



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:** 16 November 2007

**THE PROSECUTOR**

v.

**Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph Nzirorera**

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

**DECISION ON PROSECUTION MOTION FOR RECONSIDERATION OF  
THE DECISION ON PROSPECTIVE EXPERTS GUICHAOUA, NOWROJEE  
AND DES FORGES, OR FOR CERTIFICATION**

*Rule 73(B)bis of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Don Webster  
Alayne Frankson-Wallace  
Iain Morley  
Saidou N'Dow  
Gerda Visser  
Sunkarie Ballah-Conteh  
Takeh Sendze  
Deo Mbutu

**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

## INTRODUCTION

1. On 25 October 2007, the Chamber decided that whilst Alison Des Forges, André Guichaoua and Binaifer Nowrojee may be in possession of relevant specialised knowledge in a particular field, their assistance was not necessary for the Chamber to appreciate and evaluate the factual issues on the trial record.<sup>1</sup> Consequently, the Chamber precluded the admission of their evidence as expert witnesses.

2. On 1 November 2007, the Prosecution moved the Chamber to reconsider or, alternatively, grant certification for interlocutory appeal of the Decision of 25 October 2007 (“Impugned Decision”).<sup>2</sup> In his response, Joseph Nzirorera opposes the Prosecution’s application for reconsideration, but supports the certification to appeal.<sup>3</sup> The Chamber notes that Édouard Karemera and Mathieu Ndirumpatse have not filed any response.

## DISCUSSIONS

### On the Prosecutor’s application for Reconsideration

3. According to the established jurisprudence of the Tribunal, a Chamber has the inherent power to reconsider its decisions. In order for a motion for reconsideration to succeed, the moving party must demonstrate that (i) a new fact has been discovered that was not known to the Chamber at the time it made its original Decision; (ii) there has been a material change in circumstances since it made its original Decision; or (iii) 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 thereby warranting the exceptional remedy of reconsideration.<sup>4</sup>

---

<sup>1</sup> *Karemera et al.*, Decision on Prosecution Prospective Experts Witnesses Alison Des Forges, Andre Guichaoua and Binaifer Nowrojee - Rules 89 and 94bis of the Rules of Procedure and Evidence, filed on 25 October 2007 (“Impugned Decision”)

<sup>2</sup> Prosecutor’s Motion for Reconsideration of Trial Chamber III Decision of 25 October 2007 to Exclude Expert Witnesses, *or alternatively*, Motion for Certification for Interlocutory Appeal, filed on 1 November 2007

<sup>3</sup> Joseph Nzirorera’s Response to Prosecutor’s Motion for Reconsideration of Trial Chamber III Decision of 25 October 2007 to Exclude Expert Witnesses, *or alternatively*, Motion for Certification for Interlocutory Appeal, filed on 6 November 2007; *see also* Prosecutor’s Reply to Joseph Nzirorera’s Response to Prosecution Motion for Reconsideration or Certification of Decision Excluding Testimony of Expert Witnesses, filed on 8 November 2007.

<sup>4</sup> *Karemera et al.*, Decision on the Defence Motion for Reconsideration of Sanctions Imposed in Decision on the Defence Request for Leave to Interview Potential Prosecution Witnesses Jean Kambanda, Georges Ruggiu, and Omar Serushago (TC), 10 October 2003 (“6. The Chamber considers that none of the reasons submitted in support of the Motion constitute special circumstances warranting a reconsideration of Order II of the Decision of 29 September 2003. The Chamber particularly emphasizes that the issue raised at paragraph 5(ii) above

4. The Prosecution proposes that the Chamber maintain the Impugned Decision to exclude the written reports of the proposed experts, given the excessive breadth of their scope, but that the Chamber exercise its discretion to permit Alison Des Forges to testify orally on a limited number of issues during this sixth trial session.<sup>5</sup> The Prosecution further requests that the Chamber reconsiders the possibility of scheduling additional hearings so that André Guichaoua could also testify orally.<sup>6</sup>

5. In support of its application, the Prosecution alleges that the Impugned Decision to preclude the testimony of André Guichaoua and Alison Des Forges was an abuse of discretionary power. It also contends that there are new circumstances that render it necessary to reconsider the issue of admission of the evidence of these two expert witnesses. The Prosecution clearly accepts the exclusion of Nowrojee by not arguing for her testimony to be admitted or heard.

6. With regard to Alison Des Forges, the Prosecution asserts that her testimony will provide explanations that will enable the informed assessment of documents, speeches and the civil defence and pacification programmes which are the subject of competing characterisations. It concedes to the exclusion of her expert report and asks, instead, that the Chamber allow her oral testimony on a limited number of issues of grave importance, namely “social and historical context”, “layered meaning of documents”, and “analysis of the pattern, history and socially layered meanings of the ‘civil self-defence’ and ‘pacification / restoring

---

should have been brought to the Chamber’s attention at the time of filing of the Motion dismissed in the Decision of 29 September 2003, as this was an issue that Counsel was aware of at the time.”); *Karemera et al*, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses (TC), 29 August 2005 (“8. The Chamber notes its ‘inherent power’ to reconsider its own decision [...] [and] reminds itself that reconsideration is an exceptional measure available only in particular circumstances such as (i) when a new fact has been discovered that was not previously known to the Chamber, (ii) where new circumstances have arisen since the filing of the impugned decision that affect the premise of the impugned decision, or (iii) where a party shows an error of law or the Chamber abused its discretion, and an injustice has been occasioned.”); *Karemera et al*, Decision on Joseph Nzirorera’s Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness (TC), 11 October 2005, par. 8; Decision on Reconsideration of Protective Measures for Prosecution Witnesses (TC), 30 October 2006, par. 2; Decision on Reconsideration of Admission of Written Statements in Lieu of Oral Testimony and Admission of the Testimony of Prosecution Witness GAY (TC), 28 September 2007, par. 10; Decision on Joseph Nzirorera’s Motion for Reconsideration of Sanctions (TC), 3 October 2007, par. 5. The Appeals Chamber has also rendered decisions on reconsideration in this case: *The Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera*, Case No. ICTR-98-44-AR73(c), Decision on Motions for Reconsideration (AC), 1 December 2006 (“6. The Appeals Chamber may reconsider a previous interlocutory decision under its inherent discretionary power if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice.”); Case No. ICTR-98-44-AR11bis, Decision on Motion for Reconsideration of Decision on Joseph Nzirorera’s Appeal from Denial of a Request for Designation of a Trial Chamber to Consider Referral to a National Jurisdiction (AC), 21 August 2007, p. 3; Case No. ICTR-98-44-AR73.10, Decision on Ndirumpatse’s Motion for Reconsideration (AC), 5 October 2007, p. 3.

<sup>5</sup> Prosecutor’s Motion, para. 1.

<sup>6</sup> *Ibidem*.

security' campaigns". It argues that her expert analysis is necessary to enable judicial evaluation of the testimony of factual witnesses that were admitted on the record. It lists the evidence on which it wishes her to opine<sup>7</sup> and states that her analysis would evoke the contradictory nature of documentary evidence, yet reveal the probative elements that make them useful for establishing the allegations of the Indictment.<sup>8</sup>

7. With regard to André Guichaoua, the Prosecution submits that his oral testimony on specified issues should be allowed to introduce into evidence contemporaneously generated documents that he made available as annexes to his report. The Prosecution asserts that Guichaoua's analysis and cross-referencing of diaries and agenda of the Accused and other alleged co-conspirators and his analysis of documentation concerning the use of funds and resources from para-statal enterprises to finance the *Interahamwe* in Butare and other prefectures may assist in the Chamber in its assessment of evidence. The Prosecution further contends that various documents annexed to Guichaoua's report<sup>9</sup> are the *only* prosecution evidence that may be adduced to prove several specified paragraphs of the Indictment and that various paragraphs in the Pre-Trial Brief rely *substantially* on documentation to be presented and analysed by Guichaoua.<sup>10</sup>

8. The Prosecution further submits that Des Forges and Guichaoua's evidence is necessary in view of its compliance with the Chamber's insistence on reducing the number of factual witnesses while admitting defence exhibits during cross-examinations of Prosecution witnesses. The Prosecution contends that it was expected that the expert witnesses would have commented on those documents.

---

<sup>7</sup> The Prosecution requested that Alison Des Forces be allowed to testify as an expert so that she can opine on: 1) The ENI document (a memorandum on the definition of the enemy; disclosed in Tab 004 of the Prosecution Exhibit Bundle) that will be used to prove paragraph 25 of the indictment; 2) The memorandum on civil defense recovered from Prime Minister Jean Kambanda (disclosed in Tab 002 of the Prosecution Exhibit Bundle) that will be used to prove paragraph 26 of the indictment; 3) All documents listed in paragraph 28.3 of the indictment and "civil defense" documents generally; 4) Minutes of the 3 May 1994 "pacification" meeting in Kibuye and transcripts of speeches by authorities at that meeting in relation to paragraphs 33.1 and 52 of the indictment; 5) Speeches by the Accused during a MRND rally in Kigali on 16 January 1994, in relation to paragraph 31.1 of the indictment; 6) President Sindikubwabo's speech in Butare on 19 April 1994, in relation to paragraph 48 of the indictment; 7) Prime Minister Kambanda's Instructions on Restoring Security of 27 April 1994, in relation to paragraph 51 of the indictment; and, 8) Minister of Interior Edouard Karemera's memorandum on implementing the Prime Minister's Directives on Civil Defense of 25 May 1994, in relation to paragraph 57 of the indictment.

<sup>8</sup> The Prosecution mentions paragraphs 25, 25.3, 26, 28, 28.1, 28.3, 32.4, 33.1, 33.2, 36, 43, 44, 45, 48, 50, 51, 53, 55, 56, 57, 60, 61, and 64.3 of the Indictment.

<sup>9</sup> See, in particular, Annexes 16 – 28 concerning notes and memoranda of the Comité de crise prior to the formation of the Interim Government of 8 April 1994; Annex 42 concerning the MRND and its financing of the Interahamwe in Butare by the para-statal enterprise SORWAL; and Annex 44, concerning the para-statal enterprise CIMERWA.

<sup>10</sup> See Prosecutor's Motion, paras. 17 (b) that mentions paragraphs 28, 28.1, 32.4, 43, 45, 46, 50, 56, 60 and 61 of the Indictment; and, paragraphs 53, 54, 105, 115, 120, and 121 from the Pre-trial Brief.

9. The Prosecution also argues that its new request to adduce their oral testimony on limited relevant issues instead of introducing their full expert reports is a new circumstance which could justify reconsideration.

10. In relation to the interests of justice, the Prosecution contends that the Completion Strategy may have influenced the Chamber's Order, and suggests that Alison des Forges could be heard during the current session of the trial and Andre Guichaoua in the early part of 2008, thereby not causing undue delay.

11. The Chamber is of the view that the Prosecution fails to show any new fact or circumstance or error in law warranting reconsideration of the Impugned Decision.

12. When adjudicating on the Prosecutor's submissions for the admission of the evidence of Guichaoua and Des Forges as expert witnesses, the Chamber had considered the evidence adduced in the case thus far, including the exhibits, for which the Prosecution submitted the assistance of these experts was necessary for the Chamber in its analysis of the case. The Chamber also considered the documents annexed to Guichaoua's report. It did not find, however, that the assistance of the witnesses was necessary for the Chamber to analyse those documents.

13. The Chamber acknowledges that André Guichaoua and Alison Des Forges have likely been of value and assistance to the Prosecution in the development of its theories and the selection of evidentiary material to prove them. However, the fact that this assistance was provided to the Prosecution does not mean that the testimony of these experts is necessary for the Chamber in its analysis of this case.

14. The Chamber considers that an expert's testimony is intended to enlighten the Judges on specific issues of a technical nature, requiring special knowledge in a specific field;<sup>11</sup> however, the matters at stake in the present case are not those on which the Chamber requires expert assistance. As explained in details in the Impugned Decision, the Chamber considered that it was able to make its judgment without such assistance.

15. The Chamber considers that the Prosecution statement that the documentation annexed to André Guichaoua's report constitutes the only proof for some paragraphs of the Indictment is contrary to principle and inaccurate.

---

<sup>11</sup> Prosecutor v. Norman et al., Decision on Prosecution Request for Leave to call Additional Witnesses and for Orders for Protective Measures, Case No. SCSL-04-14-T, T.Ch. I, 21 June 2005, p. 4; Prosecutor v. Akayesu, Decision by a Defence Motion for the Appearance of an Accused as an Expert Witness, Case No. ICTR-96-04-T, Trial Chamber I, 9 March 1998, p. 2.

16. The Chamber recalls the evidence already adduced to support allegations in the paragraphs of the Indictment for which the Prosecutor claims not to have evidence other than that of the prospective expert witnesses. Prosecution witnesses have testified to various events in the period 6 to 12 April 1994, including activities of the Accused and meetings in which they participated. This testimony addressed the allegations made in Paragraphs 28 and 28.1 of the Indictment. There was also testimony from Prosecution witnesses concerning activities of the Interim Government at Murambi in Gitarama as alleged in paragraphs in Paragraphs 43, 45, 46, 56 and 61 of the Indictment. Prosecution witnesses have testified about the fundraising meetings convened by Kabuga.<sup>12</sup> There has been evidence about meetings in Ruhengeri and the massacres in Bisesero.<sup>13</sup> Some of the documents to which reference was made are already in evidence and others are included in the documents the Prosecutor intends to produce through investigator Baghel.

17. Furthermore, the Prosecution's contention that the admission of Guichaoua's report or his oral testimony is necessary for the introduction of documentary evidence is flawed.

18. Under Rule 89 of the Rules of Procedure and Evidence ("Rules"), the Chamber is not bound by national rules of evidence and may, in cases not otherwise provided for in the Rules, apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law. Trial Chambers of both *ad hoc* Tribunals have held that documents need not be recognised by a witness in order to have probative value.<sup>14</sup>

19. On prior decisions, the Chamber has applied those principles and admitted without any witness being heard.<sup>15</sup> In that Decision the Chamber applied Rule 89(C) of the Rules, which allows a Chamber to admit documents that are relevant and have probative value once sufficient indicia of reliability have been established. The Chamber remains satisfied that if any of these documents are admitted, it will be able to comprehend them and their import

---

<sup>12</sup> Indictment, para. 50

<sup>13</sup> Indictment, para. 32.4

<sup>14</sup> *Karemera et al.*, Decision on the Prosecution Motion for Admission into Evidence of UNAMIR Documents (TC), 30 October 2007.

<sup>15</sup> *Karemera et al.*, Decision on the Prosecution Motion for Admission into Evidence of UNAMIR Documents (TC), 30 October 2007. *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request to Admit United Nations Documents into Evidence under Rule 89(C) (TC), 25 May 2006, para. 4; *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, Judgement (TC), 3 March 2000, para. 35; *Prosecutor v. Kvočka et al.*, Decision on Zoran Zigic's Motion For Rescinding Confidentiality of Schedules Attached to the Indictment Decision On Exhibits (TC), 19 July 2001; *Prosecutor v. Prlic et al.*, IT-04-74-PT, Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings (TC), 28 April 2006; *Prosecutor v. Prlic et al.*, IT-04-74-T, Decision on Admission of Evidence (TC), 13 July 2006.

without the assistance of expert testimony. However, should there be any other documents which have no indicia of reliability that is independent from Guichaoua, then the Chamber could consider calling him for that limited purpose.

20. In its submissions, the Prosecution further suggests that the evidence of Alison De Forges is necessary to the extent that the testimony of factual witnesses heard thus far may require expert historical analysis to make a conceptual link to a Conspiracy to Commit Genocide that took form in mid-1992.<sup>16</sup>

21. The Chamber, however, recalls that the established jurisprudence of this Tribunal proscribes expert evidence from usurping the function of the Trial Chamber by offering opinions that are determinative of the guilt or innocence of the Accused or by adverting to the acts, conduct and mental state of the Accused.<sup>17</sup> Admitting the evidence of Des Forges, as suggested by the Prosecution, would be amount to usurping the functions of the Chamber in determining the guilt or not of the Accused.

22. While the Chamber has encouraged the Prosecution to streamline its case and call only witnesses necessary to prove its case, it was the Prosecution that exercised the discretion determining by itself who to call and why, in order to provide sufficient evidence to substantiate its claims. That the expert evidence was not necessary in the Chamber's view has been clearly explained, and the Prosecution has failed to persuade the Chamber that such view was abusive.

23. Contrary to the Prosecution's assertion, the Completion Strategy has not guided it in excluding the evidence of the proposed experts. This trial has come to a point where the Chamber has already heard the majority of the Prosecution evidence. The Chamber is therefore in the position to assess whether the prospective expert evidence could assist it in understanding the issues at stake.

24. In those circumstances, the Chamber is of view that the Prosecution has failed to establish that the Impugned Decision was erroneous and caused any injustice or prejudice to the Prosecution case.

---

<sup>16</sup> Prosecution's Motio, para. 17 (h) at p. 6.

<sup>17</sup> *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Limit the Scope of the Testimony of Expert Witnesses Alison Des Forges and Andre Guichaoua, 21 August 2007, para. 3. *See also Karemera et al.*, Decision on Prosecution Prospective Experts Witnesses Alison Des Forges, Andre Guichaoua and Binaifer Nowrojee - Rules 89 and 94bis of the Rules of Procedure and Evidence, 25 October 2007. *See also Prosecutor v. Hadžihasanović and Kubura, Decision on Report of Prosecution Expert Klaus Reinhardt*, Case No. IT-01-47-T, T. Ch. II, 11 February 2004, p. 4.

25. For the same reasons, the Chamber is not persuaded by Prosecution's argument that its change in its strategy – to limiting the scope of testimony of Alison Des Forges and André Guichaoua – amounts to a new fact or circumstance that would justify reconsideration of the Impugned Decision.

26. Reconsideration of the Impugned Decision is not warranted. The Chamber however recalls its prior Decision where it stated that “it will be open to the Chamber to call upon expert testimony if at any future time issues arise which require such assistance.”<sup>18</sup>

27. The Chamber will consequently address the alternative Prosecution's request, for certification to appeal.

### **On the Prosecutor's Alternative Request for Certification to Appeal**

28. Under Rule 73(B) of the Rules, a Trial Chamber may certify a decision on a motion for interlocutory appeal if, in its view, the decision (i) “involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial” such that (ii) “immediate resolution by the Appeals Chamber may materially advance the proceedings”. The Appeals Chamber has recognised that, as a corollary of its discretion concerning whether to certify an interlocutory appeal in the first place, a Trial Chamber also has the discretion to limit the scope of the interlocutory appeal to particular issues. The Trial Chamber's Certification therefore dictates the possible scope of the Appeals Chamber's Decision.<sup>19</sup>

29. The Prosecution submits that its request for certification to appeal the Chamber's Decision meets both criteria of Rule 73 (B). Regarding the first prong, it asserts that the Impugned Decision significantly affects the fair and expeditious conduct of the proceedings and may affect the outcome of the trial, since it significantly trimmed its original witness list, narrowed the scope of its examinations and consented to the admission of a significant number of Defence exhibits on the understanding that expert opinion evidence that would be offered towards the end of the Prosecution case would provide an opportunity to clarify matters on the trial record. It restates that the expert opinion evidence from all three witnesses is “particularly important” for making its case against the Accused for the crimes of

---

<sup>18</sup> Rules of Procedure and Evidence, Rule 98: “A Trial Chamber may *proprio motu* order either party to produce additional evidence. It may itself summon witnesses and order their attendance.”

<sup>19</sup> See *Karemera et al.*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 13. See also *Nyiramasuhuko v. Prosecutor*, Case No. ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004, para. 7.



Conspiracy to Commit Genocide; Direct and Public Incitement to Genocide; and, Rape as a Crime Against Humanity.

30. With respect to the second prong, the Prosecution asserts that a decision from the Appeal Chamber may materially advance the proceedings by ensuring that any subsequent judgment on those three counts by this Trial Chamber will not be assailed on appeal.

31. Joseph Nzirorera does not oppose the Prosecution's alternative request for certification to appeal.<sup>20</sup>

32. The Chamber agrees that the Impugned Decision involves two important issues that may affect the fair and expeditious conduct of the proceedings or the outcome of the trial: (i) the right of a party to adduce what it considers as important evidence in a trial; and (ii) the Trial Chamber's power to control its own proceedings by limiting the appearances of witnesses before it. As such, this second issue is concerned with the very core of any judicial exercise, namely, the issue of judicial independence. Accordingly, the first prong of Rule 73 (B) is satisfied.

33. The Chamber is also satisfied that the second prong of Rule 73 (B) is met. In the Chamber's view, an immediate resolution by the Appeals Chamber on whether the Trial Chamber abused its discretionary power in denying the admission of the evidence of Des Forges and Guichaoua as experts may materially advance the proceedings. The Chamber notes the Appeals Chamber's jurisprudence according to which certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence, and that it is first and foremost the responsibility of the Trial Chamber, as *trier* of fact, to determine which evidence to admit during the course of the trial.<sup>21</sup> However, in view of the broad scope of the issues concerned by the Impugned Decision and considering the advanced stage of the proceedings, leaving this matter to be resolved in later appeal creates the risk of unnecessarily complicating and delaying the proceedings, all of which could be avoided by having the matter resolved at this stage.<sup>22</sup>

34. In view of these circumstances, the Chamber considers it appropriate to grant certification to appeal to the Decision of 25 October 2007 limiting it only to the matters

---

<sup>20</sup> Nzirorera's Response, at paras. 11 - 13

<sup>21</sup> *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 10 ("certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence").

<sup>22</sup> *Prosecutor v. Milutinović et al.*, Decision on prosecution request for certification of interlocutory appeal of second decision on addition of Wesley Clark to rule 65 ter list, 14 March 2007, para. 15

related to the exclusion of André Guichaoua and Alison des Forges in the terms referenced on the request for reconsideration.

**FOR THESE REASONS, THE CHAMBER**

- I. DENIES** the request for reconsideration;
- II. GRANTS** the Prosecution's motion for certification to the extent stated in paragraph 34.

Arusha, 16 November 2007, done in English.

Dennis C. M. Byron  
Presiding Judge

Gberdao Gustave Kam  
Judge

Vagn Joensen  
Judge

[Seal of the Tribunal]