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ICTR-98-44-T
10-12-2008
(43786-39152)

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-T

IN TRIAL CHAMBER No. 3

Before: Judge Dennis C.M. Byron, Presiding
Judge G. Gustave Kam
Judge Vagn Joensen

Registrar: Mr. Adama Dieng

Date Filed: 8 December 2008

THE PROSECUTOR

v.

JOSEPH NZIRORERA

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JOSEPH NZIRORERA'S OMNIBUS
MOTION FOR ADMISSION OF
WRITTEN STATEMENTS AND TESTIMONY

The Office of the Prosecutor:

Mr. Don Webster
Ms. Allayne Frankson-Wallace
Mr. Iain Morley
Ms. Gerda Visser
Mr. Saidou N'Dow

Defence Counsel:

Mr. Peter Robinson
Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ngirumpatse

1. Joseph Nzirorera respectfully moves, pursuant to Rule 92 *bis*, for admission into evidence of written statements and testimony of witnesses who he would otherwise intend to call to give live testimony at the trial during his case-in-chief.

2. Joseph Nzirorera makes this motion solely because the Trial Chamber has ordered him to reduce the number of witnesses who will testify live at the trial. He is prepared to call each of these witnesses to testify before the Trial Chamber if given time to do so. Therefore, he requests that, if it admits them, the Trial Chamber give the statements and prior testimony the same weight as if the witnesses testified live.

3. Rule 92 *bis* provides that:

- (A) 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.
 - (i) Factors in favour of admitting evidence in the form of a written statement include, but are not limited to, circumstances in which the evidence in question:
 - (a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
 - (b) relates to relevant historical, political or military background;
 - (c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;
 - (d) concerns the impact of crimes upon victims;
 - (e) relates to issues of the character of the accused; or
 - (f) relates to factors to be taken into account in determining sentence.

- (ii) Factors against admitting evidence in the form of a written statement include whether:
 - (a) there is an overriding public interest in the evidence in question being presented orally;
 - (b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or
 - (c) there are any other factors which make it appropriate for the witness to attend for cross-examination.

- (B) A written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and
 - (i) the declaration is witnessed by:
 - (a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or
 - (b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and

 - (ii) the person witnessing the declaration verifies in writing:
 - (a) that the person making the statement is the person identified in the said statement;
 - (b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct;
 - (c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and
 - (d) the date and place of the declaration.

The declaration shall be attached to the written statement presented to the Trial Chamber.

- (C) A written statement not in the form prescribed by paragraph (B) may nevertheless be admissible if made by a person who has subsequently died, or by a person who can no longer with reasonable diligence be traced, or by a person who is by reason of bodily or mental condition unable to testify orally, if the Trial Chamber:
- (i) is so satisfied on a balance of probabilities; and
 - (ii) finds from the circumstances in which the statement was made and recorded that there are satisfactory *indicia* of its reliability.
- (D) A Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused.
- (E) Subject to any order of the Trial Chamber to the contrary, a party seeking to adduce a written statement or transcript shall give fourteen days notice to the opposing party, who may within seven days object. The Trial Chamber shall decide, after hearing the parties, whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.

4. The decision whether to admit a statement or testimony pursuant to Rule 92 *bis* involves the following steps:

First, does the statement or transcript go to proof of a matter other than the acts and conduct of the accused as charged in the indictment;

Second, is the statement or transcript sought to be admitted relevant and does it have probative value;

Third, have the formal certification requirements of Rule 92bis(B) been met; and

Fourth, should the statement be admitted in the exercise of the Trial Chamber's discretion.¹

5. All of the statements and testimony proposed to be admitted in this motion meet these requirements. They do not go to the acts and conduct of the accused and they are relevant and probative to rebut evidence offered in the prosecution's case.² The certifications have not yet been obtained because the Registry requested that the process be delayed until the Trial Chamber decided on the admissibility of the statements.³ However, Trial Chambers have admitted statements provisionally subject to the certifications being obtained.⁴ The Trial Chamber's discretion should be exercised in favour of admission of the statements and testimony since it has made it impossible for Mr. Nzirorera to call the witnesses live due to its imposition of time limits on the presentation of the defence case.

6. Written statements from the following witnesses are sought to be admitted pursuant to Rule 92 *bis* (A):

¹ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 bis* (9 March 2004) at para. 16

² The relevance and probative value of each witness' statement or testimony is set forth in *Joseph Nzirorera's Pre-Defence Brief* (8 December 2008) which is incorporated by reference herein. By searching the name of the witness in the *Pre-Trial Brief*, one can locate the paragraph of the indictment or evidence admitted outside of the indictment, as well as the prosecution testimony or exhibit, which the witness' testimony is designed to rebut.

³ See letter of Jean-Pele Fomete attached as Annex "A"

⁴ *Prosecutor v Martić*, No. IT-95-11-T, *Decision on Prosecution's Motions for Admission of Written Evidence Pursuant to Rule 92 bis of the Rules* (16 January 2006) at para. 11; *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Defence Motion to Admit the Evidence of a Witness in the Form of a Written Statement Pursuant to Rule 92 bis* (17 January 2006); *Prosecutor v Milutinović et al*, No. IT-05-87-T, *Decision Denying Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 bis* (13 September 2006) at para. 11, fn. 52; *Prosecutor v Popović et al*, No. IT-05-88-T, *Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (12 September 2006) at para. 21

(A) Ruhengeri events:

1. Michel Bakuzakundi
2. Alphonse Ntilivamunda
3. Dominic Gatsimbanyi
4. Bonaventure Hakizimana
5. Julius Simpakanye
6. Pierre Ntamushobora
7. Esperance Nyirakidedeli,
8. Antoine Mburabuze,
9. Jerome Nteziyaremye
10. Juvenal Barayasesa
11. Augustin Ruremesha
12. Claude Nsengiyumva
13. Charles Nzabagerageza
14. Haruna Manizabayo
15. Alphonse Mbonabihama
16. Jean Bosco Ngayumbwiko
17. Cyprien Ntakabereho
18. Protais Rukeramihigo
19. Theogene Bamporeye
20. Marc Ntigura
21. Francois Sekanze
22. Faustin Sehinda
23. Samuel Havugimana
24. Magdalena Mukamuligo
25. Andre Gihanza
26. Edison Munyatarama
27. Anastase Ntahnkiriye
28. Jerome Bicamumpaka
29. Alexis Dukuzumuremyi

(B) National events

30. Aloys Simba
31. Charles Nyandwi
32. Bernard Habyarimana
33. Leon Habyarimana
34. Winnie Musabeyezu
35. Jean Marie Vianney Higiho,
36. Majaliwa Bizimana
37. Celestin Sezibera
38. Pierre Nsengiyumva
39. Ibrahim Nzarigezahe
40. Marcel Gatsinzi

41. Seraphin Twahirwa
42. Murangwa Ugiyekera
43. Charles Bandora
44. Dieudonne Ndayisenga
45. Seraphin Rwabukumba
46. Godelieve Barushwanubusa
47. Francois Gahigi
48. Stany Mbonyimana
49. Jean Claude Seyoboka
50. Aloys Zirarushya
51. Pierre Celestin Rwigema
52. Pascal Mutuyeyezu
53. Innocent Twagiramungu
54. Barabwiriza Runyinya
55. Simon Bikindi
56. Jean Baptiste Gatete
57. Jean Baptiste Nemeyabahizi
58. Thomas Kigufi
59. Abdulmohamed Bandali
60. Jean Bosco Sezirahaga
61. Jean Berchmans Imananibishaka
62. Aloys Ntabakuze
63. Protais Zigiranyirazo
64. Francis Xavier Nzuwonemeye
65. Hormisdas Nsengimana
66. Vincent Rutaganira

(C) Gisenyi events

67. Jerome Ngendahimana
68. Andre Bizimana
69. Samuel Imanishimwe
70. Theophile Gakara
71. Jean Chrystosome Ntirugiribambe
72. Felicien Muberuka
73. Emmanuel Mbigambe
74. Joseph Bamporineza
75. Ildephonse Ntatije
76. Jonathan Ntarugo
77. Anastase Abiyigoma
78. Gaspard Mburano
79. Thacien Munana
80. Oreste Habarurema
81. Jean Damascene Semanza
82. Faustin Gakombe
83. Willard Munger

84. Hassan Ngeze
85. Moussa Zari Banganirubusa
86. Augustin Nzabonimana
87. Alphonse Nzungize
88. Alphonse Higaniro
89. Jean Baptiste Baligendere

(D) Kibuye events

90. Clement Kayishema
91. Cyprien Munyampundu
92. Donatille Niyitegeka

(E) Adjudicated facts

93. Shadrack Sendugu
94. Shadrack Nikobasanzwe
95. Francois Xavier Mvuyekure
96. Manayeri Nkudabakura
97. Francois Rwabukumba
98. Antoine Rutikanga
99. Mathias Gasana
100. Evariste Micoyabagabo
101. Evariste Munyabarambe
102. Marcel Gakwisi
103. Callixte Bitegwamaso
104. Jean Nsanzumuhire
105. Amadin Mboniyintwali
106. Father Litric Danko
107. Enos Kagaba
108. Bizimungu, Omar
109. Hashim Uwayisaba
110. Manasseh Gakwerere
111. Fulgence Rukerikibaye
112. Jean Baptiste Kayihura

7. Transcripts of prior testimony from other trials are sought to be admitted pursuant to Rule 92 *bis* (D):

(A) Ruhengeri events

113. Witness DB11-2, *Ndindiliyimana* trial (12-13 June 2007)

(B) National events

114. Agnes Ntamabyaliro, *Bizimungu* trial (21-29 August 2006)
 115. Emmanuel Ndindabahizi, *Bizimungu* trial (30 April—3 May 2007)
 116. Faustin Twagiramungu, *Ntakirutimana* trial (4-5 February 2001)
 117. Joshua Ruzibiza, *Bagosora* trial (9-10 March 2006)
 118. Aloys Ruyenzi, *Zigiranyirazo* trial (3 April 2007)
 119. Witness ALL-42, *Bagosora* trial (8-9 November 2006)
 120. Witness BRA-1, *Bagosora* trial (5-6 April 2006)
 121. Witness LE-1, *Bagosora* trial (19-21 October 2005)
 122. Luc Marchal, *Bagosora* trial (30 Nov-5 Dec 2006)

(C) Adjudicated Facts

123. Witness JK-27, *Kajelijeli* trial (17-18 September 2002)
 124. Gerard Ntakirutimana, *Ntakirutimana* trial (8-10 May 2002)
 125. Alfred Musema, *Musema* trial (10-27 May 1999)

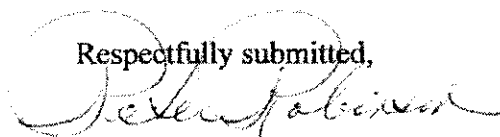
(D) Gisenyi events

126. Witness LIG-1, *Bagosora* trial (13-14 April 2005)
 127. Witness BDR-1, *Bagosora* trial (14-15 April 2005)

8. The statements and testimony are being provided in annexes filed with this motion. A confidential annex contains testimony given in closed session.

9. The Trial Chamber is respectfully requested to order the admission of the written statements and testimony pursuant to Rule 92 *bis*, and to direct the Registrar to obtain the certifications for the statements to be admitted.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera

ANNEX "A"



**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

Arusha International Conference Centre
P.O.Box 6016, Arusha, Tanzania - B.P. 6016, Arusha, Tanzania

Tel: 255 27 2504207-11 2504387-72 or 1 212 963 2850 Fax: 255 27 2504207-11 2504387-72 2848/49

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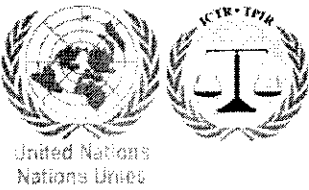
FACSIMILE TRANSMISSION — TRANSMISSION PAR TELECOPIE

Date:	29 September 2008	Ref:	JCR/HJA-11-6-061/08
To:	Peter ROBINSON, (Lead Counsel for Nzirorera)	From:	Jean-Pélé FOMETE, Chief, Court Management Section For Adama DIENG, Registrar
Fax No.:		Reply Fax:	255 27 2504 73250 000 1-212-963-2448
Cc:	Joseph NZIRORERA (UNDF)		
Subject:	YOUR RULE 92 REQUEST – CERTIFICATION OF WITNESS STATEMENTS		

1. I acknowledge receipt of your request for the appointment of Presiding Officer (s) for the certification of witness statements, pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence, as well as the hard copy versions of the statements transmitted to the CMS on 25 September 2008 and wish to inform you as follows:
 - a) I note that the number of statements required to be certified is quite large (seventy six in all) and given that the witnesses are located in three different continents, sending Presiding Officers to the various locations will certainly imply the deployment of huge financial resources.
 - b) In order to avoid waste of scarce resources and as a practical approach to the issue, the Registrar proposes that you consider, first and foremost submit a motion to the Chamber, in any form you deem appropriate, including, but not limited to an *ex-parte* submission, for a prior determination on the probable admissibility of those statements.
 - c) The Registrar wishes to assure you of his preparedness to appoint Presiding Officers to certify the statements the Chamber would otherwise deem satisfactory for admission. This approach, in the Registrar's considered opinion, will not only assist in saving cost for the Tribunal but will also help in advancing the case for Nzirorera.
 - d) The Registrar wishes to indicate that he is prepared to file a submission, pursuant to Rule 33 (B) of the Rules, to articulate this proposition.
 - e) Your understanding and cooperation in this matter will be highly appreciated.

Drafted by:	Cleared by:
No. of transmitted pages including cover sheet:	

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TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input checked="" type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Trial Chamber III A. N'Gum
	<input type="checkbox"/> Chief, CMS J.-P. Fomété	<input type="checkbox"/> Appeals Chamber / Arusha Chamber II F. A. Talon		<input type="checkbox"/> Appeals Chamber / The Hague K. K. A. Afandé R. Muzigo-Morrison
From:	<input type="checkbox"/> Chamber (names)	<input checked="" type="checkbox"/> Defence Peter Robinson (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
	Case Name: The Prosecutor vs. Joseph Nzirorera			Case Number: ICTR-98-44-T
Dates:	Transmitted: 7 December 2008		Document's date: 8 December 2008	
No. of Pages:	11	Original Language:	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
Title of Document:	JOSEPH NZIRORERA'S OMNIBUS MOTION FOR ADMISSION OF WRITTEN STATEMENTS AND TESTIMONY			
Classification Level:		TRIM Document Type:		
<input type="checkbox"/> Ex Parte <input type="checkbox"/> Strictly Confidential / Under Seal <input type="checkbox"/> Confidential <input checked="" type="checkbox"/> Public		<input type="checkbox"/> Indictment <input type="checkbox"/> Warrant <input type="checkbox"/> Correspondence <input type="checkbox"/> Submission from non-parties <input type="checkbox"/> Decision <input type="checkbox"/> Affidavit <input type="checkbox"/> Notice of Appeal <input type="checkbox"/> Submission from parties <input type="checkbox"/> Disclosure <input type="checkbox"/> Order <input type="checkbox"/> Appeal Book <input type="checkbox"/> Accused particulars <input type="checkbox"/> Judgement <input checked="" type="checkbox"/> Motion <input type="checkbox"/> Book of Authorities		

II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

CMS SHALL take necessary action regarding translation.

Filing Party hereby submits only the original, and **will not submit** any translated version.

Reference material is provided in annex to facilitate translation.

Target Language(s):
 English French Kinyarwanda

CMS SHALL NOT take any action regarding translation.

Filing Party hereby submits **BOTH the original and the translated version** for filing, as follows:

Original	in	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda
Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

CMS SHALL NOT take any action regarding translation.

Filing Party **will be submitting the translated version(s)** in due course in the following language(s):
 English French Kinyarwanda

KINDLY FILL IN THE BOXES BELOW

<input type="checkbox"/> The OTP is overseeing translation. The document is submitted for translation to: <input type="checkbox"/> The Language Services Section of the ICTR / Arusha. <input type="checkbox"/> The Language Services Section of the ICTR / The Hague. <input type="checkbox"/> An accredited service for translation; see details below: Name of contact person: Name of service: Address: E-mail / Tel. / Fax:	<input type="checkbox"/> DEFENCE is overseeing translation. The document is submitted to an accredited service for translation (fees will be submitted to DCDMS): Name of contact person: Name of service: Address: E-mail / Tel. / Fax:
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III - TRANSLATION PRIORITISATION (For Official use ONLY)

<input type="checkbox"/> Top priority	COMMENTS	<input type="checkbox"/> Required date:
<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: