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
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 11 December 2006

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

DECISION ON PROSECUTION MOTION FOR ADMISSION OF EVIDENCE OF RAPE AND SEXUAL ASSAULT PURSUANT TO RULE 92 *BIS* OF THE RULES; AND ORDER FOR REDUCTION OF PROSECUTION WITNESS LIST

Rules 92*bis* and 73*bis* (D) of the Rules of Procedure and Evidence

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INTRODUCTION

1. The trial in this case commenced on 19 September 2005, with the Prosecution calling its first witnesses. Pursuant to Count Five of the Indictment, the Accused are charged with the commission of the crime of rape as a crime against humanity.[1] It is not alleged that the Accused personally physically perpetrated the alleged rapes, but rather that they are responsible for the crime of rape by virtue of their superior responsibility[2] for those who physically perpetrated the rapes or, alternatively, by virtue of an extended form joint criminal enterprise theory.[3]

2. On 4 July 2005, the Prosecution disclosed the statements of 143 witnesses who, it was proposed, would testify on the issue of rape and sexual assault, as pled in Count Five of the Indictment. On 13 December 2005, the Chamber granted the Prosecution's request to remove fifty of those witnesses from its List, and ordered the Prosecution to file any motion seeking the admission of evidence in written form in lieu of oral testimony, as provided for by Rule 92*bis* of the Rules of Procedure and Evidence, by 10 January 2006.[4] That deadline was subsequently extended to 20 February 2006.[5]

3. On that date, the Prosecution filed a Motion[6] seeking the following relief:

- The admission into evidence of the written statements of 63 purported rape witnesses, in lieu of them testifying orally, pursuant to Rule 92*bis* (A) of the Rules.

- The admission into evidence of the transcripts of evidence of eight purported rape witnesses[7] in previous proceedings before this Tribunal, in lieu of them testifying orally, pursuant to Rule 92*bis* (D) of the Rules.

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[1] *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera ("Karemera et al."),* Case No. 98-44-I, Amended Indictment, 24 August 2005.

[2] Paragraph 70 of the Indictment alleges that the rapes were so widespread and systematic that the Accused knew or had reason to know that the *Interahamwe* and other militiamen were about to commit them or that they had committed them; that they had the material capacity to halt or prevent the rapes, or punish or sanction the perpetrators; but that they failed to do so.

[3] Paragraph 69 (and 7) of the Indictment alleges that the rapes were the natural and foreseeable consequence of the object of the joint criminal enterprise to destroy the Tutsi as a group, and that the Accused were aware that rape was the natural and foreseeable consequence of the joint criminal enterprise in which they knowingly and wilfully participated. See also paragraphs 4, 5, 6, 7, 8, 14, 15 and 16 of the Indictment which also outline the general allegations of the joint criminal enterprise and relate to Count Five.

[4] *Prosecutor v. Karemera et al.,* Case No. 98-44-T, Decision on Variance of the Prosecution Witness List, 13 December 2005.

[5] *Prosecutor v. Karemera et al.,* Case No. 98-44-T, Decision on Prosecution Motion Seeking Extension of Time to File Applications Under Rule 92bis, 10 February 2006.

[6] See "Prosecution Motion for Proof of Facts Other Than by Oral Evidence Pursuant to Rule 92bis – Admission of 63 witness statements and 9 previous trial testimonies concerning rape and sexual assaults", dated 20 February 2006. See also, "Prosecutor's Reply: Motion for Proof of Facts Other than by Oral Evidence Pursuant to Rule 92*bis* and Prosecutor's Response to Motion for Extension of Time", dated 2 March 2006.

[7] Note that the Prosecution originally sought the admission of the previous trial testimony of nine witnesses, pursuant to Rule 92*bis*. However, by Corrigendum dated 3 October 2006, the Prosecution withdrew its application for the admission of the evidence of one of those nine witnesses – Witness FAF (a.k.a. 'TM' and 'RJ') – so that its final application pursuant to Rule 92*bis* (D) relates to the previous trial testimony of eight witnesses only.

4. The Prosecution submits that, in the event that the Chamber requires the witnesses in relation to whom it is seeking the admission of their evidence in written form to appear in person for the purposes of cross-examination, the Prosecution prefers to call each witness to give his or her evidence orally, in its entirety. In addition to the aforementioned evidence which it is seeking to have admitted in written form, the Prosecution intends to call 21 witnesses to give evidence on Count Five, orally.

5. The Motion is opposed by the Defence for Joseph Nzirorera,[8] as well as by the Defence for Mathieu Ngirumpatse, which adopts the submissions of the Nzirorera Defence.[9] In addition to opposing the Motion on its merits, the Defence seeks two further forms of relief: firstly, for the Chamber to grant the Defence an extension of time to respond fully to the merits of the Motion, in order for it to be able to investigate the material sought to be admitted with a view to establishing its unreliability; and, secondly, for the Chamber to exclude the evidence of all 72 witnesses and to make an order for the reduction of the Prosecution Witness List, accordingly, on the ground that an excessive number of witnesses is being proposed in relation to Count Five of the Indictment.

DISCUSSION

Applicable Law

General Requirements

6. Rule 92*bis* of the Rules, entitled "Proof of Facts Other Than by Oral Evidence", bestows a discretionary power upon a Trial Chamber to admit, in whole or in part, the evidence of a witness in the form of a written statement (Sub-Rule (A)), or, where the witness has previously given evidence in proceedings before this Tribunal, in the form of a transcript of that evidence (Sub-Rule (D)), in lieu of oral testimony, on the condition that it goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.

7. In relation to written statements only, a further threshold requirement is provided for by Rule 92*bis* (B), which outlines the formal requirements for the admission of written statements under the Rule. Furthermore, and with respect only to written statements, the Chamber is guided in the exercise of its discretion by the criteria for and against admission, set out in Rule 92 *bis* (A)(i) and (ii), respectively, which are non-exhaustive lists. The factors enumerated include "any other factors which make it appropriate for the witness to attend for cross-examination", which is a factor against the admission of evidence in written form.[10]

8. In relation to the admission of written statements, or transcripts of prior trial testimony under Rule 92*bis*, the general requirements of relevance and probative value,

[8] "Response to Prosecution Motion for Proof of Facts Other than by Oral Evidence Pursuant to Rule 92*bis* and Motion for Extension of Time", filed by the Defence for Joseph Nzirorera, on 27 February 2006.
[9] "Mémoire de M. Ngirumpatse sur la Prosecution Motion for Proof of Facts Other Than By Oral Evidence Pursuant to Rule 92 bis et Requête aux Fins D'extension de Délai de Réponse (Confidentiel)", filed on 28 February 2006.
[10] Sub-Rule 92*bis* (A)(ii)(c).

applicable to all types of evidence under Rule 89 (C), must also be satisfied.[11] Finally, after making a determination that a written statement or transcript of previous trial testimony is admissible in written form, Sub-Rule 92*bis* (E) bestows a further discretionary power upon the Chamber to admit the witness' evidence in whole or in part, and/or to require the witness to appear for cross-examination. The exercise of the Chamber's discretion under Rule 92*bis*, must be governed by the right of the Accused to a fair trial, as provided for in Articles 19 and 20 of the Statute.

The meaning of the phrase "acts and conduct of the accused"

9. The meaning of the term "acts and conduct of the accused as charged in the indictment" has been defined by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), particularly in relation to cases such as the one before the Chamber, in which the accused are charged with criminal responsibility for the physical acts of subordinates and/or co-perpetrators.

10. The jurisprudence states that the term is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused himself and not the acts and conduct of his co-perpetrators and/or subordinates.[12] The Appeals Chamber Decision in *Galić* is the leading Appeals Chamber authority on the interpretation of Rule 92*bis*.[13] That Decision held that Rule 92*bis* excludes the acts and conduct of the Accused as charged in the Indictment *which establish his responsibility* for the acts and conduct of others, but does not exclude the acts and conduct of *others* for which the Accused is alleged to be responsible, for example, the acts and conduct of his co-perpetrators or subordinates.[14]

11. According to the jurisprudence, Rule 92*bis* (A) (and by analogy Rule 92*bis* (D)) excludes any written statement (or transcript) which goes to the proof of any act or conduct of the accused upon which the prosecution relies to establish: (1) that the accused personally physically perpetrated any of the crimes charged himself or herself; or (2) that he planned, instigated or ordered the crimes charged; or (3) that he otherwise aided and abetted those who actually did commit the crimes in their planning, preparation or execution of those crimes; or (4) that he was a superior to those who actually did commit the crimes; or (5) that he knew or had reason to know that those crimes were about to be or had been committed by his

[11] *Prosecutor v. Bagosora et al.,* Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 *bis* (TC), 9 March 2004, para. 12.
[12] *Prosecutor v. 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, para. 22, cited in *Prosecutor v. Galić,* Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C) (AC), 7 June 2002, fn. 28, in support of the Appeals Chamber's statement of principle, at paragraph 10 of its Decision, that the term "acts and conduct of the accused as charged in the indictment" does not refer to the acts and conduct of others for which the accused is charged in the indictment with responsibility.
[13] *Prosecutor v. Galić,* Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C) (AC), 7 June 2002. In fact the authority of the *Galić* Decision in relation to the meaning of the term "acts and conduct of the accused" was recently recalled by the Appeals Chamber in its Decision in this case concerning judicial notice. See *Prosecutor v. Karemera et al.,* Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 52.
[14] See *Prosecutor v. Galić,* Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C) (AC), 7 June 2002, paras. 9-14.

subordinates; or (6) that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.[15]

12. The proximity to the accused of the acts and conduct which are described in the written statement or transcript is relevant to the exercise of the Trial Chamber's discretion in deciding whether the evidence should be admitted in written form at all. [16] In cases alleging command responsibility and where the crimes charged involve widespread criminal conduct by the alleged subordinates of the accused, there is often but a short step from a finding that the acts constituting the crimes charged were committed by such subordinates to a finding that the accused knew or had reason to know that those crimes were about to be or had been committed by them.[17] In such cases, it may well be that the alleged subordinates of the accused are so proximate to the accused that "the evidence of their acts and conduct which the prosecution seeks to prove by a Rule 92*bis* statement becomes sufficiently pivotal to the prosecution case that it would not be fair to the accused to permit the evidence to be given in written form".[18]

13. Where the Prosecution case is that an accused participated in a joint criminal enterprise, and is therefore liable for the acts of others in that joint criminal enterprise, Rule 92 *bis* also excludes any written statement or transcript which goes to proof of any act or conduct of the accused upon which the prosecution relies to establish that he had participated in that joint criminal enterprise, or that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes.[19] Again, the proximity to the accused of the acts and conduct which are described in the written statement is relevant to the exercise of the Trial Chamber's discretion in deciding whether the evidence should be admitted in written form at all. Where the individual, whose acts and conduct are described in the statement or transcript is proximate to the accused and where the evidence is pivotal to the Prosecution case, the Trial Chamber may decide not to admit the statement or transcript at all.[20]

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[15] *Prosecutor v. Galić,* Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C) (AC), 7 June 2002, para. 10.

[16] *Prosecutor v Brđanin & Talić*, IT-99-36-T, *(Confidential)* Decision on the Admission of Rule 92*bis* Statements, 1 May 2002, par 14 [A public version of this Decision was filed on 23 May 2002.]

[17] *Prosecutor v. Galić,* Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C) (AC), 7 June 2002, para. 14.

[18] *Prosecutor v. Galić,* Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C) (AC), 7 June 2002, para. 15; *Prosecutor v. Blagojević et al.,* Case No. IT-02-60-T, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant To Rule 92 bis (TC), 12 June 2003, para. 12.

[19] *Prosecutor v. Galić,* Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C) (AC), 7 June 2002, para. 10; *Prosecutor v. Milošević,* Case No. IT-02-54-T, Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to 92 bis (D) – Foča Transcripts (TC), 30 June 2003, para. 12; *Prosecutor v. Blagojević et al.,* Case No. IT-02-60-T, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant To Rule 92 bis (TC), 12 June 2003, para. 11; *Prosecutor v. Tadić,* Case No. IT-94-1-A, Judgment (AC), 15 July 1999, para. 220.

[20] *Prosecutor v. Galić,* Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C) (AC), 7 June 2002, paras. 13-15; *Prosecutor v. Blagojević et al.,* Case No. IT-02-60-T, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant To Rule 92 bis (TC), 12 June 2003, para. 12.

Cross-examination of the Witness

14. According to Rule 92*bis* (A)(ii)(c), a factor against admitting evidence in the form of a written statement is whether there are any other factors which make it appropriate for the witness to attend for cross-examination. In the *Galić* case, the Appeals Chamber considered that in some instances, "the absence of the opportunity to cross-examine the maker of the statement would in fairness preclude the use of the statement in any event".[21]

15. In addition to considering the issue of cross-examination as relevant for the admission of a statement under Rule 92*bis* (A), the Chamber has a discretionary power to decide whether to require the witness to appear for cross-examination, under Rule 92*bis* (E). As the *Galić* Appeals Chamber said,

> … the fact that [a] written statement goes to proof of the acts and conduct of a subordinate of the accused or of some other person for whose acts and conduct the accused is charged with responsibility does, however, remain relevant to the Trial Chamber's decision under Rule 92*bis*. That is because such a decision also involves a further determination as to whether the maker of the statement should appear for cross-examination [under Rule 92*bis* (E)].

In that regard, the proximity to the accused of the acts and conduct which are described in the written statement sought to be admitted is also relevant to the exercise of the Trial Chamber's discretion in deciding whether to require the witness to appear for cross-examination.

16. The principal consideration for determining whether a witness should appear for cross-examination is the overriding obligation of a Chamber to ensure a fair trial under Articles 19 and 20 of the Statute. In that regard, among the matters for consideration are whether the statement or transcript goes to proof of a critical element of the Prosecution's case against the accused.[22] Cross-examination shall be granted if the statement touches upon a critical element of the Prosecution's case, or goes to a live and important issue between the parties, as opposed to peripheral or marginally relevant issue.[23]

Application of Rule 92*bis* to the Material Before the Trial Chamber

17. The Chamber will now consider the substance of the materials sought to be admitted in the light of Rule 92 *bis,* the relevant jurisprudence, and the Parties' submissions.

18. As a preliminary matter, the Chamber finds that the formal requirements of Rule 92*bis* (B) have been met with respect to all 63 statements sought to be admitted under Rule 92*bis* (A). This finding is supported by the submissions of both Parties.

[21] *Prosecutor v. Galić,* Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C) (AC), 7 June 2002, para. 15.
[22] *Prosecutor v. 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, para. 7.
[23] *Prosecutor v. 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, para. 24.

19. Having reviewed all of the material sought to be admitted, the Chamber notes that none of the rapes and/or sexual assaults alleged are alleged to have been physically perpetrated by any of the Accused in this case. Rather, all of the rapes and/or sexual assaults are alleged to have been physically perpetrated by *Interahamwe* and militiamen, and not by any of the Accused in this case.

20. However, according to the forms of liability pleaded in the Indictment (as outlined in paragraph one of this Decision, and the footnotes thereto) the evidence is to be relied upon to prove that rapes were committed on a widespread and systematic basis by the Accused's subordinates and/or co-perpetrators. These allegations are so pivotal to the Prosecution's case that it would be unfair to the Accused to permit the evidence to be given in written form without an opportunity to cross-examine the witnesses.

21. The Prosecution Motion falls to be rejected. There is therefore no need for the Chamber to rule upon the Defence's application for extension of time in order to be able to conduct investigations with a view to making a factual demonstration of the unreliability of the material sought to be admitted.

Defence Motion for Order Reducing Prosecution Witness List Pursuant to Rule 73*bis* (D)

22. The Defence submits that the Trial Chamber should exclude the evidence sought to be admitted under Rule 92*bis* of the Rules*,* in its entirety, by means of an order pursuant to Rule 73*bis*(D) of the Rules.[24] The Prosecutor opposes this application. It finds difficult to conclude that the testimony of 93 witnesses is excessive given the massive scale of the rapes alleged in the Indictment. It submits that, since the Indictment alleges the rape of Tutsi women and girls over the course of three months in five different *préfectures*, the proposed number of 93 witnesses amounts to an average of approximately six witnesses to testify to the rapes, per month, per *préfecture*[25] – a number which the Prosecutor contends is not excessive.

23. According to Rule 73*bis* (D) of the Rules, the Trial Chamber or the designated Judge may order the Prosecutor to reduce the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts.[26]

24. In this case, the Trial Chamber has thus far declined the Defence's request for an order that the Prosecution reduce its Witness List.[27] In its Decision of 13 December 2005, the Chamber noted the Prosecution's intention to file a request seeking admission of written statements for 86 witnesses in lieu of their oral testimony, and therefore found that it was

[24] Rule 73*bis* (D) provides: "The Trial Chamber or the designated Judge may order the Prosecutor to reduce the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts".

[25] So that the calculation is six witnesses, multiplied by five *préfectures*, multiplied by three months (6 x 5 x 3), which equals a total of ninety witnesses. The Prosecution Witness List currently lists 93 witnesses on the Count of Rape as a Crime Against Humanity – 21 to be called to testify orally, and 72 in respect of whom this application is brought.

[26] See *Bagosora et al*., Case No. ICTR-98-41-T, Order for Reduction of Prosecutor's Witness List (TC), 8 April 2003: the Trial Chamber I ordered *proprio motu* the Prosecution to reduce its witness list from 235 to 100 witnesses.

[27] *Prosecutor v. Karemera et al.,* Case No. 98-44-T, Decision on Variance of the Prosecution Witness List, 13 December 2005, para. 20.

"premature for the Chamber to order the Prosecution to reduce the number of witnesses it intends to call."[28]

25. Now, as a result of the Chamber's finding in the present Decision rejecting the Prosecution's application for admission of written statements, the Prosecution Witness List will include 93 witnesses to be called to testify on the rape allegations. Considering the particular circumstances of the case, the Chamber is of the view that this number should be drastically reduced.

26. In order to justify the number of witnesses to be called to prove Count Five, the Prosecution offers a mode of calculation based on average of approximately six witnesses to testify to the rapes, per month, per *préfecture*.[29] Should this formula be strictly applied to the allegations as set forth in the Indictment, the Chamber notes that, contrary to the Prosecution's assertion, no more than some 36 witnesses only should be called to testify. The Indictment alleges the commission of rapes in each *préfecture* for a substantially reduced period than the Prosecutor claims: rapes were allegedly committed in Ruhengeri and Butare *préfectures* over a period of two weeks (respectively, from early to mid April; and from mid to late April); in Kigali-*ville* for one month (April); in Kibuye for two months (May and June) and in Gitarama for two months (April and May), and not over the course of three months in each *préfecture* as the Prosecution submits to justify a number of 93 witnesses.

27. The Chamber recalls that in its Decision of 13 December 2005, it denied the Defence's submission to reduce the witness list because, at that time, it received information from the Prosecution that only *seven* witnesses were supposed to be called to give oral evidence on Count Five of the Indictment, related to the rape allegations.[30] Then, the Prosecution indicated its intention to call 21 witnesses to give oral testimony on this Count and sought the admission of written statements of 72 witnesses on the premise that their evidence would be of a cumulative nature. The Chamber also recalls that the Prosecution has acknowledged on prior occasions that its list is too long and has expressed its intention to reduce the number of witnesses as the trial progresses. In that respect, the Prosecution's Motion for judicial notice was sought to reduce the evidence to be orally heard during this trial and, in its Decision of even date, the Chamber has taken judicial notice of adjudicated facts concerning rapes committed in Gitarama, Kibuye, Kigali-rural, Ruhengeri and Kigali-ville *prefectures*.

28. In view of the particular circumstances of the case, the Chamber finds that the Prosecution Witness List is excessive and should be drastically reduced with respect to the number of witnesses proposed to give evidence on Count Five of the Indictment. In reaching this conclusion, the Chamber has had regard to: (i) the number of witnesses currently proposed to be called on this Count; (ii) the factual elements that the Prosecution has to establish; (iii) the application of the Prosecution's own formula in submitting to the Chamber that the current number of witnesses is not excessive; (iv) that the use of excessive witnesses wastes judicial resources and time and compromises the administration of justice and the

[28] *Ibidem.*
[29] So that the calculation is six witnesses, multiplied by five *préfectures*, multiplied by three months (6 x 5 x 3), which equals a total of ninety witnesses. The Prosecution Witness List currently lists 93 witnesses on the Count of Rape as a Crime Against Humanity.
[30] *Karemera et al.,* Case No. 98-44-T, Decision on Variance of the Prosecution Witness List, 13 December 2005, para. 20.

rights of the accused, and (v) that by Decision of even date, the Chamber has taken judicial notice of a number of adjudicated facts concerning rape and sexual assault.

FOR THOSE REASONS

THE CHAMBER

DENIES the Prosecution's Motion in its entirety; and hereby

ORDERS the Prosecution, pursuant to Rule 73*bis* (D) of the Rules, to drastically reduce the number of witnesses being called to give evidence of rape and sexual assault in relation to Count Five of the Indictment and to file, as soon as possible, with the Chamber, and disclose to the Defence of each of the Accused, a revised Witness List.

Arusha, 11 December 2006, done in English.

Dennis C. M. Byron	Emile Francis Short	Gberdao Gustave Kam
Presiding	Judge	Judge

[Seal of the Tribunal]