



10-99-54-T
14-05-2012
(110101 - 110094)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

110101
Amwame

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 14 May 2012

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL
REGISTRAR
2012 MAY 14 P. 12: 26

**DECISION ON DEFENCE MOTION FOR ADMISSION OF WRITTEN
STATEMENTS**

Office of the Prosecutor

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Handwritten signature

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 for Admission of Written Statements”, filed confidentially on 21 February 2012 (the “Defence Motion”);

CONSIDERING:

- (a) the “Prosecution Response to Defence Motion for Admission of Written Statements”, filed on 27 February 2012 (the “Prosecution Response”); and
- (b) the “Defence’s Reply to Prosecution’s Response to Defence Motion for Admission of Written Statements”, filed confidentially on 2 March 2012;

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 11 and 12 April 2011, the Chamber rendered two Decisions pursuant to Rule 92*bis*. In these Decisions, the Chamber found that the Defence had not fulfilled the formal requirements of the Rule, and therefore denied the Defence motions.¹

2. On 22 September 2011, the Chamber denied a Defence Motion for reconsideration of the first two Decisions pursuant to Rule 92*bis*, and for admission of eight statements pursuant to Rule 92*bis*. The Chamber considered that the statements tended to disprove the acts and conduct of the Accused, and were therefore inadmissible under Rule 92*bis* (A). The Chamber further considered that it would be contrary to the public interest for three of these statements to be admitted pursuant to Rule 92*bis*.²

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, paras. 20, 23, p. 6; Decision on Defence Second Motion to Declare Written Statements Admissible and for Leave for Certification of These Written Statements by a Presiding Officer (TC), 12 April 2011, paras. 23, 26, p. 7.

² 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 (TC), 22 September 2011 (“Decision of 22 September 2011”), paras. 37-39, 41, 43, 45, 48, p. 11. On 25 November 2011, the Chamber denied a Defence Motion to reconsider or certify for appeal this Decision. See Decision on Defence Motion for Reconsideration or Certification to Appeal the Trial Chamber’s Rule 92*bis* Decision of 22 September 2011 (TC), 25 November 2011, p. 9.



SUBMISSIONS OF THE PARTIES

Defence Motion

3. The Defence seeks the admission into evidence of the written statements of DWAN-38, DWAN-109, DWAN-149 and DWAN-166, for each of these statements to be assigned an exhibit number, and for an order that protective measures continue to apply to these individuals.³

4. The Defence submits that the statements are duly certified, and that none of the statements go to the acts and conduct of the Accused as charged in the Indictment. Instead, the statement of DWAN-38 concerns the agenda of the Habyarimana family, and thereby questions the credibility of one Prosecution witness while corroborating two other Prosecution witnesses and a Defence exhibit. The statement of DWAN-109 is said to concern the death of Nyamunini, thereby contradicting evidence of one Prosecution witness and corroborating two Defence witnesses. Finally, the statements of DWAN-149 and DWAN-166 concern the routes between Kigali and Gisenyi from April to July 1994, and thereby question the credibility of Prosecution witnesses and corroborate Defence witnesses.⁴

Prosecution Response

5. The Prosecution asks the Chamber to dismiss the Defence Motion because the four statements are inadmissible under Rule 92bis. In particular, the Prosecution claims that the statements of DWAN-149 and DWAN-166 pertain to the acts and conduct of the Accused, that these statements and that of DWAN-109 address issues in contention between the parties, and that the statement of DWAN-38 has no probative value.⁵

6. In the alternative, the Prosecution contends that the Defence Motion should be dismissed because it impermissibly seeks to add four witnesses to the Defence witness list.⁶

Defence Reply

7. The Defence retorts that none of the statements go to the acts and conduct of the Accused. To the extent that the Chamber deems that the statements touch upon a critical element of the case, the Chamber retains the discretion to require their authors to appear for cross-examination. In any event, the Defence submits that the statements are relevant, but that none of them are pivotal or proximate to the Accused such that oral testimony should be required.⁷

8. The Defence further contends that the statements of DWAN-149 and DWAN-166 are related to relevant historical, political or military background.⁸

9. Finally, the Defence submits that it was limited to 35 *viva voce* witnesses, and no statement was ever made that these 35 witnesses also included witnesses pursuant to Rule 92bis.⁹

³ Defence Motion, paras. 31-32, 63. The Defence states that the original signed and certified statements are in the Defence office, and will be filed in court in the event the Chamber grants the Defence Motion. *Id.*, para. 7.

⁴ *Id.*, paras. 5-7, 18, 20, 23-24, 28-30, 33-62, Annexes 1-4. See also *id.*, paras. 9-17, 19, 21-22, 25-27.

⁵ Prosecution Response, paras. 15-19, 22-26, p. 7. See also *id.*, paras. 20-21.

⁶ *Id.*, paras. 27-28, p. 7.

⁷ Defence Reply, paras. 13, 16-24, 26-33, 35. See also *id.*, paras. 9-12, 15, 25.

⁸ *Id.*, para. 34.

DELIBERATIONS

Formal Requirements of Rule 92bis

10. Rule 92bis (B) provides the formal requirements that a statement must meet to qualify for admission under this Rule.¹⁰ Among these requirements is that the statement must be accompanied by a declaration witnessed by “a person authorised to witness such a declaration in accordance with the law and procedure of a State.”

11. The Defence submits four statements for admission under this Rule. In each of the statements, every page is signed by the individual and dated. There also appear to be official stamps from national jurisdictions and signatures by duly authorized witnesses.¹¹ The Prosecution does not appear to challenge that these statements meet the provisions of Rule 92bis (B).¹²

12. Having reviewed these statements, the Chamber considers that they satisfy the requirements of Rule 92bis (B). The Chamber will therefore determine whether they are admissible.

Admissibility

13. For a statement to be admitted pursuant to Rule 92bis (A), its author must be a witness. The Chamber notes that the authors of the four written statements were not on the Defence list of witnesses when this Motion was filed on 21 February 2012. In fact, the Chamber recalls that the Defence case closed on 22 February 2012 by which time all 35 Defence witnesses had been heard. Therefore, it is the view of the Chamber that the four written statements are inadmissible under Rule 92bis as the aforementioned precondition has not been met by the Defence.¹³

14. Furthermore, Rule 92bis (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.¹⁴

15. The jurisprudence of the *ad hoc* Tribunals provides that “[t]he phrase ‘acts and conduct of the accused’ in Rule 92bis is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused. It should not be extended by fanciful

⁹ *Id.*, paras. 37-40. See also *id.*, paras. 36, 41.

¹⁰ Exceptions to these formal requirements can be found in Rule 92bis (C)-(D). None of these exceptions appear to be at issue in the Defence Motion, and the Chamber has therefore not considered them here.

¹¹ See Defence Motion, Annexes 1-4.

¹² See generally Prosecution Response. See also *id.*, para. 8 (addressing Rule 92bis (B), without alleging that the four statements at issue do not meet these formal requirements).

¹³ *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-1, Decision on Prosecutor’s Motion For Leave to be Authorised to Have Admitted the Affidavits Regarding the Chain of Custody of the Diary of Pauline Nyiramasuhuko under Rule 92bis (TC), 14 October 2004, para. 12; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-1, Decision on Prosecutor’s Motion and Notice Pursuant to Rule 92bis(E) (TC), 17 November 2004, paras. 5-8.

¹⁴ *The Prosecutor v. Ildéphonse 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 92bis (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.

interpretation.”¹⁵ The Appeals Chamber in *Galić* pointed out that an overly broad interpretation of Rule 92bis would render it inutile. It rejected the contention that Rule 92bis excludes statements referring to the acts and conduct of others for which the Accused is 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 the requisite intent with the person who actually committed the crimes charged. On the other hand, statements concerning the acts and conduct of individuals that the Accused allegedly aided and abetted to commit the crimes charged would be admissible.¹⁶

16. 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 accused, the Trial Chamber may decide that it would not be fair to the accused to permit the evidence to be given in written form.”¹⁷

17. For a statement to be admissible pursuant to Rule 92bis, 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”.¹⁸

18. Even when a statement is admissible under Rules 92bis 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”.

19. 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.¹⁹

DWAN-38

20. The statement of DWAN-38 provides that members of the Habyarimana family, including Agathe Kanziga, “Jean-Luc” Habyarimana and Séraphin Rwabukumba, left

¹⁵ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution’s Request to Have Written Statements Admitted Under Rule 92bis (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); *Prosecutor v. Vujadin Popović et al.*, Decision on Prosecution’s Confidential Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 bis (TC), 12 September 2006, para. 10 (quoting *Slobodan Milošević* Decision); *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C) (AC), 7 June 2002 (“*Galić* Appeals Decision”), n. 28.

¹⁶ *Galić* Appeals Decision, paras. 9-10.

¹⁷ *Id.*, para. 13. See also *Nizeyimana* Appeals Decision, para. 18 (“[A] written statement need not necessarily go to proof of the accused’s acts or conduct in order to be prejudicial, and the fact that a relevant and probative written statement does not go to proof of the accused’s acts or conduct does not necessarily render it admissible.”).

¹⁸ See *Galić* Appeals Decision, para. 31. See also *The Prosecutor v. Sylvain Nsabimana et al.*, Case No. ICTR-98-42-T, Decision on Nsabimana’s Motion to Admit the Written Statement of Witness JAMI in Lieu of Oral Testimony Pursuant to Rule 92bis (TC), 15 September 2006, para. 31.

¹⁹ See, for example, *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Motions for Admission of Written Statements and Witness Testimony (TC), 15 July 2009, para. 7, p. 24.

Rwanda on 9 April 1994 and have not returned since. The Defence seeks to admit this statement in order to question the credibility of Prosecution Witness ANAN.²⁰ The Prosecution submits that this statement should not be admitted because it has no probative value.²¹

21. The Chamber considers that this statement does not go to the acts and conduct of the Accused as alleged in the Indictment, and therefore might qualify for admission pursuant to Rule 92*bis* (A).

22. The Chamber recalls that the Defence cross-examined Witness ANAN about a prior statement, in which he alleged that Agathe Kanziga, "Jean-Pierre" or "Jean-Paul" Habyarimana and Séraphin Rwabukumba participated in crimes in Giciye, Satinsi, Muramba, Gitarama, Ngororera and Karago, between 6 and 13 April 1994.²²

23. Taking into account Witness ANAN's testimony, as well as the other evidence cited by the Defence, the Chamber considers that DWAN-38's statement lacks probative value for the purposes of this case as it relates only to the alleged departure dates of some members of the Habyarimana family. The Chamber does not consider that this written statement, taken two years after Witness ANAN testified, questions the overall credibility of Witness ANAN, as alleged by the Defence.²³

24. The Defence also seeks to admit this statement because it allegedly corroborates two other Prosecution witnesses and Defence Exhibit 104 as to the whereabouts of certain members of the Habyarimana family.²⁴ The Chamber notes that the statement is at odds with Defence Exhibit 104, which does not identify Séraphin Rwabukumba as having left Rwanda on 9 April 1994 with the other identified members of the Habyarimana family.²⁵ To the extent that the statement might corroborate minor details of Prosecution testimony,²⁶ the Chamber considers that these matters are peripheral thus any corroboration, if at all, would be minimal in the context of this case. Moreover, the Chamber observes, as indicated in paragraph 23, that this statement was made almost two years after this matter arose.

25. Taking all this into account, the Chamber denies admission into evidence of this statement.

DWAN-109

26. The statement of DWAN-109 provides that an individual that may be identified in two paragraphs of the Indictment as having been killed in 1994, in fact died before that year.²⁷ By stating that this individual was in fact not killed during the period subject of the Indictment, this statement may directly refute a charge against the Accused.²⁸

²⁰ See Defence Motion, paras. 34-38, Annex 1.

²¹ See Prosecution Response, paras. 16-18.

²² See T. 8 February 2010, pp. 69-73, 76-79 (CS) (Witness ANAN). See also Defence Motion, para. 32.

²³ Prosecution Witness ANAN testified between 27 January and 8 February 2010 and DWAN-38 gave her statement on 19 January 2012. See also Defence Motion, para. 35.

²⁴ See Defence Motion, paras. 34-38, Annex 1.

²⁵ See Defence Exhibit 104A, p. 5. See also Defence Motion, para. 38.

²⁶ See T. 29 September 2009 (Witness André Delvaux), pp. 9-10; T. 25 August 2010 (Witness Joseph Ngarambe), pp. 24-26. See also Defence Motion, paras. 36-37.

²⁷ See Defence Motion, Annex 2 (concerning the death of "Nyamunini" in 1993), and Amended Indictment, filed on 14 April 2009, paras. 26, 43 (alleging the death of "Myamunini" around mid-April 1994). The Chamber

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27. The Chamber is therefore of the view that this statement tends to disprove the Accused's acts or conduct as charged in the Indictment, and is therefore inadmissible under Rule 92bis (A). The Chamber therefore denies admission into evidence of this statement.

DWAN-149 and DWAN-166

28. The statements of these individuals concern the route and feasibility of travel between Kigali and Gisenyi from April to July 1994. The Defence seeks their admission to question the credibility of Prosecution Witnesses ANAW and DAK, and to corroborate the evidence of four Defence witnesses, including the Accused.²⁹

29. The Prosecution responds that these statements concern whether it was possible for the Accused to travel between Kigali and Gisenyi, and therefore pertain to his alleged acts and conduct charged in the Indictment. The Prosecution further submits that the statements address issues in contention between the Parties, as the statements pertain to the testimony of Witnesses ANAW and DAK, which addresses a substantial part of the Indictment and is therefore pivotal to the Prosecution case.³⁰

30. The Chamber considers that these statements may go to the acts and conduct of the Accused as charged in the Indictment, as they appear to pertain to whether the Accused could have been committing acts in Gisenyi as the Indictment alleges.

31. In any event, the Chamber considers that the alibi and the feasibility of travel between Kigali and Gisenyi, particularly during April 1994, is a serious matter of contention between the Parties. Because the Chamber considers that any relevant testimony on this issue should be presented orally, the Chamber denies admission into evidence of these two statements.

notes the Defence submission that the Accused is not charged with the killing of Nyamunini. See Defence Reply, para. 21. The Chamber, however, does not consider it appropriate to address this issue here.

²⁸ See generally Decision of 22 September 2011, para. 36.

²⁹ See Defence Motion, paras. 47, 49-50, 53-55, 57-60, Annexes 3-4.

³⁰ See Prosecution Response, paras. 19, 23-26.

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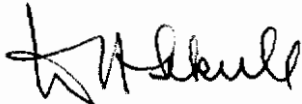
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FOR THE ABOVE REASONS, THE CHAMBER

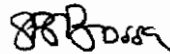
DENIES the Defence Motion insofar as it seeks the admission into evidence of the written statements; and

ORDERS that DWAN-38, DWAN-109, DWAN-149 and DWAN-166 remain covered by the protective measures set out in the Decision on Defence Urgent Motion for Witness Protective Measures.³¹

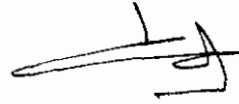
Arusha, 14 May 2012



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]



³¹ Decision on Defence Urgent Motion for Witness Protective Measures (TC), 9 February 2010.