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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

2265/H

ICTR-98-44-AR73.14
30th January 2009
{2265/H – 2255/H}

**IN THE APPEALS CHAMBER**

**Before:** Judge Fausto Pocar, Presiding
Judge Carmel A. Agius
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Theodor Meron

**Registrar:** Mr. Adama Dieng

**Decision of:** 30 January 2009

ICTR Appeals Chamber
Date: 30th January 2009
Action: R. Jumet
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**THE PROSECUTOR**

**v.**

**ÉDOUARD KAREMERA**
**MATHIEU NGIRUMPATSE**
**JOSEPH NZIRORERA**

*Case No. ICTR-98-44-AR73.14*

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**DECISION ON MATHIEU NGIRUMPATSE'S APPEAL FROM THE TRIAL CHAMBER DECISION OF 17 SEPTEMBER 2008**

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**Office of the Prosecutor:**
Mr. Don Webster
Ms. Alayne Frankson-Wallace
Mr. Iain Morley
Mr. Saidou N'Dow
Ms. Gerda Visser
Ms. Sunkarie Ballah-Conteh
Mr. Takeh Sendze

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Tribunal pénal international pour le Rwanda
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**Counsel for Mathieu Ngirumpatse:**
Ms. Chantal Hounkpatin and Mr. Frédéric Weyl

**Counsel for Mathieu Ngirumpatse's Co-Accused:**
Ms. Dior Diagne Mbaye and Mr. Félix Sow for Mr. Édouard Karemera
Mr. Peter Robinson and Mr. Patrick Nimy Mayidika Ngimbi for Mr. Joseph Nzirorera

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), is seized of the "Appeal of Mathieu Ngirumpatse against the Decision of Trial Chamber III dated 17 September 2008" ("Appeal") by Mathieu Ngirumpatse ("Ngirumpatse") filed on 24 November 2008.

## A. Background

2. On 17 September 2008, the Trial Chamber rejected Ngirumpatse's request for reconsideration of a warning to Counsel for failing to comply with the Trial Chamber's previous orders to file information in accordance with the requirements of Rule 73*ter* of the Rules of Procedure and Evidence of the Tribunal ("Rules"), and to reduce the number of witnesses.[1] In the same decision, the Trial Chamber also refused to reconsider its decision limiting the time allotted to the presentation of Ngirumpatse's Defence case to 40 hours, and ordered Ngirumpatse to reduce the number of witnesses to 35.[2]

3. On 24 September 2008, Ngirumpatse applied to the Trial Chamber for certification to appeal this decision,[3] which was granted on 24 October 2008.[4]

4. On 30 October 2008, Ngirumpatse requested additional time to file his Appeal Brief,[5] which was not opposed by the Prosecution.[6] On 17 November 2008, the Appeals Chamber granted the request and authorized Ngirumpatse to file the appeal within seven days.[7]

5. Ngirumpatse filed the present Appeal on 24 November 2008. The Prosecution filed its Response opposing the Motion on 1 December 2008.[8] Ngirumpatse replied on 5 December 2008.[9]

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[1] Decision on Mathieu Ngirumpatse's Motions for Reconsideration and Extension of Time-Limits for the Presentation of his Case, 17 September 2008 ("Impugned Decision"), p. 6.

[2] Impugned Decision, pp. 6, 7. It further ordered him to file the final list of 35 witnesses, and to file his motion to admit evidence in written form in lieu of oral testimony under Rule 92*bis* no later than 1 October 2008. Impugned Decision, p. 7. On 1 October 2008, Ngirumpatse filed a list of 35 witnesses expected to testify orally and 27 reserve witnesses who may be called to testify orally in addition to or in substitution for these 35 witnesses. Ngirumpatse's Brief following the Decision on the Motions for Reconsideration and for Extension of the Time Limit for Presentation of Mathieu (sic) Ngirumpatse's Case, 1 October 2008. Ngirumpatse also filed a motion under Rule 92*bis* to admit written statements from 19 witnesses in lieu of oral evidence. *Requête de Matthieu [sic] Ngirumpatse en admission de déclarations ecrites sur le fondement de l'Article 92bis du règlement de procédure*, 1 October 2008.

[3] Mathieu Ngirumpatse's Request for Certification to Appeal the Decision of 17 September 2008, 24 September 2008.

[4] Decision on the "*Requête en certification d'appel de la décision du 17 septembre 2008 relative à la présentation de la preuve de Mathieu Ngirumpatse*", 24 October 2008.

[5] *Requête de Matthieu [sic] Ngirumpatse en extension de délai pour faire appel de la décision de la Chambre de première instance III en date du 17 septembre 2008*, 30 October 2008.

[6] Prosecutor's Response to "*Requête de Matthieu [sic] Ngirumpatse en extension de délai pour faire appel de la décision de la Chambre de premièr [sic] instance III en date du 17 septembre 2008*", 4 November 2008.

[7] Decision on Mathieu Ngirumpatse's Motion for Extension of Time to File an Interlocutory Appeal, 17 November 2008, p. 4.

## B. Discussion

6. In the Appeal, Ngirumpatse challenges three aspects of the Impugned Decision. First, he challenges the denial of his request for reconsideration of the warning given by the Trial Chamber to his Counsel.[10] He argues that his Counsel fully complied with all of the Trial Chamber's orders and with the requirements of Rule 73*ter* of the Rules, and that therefore the Defence did not engage in any offensive or abusive conduct that would warrant a sanction pursuant to Rule 46 of the Rules. He also submits that the Trial Chamber's warning was unfair, as the parties concerned were not able to make any submissions.[11]

7. Second, Ngirumpatse appeals the denial of his request for reconsideration of the Trial Chamber's decision to reduce the time for the presentation of the Defence case to 40 days.[12]

8. Finally, he challenges the Trial Chamber's order reducing, *proprio motu*, the number of witnesses to be heard orally to 35.[13] He argues that the Trial Chamber did not provide sufficient reasons to justify these restrictions on the presentation of the Defence case, that Ngirumpatse's ability to present a full and fair defence would be impaired by these restrictions, and that the time allotted to him was not reasonably proportionate to that allotted to the Prosecution.[14]

9. The Prosecution responds that, as the Appeals Chamber has previously held that sanctions cannot be appealed, Ngirumpatse's appeal of the Trial Chamber's alleged failure to reconsider the warnings given to Counsel should be summarily dismissed.[15] The Prosecution argues that the Trial Chamber issued a decision which sufficiently informed Ngirumpatse of the reasons for the dismissal of his motions, particularly given that the Impugned Decision served to summarize and finalize a number of intermediary decisions.[16] In the Prosecution's submission, the Trial Chamber's orders do not violate Ngirumpatse's right to present a full and complete defence, nor do they violate his right to equality of treatment *vis-à-vis* the other parties, particularly given that the Prosecution only called 29 witnesses to testify orally.[17] The Prosecution therefore submits that the Trial

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[8] Prosecutor's Interlocutory Appeal Brief for "*Appel de Matthieu [sic] Ngirumpatse de la décision de la Chambre de première instance III du 17 septembre 2008*", 1 December 2008 ("Response").
[9] Matthieu [*sic*] Ngirumpatse's Reply to the Prosecutor's Response to the Appeal against the Decision of 17 September 2008, 5 December 2008 ("Reply").
[10] Appeal, paras. 29-45.
[11] Appeal, paras. 29-45.
[12] Appeal, paras. 46-67.
[13] Appeal, paras. 46-67.
[14] Appeal, paras. 46-67.
[15] Response, para. 9.
[16] Response, paras. 12-15.
[17] Response, paras. 16-24.

Chamber did not abuse its discretion in failing to reconsider its decision concerning the reduction of time allotted for the Defence case to 40 days, and in reducing the number of witnesses to 35.[18]

10. Ngirumpatse replies that the Appeals Chamber has the authority to consider the denial of reconsideration of sanctions, as part of its inherent authority to remedy abuses of discretion by the Trial Chamber.[19] He submits that the Trial Chamber has shown no good cause why he should reduce the number of witnesses, and that the reasons on which it relies are based on considerations extraneous to the case.[20]

### 1. Reconsideration of Warning

11. The Appeals Chamber notes that neither the Statute nor the Rules provide a right of appeal from sanctions imposed pursuant to Rule 46 of the Rules.[21] However, it observes that Ngirumpatse is not appealing the sanctions imposed by the Trial Chamber, but rather its refusal to reconsider the warning it had previously issued to Counsel pursuant to Rule 46 of the Rules.

12. The Appeals Chamber recalls that whether or not a Trial Chamber reconsiders a prior decision is discretionary. The issue in an appeal from such a decision is not whether the prior decision sought to be reconsidered was correct, or whether the decision not to review it was correct, in the sense that the Appeals Chamber agrees with either decision, but rather whether the Trial Chamber had correctly exercised its discretion in refusing to reconsider the prior decision.[22]

13. The Appeals Chamber notes that reconsideration of a decision by a Trial Chamber is an exceptional measure that is available only in particular circumstances.[23] Reconsideration is permissible when a new fact has been discovered that was not known to the Chamber at the time it

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[18] Response, paras. 10, 11.
[19] Reply, paras. 5, 6.
[20] Reply, paras. 12, 13.
[21] *See* Response, para. 9. *See also Joseph Nzirorera v. The Prosecutor*, Case No. ICTR-98-44-AR73(F), Decision on Counsel's Appeal from Rule 73(F) Decisions, 9 June 2004, p. 3, where the Appeals Chamber noted that neither the Statute nor the Rules provide a right of appeal from sanctions imposed pursuant to Rule 73(F) of the Rules.
[22] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-A, Interlocutory Appeal from Refusal to Reconsider Decisions Relating to Protective Measures and Application for a Declaration of "Lack of Jurisdiction", 2 May 2002, para. 10; *Prosecutor v. Slobodan Milošević*, Case Nos. ICTY-99-37-AR73, ICTY-01-50-AR73, ICTY-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 4.
[23] *The Prosecutor v. Arsène Ntahobali*, Case No. ICTR-97-21-T, Decision on Ntahobali's Motion for Reconsideration of the Decision concerning Prosecution Witness QCB of 20 November 2008, 9 December 2008 ("*Ntahobali* Decision"), para. 21; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecution Motion to Vary the Witness List Pursuant to Rule 73*bis*(E)", 15 June 2004 ("*Bagosora* Decision of 15 June 2004"), para. 7; *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-R, Decision on Request for Reconsideration of the Decision on Request for Review, 27 September 2006, pp. 1-2; *Eliezer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Decision on Defence Extremely Urgent Motion for Reconsideration of Decision Dated 16 December 2003, 19 December 2003, p. 4. *Cf. Prosecutor v. Zoran Žigić a/k/a "Ziga"*, Case No. IT-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2006", 26 June 2006, para. 9.

made its original decision, there has been a material change in circumstances since it made its original decision, or 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.[24]

14. On 30 July 2008, the Trial Chamber issued a warning to Ngirumpatse's Counsel pursuant to Rule 46 of the Rules for its failure to comply with its previous orders.[25] Despite Ngirumpatse's submission in the Appeal that he always complied fully with the requirements of Rule 73*ter* and other orders of the Trial Chamber,[26] the Appeals Chamber notes that, in the briefs that he filed on 7 April 2008, 24 April 2008, and 15 July 2008 in response to the Trial Chamber's orders that he file material pursuant to Rule 73*ter*, Ngirumpatse did not provide summaries of the anticipated testimony of several witnesses, claiming that investigations were still in progress, nor did he provide an indication of the estimated length of time for each witness, as required under Rule 73*ter*.[27] Moreover, although the Trial Chamber urged Ngirumpatse on 17 April 2008 and 25 June 2008 to reduce the number of witnesses he anticipated calling, he did not do so.[28] The Trial Chamber therefore imposed the warning after repeated failures by his Defence to comply with the orders of the Trial Chamber.

15. In the Impugned Decision, the Trial Chamber held that it had not committed any error of law in its earlier decision nor had it abused its discretion, and, on that basis, refused to reconsider its previous decision.[29] While it would have been preferable for the Trial Chamber to have articulated the requirements for reconsideration more explicitly, the Appeals Chamber finds that it applied the test correctly, and did not abuse its discretion in failing to reconsider the warning it imposed upon Counsel. The Appeals Chamber therefore dismisses this part of the Appeal.

2. Time allocation and reduction of the witness list

16. On 25 June 2008, the Trial Chamber held that approximately 40 days of hearing for six hours a day would be consistent with and proportionate to what was needed for the presentation of

[24] *Ntahobali* Decision, para. 21; *Bagosora* Decision of 15 June 2004, para. 9.
[25] *Ordonnance relative au mémoire de Mathieu Ngirumpatse sur l'ordonnance du 25 juin lui prescrivant de préciser la liste de ses témoins*, 30 July 2008, p. 7.
[26] Appeal, para. 35.
[27] *Mémoire préliminaire de M. Ngirumpatse sur le fondement de l'article 73ter du règlement de procédure et de preuve*, 7 April 2008; *Mémoire pour M. Ngirumpatse sur la décision de la Chambre en date du 17 avril 2008 relative à l'administration de la preuve de la Défense*, 24 April 2008 ("Brief of 24 April 2008"); *Mémoire pour M. Ngirumpatse sur l'ordonnance du 25 juin lui prescrivant de preciser la liste de ses témoins*, 15 July 2008 ("Brief of 15 July 2008").
[28] Decision on the Commencement of the Defence Case, 17 April 2008 ("Decision of 17 April 2008"), para. 13; Order on Mathieu Ngirumpatse's Brief Following the 17 April 2008 Decision on the Presentation of the Defence Evidence, 25 June 2008 ("Order of 25 June 2008"), para. 11. In his Brief of 24 April 2008, Ngirumpatse submitted a list of 514 witnesses. The Trial Chamber indicated in paragraph 11 of its Order of 25 June 2008 that Ngirumpatse was allotted 40 hours for the presentation of his defence, and ordered him to amend his witness list accordingly. However, he still submitted a list of 354 witnesses in his Brief of 15 July 2008, which would clearly have exceeded the time allotted.
[29] Impugned Decision, para. 6.

Ngirumpatse's case, and ordered Ngirumpatse to amend his witness list accordingly.[30] Ngirumpatse then responded by filing a list of 354 witnesses.[31] In its Order of 30 July 2008, the Trial Chamber further requested Ngirumpatse to reduce the number of his witnesses.[32] In the Impugned Decision, the Trial Chamber refused to reconsider its decision that approximately 40 days would be sufficient for the presentation of Ngirumpatse's case, and held, on the basis of past hearings, that about 35 witnesses could be heard in that time.[33]

17. The Appeals Chamber recalls that it is well-established that Trial Chambers exercise discretion in relation to the conduct of proceedings before them.[34] In particular, a Trial Chamber has the authority, pursuant to Rule 90(F) of the Rules, to exercise control over the presentation of evidence, and under Rule 73*ter* of the Rules, has the discretion to shorten the examination-in-chief of Defence witnesses, or to limit the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts.

18. The Trial Chamber's decision in this case to reduce the time allocated to the Defence for the presentation of its evidence, and to reduce the number of witnesses who may testify on behalf of Ngirumpatse was a discretionary decision, to which the Appeals Chamber accords deference, based on its recognition of the Trial Chamber's familiarity with the day-to-day conduct of the proceedings and practical demands of the case.[35] The Appeals Chamber's examination is therefore limited to establishing whether the Trial Chamber abused its discretion by committing a discernible error.[36] The Appeals Chamber will only overturn a Trial Chamber's exercise of its discretion where it is found to be (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of discretion.[37]

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[30] Order of 25 June 2008, para. 11.
[31] Brief of 15 July 2008.
[32] Order of 30 July 2008, para. 11.
[33] Impugned Decision, para. 15.
[34] *The Prosecutor v Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007 ("*Nyiramasuhuko* Decision"), para. 10; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007 ("*Karemera* Decision on Witness Proofing"), para. 3; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007 ("*Prlić* Decision on Reduction of Time"), para. 8, referring to Decision on Joint Defence Interlocutory Appeal against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination By Defence and on Association of Defence Counsel's Request for Leave to File an *Amicus Curiae* Brief, 4 July 2006 ("*Prlić* Decision on Cross-Examination"), p. 3.
[35] *Nyiramasuhuko* Decision, para. 10; *Prlić* Decision on Reduction of Time, para. 8.
[36] *Nyiramasuhuko* Decision, para. 10; *Prlić* Decision on Reduction of Time, para. 8; *Karemera* Decision on Witness Proofing, para. 3.
[37] *Nyiramasuhuko* Decision, para. 10; *Prlić* Decision on Reduction of Time, para. 8; *Karemera* Decision on Witness Proofing, para. 3.

(a) The Trial Chamber's alleged failure to issue a reasoned decision

19. Ngirumpatse submits that the Trial Chamber did not provide sufficient reasons for why it considered approximately 40 days to be sufficient for the presentation of the Defence case.[38] The Appeals Chamber notes that, in its discretionary decision reducing the time allocated to the Defence for the presentation of its evidence and the number of witnesses who may testify, a Trial Chamber must, at minimum, provide reasons in support of its findings on the substantive consideration relevant for its decision.[39]

20. In its Order of 25 June 2008, the Trial Chamber urged the Defence to reduce the number of witnesses due to the repetitive nature of some testimonies, which it reiterated in its Order of 30 July 2008.[40] The Appeals Chamber notes that the Trial Chamber was, to a certain extent, impeded from making a more specific determination of which testimonies were repetitive by Ngirumpatse's continued failure to provide summaries of the anticipated testimony of many witnesses, on the basis that investigations were still ongoing.[41] The Trial Chamber also indicated in the Order of 25 June 2008 that its view that the 40 days of hearings would be sufficient for Ngirumpatse to present his case was based on a consideration of Ngirumpatse's Pre-Defence Brief.[42] Moreover, in the Impugned Decision, the Trial Chamber indicated that it found that, in light of the Pre-Defence Brief, as well as the Prosecution and Defence evidence heard to date, 35 witnesses would objectively suffice for Ngirumpatse to present his case.[43]

21. The Appeals Chamber finds that the Impugned Decision marks the culmination of a series of orders and decisions, which, when considered together, clearly indicate the reasons on which the Trial Chamber based its decision to order a reduction in the time allocated to the Defence and in the number of witnesses. The Appeals Chamber therefore considers that the Trial Chamber adequately set out the reasons on the basis of which it ordered the reduction in the number of witnesses and the amount of time allotted to the Defence.

[38] Appeal, para. 48.
[39] *Prlić* Decision on Reduction of Time, para. 16.
[40] Order of 25 June 2008, para. 11; Order of 30 July 2008, para. 11.
[41] Order of 25 June 2008, para. 9; Order of 30 July 2008, para. 11; Impugned Decision, para. 14.
[42] Order of 25 June 2008, para. 11.
[43] Impugned Decision, para. 16.

(b) The alleged violation of the right to present a full and complete defence

22. Ngirumpatse submits that the restrictions imposed by the Trial Chamber impair his right to present a complete and effective defence, considering the complexity of the case, and the wide scope of the Indictment.[44]

23. The Appeals Chamber recalls that the ICTY Appeals Chamber has held that:

> [a]lthough Rule 73*ter* gives the Trial Chamber the authority to limit the length of time and the number of witnesses allocated to the defense case, such restrictions are always subject to the general requirement that the rights of the accused pursuant to Article 21 of the Statute of the International Tribunal be respected. Thus, in addition to the question whether, relative to the time allocated to the Prosecution, the time given to the Accused is reasonably proportional, a Trial Chamber must also consider whether the amount of time is objectively adequate to permit the Accused to set forth his case in a manner consistent with his rights.[45]

The Appeals Chamber must therefore determine whether in ordering Ngirumpatse to reduce the number of his witnesses and the length of his case, the Trial Chamber took into consideration the complexity of Ngirumpatse's case and determined that the maximum time and number of witnesses allotted to him was sufficient to allow him a fair opportunity to present his defence.[46]

24. The Appeals Chamber notes that in ordering Ngirumpatse to reduce the number of his witnesses in the Impugned Decision, the Trial Chamber was guided by its previous orders which directed him to significantly reduce the number of witnesses, with which he did not comply.[47] Ngirumpatse's failure to comply with those orders resulted in the Trial Chamber issuing the Impugned Decision and ordering Ngirumpatse to reduce the number of his witnesses to a maximum of 35.

25. The Appeals Chamber notes that it is within the discretion of the Trial Chamber to reduce the number of witnesses to be called by reference to the Pre-Defence Brief.[48] The Appeals Chamber is therefore satisfied that in basing its decision on the Pre-Defence Brief, in considering the repetitive nature of the testimonies, as well as the Prosecution and Defence evidence heard to date, the Trial Chamber properly considered the complexity of the case, and whether reducing the

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[44] Appeal, para. 55.
[45] *Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005 ("*Orić* Decision"), para. 8. *See also Nyiramasuhuko* Decision, para. 21.
[46] *Nyiramasuhuko* Decision, para. 21.
[47] Decision of 17 April 2008, para. 13; Order of 25 June 2008, para. 11. In his Brief of 24 April 2008, Ngirumpatse submitted a list of 514 witnesses. The Trial Chamber indicated in paragraph 11 of its Order of 25 June 2008 that Ngirumpatse was allotted 40 hours for the presentation of his defence, and ordered him to amend his witness list accordingly. However, he still submitted a list of 354 witnesses on 15 July 2008, which would clearly have exceeded the time allotted. Brief of 15 July 2008. Finally, in the brief he submitted on 13 August 2008, Ngirumpatse listed 180 witnesses. *Confidential Mémoire de M. Ngirumpatse sur l'ordonnance de la Chambre du 30 juillet 2008 "relative au memoire de Mathieu Ngirumpatse sur l'Ordonnance du 25 juin lui prescrivant de préciser la liste de ses témoins"*, 13 August 2008.
[48] *Nyiramasuhuko* Decision, para. 24.

number of the Appellant's witnesses to a maximum of 35 would still allow Ngirumpatse the opportunity to present a full defence.

26. The Appeals Chamber also notes that the Trial Chamber has also indicated repeatedly that the time and the number of witnesses allocated to the Defence are not rigid and that it is prepared to adjust them should circumstances so require. In the Order of 25 June 2008, the Trial Chamber held that it was "prepared to extend the time allotted in light of new circumstances and in the interests of justice".[49] In the Impugned Decision, the Trial Chamber indicated that, if necessary, it may "reconsider the time allotted and/or the proposed number of witnesses, provided that the Defence presents specific materials in support of such a request".[50] The Trial Chamber's ruling also only applies to *viva voce* witnesses, and therefore leaves Ngirumpatse with the possibility of applying to have the evidence of further witnesses admitted in written form pursuant to Rule 92*bis*.

27. The Appeals Chamber is therefore satisfied that the Trial Chamber has considered whether the amount of time and number of witnesses it has allocated are objectively adequate to permit Ngirumpatse to present his case in a manner consistent with his rights.

(c) The alleged violation of the right to equality

28. Ngirumpatse further submits that the amount of time and number of witnesses that he was allocated are disproportionate to the time allocated to the Prosecution, which was allowed to present its case for more than 180 days of hearing.[51]

29. The Appeals Chamber has endorsed the finding of the ICTY Appeals Chamber that:

> The Appeals Chamber has long recognised that "the principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee." At a minimum, "equality of arms obliges a judicial body to ensure that neither party is put at a disadvantage when presenting its case," certainly in terms of procedural equity. This is not to say, however, that an [a]ccused is necessarily entitled to precisely the same amount of time or the same number of witnesses as the Prosecution. The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defense strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution's case, an endeavour which may require less time and fewer witnesses. This is sufficient reason to explain why a principle of basic proportionality, rather than a strict principle of mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides.[52]

[49] Order of 25 June 2008, para. 11.
[50] Impugned Decision, para. 16.
[51] Appeal, paras. 56, 57. In his Appeal, Ngirumpatse submits that the Prosecution case lasted 180 days. However, the Trial Chamber found that the Prosecution used only 170 days. *See* Order to Joseph Nzirorera to Reduce his Witness List, 24 October 2008, para. 7.
[52] *Nyiramasuhuko* Decision, para. 26; *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR15bis.3, Decision on Appeals pursuant to Rule 15*bis*(D), 20 April 2007, para. 27, quoting *Orić* Decision, para. 7 (internal footnote omitted).

The Appeals Chamber also recalls that the Trial Chamber's duty to ensure the fairness and expeditiousness of proceedings will often entail a delicate balancing of interests, particularly in a multi-accused trial.[53]

30. The Appeals Chamber finds that, although it did not do so explicitly, in determining the number of witnesses and time allocated to Ngirumpatse, the Trial Chamber took into account that the Prosecution significantly reduced the number of witnesses it chose to call, and ultimately called only 29 witnesses to testify orally over 170 days.[54] The Prosecution therefore called fewer witnesses than those that the Ngirumpatse Defence has been allocated. While the time in which the Prosecution presented its case was significantly longer than that allocated to the Ngirumpatse Defence, the Appeals Chamber recalls the reasoning in the *Orić* case that strict proportionality in time is not required.[55] It observes that this is a multi-accused trial, and that therefore the case of the Prosecution, which has the burden of proving the liability of each accused beyond a reasonable doubt, may well be longer than the defence of any individual accused.

31. The Appeals Chamber is satisfied that the Trial Chamber considered and balanced the considerations identified above, and that it did not abuse its discretion in determining that the number of witnesses and the amount of time allocated for the presentation of the Ngirumpatse Defence were reasonably proportionate to those allocated to the Prosecution.

(d) Conclusion

32. The Appeals Chamber therefore finds that the Trial Chamber has not abused its discretion by committing a discernible error, and dismisses this part of the Appeal.

## C. Disposition

33. For the foregoing reasons, the Appeal is **DISMISSED** in its entirety.

Judge Pocar appends a separate opinion.

Done this 30th day of January 2009,
at The Hague, The Netherlands.

[Seal of the Tribunal]

Judge Fausto Pocar
Presiding

[53] *Prlić* Decision on Reduction of Time, para. 16; *Nyiramasuhuko* Decision, paras. 23, 24.
[54] *See* Order to Joseph Nzizorera to Reduce his Witness List, 24 October 2008, para. 7. The Prosecution also adduced written statements from 17 witnesses as well as documentary and other evidence.
[55] *Orić* Decision, para. 7 (internal footnote omitted).

# SEPARATE OPINION OF JUDGE FAUSTO POCAR

1. I agree with the outcome of the Decision, but write separately to clarify that I understand the expression "reconsideration of a decision by a Trial Chamber is an exceptional measure that is available only in particular circumstances" in paragraph 13 as meaning that reconsideration is only allowed for *non-final* decisions by a Chamber.

2. Since our decision in *Barayagwiza* on 31 March 2000,[56] it has been constant practice of both Appeals Chambers to follow the principle that reconsideration, as opposed to review, is only allowed against non-final decisions. I note that the decisions cited in footnote 23 are based on the premise that only such decisions are subject to reconsideration. In the *Žigić* case, the ICTY Appeals Chamber considered that reconsideration of a final judgement is not consistent with the Statute, which provides for the right of appeal and the right of review, but not for a second right of appeal through reconsideration.[57] The same principle applies here.

3. On the basis of this understanding, I can agree with the outcome in this case.

Done this 30th day of January 2009,
at The Hague, The Netherlands.

Judge Fausto Pocar
Presiding

[Seal of the Tribunal]

[55] *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, paras 49-50 and 73.
[57] *Prosecutor v. Zoran Žigić a/k/a "Ziga"*, Case No. IT-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2006", 26 June 2006, para. 9.