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ICTR-98-44-T
28-8-2009
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 28 August 2009

THE PROSECUTOR

v.

Édouard KAREMERA
Matthieu NGIRUMPATSE
Joseph NZIRORERA
Case No. ICTR-98-44-T

JUDICIAL RECORDS ARCHIVED
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**DECISION ON MOTION FOR DISCLOSURE OF MEDICAL INFORMATION AND
FOR EXTENSION OF TIME**

Rules 54 and 74bis of the Rules of Procedure and Evidence

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INTRODUCTION

1. On 3 March 2009, the Chamber granted a Prosecution motion to sever Matthieu Ngirumpatse from this case due to his ill health and the resulting delay in the proceedings.¹ On 19 June 2009, the Appeals Chamber reversed the Chamber's decision to sever Ngirumpatse and remanded the matter to the Chamber for further consideration.²
2. The Appeals Chamber found that Trial Chamber reached its conclusions on the prejudice which would be caused to the co-Accused, Édouard Karemera and Joseph Nzirorera, as a result of further delays occasioned by Matthieu Ngirumpatse's illness without having assessed all relevant factors. In particular, the Appeals Chamber found that the Chamber should not have made its decision on severance by relying exclusively on a medical assessment that was provisional, lacking in detail, and disputed by the parties and in circumstances where it had no specific information concerning the nature of Ngirumpatse's medical problem.³
3. On 23 June 2009, the Chamber ordered a further medical report from the Chief Medical Officer of the Tribunal, Dr. Épée, and requested the Registrar to recommend an independent medical expert with no prior involvement in the case to prepare a report concerning Matthieu Ngirumpatse's state of health and prognosis.⁴ Dr. Épée filed her *ex parte* report on 3 July 2009, and on that day, the Chamber appointed an independent medical expert (the "Independent Expert") to provide a report addressing certain particular questions.⁵ The Independent Expert submitted an *ex parte* report to the Chamber on 11 August 2009.
4. On 24 August 2009, the Chamber provided a redacted version of the Independent Expert's conclusions to the Parties, and requested submissions on the modalities of continuing the proceedings. The Chamber proposed resuming the proceedings on 19 October 2009, until 4 December 2009, sitting four days a week, for half a day.⁶ Matthieu Ngirumpatse filed such submissions on 26 August 2009.⁷

¹ *Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse, Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et al."), Decision on Continuation of Trial, 3 March 2009.

² *Karemera et al.*, Decision on Appeal concerning the Severance of Matthieu Ngirumpatse, 19 June 2009 ("Severance Appeal").

³ Severance Appeal, para. 22.

⁴ *Karemera et al.*, Order Concerning Medical Examination of Matthieu Ngirumpatse, 23 June 2009.

⁵ *Karemera et al.*, Ordonnance concernant la désignation d'un expert médical, 3 July 2009.

⁶ *Karemera et al.*, Ordonnance concernant la reprise du procès, 24 August 2009.

⁷ Mémoire pour Matthieu Ngirumpatse suite à l'ordonnance du 24 août 2008 concernant la reprise du procès, filed 26 August 2009.

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5. Joseph Nzirorera now moves for the disclosure of the full reports of both the Chief Medical Officer and the Independent Expert, as well as an extension of time to make submissions on the resumption of the proceedings.⁸ The Prosecution supports,⁹ and Matthieu Ndirumputse opposes,¹⁰ Nzirorera's request for disclosure of the medical reports. Édouard Karemera did not file submissions in response to the Motion.¹¹

DELIBERATIONS

6. Article 19 of the Statute mandates that Trial Chambers "shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused". Rule 74bis of the Rules provides that a Chamber may, *proprio motu* or at the request of a party, order a medical examination of an accused. Rule 53 permits the Chamber to issue such orders as may be necessary for the preparation or conduct of the trial.

7. Joseph Nzirorera argues that the Appeals Chamber instructed this Chamber to obtain sufficient information which would allow it to make an informed decision regarding continuation of the proceedings, which includes receiving meaningful submissions from the parties. Nzirorera argues that he is unable to make such submissions without meaningful information. He claims that the redacted disclosure of the Independent Expert's conclusions provides no information as to the nature of Matthieu Ndirumputse's illness, diagnosis or prognosis.¹²

8. The Prosecution supports Joseph Nzirorera's request for disclosure of the medical reports, likewise arguing that the redacted version of the Independent Expert's report does not offer sufficient insight into Matthieu Ndirumputse's illness or prognosis to enable it to provide the Chamber with substantive submissions. The Prosecution takes the position that all parties should be privy to the same information as that provided to Counsel for Matthieu Ndirumputse, and that it would be improper to allow Ndirumputse's privacy concerns to limit

⁸ Joseph Nzirorera's Motion for Disclosure of Medical Information and for Extension of Time, filed 25 August 2009 ("Motion").

⁹ Prosecutor's Response to "Joseph Nzirorera's Motion for Disclosure of Medical Information and for Extension of Time", filed 26 August 2009 ("Prosecution Response").

¹⁰ Mémoire pour M Ndirumputse sur l'ordonnance concernant la requête de Joseph Nzirorera en communication d'informations médicales et en extension de délai, filed 27 August 2009 ("Ndirumputse Response").

¹¹ Pursuant to an Order of the Chamber, such submissions should have been filed by mid-day, 27 August 2009: Karemera *et al.*, Ordonnance concernant la requête de Joseph Nzirorera en communication d'informations médicales et en extension de délai, 26 August 2009.

¹² Motion, paras. 5-7.

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a full and fair hearing on the resumption of the proceedings. Rather, Ngirumpatse's privacy concerns can be addressed by disclosing the medical reports on a confidential basis.¹³

9. Matthieu Ngirumpatse opposes the Motion, arguing that the right to medical privacy is an essential human right, and no legitimate purpose would be served by disclosure of the medical reports. Ngirumpatse argues that the parties do not need the full reports, but that the Independent Expert's redacted conclusions are sufficient for the present purposes.¹⁴ Ngirumpatse has also offered to provide his medical information to a doctor chosen by the other Parties,¹⁵ but does not explain the modalities for such a solution, such as what information this doctor would be permitted to disclose to the other Parties.

10. For a considerable period of time, the Chamber has accommodated Matthieu Ngirumpatse's health issues, while also ensuring the fair and expeditious conduct of the proceedings. Ngirumpatse has thus far maintained his right to the privacy of his medical information, and the Chamber has respected that position. However, in the Severance Appeal, the Appeals Chamber held that "[w]hile a Trial Chamber may adopt reasonable measures to protect the privacy interests of an accused, these measures cannot serve to deprive it of information essential to reaching an informed decision."¹⁶

11. The right to privacy is not an absolute one. Although Matthieu Ngirumpatse points out that the right to medical secrecy is guaranteed in international instruments such as Article 8 of the European Convention on Human Rights, the Chamber notes that Article 8 is subject to reasonable limitations, particularly for the protection of the rights and freedoms of others.¹⁷

12. The Chamber also notes that in the jurisprudence of the *ad hoc* Tribunals, typically all parties have been privy to the medical information of an accused when issues of fitness to stand trial or severance have been considered.¹⁸ In the *Stanišić* proceedings at the

¹³ Prosecution Response, paras. 3-4, 6.

¹⁴ Ngirumpatse Response, paras. 3, 5.

¹⁵ Ngirumpatse Response, para. 14.

¹⁶ Severance Appeal, para. 22.

¹⁷ Article 8 states: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

¹⁸ See *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T ("*Stanišić*"), Decision on Start of Trial and Modalities for Trial, 29 May 2009; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Nsengiyumva's Motions to Call Doctors and to Recall Eight Witnesses, 19 April 2007; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, 22 September 2004; *Prosecutor v. Radoslav Brjdanin and Momir Talić*, Case No. IT-99-36-T, Decision on Prosecution's Oral Request for the Separation of Trials, 20 September 2002.

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International Criminal Tribunal for the Former Yugoslavia, for instance, Trial Chamber I held that “transparent medical reporting should not unnecessarily encroach on the privacy rights of the Accused or third persons. Nevertheless, any redactions of medical reports will only be considered in relation to ‘redacting from the public’, and not as ‘redacting from the Chamber or the parties’.”¹⁹ It does not appear from the prior decisions, however, that any accused has previously objected to the disclosure of medical information to other parties.

13. Nonetheless, the Chamber finds that this jurisprudence provides some guidance on the present issue, particularly the principle that determining whether an accused is able to attend court proceedings “requires a legal determination in which facts presented by a medical assessment are but one, although a large, consideration.”²⁰

14. Another pertinent consideration is submissions from all parties concerned. Indeed, the other Accused as well as the Prosecution obviously have a direct interest in whether, when and how the proceedings continue. The Chamber finds that the circumstances of the case now require that additional information regarding Matthieu Ngirumpatse’s health be provided to all parties. Indeed, the state of Ngirumpatse’s health and his ability to attend the proceedings has been the central issue for the Chamber and the parties for a year. In order to make the necessary legal determination regarding whether and how to resume the proceedings, the Chamber finds that fully-informed submissions from all parties are necessary. The Chamber finds this to be a sufficiently important objective to override Ngirumpatse’s right to the privacy of his medical information.

15. The Chamber notes that Matthieu Ngirumpatse’s Defence team is in possession of the complete reports of both Dr. Épée and the Independent Expert, and has made submissions on that basis. For instance, Ngirumpatse submits that the analysis conducted by the Independent Expert was incomplete and that he only fulfilled part of his mandate.²¹ In order to enable the parties to respond to such submissions, and to respect the principle of equality between the parties,²² the Chamber finds Joseph Nzirorera’s and the Prosecution’s request for the medical reports to be well founded.

¹⁹ Stanišić, Decision on Urgent Defence Request for Further Submission of Psychiatric Medical Expert and Decision on Defence Motion to Redact Medical Reports, 6 August 2009, para. 18.

²⁰ Stanišić, Decision on Start of Trial and Modalities for Trial, 29 May 2009, para. 22.

²¹ Mémoire pour Matthieu Ngirumpatse suite à l’ordonnance du 24 août 2008 concernant la reprise du procès, filed 26 August 2009, para. 14; see also paras. 30 and 31.

²² The Chamber notes that it appears that some of the parties may already be privy to Matthieu Ngirumpatse’s condition. See Joseph Nzirorera’s Notice of Request for Expert Witness, filed 12 February 2009.


16. Accordingly, the Chamber finds that all parties are entitled to the reports of Dr. Épee and the Independent Expert, filed 3 July and 11 August 2009, respectively. The reports and the information contained therein should be held in the strictest confidence and may only be used to provide the submissions ordered in the *Ordonnance concernant la reprise du procès*.

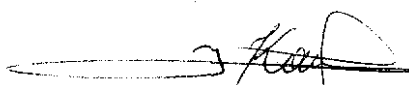
17. The Chamber also accepts Joseph Nzirorera's submission that additional time is required for review of the medical reports.²³ The Chamber agrees with the Prosecution that a period of five days is sufficient for such a review.²⁴ Accordingly, the Chamber amends its previous order,²⁵ and orders Joseph Nzirorera, Édouard Karemera and the Prosecution to file any submissions in response to the submissions of Matthieu Ngirumpatse by 2 September 2009. Ngirumpatse is ordered to file any reply by 4 September 2009.

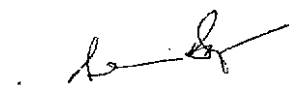
FOR THESE REASONS, THE CHAMBER

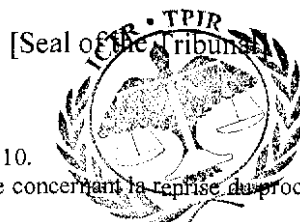
- I. **GRANTS** Joseph Nzirorera's Motion;
- II **ATTACHES** a copy of Dr. Épee's report filed 3 July 2009 and the Independent Expert's report filed 11 August 2009 as a confidential Annexes A and B, respectively;
- III **ORDERS** that the confidential Annexes to this Decision and the information contained therein be held in strict confidence by the parties and may only be used to provide the submissions ordered in the *Ordonnance concernant la reprise du procès*; and,
- IV **AMENDS** the *Ordonnance concernant la reprise du procès* and **ORDERS** Joseph Nzirorera, Édouard Karemera and the Prosecution to file any submissions by 2 September 2009 and **ORDERS** Matthieu Ngirumpatse to file any reply by 4 September 2009.

Atusha, 28 August 2009, done in English.


Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


Vagn Joensen
Judge



²³ Motion, para. 15.

²⁴ Prosecution Response, para. 10.

²⁵ Karemera et al., *Ordonnance concernant la reprise du procès*, 24 August 2009.