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UNITED NATIONS  
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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:** 17 February 2009

**THE PROSECUTOR**

v.

**Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA**

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

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**DECISION ON THE PROSECUTOR'S NOTICE OF DEFICIENCIES IN JOSEPH  
NZIRORERA'S RULE 73 TER FILINGS AND MOTION FOR REMEDIAL  
MEASURES**

*Rules 66(B), 67(C), 73 ter, and 92bis of the Rules of Procedure and Evidence*

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## INTRODUCTION

1. On 24 October 2008, the Chamber ordered Joseph Nzirorera, under rule 73(D) of the Rules of Procedure and Evidence, to reduce his list of witnesses to approximately 55 witnesses to be called over a period of 45 trial days.<sup>1</sup> The Chamber also ordered Nzirorera to file his application for all written statements he intended to have admitted *in lieu* of oral testimony under Rule 92*bis* as soon as possible.<sup>2</sup>

2. On 10 December 2008, Joseph Nzirorera filed his Sixth Rule 73*ter* Filing, which included his: Confidential Witness List and Summary of Testimony; Public Redacted Witness List and Summary of Testimony; and Omnibus Motion for Admission of Written Statements and Testimony.<sup>3</sup>

3. The Prosecution now alleges that Joseph Nzirorera's Rule 73*ter* filings are deficient because: (1) Nzirorera's Omnibus Motion impermissibly expands the number of witnesses he is permitted to call according to the Chamber's 73*ter* Order; (2) Nzirorera has not provided adequate or complete identifying information for the witnesses that he intends to call; (3) Nzirorera has not complied with the Prosecutor's requests for reciprocal disclosure pursuant to Rule 67(C), and did not comply with the Chamber's previous order to disclose witness statements from his prospective witnesses; and (4) Nzirorera has failed to provide copies and translations of the documents on his exhibit list.<sup>4</sup>

4. The Prosecution also requests the following legal findings and remedial measures: (1) an explicit finding that Nzirorera has violated the Chamber's Rule 73*ter* Order, and that Nzirorera's Sixth Rule 73*ter* Filing and Omnibus Motion are defective; (2) an order to Nzirorera to file a comprehensive witness list in compliance with the Chamber's Rule 73*ter* Order, which would include all witnesses that he expects to call in his Defence; (3) an order to Nzirorera to re-file his Omnibus Motion, which should be limited to witnesses who are properly listed in a submission under Rule 73*ter* in conformity with this Chamber's previous orders, particularly regarding the number of witnesses that he is permitted to call in his

<sup>1</sup> *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, ("*Karemera et.al.*"), Order to Joseph Nzirorera to Reduce his Witness List, 24 October 2008, ("Chamber's Rule 73*ter* Order").

<sup>2</sup> *Idem.*

<sup>3</sup> Joseph Nzirorera's Sixth Rule 73*ter* Filing, filed on 8 December 2008, ("Nzirorera's Sixth Rule 73*ter* Filing"); Joseph Nzirorera's Confidential Witness List and Summary of Testimony, filed on 8 December 2008, ("Nzirorera's Confidential List"); Joseph Nzirorera's Public Redacted Witness List and Summary of Testimony, filed on 8 December 2008, ("Nzirorera's Public List"); Joseph Nzirorera's Omnibus Motion for Admission of Written Statements and Testimony, filed on 8 December 2008, ("Omnibus Motion").

<sup>4</sup> Prosecutor's Notice of Deficiencies in Joseph Nzirorera's Rule 73*ter* Filings and Motion for Remedial Measures, filed on 2 February 2009, ("Prosecutor's Notice"), para. 2.

Defence case; (4) an order to Nzirorera to provide complete, detailed identifying information for each prospective witness, regardless of whether the witness is anticipated for "live" testimony before the Chamber or to give evidence in written form subject to a successful application under Rule 92bis; (5) an order to Nzirorera to disclose all Defence witness statements in his possession, and where he has not recorded statements from a witness, he should provide comprehensive will-say statements for all of his witnesses based on his Rule 67(C) and (D) reciprocal disclosure obligations; (6) an order to Nzirorera to provide a detailed exhibit index of all potential exhibits and provide copies of all exhibits and translations, as and when available, and that when documents are voluminous, he should specify which portions of the documents are relevant; and (7) a warning to Nzirorera to refrain from making late or incomplete disclosures and filings, and a firm indication that the scope of the evidence from prospective Defence witnesses will be limited by the witness summaries filed under rule 73ter(B), or that cross-examinations may be postponed to afford the Prosecutor an opportunity to investigate.<sup>5</sup>

5. Joseph Nzirorera asserts: (1) that he has not impermissibly expanded the number of witnesses he is permitted to call; (2) that he is willing to share whatever additional identifying information he has to assist the Prosecution; (3) that the Prosecution has received all of the reciprocal disclosures it is entitled to under Rule 67(C); (4) that, although the Prosecution is not entitled to copies of all documents obtained by Nzirorera from the RPF archives, he may make them available to the Prosecution as a matter of professional courtesy; and (5) that he will make copies of the six documents on his exhibit list, which do not bear prosecution numbers, available to the Prosecution within the week.<sup>6</sup>

**DELIBERATIONS**

***Whether Nzirorera Impermissibly Expanded his Witness List***

6. The Prosecution contends that Joseph Nzirorera has violated the Chamber's Rule 73ter Order because that Order directed Nzirorera to reduce his final list of witnesses to a maximum of 55 live witnesses and 47 Rule 92bis witnesses, yet Nzirorera's Sixth Rule 73ter Filing and Omnibus Motion contain 58 live witnesses and 127 witnesses whose statements he intends to admit under Rule 92bis.<sup>7</sup> The Prosecution maintains that the Chamber capped

<sup>5</sup> Prosecutor's Notice, paras. 1-7 of "Conclusion".

<sup>6</sup> Joseph Nzirorera's Response to Prosecution's Notice of Deficiencies, filed on 9 February 2009, ("Nzirorera's Response").

<sup>7</sup> Prosecutor's Notice, para. 5.

Nzirorera's list of 92bis witnesses at 47 because the Preamble to the Chamber's Rule 73ter Order contained the following statement:

"On 8 September 2008. . . Joseph Nzirorera filed his fifth Rule 73ter submission, which included an updated witness list and summaries of anticipated testimonies of his potential witnesses in a confidential Annex, listing at total of 227 witnesses. In both filings he indicated that he would call 180 witnesses over 180 trial days, and adduce the witness statements of the remaining witnesses under Rule 92bis."

According to the Prosecution, this indicates that the Chamber considered the gross total of Joseph Nzirorera's witnesses to be 227, and that because Nzirorera had committed to calling 180 live witnesses, the balance of witnesses (47), constitutes the Chamber's implicit limit on Rule 92bis witnesses.<sup>8</sup>

7. Regarding Joseph Nzirorera's live witnesses, the Chamber recalls that its Rule 73ter Order expressly states that Nzirorera's final witness list shall be reduced to *approximately* 55 witnesses to be called over forty-five trial days.<sup>9</sup> Nzirorera's Sixth Rule 73ter Filing lists 58 live witnesses, which the Chamber considers appropriate, and in compliance with its Rule 73ter Order. Moreover, the Chamber finds that 58 witnesses can be reasonably called over forty-five trial days. Accordingly, Nzirorera has not violated the Chamber's Rule 73ter Order concerning live witnesses.

8. Regarding Joseph Nzirorera's Rule 92bis witnesses, the Chamber recalls that it did not place an exact limit on the amount of witnesses Nzirorera could include in an application under Rule 92bis. Instead, the Chamber simply ordered Nzirorera to file his application for admission of all his intended written statements *in lieu* of oral testimony under Rule 92bis as soon as possible.<sup>10</sup>

9. In any event, the Chamber recalls that Nzirorera's Fifth Rule 73ter Filing states, without any reference to a gross total of 227 witnesses, that he intended to call 180 live witnesses, and offer the statements of the remaining witnesses pursuant to Rule 92bis.<sup>11</sup> Thus, the Chamber does not consider that Nzirorera intended for "remaining witnesses pursuant to Rule 92bis" to be limited to the difference between a gross total of 227 witnesses and the 180 live witnesses he intended to call at the time his Fifth Rule 73ter Filing was submitted. Accordingly, Nzirorera has not violated the Chamber's Rule 73ter Order concerning Rule 92bis witnesses.

<sup>8</sup> Prosecutor's Notice, paras. 6-7.

<sup>9</sup> Chamber's Rule 73ter Order, Executive Conclusion, Roman Numeral I.

<sup>10</sup> Chamber's Rule 73ter Order, Executive Conclusion, Roman Numeral II.

<sup>11</sup> Joseph Nzirorera's Fifth Rule 73ter Filing, filed on 8 September 2008, para. 4.

10. However, noting that Joseph Nzirorera recently filed an amended witness list on 10 February 2009,<sup>12</sup> the Chamber informs the parties that it will take great care to prevent needlessly cumulative testimony in the presentation of Nzirorera's witnesses.

***Additional Submissions Regarding Nzirorera's Witness List***

11. The Prosecution submits that the Chamber must modify aspects of its previous rulings on Joseph Nzirorera's Rule 73ter filings to allow Nzirorera to file his current witness list because, otherwise, the current list violates those previous rulings. The Prosecution then asserts that these modifications to the Chamber's previous rulings would establish the necessary platform for Nzirorera's current Rule 92bis application, which is impermissibly large. Alternatively, the Prosecution would like the Chamber to find that Nzirorera has violated the Chamber's earlier rulings with his Sixth Rule 73ter Filing and Omnibus Motion. The Chamber disagrees for the reasons stated above in its deliberation concerning the number of permissible live and Rule 92bis witnesses.

12. Additionally, the Prosecution claims that Joseph Nzirorera should have listed his Rule 92bis witnesses in his Sixth 73ter filing because the Chamber is bound by the jurisprudence of the *Nyiramasuhuko*<sup>13</sup> and *Bizimungu*<sup>14</sup> Chambers, which states that witnesses whose evidence is to be received under Rule 92bis must appear on a witness list filed with the Chamber pursuant to Rule 73ter.<sup>15</sup> However, the Chamber notes that Nzirorera's Confidential List, which was included as part of his Sixth Rule 73ter Filing, contains the names of all of his Rule 92bis witnesses that appear in the Omnibus Motion.<sup>16</sup>

13. The Chamber further reminds the parties that it has not yet ruled on Nzirorera's Omnibus motion and, therefore, that the appearance of a witness in the Omnibus Motion does not guarantee that the witness's statement will be admitted.

14. The Prosecution further argues that Joseph Nzirorera's Sixth Rule 73ter Filing does not include Bonaventure Ubalijoro, Raphael Bikumbi, GK, and WFP-1 whose statements

<sup>12</sup> Joseph Nzirorera's First Revised Public Redacted Witness List, filed on 10 February 2009.

<sup>13</sup> *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, Decision on Prosecutor's Motion for Leave to be Authorised to have Admitted the Affidavits Regarding the Chain of Custody of the Diary of Pauline Nyiramasuhuko (TC), 14 October 2004, para. 12, ("*Nyiramasuhuko* Decision")

<sup>14</sup> *Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jerome-Clement Bicamumpaka, and Prosper Mugiraneza*, ("*Bizimungu et al.*"), Case No. ICTR-99-50-T, Decision on Prosecutor's Motion and Notice Pursuant to Rule 92bis(E) (TC), 17 November 2004, para. 6, ("*Bizimungu* Decision").

<sup>15</sup> Prosecutor's Notice, para. 9. For the sake of accuracy, the Chamber notes, however, that the *Nyiramasuhuko* and *Bizimungu* Decisions do not refer to Rule 73ter; instead, they refer to Rule 73bis because they address motions by the *Prosecution* to admit statements under Rule 92bis.

<sup>16</sup> Nzirorera's Confidential List, pp. 3-6.

have already been admitted into evidence under Rule 92bis, or Jean-Baptiste Butera, who has already testified via video-link.<sup>17</sup> Consequently, the Prosecution maintains that Nzirorera's final witness list contains five additional witnesses that were not listed by Nzirorera.

15. However, Joseph Nzirorera does refer to Bonaventure Ubalijoro,<sup>18</sup> Raphael Bikumbi,<sup>19</sup> GK,<sup>20</sup> WFP-1,<sup>21</sup> and Jean-Baptiste Butera<sup>22</sup> in his Pre-Defence Brief, which forms part of his Sixth Rule 73ter Filing. Additionally, because Butera testified before the date of the Chamber's Rule 73ter Order, the Chamber does not find that any action is necessary concerning this witness.

16. Finally, the Prosecution argues that Joseph Nzirorera has added several new witnesses to his Sixth Rule 73ter Filing that did not appear in any of his previous filings.<sup>23</sup> The Chamber considers that this is permissible because it has already agreed that Nzirorera's previous filings were tentative, and not final.

#### ***Alleged Lack of Identifying Information***

17. The Prosecution contends that Joseph Nzirorera has neglected to provide complete identifying information for the majority of the witnesses that he intends to call.<sup>24</sup> However, the Chamber notes that Nzirorera has agreed to provide the Prosecution with whatever identifying information he has, and that the full information required by the Trial Chamber will be provided well before each witness testifies.<sup>25</sup>

18. Considering that there are no protective measures in place for any of Joseph Nzirorera's witnesses aside from a no-contact order with the Prosecution,<sup>26</sup> the Chamber finds that Nzirorera should provide all identifying information for all of his live and Rule 92bis witnesses to the Prosecution, regardless of the Chamber's forthcoming decision on his Omnibus Motion. The Chamber appreciates Nzirorera's willingness to cooperate and assist the Prosecution on this matter.

<sup>17</sup> Prosecutor's Notice, paras. 10-11.

<sup>18</sup> Joseph Nzirorera's Pre-Defence Brief, filed on 8 December 2008, para. 1542, ("Pre-Defence Brief").

<sup>19</sup> Pre-Defence Brief, para. 1543.

<sup>20</sup> Pre-Defence Brief, para. 820.

<sup>21</sup> Pre-Defence Brief, para. 1621.

<sup>22</sup> Pre-Defence Brief, para. 802.

<sup>23</sup> Prosecutor's Notice, para. 12.

<sup>24</sup> Prosecutor's Notice, para. 14.

<sup>25</sup> Nzirorera's Response, para. 5.

<sup>26</sup> *Karemera et al.*, Decision on Joseph Nzirorera's Emergency Motion for No Contact Order and "Requête de Matthieu Ngirumpatse aux fins d'interdire au Procureur de contacter toute personne figurant sur la liste de témoins sans l'accord préalable de ses conseils"(TC), 21 August 2008.

19. The identifying information that Joseph Nzirorera must disclose should include: (1) the full name of the witness (family name, first name, nicknames where applicable, and the assigned pseudonym, if applicable); (2) his or her nationality, sex, date, and place of birth (including *cellule*, *secteur*, *commune*, and *préfecture*); (3) the full names of both parents; (4) his or her residence in 1994 including *cellule*, *secteur*, *commune*, and *préfecture*; (5) current country and city of residence; and (6) his or her occupation at present and in 1994.<sup>27</sup>

***Alleged Lack of Reciprocal Disclosure and Failure to Disclose Witness Statements in a Timely Manner***

20. The Prosecution claims that it has requested two types of reciprocal disclosures from Joseph Nzirorera under Rule 67(C): (1) all statements that have been made to Nzirorera by his witnesses; and (2) all documents that Nzirorera's Defence team has retrieved from the RPF archives in Kigali.<sup>28</sup>

21. Concerning the statements made to Joseph Nzirorera by his witnesses, the Prosecution does not contend that Nzirorera has failed to disclose the statements because it acknowledges that the statements were attached as annexes to Nzirorera's Omnibus Motion,<sup>29</sup> instead, it argues that the disclosure was untimely. The Prosecution argues that it is clear from Nzirorera's Omnibus Motion that he had recorded statements from prospective witnesses in his possession long before they were submitted as annexes to that motion, and that this suggests bad faith or outright refusal to comply with the Chamber's previous orders.<sup>30</sup>

22. The Chamber does not consider that Joseph Nzirorera refused to comply with the Chamber's previous orders regarding reciprocal disclosure of witness statements because he did file the final list of witness statements on 8 December 2008, when he filed his Sixth Rule 73ter Filing and Omnibus Motion. The Chamber considers that, even though it is very concerned by Nzirorera's apparent inability to submit a timely Rule 73ter filing, and his continuous disregard of the Chamber's orders on the issue for several months, Nzirorera did not violate the Chamber's previous orders on this matter.

23. Regarding the reciprocal disclosure of RPF documents, the Chamber notes that Joseph Nzirorera has recently submitted a DVD containing all of the documents obtained by his Defence team from the RPF Archives in Kigali to Court Management Services ("CMS"), for

<sup>27</sup> *Karemera et. al.*, Decision on Prosecution's Submissions Concerning Édouard Karemera's Compliance with Rule 73ter and Chamber's Orders (TC), 2 April 2008, para. 8.

<sup>28</sup> Prosecutor's Notice, paras. 19-20.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

disclosure to the Prosecution.<sup>31</sup> Accordingly, the Chamber considers that this issue is currently resolved.

***Alleged Failure to Supply Copies and Translations of Proposed Exhibits***

24. The Prosecution claims that Joseph Nzirorera must provide copies of his proposed exhibits electronically and in hard-copy with, where appropriate, highlighting of relevant portions and translations.<sup>32</sup> Further, the Prosecution asserts that documents, which did not originate from the Prosecution, and which would not otherwise be available to the Prosecution by searching its Zy-find evidentiary database, should have priority.<sup>33</sup>

25. The Chamber notes that Joseph Nzirorera recently submitted hard copies of all exhibits on his exhibit list, which do not bear a Prosecution identification number;<sup>34</sup> accordingly, this issue is currently resolved. The Chamber considers that the Prosecution is capable of making its own copies of all of Nzirorera's exhibits, which bear Prosecution identification numbers.

26. Regarding translations of Joseph Nzirorera's proposed exhibits, the Chamber orders Nzirorera to provide the translations it already has in its possession to the Prosecution, but considers that the Prosecution is capable of translating the remaining documents on its own. This is particularly the case since all but seven of the exhibits at issue bear Prosecution identification numbers. The Chamber denies all other requests made by the Prosecution regarding copies and translations of Nzirorera's exhibits.

**FOR THESE REASONS, THE CHAMBER**

**I. GRANTS** the Prosecution's motion in part;

**II. ORDERS** Joseph Nzirorera to provide all identifying information for all of his witnesses to the Prosecution, regardless of the Chamber's imminent decision on his Omnibus Motion, no later than 7 days from the date of this Decision. The identifying information should include: (1) the full name of the witness (family name, first name, nicknames where applicable, and the assigned pseudonym, if applicable); (2) his or her nationality, sex, date, and place of birth (including Cellule, Secteur, Commune, and Préfecture); (3) the full names of both parents;

<sup>31</sup> Letter from Joseph Nzirorera's Lead Counsel to Mr. Constant Hometowu (CMS), 13 February 2009.

<sup>32</sup> Prosecutor's Notice, para. 23.

<sup>33</sup> *Ibid.*

<sup>34</sup> Letter from Joseph Nzirorera's Lead Counsel (with attachments) to Mr. Constant Hometowu (CMS), 13 February 2009.

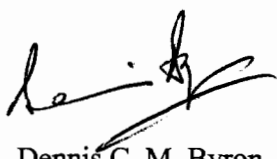


(4) his or her residence in 1994 including Cellule, Secteur, Commune, and Préfecture; (5) current country and city of residence; and (6) his or her occupation at present and in 1994;

**III. ORDERS** Nzirorera to provide all translations of his exhibits on his exhibit list of 22 September 2008, which he currently has in his possession, to the Prosecution no later than 7 days from the date of this Decision; and

**IV. DENIES** the Prosecution's motion in all other regards.

Arusha, 17 February 2009, done in English.



Dennis C. M. Byron

Presiding Judge



Gberdao Gustave Kam

Judge



Vagn Joensen

Judge

[Seal of the Tribunal]

