



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:** 19 April 2008

**THE PROSECUTOR**

v.

**Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA**

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

**DECISION ON THE PROSECUTION MOTION FOR TO REOPEN ITS CASE AND  
ON THE DEFENCE MOTION TO FILE ANOTHER RULE 98BIS MOTION**

*Rules 85 and 98bis of the Rules of Procedure and Evidence*

**The Prosecution:**

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

**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 17 April 2008 the Parties made oral applications on which the Chamber undertook to adjudicate before resumption of proceedings on 21 April 2008. The Defence applies for leave to present a fresh Rule 98bis motion for acquittal as a result of the testimony of Prosecution Witness BTH during cross-examination between the period from 10 to 17 April 2008 and as a result of the same testimony the Prosecution applies for leave to call additional witnesses to buttress its case.

2. During the presentation of the Prosecution case, the cross-examination of Witnesses BDW and AXA could not have been completed because of disclosures which were made after the examination-in-chief had been completed. The Chamber ordered that it would allow the completion of the cross-examination at the commencement of the trial session in which the Defence case would start. In the meantime, Witness BTH had publicly recanted testimony he gave in the trial and the Chamber granted a request to have him recalled for further examination and directed that this examination be conducted at the commencement of the trial session during which the Defence case would be commenced. The Chamber also granted a defence application for the testimony of Jean-Baptise Butera to be taken through video-link from a distant country.

3. During his testimony, BTH stated under oath that the testimony he had previously given was false and that it was adduced as part of a conspiracy with other witnesses to provide false testimony against the Accused. The Defence considers that this testimony has destroyed the Prosecution case against them and that they should not be called upon to answer.

## DELIBERATIONS

### *Defence Motion on Rule 98bis*<sup>1</sup>

4. The Defence for Nzirorera applies for leave to present a fresh motion for a judgement of acquittal pursuant to Rule 98bis of the Rules of Procedure and Evidence (“Rules”), which permits such an application to be made after the close of the Prosecution case. The basis for the application is that it was only during the most recent cross-examination that Witness BTH testified that his evidence-in-chief was false because of a conspiracy to build a false case against the Accused in which he and other Prosecution witnesses were involved. It argues that this testimony raises for the first time concern that the Prosecution case has completely broken down because the evidence on which it is based cannot be believed. It submits that the right to make such an application exists because the Prosecution case will only be closed when the cross-examination of Witness BDW is completed on 21 April 2008. It contends that Rule 85 of the Rules is supportive because it provides that the Defence could proceed with its case, only after the close of the Prosecution case. The Defence for Karemera joins in the application.

5. Counsel’s reliance on Rule 85 is misplaced because it specifically allows the Chamber to direct the order in which the evidence should be adduced in the interest of justice. The Chamber recalls its scheduling orders, directing that the Prosecution case would formally close on the issuance of a decision which was delivered on 25 January 2008,<sup>2</sup> and that the Defence would file their Rule 98bis motions, which motions have been adjudicated in the Decision of 19 March 2008 (“Rule 98bis Decision”).<sup>3</sup> The scheduling orders also prescribed the order in which the evidence would be adduced during the current trial session, as follows; the first witness would be Jean-Baptiste Butera (a witness for Joseph Nzirorera), then the cross-examination of Prosecution witnesses would be completed, and then the witnesses for Edouard Karemera would testify. It was during compliance with these orders that BTH gave the testimony on which counsel bases his application. The Chamber reiterates that the Prosecution case has already been closed and that the order in which the witnesses are to appear are in the interest of justice.

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<sup>1</sup> T. 17 April 2008, pp. 60-62, 69 *et seq.*

<sup>2</sup> *The Prosecutor v. Édouard Karemera et al.* (“Karemera *et al.*”), Case No. ICTR-98-44-T, Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence (TC), 25 January 2008.

<sup>3</sup> *Karemera et al.*, Decision on Motions for Judgement of Acquittal (TC), 19 March 2008.

6. The substantive argument on credibility on which the Defence intends to rely should be addressed when evaluating the evidence as a whole at the end of the trial. The Chamber recalls that, in rendering its Rule 98bis decision, it made no reference to the testimony of BTH and therefore does not consider his testimony essential to establishing the existence of a *prima facie* case against the Accused.

7. The Chamber is not satisfied that there is any good reason to vary the scheduling orders it has already made. It considers that any variation to accommodate the application of the Defence would result in unreasonable delay. Accordingly, the Defence's request for leave to file a further motion for judgment of acquittal falls to be denied.

***Prosecution Motion to Reopen its Case and Vary Its Witness List***<sup>4</sup>

8. The Prosecution submits that the change in BTH's evidence has affected the balance of evidence in its case and that it would be in the interest of justice to allow it to reopen its case and to present additional evidence in order to enhance its ability to prove its case beyond reasonable doubt. The Prosecution thereby moves the Chamber to reinstate former potential Witnesses GBV, GBG and GDG to its witness list. It contends that there are no disclosure issues and that their testimony will corroborate BTH's initial evidence on which the Prosecution wishes to rely, as well as the testimony of GBU, GAV, and ANU, three other Prosecution witnesses who have already testified about events in Ruhengeri.<sup>5</sup>

9. The Prosecution suggested that it had access to other witnesses who could rebut the new testimony of BTH but that it would make a strategic decision at the end of the Defence case whether to call these or any rebuttal witnesses. It would, of course, be premature for the Chamber to consider these suggestions until the Prosecution actually presents its application.

10. It is already well established that the Chamber can vary the witness list of parties to the proceedings in accordance with the provisions of Rule 73 of the Rules when it is in the interest of justice to do so.<sup>6</sup> In assessing the interest of justice, Chambers have considered the materiality of the testimony, the complexity of the case, and prejudice to the Defence, including elements of surprise, on-going investigations, replacements, and corroboration of evidence. The Prosecution's duty under the Statute to present the best available evidence to

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<sup>4</sup> T. 17 April 2008, pp. 69 *et seq.*

<sup>5</sup> T. 17 Apr. 2008, pp. 71-72.

<sup>6</sup> *The Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze, and Anatole Nsengiyumva* ("Bagosora *et al.*"), Case No. ICTR-98-41-T, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis (E) (TC), 26 June 2003, para. 13.

prove its case has to be balanced against the right of the accused to have adequate time and facilities to prepare their defence, and their right to be tried without undue delay.<sup>7</sup> These considerations require a close analysis of each witness, including the sufficiency and time of disclosure of witness information to the Defence; the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictments; the ability of the Defence to make an effective cross-examination of the proposed testimony, given its novelty or other factors; and the justification offered by the Prosecution for the addition of the three witnesses.<sup>8</sup>

11. The Chamber recalls that the Prosecution case has been closed since 25 January 2008. The Chamber considers that although there is no clear provision in the legal instruments of the Tribunal which provides for the reopening of the Prosecution case, except for a rebuttal. There is jurisprudence showing that there is discretionary power to permit the Prosecution to adduce additional evidence after the close of its case. This power may be exercised, when required in the interest of justice, where there is new evidence which was discovered after the closure of the Prosecution case, or to rebut some evidence adduced during the Defence case.<sup>9</sup>

12. This is a complex case, but as the Chamber has already noted the testimony of BTH was not pivotal to its conclusion that there was a *prima facie* case against the Accused. The Chamber notes that the proposed witnesses GBG, GBV, and GDV were on the Prosecution witness list, so it could not be argued that their evidence is new. The Prosecution describes the nature of the testimony intended to be adduced as corroborating evidence that is already on the record. This cannot fit the concept of either substantial materiality or rebuttal evidence. The Prosecution chose not to call them and decided to rely instead on BTH. Despite the changes in his testimony, which, if believed, would tend to support some contentions argued by the Defence for Nzirorera, BTH remains a Prosecution witness, even though he has become a hostile one. The Prosecution is expected to know its case. Moreover, the case has been going on for a long time. If the requested leave is granted, there would be additional delay, and the Chamber does not consider that the reasons advanced could justify it.

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<sup>7</sup> *The Prosecutor v. Ferdinand Nahimana, Hassan Ngeze, Jean Bosco Barayagwiza*, Case No. ICTR-96-52-T, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001, paras. 16-20.

<sup>8</sup> *Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis (E) (TC), 26 June 2003, para. 14.

<sup>9</sup> *Delalic et al.* Case No. IT-96-21-T, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case (TC), 19 August 1998, paras. 21-23, 27; (Appeal) Judgement, 20 February 2001, para. 283.

13. Finally, the Chamber considers that it would be unreasonable to allow parties to vary their witness lists every time they consider that a witness may have been discredited. Witnesses are often discredited by the efforts of the opposing party in criminal litigation. It would offend an accused person's right to be tried without undue delay if the witness list was varied on each such occasion. Consequently, the Chamber does not think that it would be in the interest of justice to allow the Prosecution to call the additional witnesses.

**FOR THESE REASONS, THE CHAMBER**

**DENIES** the Motions in their entirety.

Arusha, 19 April 2008, done in English.

Dennis C. M. Byron  
Presiding Judge

Gberdao Gustave Kam  
Judge

Vagn Joensen  
Judge

[Seal of the Tribunal]