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**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Byron, Presiding  
Gberdao Gustave Kam  
Vagn Joensen

**Registrar:** Adama Dieng

**Date:** 15 July 2009

**THE PROSECUTOR**

v.

**Édouard KAREMERA  
Matthieu NGIRUMPATSE  
Joseph NZIRORERA**

*Case No. ICTR-98-44-T*

JUDICIAL RECORDS ARCHIVES  
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**DECISION ON JOSEPH NZIRORERA'S MOTIONS FOR ADMISSION OF  
WRITTEN STATEMENTS AND WITNESS TESTIMONY**

*Rule 92 bis of the Rules of Procedure and Evidence*

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## INTRODUCTION

1. In a motion filed on 10 December 2008, Joseph Nzirorera seeks to have admitted statements from 112 witnesses pursuant to Rule 92 *bis* (A) of the Rules of Procedure and Evidence ("Rules") and testimony from 15 witnesses pursuant to Rule 92 *bis* (D).<sup>1</sup> Nzirorera submits that all the statements and testimony proposed to be admitted meet the requirements of Rule 92 *bis* of the Rules. However, Nzirorera submits that certification has not been obtained, as required by Rule 92 *bis* (B), as the Registry requested, with a view to avoiding the waste of scarce resources, that the process be delayed until the Chamber had decided on the admissibility of the statements. He has attached a letter from the Chief of the Court Management Section at Annex A to his Omnibus 92 *bis* Motion in this regard.<sup>2</sup> Consequently, Nzirorera requests the Chamber to order the Registrar to obtain certification of the statements admitted.<sup>3</sup>

2. The Prosecution opposes Joseph Nzirorera's Omnibus 92 *bis* Motion.<sup>4</sup> It argues that: (i) Nzirorera has used this motion to expand his witness list and that Nzirorera has failed to provide identifying information for the 127 witnesses listed in his motion; (ii) Nzirorera has included in his application statements going to proof of the acts and conduct of the accused which is contrary to Rule 92 *bis* (A); (iii) Nzirorera has failed to adhere to the formal requirements of Rule 92 *bis* (B) and (C); (iv) the nature and the source of the evidence is unreliable; and (v) there is an obvious need for cross examination of the witnesses and this will unduly expand the length and breadth of Nzirorera's Defence case.<sup>5</sup> In an annex to its

<sup>1</sup> Joseph Nzirorera's Omnibus Motion for Admission of Written Statement and Testimony ("Nzirorera's Omnibus 92 *bis* Motion"), filed on 10 December 2008. Nzirorera also filed supplements to his Omnibus 92 *bis* Motion to replace six witness statements that were previously attached to his original Omnibus 92 *bis* Motion: Supplement to Joseph Nzirorera's Omnibus Rule 92 *bis* Motion, filed on 22 January 2009 ("Supplement to Omnibus 92 *bis* Motion"); Second Supplement to Joseph Nzirorera's Omnibus Rule 92 *bis* Motion, filed on 26 January 2009. Nzirorera filed a reply brief: Reply Brief: Joseph Nzirorera's Omnibus Motion for Admission of Written Statements and Testimony, filed on 6 February 2009. The Chamber notes that the public annexes to Nzirorera's motions, read in conjunction with Nzirorera's Pre-Trial Brief, could reveal the identifying information for a number of witnesses subject to protective measures in this case. Accordingly, the Chamber will order the Registrar to re-file these annexes confidentially.

<sup>2</sup> Omnibus 92 *bis* Motion, para. 5; Annex A to Nzirorera's Omnibus 92*bis* Motion, Facsimile from Jean-Pélé Fomete, chief of the Court Management Section to Peter Robison, dated 29 September 2008.

<sup>3</sup> Nzirorera's Omnibus 92 *bis* Motion, para. 9.

<sup>4</sup> Prosecutor's Response to Joseph Nzirorera's Omnibus Motion for Admission of Written Statements and Testimony ("Prosecution's Response"), filed on 2 February 2009, para. 5. On 15 January 2009, the Chamber granted the Prosecution request for an extension of time to 31 January 2009 to respond to Joseph Nzirorera's Omnibus 92 *bis* Motion: *Prosecutor v. Édouard Karemera, Matthieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et al."), Decision on Prosecutor's Motion for Extension of Time, 15 January 2009.

<sup>5</sup> Prosecution's Response, para. 5.

Response, the Prosecution attaches a table where it indicates its views on all the written statements and transcripts Nzirorera seeks to have admitted.<sup>6</sup>

3. In a motion filed on 4 May 2009, Joseph Nzirorera seeks the admission of a statement from Emmanuel Nyamuhimba pursuant to Rule 92 *bis* (A)<sup>7</sup> and in a motion filed on 29 June 2009, he seeks the admission of a statements and transcripts of testimony of RPF insider witnesses pursuant to Rule 92 *bis* (C) and (D).<sup>8</sup> The Prosecution opposes these motions as well.<sup>9</sup>

## DELIBERATIONS

### I. Preliminary Issues

4. The Prosecution raises two preliminary issues relating to Joseph Nzirorera's motions of 4 May 2009 and 29 June 2009. First, the Prosecution argues that Nzirorera did not show good cause for not complying with the Chamber's previous order to file all of his 92 *bis* statements by 8 December 2008.<sup>10</sup> The Chamber notes that Nzirorera explains that he did not attach the additional statements and transcripts included in these additional motions to his 92 *bis* Omnibus Motion because the whereabouts of Emmanuel Nyamuhimba were unknown in December 2008<sup>11</sup> and because he only learned in June 2009 that the RPF insider witnesses could not be located.<sup>12</sup> The Chamber considers that these explanations constitute good cause for these supplementary motions.<sup>13</sup> The Chamber finds it in the interests of justice to consider these motions and finds no reason to order that fees related to the motion be denied.

5. Second, the Prosecution argues that Joseph Nzirorera has failed to comply with the requirements of Rule 73 *ter* by adding Emmanuel Nyamuhimba and the RPF insider

<sup>6</sup> Confidential Annex attached to Prosecution's Response.

<sup>7</sup> Joseph Nzirorera's Motion to Admit Statement of Emmanuel Nyamuhimba, filed on 4 May 2009 ("Nzirorera's 92 *bis* Nyamuhimba Motion").

<sup>8</sup> Joseph Nzirorera's Motion to Admit Statements and Testimony of RPF Insider Witnesses pursuant to Rule 92 *bis*, filed on 29 June 2009 ("Nzirorera's 92 *bis* RPF Insider Witnesses Motion"). Nzirorera also filed a reply: Reply Brief: Joseph Nzirorera's Motion to Admit Statements and Testimony of RPF Insider Witnesses pursuant to Rule 92 *bis*, filed on 7 July 2009 ("Nzirorera's 92 *bis* RPF Insider Witnesses Reply").

<sup>9</sup> Prosecutor's Response to Nzirorera's Motion to Admit the Statement of Emmanuel Nyamuhimba, filed on 7 May 2009 ("Prosecution's Response to Nyamuhimba Motion"); Prosecutor's Response to Nzirorera's Motion to Admit the Statements and Testimony of RPF Insider Witnesses pursuant to Rule 92 *bis*, filed on 6 July 2009 ("Prosecution's Response to RPF Insider Witnesses Motion").

<sup>10</sup> Prosecution's Response to Nyamuhimba Motion, paras 11-12; Prosecutor's Response to RPF Insider Witnesses, para. 11.

<sup>11</sup> Nzirorera's 92 *bis* Nyamuhimba Motion, paras 7-12.

<sup>12</sup> Nzirorera's 92 *bis* RPF Insider Witnesses Motion, para. 2; Nzirorera's 92 *bis* RPF Insider Witnesses Reply, para. 3.

<sup>13</sup> *Karemera et al.*, Decision on Joseph Nzirorera's Motions for Reconsideration of 24 October 2008 Order, for Extension of Time, Subpoenas and Video-Link and on Prosecution's Motion for an Order to Nzirorera to Reduce his Witness List, 2 December 2008.

witnesses to his witness lists, without asking for leave to vary his witness list.<sup>14</sup> The Chamber notes however that Rule 73 *ter* (E) requires the Defence to seek leave to this end only after the commencement of the Defence case. As Joseph Nzirorera has not commenced his case, he retains the right to vary his witness list without seeking leave from the Chamber to do so. Accordingly, the Prosecution's objection stands to be rejected and the Chamber will therefore consider these motions on the merits.

## II. On the Merits

6. The admission of a written statement under Rule 92 *bis* (A) or a transcript of evidence under Rule 92 *bis* (D) involves an enquiry as to whether the statement or transcript sought to be admitted goes to proof of a matter other than the acts and conduct of the Accused as charged in the Indictment and whether it satisfies Rule 89(C), in that it is relevant and has probative value.<sup>15</sup> Definitive proof of reliability and credibility of the evidence is not required, but merely a showing of *prima facie* reliability and credibility on the basis of sufficient indicia.<sup>16</sup> In addition, for the admission of a written statement, the non-exhaustive factors listed in Rule 92 *bis* (A) (i) and (ii)<sup>17</sup> and the formal requirements of Rule 92 *bis* (B) must also be met.

7. Even if a statement or transcript fulfils all of these requirements, the Chamber must decide whether or not to exercise its discretion to admit it, bearing in mind the overarching necessity of ensuring a fair trial. A relevant factor in the exercise of this discretion is the proximity to the Accused of the person whose acts are described in the statement. Pursuant to Rule 92 *bis* (E), if the Chamber permits the admission of the statement or transcript, it must also decide whether or not to admit it in whole or in part and whether or not to require cross-examination of the witness. In addition to issues relating to the fairness of the trial, a relevant

<sup>14</sup> Prosecution's Response to Nyamuhimba Motion, paras 6-9, referring to Joseph's Nzirorera's Second Revised Public Redacted Witness List, filed on 6 May 2009; Prosecution's Response to RPF Insider Witnesses Motion, paras 5-10.

<sup>15</sup> *Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Case No. ICTR-98-41-T ("*Bagosora et al.*"), Decision on Prosecutor's Motion for the Admission of Written Statement Under Rule 92 *bis*, 9 March 2004, para. 12.

<sup>16</sup> *Karemera et al.*, Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts 29 May 2009, para. 15.

<sup>17</sup> Factors which favour admission include the fact that oral evidence has been heard on similar facts; the statement provides an historical, political or military background; or the statement relates to the character of the accused. Factors weighing against admission include whether there is an overriding public interest to hear the evidence orally; its nature and source render it unreliable; or its prejudicial effect outweighs its probative value.

factor in this regard is whether the evidence relates to a live and important issue between the parties, as opposed to a peripheral one.<sup>18</sup>

8. The Chamber will now address each of the 116 witness statements and the 16 transcripts of evidence sought for admission. The analysis provided below is organised according to the legal basis upon which admission is granted or denied, save for the evidence of the RPF insider witnesses, which is treated in a separate section.

**(A) Witness Statements that Go to Proof of the Acts and Conduct of the Accused as charged in the Indictment**

*Annexes 4, 15-17, 20, 36-37, 41, 43, 47, 49, 52, 55-56, 58, 61-65, 68-69, 85, 89 and 91 – Statements of Bonaventure Hakizimana, Julius Simpakanye, Alphonse Mbonabihama, Jean-Bosco Ngayumbwiko, Cyprien Ntakaberaho, Marc Ntigura, Majaliwa Bizimana, Célestin Sezibera, Séraphin Twahirwa, Charles Bandora, François Gahigi, Jean-Claude Seyoboka, Mutuyeyezu, Simon Bikindi, Jean-Baptiste Gatete, Thomas Kifugi, Jean-Bosco Sezirahaga, Jean Berchmans Imananibishaka, Aloys Ntabakuze, Protais Zigiranyirazo, Francois-Xavier Nzuwonemeye, Hormisdas Nsengimana, André Bizimana, Samuel Imanishimwe, Moussa Zari Banganirubusa, Jean-Batiste Baligendere and Cyprien Munyampundu*<sup>19</sup>

9. The Chamber considers that the above statements sought for admission go to proof of the acts and conduct of one of the Accused as charged in the Indictment<sup>20</sup> and that they are therefore not admissible pursuant to Rule 92 *bis*.

**(B) Witness Statements that are of Limited Relevance, Probative Value or Reliability**

10. The Chamber finds that a number of the witness statements sought for admission are inadmissible because they are of limited relevance, probative value or reliability. In the paragraphs that follow, the Chamber provides its reasoning with respect to these statements.

*Annexes 7, 8, 9, 10 and 24 – Statements of Espérance Nyirakidedeli, Antoine Mburabuze, Jérôme Nteziyaremye, Juvénal Barayasesa and Magdalena Mukamuligo*

11. The Chamber notes that five of the witness statements sought for admission contain declarations to the effect that they have no knowledge of meetings held by Joseph Nzirorera with authorities in Nzirorera's mother's house. The Chamber considers that these statements

<sup>18</sup> *Bagosora et al.*, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under 92 *bis*, 9 March 2004, para. 16.

<sup>19</sup> The Chamber notes that Joseph Nzirorera filed an updated and signed version of the statement identified in Annex 89 in his Supplement to 92 *bis* Motion.

<sup>20</sup> Furthermore, the Chamber observes that Annex 20 – Statement of Marc Ntigura has limited probative value as, from Ntigura's own declarations, he was not present every day at the Mukingo commune office.

are of limited probative value.<sup>21</sup> Indeed, it does not appear from the statements that any of the witnesses were near Nzirorera's mother's house at all times and that they were in a special position enabling them to know what was happening in Nzirorera's mother's house.

***Annex 11 – Statement of Augustin Ruremesha***

12. The Chamber notes that in his witness statement, Augustin Ruremesha declares that he has no knowledge of meetings held by Joseph Nzirorera with authorities in Nzirorera's mother's house and of military training of *Interahamwe* in Mukingo *commune*. However, the Chamber considers that this statement is of limited probative value as it does not appear from the statement that Ruremesha could see what was happening at Nzirorera's mother's house at all times or how he would have been aware of any military training in Mukingo *commune* or that he was in a special position to know of either.

***Annex 13 – Statement of Charles Nzabagerageza***

13. In his statement, Charles Nzabagerageza declares that he was never a member of any committee that discussed or decided on the formation of the *Interahamwe* in Mukingo *commune*. He further states that he never organised, attended or heard of any meeting to announce the formation of the *Amahindure* force and that he never heard of any military training of youth in Mikungo *commune* or of any meeting held to organise such training. However, the Chamber notes that the attachments Nzabagerageza claimed to have attached to this statement are missing. Consequently, the probative value of this statement is limited.

***Annexes 21, 22 and 23 – Statements of François Sekanze, Faustin Sehinda and Samuel Havugimana***

14. In their statements, François Sekanze, Faustin Sehinda and Samuel Havugimana declare that there was no military training of youth from Mukingo prior 6 April 1994 and that in June 1994 they were appointed as instructors for the military training of youth from Mukingo *commune* for the purpose of sending them to the front. The Chamber notes that these three statements contain two paragraphs that are word for word identical. Having due regard to the content of these statements, the Chamber finds that this duplication casts serious doubts on their reliability. In addition, the Chamber finds that these statements are of limited relevance

<sup>21</sup> In addition, the Chamber finds that parts of Annex 9 – Statement of Jérôme Nteziyaremye and Annex 24 – Statement of Magdalena Mukamuligo go to proof of a matter relating to the acts and conduct of the Accused as charged in the Indictment. Furthermore, in relation to Annex 10 – Statement of Juvénal Barayasesa, the Chamber finds that paragraph 10 is given without any foundation and paragraph 11 is too vague to present probative value as well.

and probative value: they do not explicitly refer to the *Amahindure* force, nor do they relate specifically to Paragraph 62.5 of the Indictment.

***Annex 26 – Statement of Edison Munyatarama***<sup>22</sup>

15. The Chamber finds that the statement of Edison Munyatarama is of limited relevance: it is only minimally relevant to the adjudicated fact admitted in relation to meetings in Nkuli *commune* on 6 and 7 April 1994 and its relevance in relation to allegations of rapes in Mukingo *commune* is not clear. The Chamber further considers that this statement lacks probative value regarding meetings held at Nkuli *commune* as paragraph 10 of this statement is vague and contains declarations without foundation.

***Annexes 27 and 29 – Statements of Anastase Ntahonkiriye and Alexis Dukuzumuremyi***<sup>23</sup>

16. The Chamber notes that these two statements relate to Prosecution evidence relating to a meeting during which Juvénal Kajelijeli was elected as new *bourgmestre* of Mukingo *commune*. The Chamber notes that these two statements are identical word for word. Having due regard to the content of these statements, the Chamber finds that this duplication casts serious doubts on their reliability. In addition, the Chamber finds that these statements are of limited relevance and probative value. Indeed, the Chamber previously ruled that Prosecution evidence would be admitted for the limited purpose of establishing the presence of Nzirorera at this meeting and not the content of the meeting itself.<sup>24</sup>

***Annex 34 – Statement of Winifred Musabeyezu***

17. In her statement, Winifred Musabeyezu declares that she did not attend an MRND meeting in February 1992 in Vedaste's Building. Given that there is no indication in the statement that this witness was in a position to have attended all meetings of the MRND in February 1992, the Chamber finds that its probative value is limited. identical

***Annex 35 – Statement of Jean-Marie Vianney Higiro***

18. The Chamber notes that this statement is incomplete and that it is therefore unreliable.

<sup>22</sup> The Chamber notes that Joseph Nzirorera filed an updated and signed version of this statement in his Supplement to 92 *bis* Motion.

<sup>23</sup> The Chamber notes that Joseph Nzirorera filed an updated and signed version of this statement in his Supplement to 92 *bis* Motion.

<sup>24</sup> T. 13 June 2007, pp. 36-42.