

ICTR-98-44-T

20-10-2009

(48522-48517)

48522

HM



UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

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

**Registrar:** Adama Dieng

**Date:** 20 October 2009

2009 OCT 20 P 4:24  
JUDICIAL RECORDS  
RECEIVED  
S. Webster

THE PROSECUTOR

v.

Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA

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

**DECISION ON JOSEPH NZIRORERA'S MOTION TO ADMIT STATEMENTS OF  
ALOYS SIMPUNGA AND GÉRARD KAYUMBA AND ON RECONSIDERATION  
OF DECISION ON ADMISSION OF WRITTEN STATEMENTS AND WITNESS  
TESTIMONY**

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

**Office of the Prosecution:**

Don Webster  
Arif Virani  
Saidou N'Dow  
Sunkarie Ballah-Conteh  
Eric Husketh  
Takeh Sendze

**Defence Counsel for Édouard Karemera**  
Dior Diagne Mbaye and Félix Sow

**Defence Counsel for Mathieu Ngirumpatse**  
Chantal Hounkpatin and Frédéric Weyl

**Defence Counsel for Joseph Nzirorera**  
Peter Robinson and Patrick Nimy Mayidika Ngimbi

18

## INTRODUCTION

1. In a motion filed on 6 October 2009, Joseph Nzirorera seeks to have admitted statements from Aloys Simpunga and Gérard Kayumba pursuant to Rule 92 *bis* (A) of the Rules of Procedure and Evidence ("Rules"),<sup>1</sup> subject to certification pursuant to Rule 92 *bis* (B).
2. The Prosecution opposes the Motion.<sup>2</sup>

## DELIBERATIONS

3. The admission of a written statement under Rule 92 *bis* (A) 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>3</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>4</sup> In addition, for the admission of a written statement, the non-exhaustive factors listed in Rule 92 *bis* (A) (i) and (ii)<sup>5</sup> and the formal requirements of Rule 92 *bis* (B) must also be met.

4. 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>1</sup> Joseph Nzirorera's Motion to Admit Statements of Aloys Simpunga and Gerard Kayumba ("Motion"), filed on 6 October 2009.

<sup>2</sup> Prosecutor's Response to Joseph Nzirorera's Motion to Admit Statements of Aloys Simpunga and Gerard Kayumba ("Prosecutor's Response"), filed on 7 October 2009.

<sup>3</sup> *Prosecutor v. Théoneste Bagosora, Gratien 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>4</sup> *Karemra et al.*, Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts 29 May 2009, para. 15.

<sup>5</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>6</sup>

5. The Chamber recalls that on 24 October 2008, it ordered Joseph Nzirorera to file a consolidated motion pursuant Rule 92 *bis* and that it indicated that fees for additional filings would be denied unless good cause is shown.<sup>7</sup>

6. 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>8</sup> Joseph Nzirorera invokes issues relating to strategy between the three Defence teams in this case and the Severance of Matthieu Ngirumpatse from this case as justification for not submitting those two statements in his Omnibus 92 *bis* Motion.<sup>9</sup>

7. The Chamber first notes that although the written statement of Aloys Simpunga was signed on 10 June 2009 and the one of Gérard Kayumba was signed on 6 May 2009 in the presence of members of Joseph Nzirorera's Defence team, they were only submitted to this Chamber on 19 August 2009. The Chamber notes that at the time it had not rendered yet its decision on remand regarding the continuation of trial and conceives that Joseph Nzirorera was still reviewing his strategy.

8. The jurisprudence of this Tribunal has established that Rule 92 *bis* (A) implies that, for a statement to be admitted pursuant to this rule, its author must be a witness. This means that to be a witness, a person must appear on a party's witness list.<sup>10</sup>

9. When Joseph Nzirorera filed this motion, his witness list was the one filed on 19 August 2009.<sup>11</sup> The Chamber observes that neither Aloys Simpunga nor Gérard Kayumba appears on this witness list. However, Joseph Nzirorera filed a final witness list on 16

<sup>6</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>7</sup> *Karemara et al.*, Order to Joseph Nzirorera to Reduce his Witness List, 24 October 2008.

<sup>8</sup> Prosecutor's Response to Joseph Nzirorera's Motion to Admit Statements of Aloys Simpunga and Gerard Kayumba ("Prosecutor's Response"), filed on 7 October 2009, para. 9.

<sup>9</sup> Motion, Confidential Annex C.

<sup>10</sup> *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, Decision on Prosecutor's Motion for Leave to Be Authorised to Have the Affidavits Regarding the Chain of Custody of the Diary of Pauline Nyiramasuhuko Under Rule 92bis, 14 October 2004, para. 12; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Motion and Notice Pursuant to Rule 92 *bis* (E), 17 November 2004, paras. 4-8; *Karemara et al.*, decision on Variance of the Prosecution Witness List, 13 December 2005, para. 19; *The Prosecutor v. Rukundo*, Case No. ICTR-2001-70-T, Decision on Defence Motion to Present Additional Witnesses and to File Documentary Evidence Prior to the Close of its Case, 30 November 2007, para. 12.

<sup>11</sup> Joseph Nzirorera's Fourth Revised Witness List, filed on 19 August 2009.

October 2009<sup>12</sup> where these two witnesses appear. In the interest of justice and in order to avoid duplication of filing of identical submissions by the Parties, the Chamber considers that it should address the merits of this motion.

*Aloys Simpunga's Statement*

10. On 10 June 2009, Aloys Simpunga signed a written statement refuting evidence provided by prosecution witness UB that Simpunga attended a meeting at the Kigali *préfecture* office at the end of April 1994. With certain exceptions<sup>13</sup>, this Trial Chamber has held that a statement that a person did not attend a particular meeting at which the accused is alleged to have attended does not go to the acts and conduct of the accused, and therefore may allow such a statement to be admissible under Rule 92 *bis*.<sup>14</sup> The Chamber considers that this statement is relevant and of probative value as it addresses issues raised by the evidence adduced by the Prosecution. The Chamber also finds that this statement is cumulative in nature as oral evidence will be heard on this fact. Consequently, the Chamber finds this statement admissible. Further, the Chamber considers that the issues covered in this statement are peripheral between the Parties and consequently decides not to call Aloys Simpunga for cross-examination.

*Gérard Kayumba's Statement*

11. The Chamber agrees with the Parties that Gérard Kayumba's statement does not go to the acts and conduct of the Accused as charged in the indictment. Kayumba's statement is intended to refute Prosecution Witness AWD's evidence. The Chamber finds that this statement is relevant; however it considers that it does not have any probative value as the statement does not add further elements to the document admitted as Exhibit D Nz 370. The Chamber further notes that the authorship of Exhibit D Nz 370 is not in dispute between the Parties. The Chamber also notes that the statement of Kayumba refuting evidence of the meeting held in Ruhango cellule on 27 March 1994 is duplicative and unnecessary to ensure Nzirorera a fair trial. Consequently, the Chamber does not find this statement admissible.

*Reconsideration of previous holding in Decision on Nzirorera's Motion on Written Statements*

<sup>12</sup> Joseph Nzirorera's Confidential Final Witness List, filed on 16 October 2009.

<sup>13</sup> See e.g., *Karemara et. al.*, Decision on Joseph Nzirorera's Motion for Admission of Written Statements and Witness Testimony ("Decision on Written Statements"), 15 July 2009, para. 9.

<sup>14</sup> Decision on Written Statements, paras. 56-57, 100-101; *Karemara et. al.*, Decision on Joseph Nzirorera's Motion to Admit Statement of Bonaventure Ubalijoro, 14 April 2008.



12. The Chamber has the inherent power to reconsider its own decisions. However, this is an exceptional remedy available only in particular circumstances. Reconsideration is permissible when, *inter alia*, 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.<sup>15</sup>

13. The Chamber notes that in its Decision on Written Statements, it found that Annexes 36, 37 and 61 were not admissible as they were going to proof of the acts and conduct of the Accused as charged in the Indictment.<sup>16</sup> However, this Trial Chamber has held that a statement that a person did not attend a particular meeting at which the accused is alleged to have attended does not go to the acts and conduct of the accused, and therefore may admit such a statement under Rule 92 *bis*.<sup>17</sup> After a review of those three statements, the Chamber finds that its original decision was erroneous and that it should not have excluded them as they do not go to the acts and conduct of the Accused, save for paragraph 6 of Annex 61. The Chamber further considers that these statements are relevant and of probative value. They are also cumulative to evidence to be heard in court. Consequently, the Chamber considers that Annexes, 36, 37 and 61, save for its paragraph 6, of Nzirorera's Omnibus 92 *bis* Motion should be admitted. Further, as those statements touch upon peripheral issues between the Parties, the Chamber decides not to call Madjaliwa Bizimana, Célestin Sezibera and Jean Berchmans Imananibishaka, authors respectively of statements at annexes 36, 37 and 61 for cross-examination.

## **FOR THESE REASONS, THE CHAMBER**

**GRANTS** Joseph Nzirorera's Motion in part; and

**ORDERS** Joseph Nzirorera to disclose to the other Parties all identifying information for Aloys Simpunga, Madjaliwa Bizimana, Célestin Sezibera and Jean Berchmans Imananibishaka;

**ORDERS** Joseph Nzirorera to obtain certification, as prescribed by Rule 92 *bis* (B), of the uncertified statements of Aloys Simpunga, Madjaliwa Bizimana, Célestin Sezibera and Jean Berchmans Imananibishaka;

<sup>15</sup> *Karemra et al*, Decision on Joseph Nzirorera's Motion for Reconsideration of 2 December 2008 Decision, 27 February 2009, para. 2.

<sup>16</sup> Decision on Written Statements, para. 9.

<sup>17</sup> Decision on Written Statements, paras. 56-57, 100-101; *Karemra et. al.*, Decision on Joseph Nzirorera's Motion to Admit Statement of Bonaventure Ubalijoro, 14 April 2008.

**DECLARES ADMISSIBLE**, subject to the disclosure of the identifying information of their authors and their certification pursuant to Rule 92 *bis* (B), the entirety of the statements of Aloys Simpunga, Madjaliwa Bizimana and Célestin Sezibera; and

**DECLARES ADMISSIBLE**, subject to the disclosure of the identifying information of Jean Berchmans Imananibishaka and the certification of his statement pursuant to Rule 92 *bis* (B), the statement of Jean Berchmans Imananibishaka, save for paragraph six of this statement.

Arusha, 20 October 2009, done in English.

  
Dennis C. M. Byron  
Presiding Judge

  
Gberdao Gustave Kam  
Judge

  
Vagn Joensen  
Judge

[Seal of the Tribunal]

