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ICTR-98-44-T
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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: 10 September 2009

THE PROSECUTOR

v.

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

JUDICIAL RECORDS ARCHIVES
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DECISION ON REMAND REGARDING CONTINUATION OF TRIAL

Rule 82(B) of the Rules of Procedure and Evidence

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INTRODUCTION

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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. 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.³ Dr. Épée filed her *ex parte* report on 3 July 2009 ("Épée Report"), and on that day, the Chamber appointed an independent medical expert (the "Independent Expert") to provide a report addressing certain particular questions.⁴ The Independent Expert submitted an *ex parte* report to the Chamber on 11 August 2009 ("Expert Report").
3. The Chamber then requested submissions from the parties on the resumption of the proceedings.⁵ To enable such submissions, the Chamber disclosed both the Épée Report and the Expert Report to the Parties on a strictly confidential basis.⁶
4. Matthieu Ngirumpatse filed submissions on 26 August 2009.⁷ Joseph Nzirorera,⁸ Édouard Karemera⁹ and the Prosecution¹⁰ have each responded, and Ngirumpatse filed a reply on 4 September 2009.¹¹

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.

³ *Karemera et al.*, Order Concerning Medical Examination of Matthieu Ngirumpatse, 23 June 2009.

⁴ *Karemera et al.*, Ordonnance concernant la désignation d'un expert médical, 3 July 2009.

⁵ *Karemera et al.*, Ordonnance concernant la reprise du procès, 24 August 2009.

⁶ *Karemera et al.*, Decision on Motion for Disclosure of Medical Information and for Extension of Time, 28 August 2009; see Confidential Annexes A and B.

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

⁸ Joseph Nzirorera's Submissions on the Resumption of Trial, filed 31 August 2009 ("Nzirorera Submissions").

⁹ Soumission confidentielle de Édouard Karemera à la suite de l'ordonnance de la chambre en date du 24 août relative à la reprise du procès, filed 1 September 2009 ("Karemera Submissions").

¹⁰ Prosecutor's Submission in relation to Trial Chamber III's Ordonnance concernant la reprise du procès, filed 1 September 2009 ("Prosecution Submissions").

¹¹ Mémoire en réplique consolidé pour Matthieu Ngirumpatse suite à l'ordonnance du 24 août 2008 concernant la reprise du procès ("Ngirumpatse Reply"), filed 4 September 2009.

DELIBERATIONS

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5. Joint trials of accused are permitted under Rule 48 of the Rules of Procedure and Evidence (“Rules”), which provides that “[p]ersons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.” Even when joinder is ordered, Rule 82(B) provides that a Chamber may order that persons accused jointly be tried separately if “necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.”

6. Severance may be ordered even after the trial has begun, and wide discretion is given to a Trial Chamber to determine whether accused jointly charged should be granted separate trials.¹² The overriding principle is the interests of justice, and severance will only be granted if serious prejudice to a specific right of an accused can be shown. Indeed, there is a preference for joint trials of individuals accused of acting in concert in the commission of a crime:

A joint trial relieves the hardship that would otherwise be imposed on witnesses, whose repeated attendance might not be secured; enhances fairness as between the accused by ensuring a uniform presentation of evidence and procedure against all; and minimizes the possibility of inconsistencies in treatment of evidence, sentencing, or other matters, that could arise from separate trials.¹³

7. The question presently before the Chamber, therefore, is whether the interests of justice require the severance of Matthieu Ngirumpatse from the proceedings because of the state of his health. As the Chamber has previously noted, this “requires a legal determination in which facts presented by a medical assessment are but one, although a large, consideration.”¹⁴

8. The Épée Report states that Matthieu Ngirumpatse is physically and mentally stable and concludes that he is presently able to participate in court proceedings for 3 hours a day, 4

¹² *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21 (“*Delalić et al.*”), Decision on the Motion by Defendant Delalić Requesting Procedures for Final Determination of the Charges Against Him, 1 July 1998, para. 35; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T (“*Bagosora et al.*”), Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses, 9 September 2003, para. 20; *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Joint Case No. ICTR-98-42-T, Decision on Nyiramasuhuko’s Motion for Separate Proceedings, a New Trial, and a Stay of Proceedings, 7 April 2006, para. 64; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-T (“*Brđanin et al.*”), Decision on Prosecution’s Oral Request for the Separation of Trials, 20 September 2002, para. 19.

¹³ *Bagosora et al.*, Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses, para. 21 and cases cited therein; *Brđanin et al.*, Decision on Prosecution’s Oral Request for the Separation of Trials, 20 September 2002, para. 18; *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-PT, Decision on Defence Motion to Sever Defendants and Counts, 15 March 1999.

¹⁴ *Karemera et al.*, Decision on Motion for Disclosure of Medical Information and for Extension of Time, para. 13, citing *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Start of Trial and Modalities for Trial, 29 May 2009, para. 22.

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days a week.¹⁵ The Expert Report states that although Ngirumpatse's physical and psychological state of health are somewhat weakened, his intellectual faculties have not been affected. The Expert Report concludes that Ngirumpatse is able to participate in the proceedings, preferably only four days a week, working for approximately six hours a day. Further, although Ngirumpatse's treatment causes pain and fatigue, this can be administered at the end of the week to permit sufficient recuperation before the trial commences at the beginning of the next week.¹⁶

9. On the basis of these reports, the Chamber proposed resuming the proceedings on 19 October 2009, until 4 December 2009, sitting four days a week, for half a day.¹⁷ Matthieu Ngirumpatse, however, requests that the proceedings resume in January 2010, submitting that the proposed October to December trial session will only result in 12 full trial days at best.¹⁸ Ngirumpatse argues that the Independent Expert's suggestion that he receive his treatment at the end of the week is unworkable, because he will not only be tired from participating in the proceedings, but will also need the weekends to prepare his defence.¹⁹

10. Matthieu Ngirumpatse also argues more generally that the Independent Expert fulfilled only part of his mandate, performed a summary examination, delivered an incomplete analysis and was biased.²⁰ He also accuses the Chief Medical Officer of the Tribunal of bias, and criticises the Expert Report for only responding to issues relating to the resumption of the trial.²¹ Ngirumpatse further claims that the Prosecution does not acknowledge the problems with the Expert Report so that it can rely on it as a basis to have the trial resume prematurely.²² Ngirumpatse submits that the Chamber should order another expert to respond to questions regarding Ngirumpatse's rights and the relevant jurisprudence.²³

11. Joseph Nzirorera submits that the Chamber should vacate its order to sever Matthieu Ngirumpatse from the trial, and otherwise supports the arguments made by Ngirumpatse. Nzirorera argues, in particular, that his own right to an expeditious trial should not be used to

¹⁵ *Karemera et al.*, Confidential Annex A, Decision on Motion for Disclosure of Medical Information and for Extension of Time, 28 August 2009.

¹⁶ *Karemera et al.*, Confidential Annex B, Decision on Motion for Disclosure of Medical Information and for Extension of Time, 28 August 2009.

¹⁷ *Karemera et al.*, Ordonnance concernant la reprise du procès, 24 August 2009.

¹⁸ Ngirumpatse Submissions, paras. 52-53. The Chamber notes however that Ngirumpatse miscalculated the length of the session proposed by the Chamber which would be of 28 half days.

¹⁹ Ngirumpatse Submissions, paras. 41-44.

²⁰ Ngirumpatse Submissions, paras. 7, 14, 26 ; See also Note confidentielle sure le rapport du docteur Biclet, Confidential Annex to Ngirumpatse Reply.

²¹ Ngirumpatse Reply, paras. 10-11.

²² Ngirumpatse Reply, para. 6.

²³ Ngirumpatse Reply, para. 12.

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deprive Ngirumpatse of his rights and that he is willing to wait until conditions are favourable for Ngirumpatse to meaningfully and safely participate in the proceedings.²⁴

12. Édouard Karemera supports Matthieu Ngirumpatse's submissions and suggests that the resumption of the trial should not take place before December 2009.²⁵

13. The Prosecution supports the Chamber's proposal to recommence the proceedings in October 2009, but also requests that the Chamber's decision on severance be held in abeyance. The Prosecution submits that, in light of Matthieu Ngirumpatse's reservations about the recommendations of the Épée Report and the Expert Report and the possibility that Ngirumpatse will not be able to participate in the trial to the extent or at the pace they suggest, it would be more reasonable to resume the trial, and then assess the practicality of the new trial arrangement.²⁶

14. The Prosecution also rejects Matthieu Ngirumpatse's criticisms of the Expert Report. The Prosecution argues that the Independent Expert provided a thorough, holistic report, which responded directly to the questions posed by the Chamber. The Prosecution submits that since the primary role of the Independent Expert was to assess Ngirumpatse's fitness to stand trial, Ngirumpatse's submissions regarding the Independent Expert's failure to conduct medical tests or suggest alternative treatments are beside the point.²⁷ The Prosecution further argues that Ngirumpatse's suggestions that the Independent Expert was biased or delivered a deliberately incomplete report are entirely unsubstantiated.²⁸

15. The Chamber agrees that Matthieu Ngirumpatse's criticisms of the Expert Report are unfounded. The Independent Expert has over 35 years of practice and is listed as a medical expert before the Paris Court of Appeal in various areas including the specialty at issue.²⁹ The Independent Expert delivered a full report, containing a medical history, overview of Ngirumpatse's medical file, results of his physical examination of Ngirumpatse, remarks on Ngirumpatse's illness and treatment, general conclusions as well as responses to the specific questions posed by the Chamber. There is no basis whatsoever to conclude that the Independent Expert, who has no previous involvement in this case, conducted himself unprofessionally or failed to fulfil his mandate.

²⁴ Nzirorera Submissions, paras. 2-4.

²⁵ Karemera Submissions, para. 11-12.

²⁶ Prosecution Submissions, paras. 6, 15-16.

²⁷ Prosecution Submissions, paras. 9-10.

²⁸ Prosecution Submissions, para. 12.

²⁹ *Karemera et al.*, Ordonnance concernant la désignation d'un expert médical, 3 July 2009, para. 3.

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16. With respect to the *Épée* Report, the Chamber notes that it was based not only on Dr. *Épée*'s long involvement in this matter, but was signed by two other doctors as consultants. The *Épée* Report also attaches the opinion of a fourth doctor, who finds that Matthieu Ngirumpatse has retained his mental capacities and is therefore fit to participate in the proceedings during normal working hours, although he recommends that Ngirumpatse not attend the proceedings on the day he receives his treatment.

17. The Chamber further notes that both Dr. *Épée* and the Independent Expert come to the same conclusions concerning the state of Matthieu Ngirumpatse's health and his current ability to participate in the proceedings; indeed, both agree that he is presently able to participate. In such circumstances, the Chamber sees no reason to appoint another expert to assess the state of Ngirumpatse's health.

18. With respect to Matthieu Ngirumpatse's submission that the trial should not recommence until January 2010 because he cannot both recover from his weekly treatment and sufficiently conduct his defence, the Chamber recalls that the applicable standard is whether Ngirumpatse is able to meaningfully participate in such a way as to "exercise his fair trial rights to such a degree that he is able to participate effectively in his trial, and has an understanding of the essentials of the proceedings."³⁰ The Chamber accepts the recommendation of the Independent Expert that Ngirumpatse can receive his treatment at the end of each week, either Thursday afternoon or Friday, which should provide sufficient time for recovery to enable his participation in the proceedings commencing on Monday.³¹ The Chamber also notes that sitting only half a day will provide Ngirumpatse with additional time to rest and conduct his defence during the week. Consequently, the Chamber finds that Ngirumpatse's capacities, even while he is receiving treatment, are such that he is able to meaningfully participate in the proceedings and sufficiently exercise his rights, particularly because he is assisted by counsel.

19. The Chamber therefore finds that there is no basis at this time to sever Matthieu Ngirumpatse from the proceedings. With respect to the modalities of continuing the proceedings, the Chamber finds that the trial should resume on 19 October 2009, until 4 December 2009, sitting for half days, four days a week. However, the Chamber appreciates that the state of Ngirumpatse's health may change, and therefore that continuous monitoring

³⁰ *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgement, 17 July 2008, para. 55.

³¹ *Karemera et al.*, Confidential Annex B, Decision on Motion for Disclosure of Medical Information and for Extension of Time, 28 August 2009.

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is of the utmost importance in order to best accommodate Ngirumpatse's health issues while also ensuring that the trial proceed in a fair and expeditious manner. The Chamber therefore requests that Dr. Épée provide it and the parties with an updated report within one month of the date of this Decision, as well as reports every two weeks from the recommencement of the proceedings.

Other Matters

20. The Chamber recalls that it granted Joseph Nzirorera's request to recall Witness G for further cross-examination by video-link.³² Due to the stay of proceedings ordered by the Chamber,³³ the video-link did not take place as scheduled.³⁴ The Chamber accepts Nzirorera's request that the testimony of Witness G be taken at the outset of the recommencement of trial,³⁵ and will schedule the precise date and time in a later order.

21. Further, the Chamber notes that Joseph Nzirorera requested the transfer of certain witnesses from Mali before the proceedings were stayed.³⁶ In order to adjudicate this request, the Chamber requests that Nzirorera file submissions indicating the new dates on which these witnesses will be required.

FOR THESE REASONS, THE CHAMBER

- I. **VACATES** the Decision on Continuation of Trial, 3 March 2009;
- II. **ORDERS** that the proceedings in this matter shall recommence on 19 October 2009, sitting Monday to Thursday, from 8:45 a.m. until 12:30 p.m., until 4 December 2009;
- III. **REQUESTS** Dr. Épée to provide the Chamber and the parties with an update report on the state of Matthieu Ngirumpatse's health and his ability to participate in the proceedings within one month of the date of this Decision, filed under confidential cover;

³² *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Recall Prosecution Witnesses ALG, AWD, G and T, 16 April 2009.

³³ *Karemera et al.*, Order Concerning Medical Examination of Matthieu Ngirumpatse, 23 June 2009.

³⁴ *Karemera et al.*, Scheduling Order Regarding the Video-Link Testimony of Witness G, 13 May 2009.

³⁵ Nzirorera Submissions, para. 5.

³⁶ See Joseph Nzirorera's Motion for Order to Transfer Witnesses from Mali, filed 7 May 2009.

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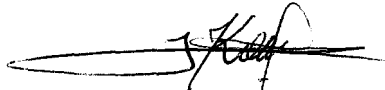
IV. **REQUESTS** Dr. Épée to provide the Chamber and the parties with a report on the state of Matthieu Ndirumpatse's health and his ability to participate in the proceedings every two weeks from the recommencement of the proceedings on 19 October 2009 until 4 December 2009, filed under confidential cover; and,

V. **REQUESTS** Joseph Nzirorera to file updated submissions concerning "Joseph Nzirorera's Motion for Order to Transfer Witnesses from Mali".

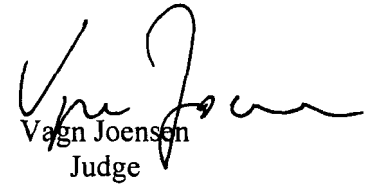
Arusha, 10 September 2009, done in English.



Dennis C. M. Byron
Presiding Judge



Gberdao Gustave Kam
Judge



Vagn Joensen
Judge

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