary" ("Rwanda Briefing Article").[21]

9. In addition to conceding that some of the documents it wishes to adduce do not even qualify as "statements" *per se*,[22] the Defence further concedes that many of the proffered statements violate the threshold criterion imposed by Rule 92 *bis* (A) in that their content touches upon the acts and conduct of the accused as charged in the Indictment.[23] However, the Defence avers that "there is [recent] precedent for the admission of witness statements under Rule 92 *bis* despite such statements going to the acts of the accused as alleged in the Indictment",[24] and admonishes the Trial Chamber 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... to avoid prejudice to the Accused".[25] Thus, it prays that the Chamber adopt a "lenient" approach in construing Rule 92 *bis* (A).[26]

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[7] Motion, para. 8.
[8] Motion, paras. 33-43 and Annex 1 to Motion ("Annexes").
[9] Motion, paras. 44-49 and Annex 2.
[10] Motion, paras. 50- 54 and Annex 3.
[11] Motion, paras. 55-61 and Annex 4.
[12] Motion, paras. 62- 66 and Annex 5.
[13] Motion, paras. 67-71 and Annex 6.
[14] Motion, paras. 72-76 and Annex 7.
[15] Motion, paras. 77-81 and Annex 8.
[16] Motion, paras. 82-86 and Annex 9.
[17] Motion, paras. 87-91 and Annex 10.
[18] Motion, paras. 92-100 and Annex 11.
[19] Motion, paras. 101-106 and Annex 12.
[20] Motion, paras. 107-113 and Annex 13.
[21] Motion, paras. 114-121 and Annex 14.
[22] Motion, para. 8.
[23] Motion, para. 17.
[24] Motion, para. 13.
[25] Motion, para. 17. (internal citation omitted)
[26] Motion, para. 17.

10. As to the technical requirements imposed by Rule 92 *bis* (B), the Defence notes that: 1) three statements (i.e. T171, T93, T110) have been witnessed by qualified advocates or notaries in the countries of France and Belgium, as prescribed by Rule 92 *bis* (B) (i), with all due formalities mandated by Rule 92 *bis* (B) (ii) having been observed;[27] 2) the deponent of one statement (i.e. T44) had his signature "attested to" by Me. Michelle Théberge, a lawyer admitted to the jurisdiction of Quebec, Canada, "and by two Defence investigators";[28] 3) the statements of two other witnesses (i.e. T11, T43) "were signed by the declarant, as well as lawyer Me. Th[é]berge, and a Defence investigator";[29] 4) the statements of four other witnesses (i.e. T22, T60, T85, T115) "were signed by the witnesses and attested to by two defence investigators";[30] 5) two of the statements deposed by CNAL "were signed before witnesses" and a third "cites the provision of the RPE dealing with perjury";[31] 6) the statements by Professor Reyntjens and Dr. Thomson were "not attested to by an authorized person" but were nevertheless "dated, sworn, and signed by their respective authors";[32] and finally 7) the Rwanda Briefing Article was neither witnessed by any third party nor signed.[33] While conceding the evident non-compliance of many of these documents with the technical formalities imposed by Rule 92 *bis* (B), the Defence recalls that "[t]he Tribunal has in the past, in the interests of justice and the economy of resources, declared admissible statements that conform with the substantive requirements of Rule 92*bis*... pending their definitive admission once in conformity with the formal requirements of Rule 92*bis*".[34]

11. Finally, the Defence embarks upon a statement-by-statement analysis as to whether the requirements of Rules 92 *bis* (A) and 89 (C) are satisfied.[35]

Variation of Witness List

12. The Defence, noting that at the time it filed the instant Motion it had yet to receive a Decision from the Trial Chamber with respect to a similar motion it had recently filed,[36] essentially reiterates verbatim the justifications for variation of its witness list that were

[27] Motion, para. 23.
[28] Motion, para. 24.
[29] Motion, para. 24.
[30] Motion, para. 24.
[31] Motion, para. 24.
[32] Motion, para. 25.
[33] Motion, para. 25.
[34] Motion, paras. 24, 26.
[35] Motion, paras. 33-121.
[36] *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana's Motion for the Admission of Written Witness Statements, 10 May 2011.

advanced in that prior motion.[37] Briefly, these arguments assert that: 1) because the Defence is only seeking to admit documents and not adduce *viva voce* evidence, the instant proceedings will not be unduly prolonged; 2) there is precedent for admitting large quantities of witness statements under Rule 92 *bis* and to disallow the Defence's present request would prejudice the Accused's right to a fair trial since it was not allowed to have each and every one of its 191 proposed witnesses testify before the Trial Chamber;[38] and 3) all of the proposed witnesses satisfy the six criteria identified in the jurisprudence as constituting "good cause" for varying a witness list "in the interests of justice".[39]

Response

13. The Prosecution opens its Response by arguing that Rule 92 *bis* "is an exceptional remedy granted in exceptional situations",[40] which ought to be guided by the general imperative under Rule 90 (A) that "[w]itnesses shall, in principle, be heard directly by the Chambers".[41] The Prosecution further disputes that the Defence have "demonstrate[d] the exceptional circumstances warranting the Chamber's exercise of its discretion in admitting proposed witness statements pursuant to the provisions in Rule 92 *bis* and 89 (C)".[42]

14. Turning to the substance of its counterarguments, the Prosecution makes a preliminary submission for the exclusion of Witness T11's statement, since that witness actually testified before the Chamber on 3 and 4 May 2011, thus rendering the Defence's application to tender a written statement under Rule 92 *bis* (A) in lieu of oral testimony "moot".[43]

15. The Prosecution further argues for the exclusion of the following documents as failing to meet the attestation requirements of Rule 92 *bis* (B): 1) the statements of factual witnesses pertaining to elements of the Indictment proffered by T22,[44] T60,[45] T85,[46] T115,[47] T44,[48] and T43;[49] 2) the *amicus curiae* investigation statements of CNAL; [50] 3) the statements of

[37] Motion, para. 122.
[38] Motion, paras. 128-29.
[39] Motion, paras. 130-136.
[40] Response, para. 41.
[41] Response, paras. 38-40.
[42] Response, para. 42.
[43] Response, paras. 43-49.
[44] Response, para. 95.
[45] Response, para. 95.
[46] Response, para. 95.
[47] Response, para. 95.
[48] Response, para. 96.
[49] Response, para. 96.
[50] Response, para. 56.

Professor Reyntjens[51] and Dr. Thomson;[52] and 4) the Rwanda Briefing Article.[53] In the alternative, the Prosecution engages in a case-by-case analysis as to how each of the aforementioned documents fails to satisfy the substantive requirements of Rule 92 *bis* (A).[54]

16. The Prosecution concedes that the statements of T171, T10 and T93 "are in compliance with the formal requirements of Rule 92*bis*(B)".[55] However, the Prosecution contends that all three of these statements contravene Rule 92 *bis* (A), in that the statements of T171 and T10 "support the alibi of the Accused and therefore go to the acts and conducts of the Accused as charged in the Indictment", and "the application for the admission of the statement of T93 should similarly fail" as it "seeks to rebut paragraph 44 of the Indictment".[56] The Prosecution also contests that the statements are admissible under Rule 89 (C).[57]

Request to Vary Witness List

17. The Prosecution first advances the argument that because any request to vary the Defence witness list under Rule 73 *ter* (E) to add the deponents of witness statements sought to be adduced pursuant to Rule 92 *bis* is predicated upon the successful demonstration that the statements in question are in fact admissible, and because the Defence has failed to demonstrate that it has satisfied Rule 92 *bis*, the application for variation must necessarily fail.[58] In the alternative, the Prosecution submits that it would be highly prejudiced by the inclusion of the proposed Defence witnesses, because: 1) the Prosecution "would require time to make investigations on the basis of which to cross-examine the witnesses"; and 2) to allow additional witnesses would "distort the principle of proportionality with respect to the number of witnesses called by both parties" and "result in a grossly unfair outcome".[59]

DELIBERATIONS

Applicable Law

18. Rule 92 *bis* states that

> (A) 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.

[51] Response, para. 88.
[52] Response, para. 52.
[53] Response, para. 88.
[54] Response, paras. 113-188.
[55] Response, para. 189.
[56] Response, paras. 190-194.
[57] Response, paras. 195-200.
[58] Response, paras. 204-210.
[59] Response, paras. 211-225.

Rule 92 *bis* (A) (i) and (ii) provide non-exhaustive lists of factors to be considered in favour and against the admission of a statement, respectively. Rule 92 *bis* (B) stipulates explicit technical requirements concerning the certification of the statement before a recognised authority, whereas Rule 92 *bis* (C) provides for certain exceptions to those technical requirements. Finally, Rule 92 *bis* (E) states that

> (E) [...] The Trial Chamber shall decide, after hearing the parties, whether to admit the statement... in whole or in part and whether to require the witness to appear for cross-examination.

The analysis under Rule 92 *bis* is to proceed as follows: "[o]nce a Chamber is satisfied that (i) the material tendered is relevant to proof of a matter other than the acts and conduct of the accused as charged in the indictment, and (ii) the written statement meets the formal requirements of Rule 92 *bis* (B), it may exercise its discretion to admit the statements".[60]

19. As the Appeals Chamber of the ICTY has affirmed, the term "acts and conduct of the accused as charged in the indictment" is "a plain expression and should be given its ordinary meaning"; namely, deeds and behaviour of the accused himself—including evidence of the accused's state of mind—but not the acts and conduct of his co-perpetrators or subordinates.[61] Moreover, "[t]he Tribunal's jurisprudence does not draw a distinction between whether the material sought to be admitted goes to prove or disprove acts and conduct of the accused. Indeed, material tending to contradict evidence that the accused carried out certain acts has been held to relate to 'proof of the acts and conduct of the accused' for the purposes of Rule 92 *bis*."[62]

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[60] *Prosecutor v. Gatete*, ICTR-2000-61-T, Decision on Defence and Prosecution Motions for Admission of Written Statements and Defence Motion to Postpone Filing of Closing Briefs, 24 June 2010, para. 8; citing *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on Four Prosper Mugiraneza Motions concerning Witness List, 4 November 2008, para. 15. See also *Prosecutor v. Nshogoza*, 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, A26, A28 and A30 as Evidence *In Lieu* of Oral Testimony, 29 April 2009, para. 8.; *Prosecutor v. Ntawukulilyayo*, ICTR-05-82-T, Decision on Defence Motion to Admit the Statement and Report of Mr. Vincent Chauchard, 29 September 2009, para. 6.

[61] *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), 7 June 2002, para. 11 and fn 28; citing with approval *Prosecutor v. Milošević*, IT-02-54-T, Decision on Prosecution's Request to have Written Statements Admitted Under Rule 92 *bis*, 21 March 2002, para. 22. See also *Nshogoza*, para. 6; *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Prosecutor's Motion for the Admission of Written Witness Statements under Rule 92 *bis*, 9 March 2004, para. 13 ("92 bis Decision"); *Ntawukulilyayo*, para. 5, fn 4.

[62] *Nshogoza*, para. 7; citing *Bizimungu*, Decision on Justin Mugenzi's Motion to Admit Transcript Extracts of General Romeo Dallaire's Evidence in the *Ndindiliyama* Proceedings, 4 November 2008, para. 24; *Bizimungu*, Decision on Jerome-Clement Bicamumpaka's Motion for the Statement of the Deceased Witnesses, Faustin Nyagahima, to be Accepted as Evidence, 30 May 2007, para. 14; *Bagosora*, 92 bis Decision, para. 16.

20. Once a Trial Chamber determines that a statement does not go to the acts or conduct of the accused as alleged in the indictment, the Chamber's discretion to admit the statement in lieu of oral testimony is "enlivened".[63] The exercise of this discretion includes whether to admit such evidence "in whole or in part",[64] and is guided by the non-exhaustive criteria for and against admission as laid out in Rules 92 *bis* (A) (i) and (ii).[65] In exercising its discretion, the Trial Chamber "must... bear... in mind the overarching necessity of ensuring a fair trial", of which a relevant factor is the proximity to the accused of the acts and conduct described in the witness statement.[66] If the statement is admitted, the Chamber may further exercise its discretion under Rule 92 *bis* (E) to require the witness to be cross-examined,[67] bearing in mind the fair trial issues mentioned above as well "whether the evidence relates to a live and important issue between the parties, as opposed to a peripheral one."[68]

21. Rule 89 (C) allows that "[a] Chamber may admit any relevant evidence which it deems to have probative value." This Rule provides the Trial Chamber with "broad discretion when assessing the admissibility of evidence".[69] As to the relationship between Rules 92 *bis* and 89 (C), "the Appeals Chamber has specifically held that a party cannot tender, under Rule 89 (C), a written statement of a prospective witness taken by an investigator as a way of avoiding the requirements of Rule 92 *bis*".[70] Moreover, "[i]n order for a statement to be admissible under Rule 92 *bis*, the general requirements of relevance and probative value, applicable to all types of evidence under Rule 89 (C), must also be satisfied".[71] This does not require "[d]efinitive proof of reliability and credibility... but merely a showing of *prima facie* reliability and credibility on the basis of sufficient indicia".[72]

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[63] See, e.g., *Ntawukulilyayo*, para. 6; *Nshogoza*, para. 8.
[64] See, e.g., *Gatete*, para. 8; *Nshogoza*, para. 5.
[65] See, e.g. *Nshogoza*, para. 8; *Ntawukulilyayo*, para. 6.
[66] *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera's Motions for Admission of Written Statements and Witness Testimony, 15 July 2009, para. 7 ("Nzirorera Decision"); citing *Bagosora*, 92 bis Decision, para. 16. See also *Galić*, para. 13.
[67] *Gatete*, para. 10; citing *Bizimungu*, Decision on Casimir Bizimungu's Motion to Vary Witness List; and to Admit Evidence of Witness in Written Form in Lieu of Oral Testimony, 1 May 2008, para. 19 ("1 May 2008 Decision"). See also *Galić*, para. 13.
[68] *Karemera*, Nzirorera Decision, para. 7; *Karemera*, Decision on "Requête de Matthieu Ngirumpatse visant à l'Admission de Déclarations sur le Fondement de l'Article 92 *Bis* du Reglement", 1 September 2010, para. 6 ("Ngirumpatse Decision").
[69] *Gatete*, para. 7; citing, *inter alia*, *Nyiramasuhuko v. Prosecutor*, ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004, para. 7.
[70] *Gatete*, para. 9; citing *Galić*, para. 31.
[71] *Gatete*, para. 9; citing *Bizimungu*, Decision on the Prosecutor's Motion and Notice Pursuant to Rule 92 bis (E), para. 20; *Bagosora*, para. 12; *Galić*, para. 31.
[72] *Karemera*, Nzirorera Decision, para. 6, citing *Karemera*, ICTR-98-44-AR73.17, Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts, 29 May 2009, para. 15.

22. Rule 73 *ter* (E) provides that

> [a]fter commencement of the Defence case, the Defence, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called.

Variations to a witness list must be supported by "good cause" and be in "the interests of justice".[73] The jurisprudence of this Tribunal has consistently held that the following factors are relevant to this analysis:

> 1) the materiality and probative value of the testimony in relation to existing witnesses and allegations in the indictment; 2) the complexity of the case; 3) any potential prejudice to the opposing party; 4) the justifications offered for the late variation of the witness list; 5) the timing of the late disclosure; and 6) any delays in the proceedings occasioned by the proposed variation.[74]

Preliminary Matters

23. At the outset, the Trial Chamber wishes to address two preliminary matters.

24. First, in keeping with a recent decision issued by this Trial Chamber with respect to a very similar Defence Rule 92 *bis* motion ("First 92 *bis* Decision"),[75] the Chamber again finds that an optimal resolution of the instant Motion would be achieved by analysing whether any of the statements the Defence seeks to adduce comport with the criteria established under Rule 92 *bis* prior to considering whether a variation of the Defence witness list is warranted via Rule 73 *ter* (E). As was the case in the First 92 *bis* Decision, insofar as any statement the Defence presently seeks to adduce is deemed inadmissible by the Chamber, the issue of whether or not to add its deponent as a Defence witness becomes moot.

25. Second, the Trial Chamber takes heed of the Prosecution argument that the *viva voce* testimony of Defence Witness T11 before this Chamber on 3 and 4 May 2011[76] precludes

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[73] See e.g., *Bagosora*, Decision on Bagosora Motion to Present Additional Witnesses and Vary its Witness List, 17 November 2006, para. 2 ("Witness List Decision"); *Bizimungu*, 1 May 2008 Decision, para. 12.

[74] See e.g., *Prosecutor v. Rukundo*, ICTR-2001-70-T, Decision on the Defence Motions for Additional Time to Disclose Witnesses' Identifying Information, to Vary its Witness List and for Video-Link Testimony, and on the Prosecution's Motion for Sanctions, 11 September 2007, para. 10; *Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-T, Decision on Nzuwonemeye's Request to Vary his Witness List, 31 January 2008, para. 31; *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, Decision on Accused's Motion to Expand and Vary the Witness List, 28 March 2006, para. 11; *Bizimungu*, 1 May 2008 Decision, para. 13; *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-T, Decision on the Defence Motion to Vary the Defence Witness List, 28 March 2007, para. 3; *Prosecutor v. Kalimanzira*, ICTR-05-88-T, Consolidated Decision on Prosecution Oral Motion to Reduce Defence Witness List and Defence Motion to Vary Witness List, 16 January 2009, para. 7.

[75] *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana's Motion for the Admission of Written Witness Statements, 10 May 2011, para. 26.

[76] See generally, Transcript of Trial Proceedings (English), 3-4 May 2011.

the present attempt to adduce that witness' statement (Annex 6) into the evidentiary record.[77] According to the plain wording of Rule 92 *bis* (A), a Trial Chamber may admit "the evidence of a witness in the form of a written statement in lieu of oral testimony".[78] Because the Rule in question clearly provides a mechanism to replace, rather than to supplement, oral testimony before the Chamber, the Defence request to admit T11's statement must be denied.

Analysis

Admission of the documents under Rule 92 *bis*

Compliance with the Technical Requirements of Rule 92 *bis* (B)

The Statements of T22, T60, T85, and T115 (Annexes 1, 2, 3 and 4)

26. With respect to Witnesses T22, T60, T85 and T115, the Defence simply posits that their statements "were signed by the witnesses and attested to by two defence investigators".[79] This terse justification does not evince even a perfunctory attempt by the Defence to adhere to the requirements of Rule 92 *bis* (B). Such total non-compliance with the imperative formalities of that Rule is evocative of the Appeals Chamber's premonition against allowing "a party [to] tender, under Rule 89 (C), a written statement of a prospective witness taken by an investigator as a way of avoiding the requirements of Rule 92 *bis*".[80] The Trial Chamber therefore rejects the Defence request to admit the statements of T22, T60, T85 and T115 into the evidentiary record.

The Statements of T43 and T44 (Annexes 5 and 7)

27. In relation to Witnesses T43 and T44, the Defence avers that "[t]he statement of [T44] was signed by the witness whose signature was attested to by Me. Michelle Théberge, a lawyer admitted at [sic] Quebec bar and by two Defence investigators", whereas the statement of T43 was "signed by the declarant, as well as lawyer Me. Th[é]berge, and a Defence investigator".[81] The Trial Chamber has several concerns regarding these submissions. First, the Defence has confused the content of its Annexes, such that the statement of T44 was not in fact "attested to by Me. Michelle Théberge... and by two Defence investigators". Rather,

[77] Response, paras. 48-49.
[78] Emphasis added.
[79] Motion, para. 24.
[80] *Gatete*, para. 9; citing *Galić*, para. 31.
[81] Motion, para. 24.

this procedure was followed in the procurement of Witness T43's statement.[82] In fact, the statement of T44 contains no evidence of having been witnessed by any person who might possibly qualify as a "recognised authority" pursuant to Rule 92 *bis* (B) (i).[83] Therefore, in keeping with the rationale provided above for the rejection of statements by T22, T60, T85 and TI15, the Chamber also declines to admit the statement of T44 for want of any demonstrable effort on the part of the Defence to comply with Rule 92 *bis* (B).

28. With respect to the statement of T43, while the Defence tacitly concedes that the "attestation" approach employed in relation to T43's statement does not strictly comply with the dictates of Rule 92 *bis* (B), and makes no assertion that any of the exceptions under Rule 92 *bis* (C) apply, it nevertheless argues that "[t]he Tribunal has in the past, in the interests of justice and the economy of resources", allowed for the provisional admission of statements that are not fully compliant with the requisite formalities, pending full compliance at a future point in time.[84] The Trial Chamber does not consider this argument, a virtually identical version of which was considered and rejected in the First 92 *bis* Motion,[85] to be any more persuasive in the present circumstances. It bears recalling that the jurisprudence is unanimous that compliance with the formal requirements of Rule 92 *bis* (B) is mandatory in all cases, and that the authority cited by the Defence merely refers to situations where Trial Chambers exercised their discretion to grant an extension of time for a party to eventually satisfy such requirements.[86] To that end, the Defence has, once again,[87] offered no explanation as to why it has failed to comply with the technical requirements of Rule 92 *bis* (B), nor provided any indication as to when, if ever, it could comply with such formalities.

29. For these reasons, the Defence request to admit the statement of T43 fails. Moreover, the Trial Chamber wishes to underscore its trepidation as to Me. Théberge's capacity, as a

[82] See Annex 5. Moreover, while the Defence submits that T43's statement was "signed by the declarant, as well as lawyer Me. Th[é]berge, and a Defence investigator", this was in fact the procedure followed in relation to the statement of T11. However, since the statement of T11 has already been disallowed *ab initio* for reasons stated in the Preliminary Matters section, there is no need to examine the compliance of that deponent's declaration under the rubric of Rule 92 *bis* (B).
[83] See Annex 7.
[84] Motion, para. 24.
[85] First 92 *bis* Decision, paras. 27-28.
[86] See, e.g., *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera's Motions for Admission of Written Statements and Witness Testimony, 15 July 2009, para. 27; *Karemera*, Decision on "Requête de Matthieu Ngirumpatse visant à l'admission de déclarations sur le fondement de l'article 92 *bis* du Règlement", 1 September 2010, para. 7.
[87] First 92 *bis* Decision, para. 28.

lawyer duly admitted to the bar of Quebec, Canada,[88] to "attest to"[89] or "certify"[90] solemnised documents in a foreign jurisdiction such as Rwanda, without further accreditation issued by the Minister of Justice of that particular jurisdiction.[91] Especially in light of the Defence's submission that T43's statement "conform[s] with the substantive requirements of Rule 92bis (B)",[92] the Trial Chamber would be greatly chagrined to learn that the Defence may have deliberately dissembled its level of compliance with Rule 92 *bis* (B), and hopes that this spectre is unfounded.

The Statements of T171, T93 and T10 (Annexes 8, 9 and 10)

30. The parties are mutually agreed that the statements of T171, T93 and T10 conform to the technical requirements imposed by Rule 92 *bis* (B).[93] However, having itself scrutinised the statements in question against the formal exigencies prescribed by that Rule, the Trial Chamber harbours certain misgivings as to whether the statements of T171 and T10 are in fact compliant with the dictates of Rule 92 *bis* (B) (i). Specifically, the Chamber notes that these two statements, which were deposed in Paris, France, are witnessed by a Mr. James Leavy, who identifies himself as a "member of the Quebec Bar"[94] and purports to derive his capacity to commission the two statements from the same statute that would appear to prohibit Me. Théberge from likewise commissioning any legal documents outside the territorial jurisdiction of that province.[95] Since Mr. Leavy, as a member of the Quebec bar practising outside of that jurisdiction (in Paris, France)[96], has not averred that he has been appointed by the Quebec Minister of Justice as someone capable of solemnising documents outside Quebec as specifically provided for under section 215 of the statute he himself invokes for his purported authority,[97] the Trial Chamber can only reiterates its consternation that the Defence has possibly misrepresented its compliance with Rule 92 *bis* (B) (i), and again hopes that this is not the case.

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[88] Me. Théberge inscribes what appears to be her lawyer registration number next to the "certification" in question. See Annex 5. Moreover, in its Motion, at para. 24, the Defence makes a point of drawing the Chamber's attention to the fact that Me. Théberge is "a lawyer admitted [to the] Quebec bar".
[89] Motion, para. 24.
[90] Annex 5, Official Language Services Section (LSS) English translation of original French document ("English Translation").
[91] Courts of Justice Act, R.S.Q., c. T-16, ss. 214, 219 (e).
[92] Motion, para. 24.
[93] Motion, para. 23; Response, para. 189.
[94] Annex 8, p. 4, English Translation.
[95] See Annex 8, p. 4, English Translation; Courts of Justice Act, R.S.Q., c. T-16, ss. 214, 215, 219 (e).
[96] The *Barreau du Québec*, which regulates the profession of law in Quebec, Canada, identifies Mr. Leavy's place of practice as Paris, France. See http://www.barreau.qc.ca/repertoire/details.jsp?Langue=fr&noInterv=5135495. See also Mr. Leavy's professional profile for the Paris office of the law firm of Weil Gotshal & Manges, http://www.weil.com/JamesLeavy/.
[97] Courts of Justice Act, R.S.Q., c. T-16, s. 215.

The Statements of CNAL (Annex 11)

31. While the Defence purports to adduce three witness statements provided by Prosecution witness CNAL that were gathered prior to and during the course of an *amicus curiae* investigation into whether members of the Defence team committed contempt against this Tribunal,[98] the plain fact is that Annex 11 to the Motion does not contain those statements, but rather a copy of the entire report of Dr. Moussounga Itsouhou Mbadinga, the first *amicus curiae* tasked by this Chamber with investigating the Defence's conduct, without a single statement attached. Having failed to append the very statements it endeavours to adduce via Rule 92 *bis*, the Defence has not provided the Trial Chamber with anything to consider pursuant to that authority, and therefore the Defence's request in relation to CNAL fails.

The Statements of Professor Reyntjens and Dr. Susan Thomson (Annexes 12, 13)

32. The Defence candidly concedes that the statements of Professor Reyntjens and Dr. Thomson "do not fulfill the attestation requirements of Rule 92 *bis* (B)",[99] but reiterates its argument that past practice of the Tribunal has allowed for the provisional admission of non-compliant statements, pending eventual compliance with the requisite formalities.[100] Again, the Trial Chamber finds this argument unpersuasive in respect of both statements. The signed statement of Professor Reyntjens is dated 4 November 2009. As a professor at a prominent university in Europe,[101] the Defence presumably would not have a difficult time locating him over the past one-and-a-half years in order to obtain a proper declaration in conformity with Rule 92 *bis* (B), and the Defence has averred no facts as to why such compliance was impossible or impracticable. Similarly, given that the Defence has been in regular correspondence with Dr. Thomson until at least as recently as March 2011,[102] and that the instant Motion was filed the very next month,[103] the Defence has again advanced no justification whatever as to why the requirements of Rule 92 *bis* (B) were too onerous to meet prior to the filing of the Motion, nor whether such requirements may be satisfied at any time in the foreseeable future. Consequently, the request to admit the statements of Professor Reyntjens and Dr. Thomson is denied.

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[98] Motion, paras. 94-100.
[99] Motion, para. 26.
[100] Motion, para. 26.
[101] Motion, para. 102.
[102] *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Extremely Urgent Motion for Reconsideration or Certification of the "Decision on Defense Urgent Motion to Hear Testimony of Dr. Susan Thomson via Video-Link" Rendered on 9 March 2011, 16 March 2011, Annex "B".
[103] 21 April 2011.

The Rwanda Briefing Article (Annex 14)

33. By the Defence's own admission, the Rwanda Briefing Article is not in fact a statement, but rather an unsigned article co-authored by four different individuals.[104] This alone is fatal to the Defence's request for admission of the document. For example, in *Kajelijeli*, the Appeals Chamber explicitly rejected the argument that a receipt for the rental of a parcel of land "could be construed as a written statement of [a witness] within the meaning of Rule 92*bis*(A)", as it "does not comply with any of the other requirements of admissibility under Rule 92*bis*".[105] The Trial Chamber finds this precedent to be analogous to the present circumstances and thus rejects the Defence's request to admit the Rwanda Briefing Article as a "witness statement" pursuant to Rule 92 *bis* (A).

Compliance with the Substantive Requirements of Rule 92 *bis* (A)

34. Having excluded eleven of the Annexes appended to the instant Motion, the Trial Chamber shall now examine whether the remaining three statements satisfy the threshold substantive requirement of Rule 92 *bis* (A); namely, whether the contents of the statements go to acts or conduct of the Accused as charged in the present Indictment.

The Statements of T171 and T10 (Annexes 8 and 10)

35. It is common ground between the parties that the statements of Witnesses T171[106] and T10[107] support the alibi of the Accused. While the Defence argues that such statements "do not concern the acts and conduct of Nzabonimana as alleged in the Indictment but rather the acts and conduct of Nzabonimana as alleged by the Defence for that period of time",[108] this novel interpretation is wholly unsupported by any legal authority. To the contrary, as this Tribunal has clearly signalled in *Simba*, evidence of alibi "goes directly to proof of the acts or conduct of the Accused".[109] This is squarely in line with the overarching jurisprudence of this Tribunal that "does not draw a distinction between whether the material sought to be admitted goes to prove or disprove acts and conduct of the accused. Indeed, material tending to contradict evidence that the accused carried out certain acts has been held to relate

[104] Motion, paras. 8, 29-31, 114-115, 118-119.
[105] *Kajelijeli v. Prosecutor*, ICTR-98-44A-A, Judgement, 23 May 2005, para. 277.
[106] Motion, paras. 79-80; Response, para. 191.
[107] Motion, paras. 90-91; Response, para. 191.
[108] Motion, para. 79. (emphasis in original)
[109] *Prosecutor v. Simba*, ICTR-01-76-T, Decision on the Admission of a Written Statement, 25 January 2005, para. 5.

to 'proof of the acts and conduct of the accused' for the purposes of Rule 92 *bis*."[110] For these reasons, the Trial Chamber finds that admission of the statements of T171 and T10 would be in flagrant breach of the threshold requirement of Rule 92 *bis* (A). Moreover, the Chamber finds no salvageable relevant material within the statements that could be severed from the offending portions, thus leading the Chamber to exercise its discretion to reject the statements *in toto*.

36. The above being noted, the Trial Chamber takes cognisance of the recent decision in *Ndindiliyimana et al.* supplied by the Defence, which it advances for the proposition "that a rigid adherence to the limitations of Rule 92 *bis*... would adversely impinge on the right of the Accused to a fair trial".[111] However, as the Prosecution demonstrates in its Response,[112] *Ndindiliyimana* involved an instance where the Trial Chamber concluded that "the only suitable remedy" that remained capable of "negat[ing] 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" was "the admission into evidence of the twelve exculpatory statements" at issue.[113] The Defence's rather feckless invocation of this precedent does not even attempt to analogise the highly aberrant facts contained therein to the circumstances presently at bar. The Defence's attempted reliance on *Ndindiliyimana* as a means to circumvent the threshold imperative of Rule 92 *bis* (A) fails.

The Statement of T93 (Annex 9)

37. The Defence asserts that "the statement [of T93] does not go to the acts or conduct of Mr. Nzabonimana as alleged in the Indictment",[114] as the Accused is never mentioned therein and the thrust of the statement deals with T93's disavowal of having witnessed any killings in Ruhango *cellule*, Nyamagana *secteur*, Tambwe *commune*, as well as his insistence that he never attended any political meeting in Ruhango in which the elimination of Tutsis was countenanced.[115] The Prosecution submits that the statement violates Rule 92 *bis* (A)

[110] *Nshogoza*, para. 7; citing *Bizimungu*, Decision on Justin Mugenzi's Motion to Admit Transcript Extracts of General Romeo Dallaire's Evidence in the *Ndindiliyama* Proceedings, 4 November 2008, para. 24; *Bizimungu*, Decision on Jerome-Clement Bicamumpaka's Motion for the Statement of the Deceased Witnesses, Faustin Nyagahima, to be Accepted as Evidence, 30 May 2007, para. 14; *Bagosora*, 92 bis Decision, para. 16.
[111] Motion, para. 13; citing *Ndindiliyimana*, Decision on the Admission of Written Statements Disclosed by the Prosecution Pursuant to Rule 68(A) of the Rules of Procedure and Evidence ("Written Statements Decision"), 12 April 2011, para. 10.
[112] Response, paras. 119-122.
[113] *Ndindiliyimana*, Written Statements Decision, paras. 4-6.
[114] Motion, para. 84.
[115] Annex 9, paras. 5-6.

because it "seeks to rebut paragraph 44 of the Indictment on the allegation concerning the meeting... in Ruhango".[116]

38. The Prosecution's argument must fail, for two reasons. First, recalling the Appeals Chamber jurisprudence that the term "acts and conduct of the accused as charged in the indictment" is "a plain expression" that encompasses "deeds and behaviour of the accused himself",[117] mere denials of a general nature that certain crimes occurred in a specific region do not meet this personalised standard. Second, with respect to T93's adamant denial that he attended the alleged meeting of senior Rwandese government officials in Ruhango, the jurisprudence suggests that "a statement that a person did not attend a particular meeting at which an accused is alleged to have also attended does not go to the acts and conduct of that accused",[118] especially when the statement "does not include testimony regarding whether the meeting actually took place, or, if so, whether [the accused] was present".[119] For these reasons, the Trial Chamber finds that the statement of T93 does not touch upon acts or conduct of the Accused as alleged in the present Indictment.

Whether the Statement of T93 is Admissible

39. Having determined that the statement of Witness T93 satisfies both the substantive threshold requirement of Rule 92 *bis* (A) and the technical exigencies of Rule 92 *bis* (B), the Trial Chamber's discretion whether to admit the statement is now "enlivened".[120] In this regard, the Chamber notes with great concern the deponent's refusal to attend the Tribunal for the purpose of adducing *viva voce* evidence. Given that the T93's statement purports to, *inter alia*, delve into matters that lie at the heart of paragraph 44 of the Indictment,[121] the Chamber is of the opinion that to allow the adduction of such a statement without affording the Prosecution the opportunity to cross-examine T93 regarding testimony that clearly "relates to a live and important issue between the parties, as opposed to a peripheral one"[122] would cause undue prejudice to the Prosecution, and therefore the Chamber declines to

[116] Response, paras. 193-194.
[117] *Galić*, para. 11 and fn 28; citing with approval *Milošević*, para. 22. See also *Nshogoza*, para. 6; *Bagosora*, 92 bis Decision, para. 13; *Ntawukulilyayo*, para. 5, fn 4.
[118] *Karemera*, Decision on Joseph Nzirorera's Motion to Admit Statement of Gratien Kabiligi, 4 February 2010, para. 7.
[119] *Karemera*, Decision on Joseph Nzirorera's Motion to Admit Statement of Bonaventure Ubalijoro, 14 April 2008, para. 5.
[120] See, e.g., *Ntawukulilyayo*, para. 6; *Nshogoza*, para. 8.
[121] Annex 9, para. 7.
[122] *Karemera*, Nzirorera Decision, para. 7; *Karemera*, Decision on "Requête de Matthieu Ngirumpatse visant à l'Admission de Déclarations sur le Fondement de l'Article 92 *Bis* du Règlement", 1 September 2010, para. 6 ("Ngirumpatse Decision").

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exercise its discretion, pursuant to Rule 92 *bis* (E), to admit the statement of T93 into the evidentiary record of the present proceedings. Moreover, as an ancillary point, the Trial Chamber is not prepared to accept concerns of witness T93 for his own security and that of his family members residing in Rwanda as grounds for his refusal to testify in person before this Trial Chamber.[123] Unless provided with solid proof to the contrary, the Trial Chamber presumes that the Witnesses and Victims Support Section (WVSS) of the Tribunal is capable of ensuring the safe passage of T93 to and from Arusha, and his security while at the seat of the Tribunal.

Variation of Witness List under Rule 73 *ter* (E)

40. Because the Trial Chamber has determined that none of the statements proposed by the Defence in the instant motion warrant admission into the evidentiary record of this trial via Rule 92 *bis*, the issue of whether or not to vary the Defence witness list in conformity with Rule 73 *ter* (E) is consequently rendered moot.

FOR THESE REASONS, THE TRIAL CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 13 July 2011, done in English.

Solomy Balungi Bossa	Bakhtiyar Tuzmukhamedov	Mparany Rajohnson
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

[123] Annex 9.