ICTR-99-54-T
22-09-2011
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104323

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

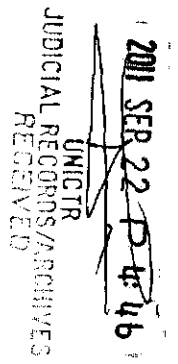
OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 22 September 2011



The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

DECISION ON DEFENCE MOTION TO DECLARE WRITTEN STATEMENTS ADMISSIBLE, FOR LEAVE FOR CERTIFICATION BY A PRESIDING OFFICER OF THESE WRITTEN STATEMENTS AND/OR RECONSIDERATION OF THE TRIAL CHAMBER'S DECISIONS RENDERED ON 11 AND 12 APRIL 2011

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

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

BEING SEIZED of the "Defence Motion to Declare Written Statements Admissible, for Leave for Certification by a Presiding Officer of These Written Statements and/or Reconsideration of the Trial Chamber's Decisions Rendered on 11 and 12 April 2011 (Article 92 *bis* of the Rules of Procedure and Evidence)", filed confidentially on 4 July 2011 (the "Defence Motion");

CONSIDERING:

(a) the "Prosecution's Response to Defence Motion to Declare Written Statements Admissible, for Leave for Certification by a Presiding Officer of These Written Statements and/or Reconsideration of the Trial Chamber's Decisions Rendered on 11 and 12 April 2011", filed confidentially on 11 July 2011 (the "Prosecution Response"); and

(b) the "Defence Reply to Prosecution's Response to Defence Motion to Declare Written Statements Admissible, for Leave for Certification by a Presiding Officer of These Written Statements and/or Reconsideration of the Trial Chamber's Decisions Rendered on 11 and 12 April 2011 (*Article 92 bis of the Rules of Procedure and Evidence*)", filed confidentially on 18 July 2011;

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

NOW DECIDES the Motion pursuant to Rules 89(C) and 92 *bis* of the Rules.

INTRODUCTION

1. On 15 September 2010, the Defence filed its Motion to Declare Written Statements Admissible and for Leave for Certification of These Written Statements by a Presiding Officer ("First Defence 92 *bis* Motion") with respect to the will-say statements of DWAN-5, DWAN-52, DWAN-27, DWAN-400, DWAN-38, DWAN-135, DWAN-149 and DWAN-150. On 4 March 2011, the Defence filed a second Motion ("Second Defence 92 *bis* Motion") seeking similar relief as regards the will-say statements of DWAN-48, DWAN-57, DWAN-62, DWAN-78, DWAN-84, DWAN-85, and DWAN-154.

2. On 11 April 2011, the Chamber denied the First Defence 92 *bis* Motion,[1] and on 12 April 2011, the Chamber denied the Second Defence 92 *bis* Motion.[2] Both Defence Motions

[1] 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 on First Defence 92 *bis* Motion").

[2] Decision on Second Defence Motion to Declare Written Statements Admissible and for Leave for Certification of These Written Statements by a Presiding Officer (TC), 12 April 2011 ("Decision on Second Defence 92 *bis* Motion").

were denied as the statements sought to be admitted were will-say statements which appeared to have been prepared by the Defence, and not statements of the witnesses themselves. The Chamber noted that the will-say statements were not signed, and simply outlined the witnesses' anticipated testimonies. The Chamber further observed that the will-say statements lacked declarations by the statements' authors that the contents thereof were true and correct to the best of that person's knowledge and belief, as required by Rule 92 *bis* (B). The Chamber thereby deemed both Defence Motions as improperly filed as the Defence had not submitted any written statements whose admissibility could be evaluated under Rule 92 *bis*.[3]

3. On 4 July 2011, the Defence filed the present Motion.

SUBMISSIONS OF THE PARTIES

Defence Motion

4. The Defence states that following the Chamber's Decisions on the First and Second Defence 92 *bis* Motions, it went on mission to Rwanda and obtained signed statements of DWAN-5, DWAN-27, DWAN-48, DWAN-52, DWAN-78, DWAN-84, DWAN-85, and DWAN-135. The Defence submits that these statements have not been certified by a notary public in Rwanda as the witnesses were afraid of doing so as Rwandan notaries public are civil servants. As a result, the Defence posits that the only viable option is to have the statements certified by a Presiding Officer appointed by the Registrar of the Tribunal.[4]

5. The Defence submits that the written statements concern the credibility of four Prosecution witnesses,[5] and corroborate the evidence of one Prosecution witness,[6] one Defence witness who has already testified, and five of the remaining Defence witnesses.[7] It also affirms that the statements do not go to the acts and conduct of the Accused as charged in the Indictment.[8]

Reconsideration

6. The Defence makes a subsidiary request that the Chamber reconsider its Decisions on the First and Second Defence 92 *bis* Motions due to the discovery of new facts or a material change in circumstances since the issuance of these Decisions. The Defence contends that the submission of statements signed by the witnesses constitutes a new fact meriting reconsideration.[9]

Prosecution Response

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[3] Decision on First Defence 92 *bis* Motion, paras. 20-23; Decision on Second Defence 92 *bis* Motion, paras. 23-26.
[4] Defence Motion, paras. 12-13, 21-25.
[5] Prosecution witnesses AFS, ANAN, ANAK and ANAD.
[6] Prosecution witness AFS.
[7] Defence witnesses DWAN-5, DWAN-21 DWAN-27, DWAN-39, DWAN-47, DWAN-70, DWAN-72, DWAN-81, DWAN-84, DWAN-134, DWAN-145, and Edison Nsabimana. Of these witnesses, one has already testified, five are expected by the Defence to testify orally, and three are the subject of the present Motion.
[8] Defence Motion, paras. 28-63.
[9] *Id.*, paras. 64-73.

7. The Prosecution contends that the statements are not admissible under Rule 92 *bis* as they directly pertain to the acts and conduct of the Accused as charged in ten paragraphs of the Indictment,[10] or otherwise go to acts and conduct so proximate to the Accused as to render them critical elements of the Prosecution's case. The Prosecution also disputes the Defence submission that the statements are of a cumulative nature by referring to other written statements. The Prosecution points out that statements can only be deemed cumulative of oral testimony under Rule 92 *bis* (A)(i)(a).[11]

8. In particular, the Prosecution argues that the statements of DWAN-48, DWAN-78, DWAN-85 and DWAN-135 undermine the allegation of a joint criminal enterprise between the Accused and Faustin Bagango as regards crimes carried out in Nyamyumba commune.[12]

9. The Prosecution contends that the statements of DWAN-5, DWAN-27, DWAN-52 and DWAN-84 directly refute paragraph 60 of the Indictment as regards the killing of three persons.[13] The Prosecution adds that the Defence mischaracterizes the testimony of Prosecution witness AFS by stating that DWAN-5's statement corroborates said testimony. The Prosecution also takes exception to DWAN-84's statement that Bagango was acquitted by a *gacaca* court, in contrast with DWAN-12's testimony on 6 July 2011. The Prosecution notes that DWAN-85's statement refutes that a large meeting took place at Kanyabuhombo School. The Prosecution submits that should the Chamber decide to admit these statements, then it should be allowed to cross-examine their authors as their statements concern live and important issues between the Parties.[14]

10. Similarly, the Prosecution submits that the statements of DWAN-48, DWAN-78, DWAN-85 and DWAN-135 refute paragraph 17 of the Indictment by contradicting Prosecution witness ANAN's testimony that the Accused attended a number of meetings with Faustin Bagango in Nyamyumba commune. DWAN-48 further contests ANAN's testimony that the Accused visited the Gisa and Electrogaz roadblocks, which is the subject of four paragraphs of the Indictment.[15]

11. DWAN-135 goes on further, refuting paragraph 39 of the Indictment and contradicting the testimonies of three Prosecution witnesses that the Accused made an anti-Tutsi speech at Kitraco between 1992 and 1994.[16]

12. The Prosecution further submits that the statements lack satisfactory indicia of reliability so as to be inadmissible under Rule 89(C). In particular, the Prosecution deplores the following: the execution of the statements in the absence of any independent and impartial authority and translator, that the statements are written in French even if six of the eight witnesses indicate they can only read and write in Kinyarwanda, the lack of any supporting official documentation, and inconsistencies between the statements and their authors' previously submitted will-say statements. The Prosecution also contends that the statements of DWAN-27, DWAN-52 and DWAN-135 are overly brief, and that the

[10] Indictment paras. 17, 22 to 24, 39 to 41, 48, 49, and 60.
[11] Prosecution Response, paras. 19-21, 67.
[12] *Id.*, para. 21.
[13] Safari, Nehemi, and Vincent Kayihura. The last individual was named in Indictment paras. 11, 32 and 57, all of which have since been withdrawn by the Prosecution, but a reference thereto nevertheless remains in Indictment para. 60. See Decision on Defence Motion for Judgement of Acquittal (TC), 14 October 2010, paras. 20-21.
[14] *Id.*, paras. 30-41, 46, 52, 55-60, 63-66, 68, 76, 84-86.
[15] *Id.*, paras. 49, 61-62, 70-72, 77-79, referring to Indictment paras. 24, 41, 48 and 49.
[16] Prosecution Response, paras. 80-81, referring to Prosecution witnesses ANAK, ANAD and ANAO.

statements of DWAN-48 and DWAN-78 are suspiciously similar. The Prosecution notes that the Defence failed to present any evidence to bolster its claim that the witnesses were unwilling to attest to their statements before Rwandan notaries public.[17]

13. The Prosecution contends that there is an overriding public interest in the evidence subject of the statements being presented orally, particularly with respect to the allegations of witness tampering in the statements of DWAN-48, DWAN-78 and DWAN-84.[18]

14. Moreover, the Prosecution submits that the Defence Motion is frivolous and constitutes an abuse of process, meriting sanctions under Rule 73(F).[19]

Reconsideration

15. The Prosecution submits that the Defence seeks reconsideration under the wrong criterion, as the discovery of a new fact entails a fact which existed at the time of the original Decision, but was simply discovered afterwards. In the present case, the new fact alleged is one which developed after the Decisions on the First and Second Defence 92 *bis* Motions. Furthermore, the Prosecution stresses that the statements still lack certification by a Presiding Officer as required by Rule 92 *bis*.[20]

Defence Reply

16. The Defence retorts that the Defence Motion is neither frivolous nor an abuse of process meriting sanctions under Rule 73(F). The Defence merely addressed the technical deficiencies leading to the denial of the First and Second Defence 92 *bis* Motions and filed the present Motion with proper witness statements.[21]

17. As to the lack of any certification of the statements by a Presiding Officer, the Defence submits that it filed the present Motion to obtain such certification.[22]

18. The Defence argues that the statements do not go to the acts and conduct of the Accused so as to render them inadmissible under Rule 92 *bis*. The Defence notes that jurisprudence provides that "acts and conduct of the Accused" is a plain expression that should be given its ordinary meaning. The Defence distinguishes between statements which relate to the Indictment so as to possess the necessary relevance and probative value to be admissible under Rule 89(C) and those which relate to the acts and conduct of the Accused so as to be inadmissible under Rule 92 *bis*. The Defence submits that the statements are in the former category, and not in the latter.[23]

19. The Defence argues that Rule 92 *bis* would be rendered useless if it could not adduce exculpatory evidence on the ground that statements which tend to disprove allegations in the Indictment are inadmissible. It is to be expected that Defence witness statements which are

[17] *Id.*, paras. 22-24, 35 42-43, 50-51, 83, Annex 1.
[18] *Id.*, para. 26.
[19] *Id.*, paras. 29, 68.
[20] *Id.*, paras. 91-95.
[21] Defence Reply, paras. 5-8.
[22] *Id.*, para. 9.
[23] *Id.*, paras. 10-14, 35-54.

relevant and have probative value would tend to disprove certain Indictment allegations; otherwise, the Defence would not seek to tender them.[24]

20. The Defence argues that it is inconsequential if there are discrepancies between the statements and the previously submitted will-say statements as the latter lack any probative value unless confirmed by the witnesses, as affirmed by the Appeals Chamber.[25]

21. As regards the Prosecution request that were the statements to be admitted, it be allowed to cross-examine their authors, the Defence submits that the legal basis therefor is questionable. The Defence posits that the Prosecution should file a request for cross-examination should it insist thereon. The Defence nevertheless acknowledges that the Chamber may permit cross-examination of the author of a statement should it decide that allegations concerning the fabrication of evidence are of public interest.[26]

22. The Defence disputes the Prosecution's contention that the statements lack satisfactory indicia of reliability under Rule 89(C). Rule 92 *bis* does not require that the statement be taken in the presence of an impartial authority and translator. The Defence points out that once provisionally admitted by the Chamber, the statements will be certified by a Presiding Officer appointed by the Registrar of the Tribunal, who will presumably be accompanied by a translator.[27]

23. With respect to the Prosecution's skepticism towards the witnesses' fear of attesting to their statements before Rwandan notaries public, the Defence recalls that the Chamber has previously accepted the objective fear of witnesses that their participation in proceedings before this Tribunal may threaten their safety and security, particularly when testifying in favor of the Accused. The Defence submits that Parties have a choice under Rule 92 *bis* between two modes of certification, and there is no need to establish why one mode was selected over the other.[28]

24. The Defence reiterates that the statements of DWAN-5, DWAN-52, and DWAN-84 are of a cumulative nature, and that there is no basis for the Prosecution to argue that the brevity of statements render them inadmissible under Rule 92 *bis*.[29]

Reconsideration

25. The Defence points out that the Prosecution admits there has been a material change in circumstances since the Decisions on the First and Second Defence 92 *bis* Motions, and thereby reconsideration is merited.[30]

26. Finally, the Defence requests that the necessary protection be granted to the authors of the statements by maintaining their confidentiality.[31]

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[24] *Id.*, paras. 55-57.
[25] *Id.*, paras. 15-16.
[26] *Id.*, paras. 17-19.
[27] *Id.*, paras. 23-25.
[28] *Id.*, paras. 26-33.
[29] *Id.*, paras. 58-67.
[30] *Id.*, paras. 68-71.
[31] *Id.*, para. 73.

DELIBERATIONS

Formal Requirements of Rule 92 bis

27. Rule 92 *bis* (B) provides the formal requirements that a statement must meet to qualify for admission under this Rule.[32] Among these requirements is that the statement must be accompanied by a declaration witnessed by a duly authorized person, or by "a Presiding Officer appointed by the Registrar of the Tribunal for that purpose."

28. The Defence submits that the authors of the eight subject statements all reside in Rwanda, and would therefore have to appear before a notary public in that country to comply with the mode of certification under Rule 92 *bis* (B)(i)(a). The Defence points out that a notary public in Rwanda is a civil servant, and the Prosecution does not appear to dispute this.[33] The Chamber recalls its past observation that "there is an objective fear that the disclosure of these witnesses' participation in the proceedings of this Tribunal may threaten their safety and security."[34]

29. In light of the potential risks to the safety and security of these eight witnesses should they attest to their statements before a notary public in Rwanda, which might thereby effectively render their statements public, the Chamber is of the view that it is appropriate under these particular circumstances to have a Presiding Officer appointed by the Registrar certify those statements. The Chamber will therefore determine the admissibility of these statements under Rule 92 *bis*, subject to their subsequent certification by a Presiding Officer.

Admissibility

30. Rule 92 *bis* (A) 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 proof of a matter other than the acts and conduct of the accused as charged in the indictment." This provision was primarily intended to be used to establish "crime-base" evidence and to make trials more expeditious in line with the rights of the Accused.[35]

31. The jurisprudence of the *ad hoc* Tribunals provides that "[t]he phrase 'acts and conduct of the accused' in Rule 92 *bis* is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused. It should not be extended by fanciful interpretation."[36] The Appeals Chamber in *Galić* pointed out that an overly broad interpretation of Rule 92 *bis* would render it inutile. It rejected the contention that Rule 92 *bis* excludes statements referring to the acts and conduct of others for which the Accused is

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[32] Exceptions to these formal requirements can be found in Rule 92*bis* (C)-(D). None of these exceptions appear to be at issue in the Defence Motion, and the Chamber has therefore not considered them here.

[33] Defence Motion, para. 13, Annex 13.

[34] Decision on Defence Urgent Motion for Witness Protective Measures (TC), 9 February 2010, para. 22.

[35] *The Prosecutor v. Ildephonse Nizeyimana*, Case No. ICTR-00-55C-AR73.2, Decision on Prosecutor's Interlocutory Appeal of Decision Not to Admit Marcel Gatsinzi's Statement into Evidence Pursuant to Rule 92*bis* (AC), 8 March 2011 ("*Nizeyimana* Appeals Decision"), para. 24; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence (AC), 23 November 2007, para. 43.

[36] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92*bis* (TC), 21 March 2002 ("*Slobodan Milošević* Decision"), para. 22. See also *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Decision on Defence Motion to Admit the Statement and Report of Mr. Vincent Chauchard (TC), 29 September 2009, para. 5 (citing *Slobodan Milošević* Decision); *Popović et al.* Decision, para. 10 (quoting *Slobodan Milošević* Decision); *v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C) (AC), 7 June 2002 ("*Galić* Appeals Decision"), note 28.

charged in the indictment with responsibility. Among others, this Rule would exclude statements which go to proof of any act or conduct of the Accused upon which the Prosecution relies to establish that he had participated in a joint criminal enterprise, or that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes. On the other hand, statements concerning the acts and conduct of individuals that the Accused allegedly aided and abetted to commit the crimes charged, or of the Accused's subordinates who committed those crimes, would be admissible.[37]

32. The *Galić* Appeals Chamber further explained that even where the statements do not go to proof of acts and conduct of the Accused as charged in the Indictment, the Trial Chamber retains the discretion to deny their admission. The Appeals Chamber cited in particular instances "[w]here the evidence is so pivotal to the [P]rosecution case, and where the person whose acts and conduct the written statement describes is so proximate to the [A]ccused, the Trial Chamber may decide that it would not be fair to the [A]ccused to permit the evidence to be given in written form."[38] The Appeals Chamber emphasized, however, that the rejection of statements under these circumstances "is not based upon any identification of that person's acts or conduct with the acts or conduct of the [A]ccused."[39]

33. For a statement to be admissible pursuant to Rule 92 *bis*, it must also comply with Rule 89(C), which states that "a Chamber may admit any relevant evidence which it deems to have probative value". The *Galić* Appeals Chamber noted that

> Rule 92 *bis* is the *lex specialis* which takes the admissibility of written statements of prospective witnesses and transcripts of evidence out of the scope of the *lex generalis* of Rule 89(C), although the general propositions which are implicit in Rule 89 (C) – that evidence is admissible only if it is relevant and that is relevant only if it has probative value – remain applicable to Rule 92 *bis*.[40]

34. Even when a statement is admissible under Rules 92 *bis* and 89(C), however, the Trial Chamber retains the discretion to deny admission thereto based on various factors. Among the factors in favour of admitting such evidence is when it "relates to relevant historical, political or military background". In contrast, the factors against admission include when "there is an overriding public interest in the evidence in question being presented orally".

35. Trial Chambers before the *ad hoc* Tribunals have likewise admitted statements subject to the availability of their authors for cross-examination, when the statements dealt with a live and important issue between the Parties, as opposed to a peripheral one.[41]

DWAN-5, DWAN-27, DWAN-52 and DWAN-84

36. The statements of DWAN-5, DWAN-27, DWAN-52 and DWAN-84 all provide that one or more individuals identified or referenced in paragraph 60 the Indictment as having

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[37] *Galić* Appeals Decision, paras. 9-10,

[38] *Id.*, para. 13.

[39] *Id.*, para. 15.

[40] *Id.*, para. 31. See also *The Prosecutor v. Sylvain Nsabimana et. al.*, Joint Case No. ICTR-98-42-T, Decision on Nsibamana's Motion to Admit the Written Statement of Witness JAMI in Lieu of Oral Testimony Pursuant to Rule 92*bis* (TC), 15 September 2006, para. 31.

[41] *Karemera et al.* Trial Decision of 4 February 2010, para. 3; *Karemera et al.* Trial Decision of 15 July 2009, para.7; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T ("*Bagosora et al.*"), Decision on Prosecutor's Motion for the Admission of Written Witness Statements under Rule 92 *bis* (TC), 9 March 2004, para. 16, citing *Slobodan Milošević* Decision, paras. 24-25; and *Prosecutor v. Dusko Sikirica et al*, Case No. IT-95-8-T, Decision on Prosecution's Application to Admit Transcripts Under Rule 92 *bis* (TC) (ICTY), 23 May 2001, para. 4.

been killed in 1994, all in fact survived beyond that year. By stating that these individuals were in fact not killed during the period subject of the Indictment, the witnesses directly refute major charges against the Accused.

37. The Chamber is therefore of the view that the statements of DWAN-5, DWAN-27, DWAN-52 and DWAN-84, insofar as these deny the deaths of one to three individuals referred to in paragraph 60 of the Indictment, tend to disprove the Accused's acts or conduct as charged in the Indictment, and are therefore inadmissible under Rule 92 *bis* (A).

38. DWAN-84's statement also potentially contradicts the testimony of AFS regarding a meeting held by Faustin Bagango at Bwitereke School, wherein the Accused allegedly avowed support for the killing of Tutsis. The Chamber considers that this is a matter in contention between the Parties and, also, that it pertains to the acts and conduct of a person so proximate to the Accused, that there is an overriding public interest in this evidence being presented orally.

39. DWAN-84's statement goes on to impute a criminal act to Prosecution witness AFS. AFS was said to be of the belief that DWAN-168 intended to kill him, and the former requested DWAN-84 to inform ICTR investigators thereof. For these reasons, the Chamber further considers that accepting such serious allegations by way of a written statement would be contrary to the public interest.[42]

DWAN-48 and DWAN-78

40. The statements of DWAN-48 and DWAN-78 indirectly contradict Prosecution witness ANAN's testimony that the Accused visited roadblocks, which is the subject of four paragraphs of the Indictment.[43] These statements allege that ANAN had never gone to Nyamyumba commune in 1994, or to Gisenyi after Martin Bucyana's death in February 1994. The two statements likewise impute serious criminal acts to ANAN. In particular, DWAN-48's statement alleges that ANAN exhorted him to make false accusations against various individuals, including the Accused, while DWAN-78 indicates in his statement that ANAN requested that he falsely accuse one individual.

41. Accordingly, the Chamber is of the view that the statements of DWAN-48 and DWAN-78 tend to disprove the acts and conduct of the Accused as charged in the Indictment, and are therefore inadmissible under Rule 92 *bis* (A). It would also be contrary to the public interest for serious allegations against ANAN to be admitted by way of written statements.

DWAN-85

42. DWAN-85's statement provides that the only meeting he remembers which took place at *Collège de la Trinité* in the Kanyabuhombo area was before May 1993. This statement possibly refutes the allegations of meetings held at Kanyabuhombo school in Nyamyumba commune in early 1994 found in three paragraphs of the Indictment, as this may be interpreted as referring to *Collège de la Trinité* .[44]

[42] *Karemera et al.* Trial Decision of 15 July 2009, para. 24.
[43] Paras. 24, 41, 48 and 49.
[44] Prosecution Response, paras. 21, 49, 61-62, 70-72, 77-81, referring to Indictment paras. 22, 23 and 40.

43. The Chamber finds that this statement tends to disprove the acts and conduct of the Accused, potentially refuting major allegations in the Indictment. Accordingly, the Chamber finds that the statement of DWAN-85 is inadmissible under Rule 92 *bis* (A).

DWAN-135

44. The statement of DWAN-135 provides that he is familiar with Kitraco. He states that he never participated in a political meeting at Kitraco in 1993 or 1994, and never heard of a meeting there with many people. This could possibly refute paragraph 39 of the Indictment and contradict the testimonies of Prosecution witnesses ANAK, ANAD and ANAO that the Accused made an anti-Tutsi speech at Kitraco between 1992 and 1994.

45. The Chamber considers that this statement tends to disprove the acts and conduct of the Accused, and accordingly finds the statement of DWAN-135 to be inadmissible under Rule 92 *bis* (A).

Reconsideration

46. The Chamber recalls the Tribunal's jurisprudence on reconsideration:[45]

> The Chamber notes at the outset that the Rules do not provide for the reconsideration of the decision. The Tribunal has an interest in the certainty and finality of its decisions, in order that parties may rely on its decisions, without fear that they will be easily altered. The fact that the Rules are silent as to reconsideration, however, is not, in itself, determinative of the issue whether or not reconsideration is available in "particular circumstances", and a judicial body has inherent jurisdiction to reconsider its decision in "particular circumstances". Therefore, although the Rules do not explicitly provide for it, the Chamber has an inherent power to reconsider its own decisions. However, it is clear that reconsideration is an exceptional measure that is available only in particular circumstances.[46]

47. Reconsideration is permissible when: (1) a new fact has been discovered that was not known to the Chamber at the time it made its original decision; (2) there has been a material change in circumstances since it made its original decision; or (3) 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. The burden rests upon the party seeking reconsideration to demonstrate the existence of sufficiently special circumstances.[47] The Defence relies on the first two grounds for reconsideration.

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[45] Decision on Defence Motion for Second Reconsideration of Witness Protective Measures (TC), 15 July 2010, para. 17 ("Decision of 15 July 2010"), citing Decision on Defence Motion for Reconsideration of the Trial Chamber's Oral Decisions Rendered on 23 September 2009 (TC), 7 July 2010 ("Decision of 7 July 2010"), para. 16; Decision on Defence Motion for Reconsideration of the Decision on the Defence Motion for Protective Measures of 9 February 2010 (TC), 31 March 2010 ("Decision of 31 March 2010"), para. 21; *Nyiramasuhuko et al.*, Decision on Ntahobali's Motion for Reconsideration of the "Decision on Ntahobali's Motion for Separate Trial" (TC), 22 February 2005, para. 17; *Bagosora et al.*, Decision on Prosecutor's Second 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), 14 July 2004, para. 7; *Bagosora et al.*, 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 ("*Bagosora et al.* Decision of 15 June 2004"), para. 7.

[46] *Bagosora et al.* Decision of 15 June 2004, para. 7.

[47] Decision of 15 July 2010, para. 18, citing Decision of 7 July 2010, para. 17; Decision of 31 March 2010, para. 22; *The Prosecution v.Édouard Karemera et al.* ("*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), 29 September 2008, para. 4; *Bagosora et al.* Decision of 15 June 2004, para. 9.

48. The Chamber considers that the Defence request for reconsideration of its Decisions on the First and Second Defence 92 *bis* Motions is misplaced. The submission of the signed statements of the eight witnesses constitutes neither the discovery of new facts nor a material change in the circumstances in the context of reconsideration. Instead, the Defence merely remedied the deficiencies of some of the earlier statements it had submitted in accordance with the aforementioned Decisions. The Chamber concluded therein that it could not evaluate the admissibility of mere will-say statements which were neither signed by the witnesses nor certified in accordance with Rule 92 *bis*. The Decisions on the First and Second Defence 92 *bis* Motions were without prejudice to the determination of the admissibility of properly executed witness statements. Accordingly, the Chamber denies the Defence Motion insofar as it seeks reconsideration of the Decisions on the First and Second Defence 92 *bis* Motions.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion in its entirety; and

ORDERS that DWAN-5, DWAN-27, DWAN-48, DWAN-52, DWAN-78, DWAN-84, DWAN-85, and DWAN-135 as potential Defence witnesses, remain covered by the protective measures set out in the Decision on Defence Urgent Motion for Witness Protective Measures.

Arusha, 22 September 2011

William H. Sekule Presiding Judge	Solomy Balungi Bossa Judge	Mparany Rajohnson Judge

[Seal of the Tribunal]