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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER III

Case No. ICTR-98-44-T

ENGLISH
Original: FRENCH

Before: Judge Dennis C. M. Byron, presiding
Judge Gberdao Gustave Kam
Judge Vagn Joensen
Registrar: Adama Dieng
Date filed: 28 December 2010

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The PROSECUTOR

v.

**ÉDOUARD KAREMERA AND
MATTHIEU NGIRUMPATSE**

**DECISION ON MATTHIEU NGIRUMPATSE'S MOTION TO VARY HIS WITNESS
LIST AND FOR RECONSIDERATION**

Rules 54, 71, 73 and 73 ter of the Rules of Procedure and Evidence

Office of the Prosecutor:
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CIH10-0204 (E)

Translation certified by LSS, ICTR

INTRODUCTION

1. The last session in this case will commence on 10 January 2011. To date, the Chamber has heard 29 witnesses who testified in defence of Matthieu Ngirumpatse, as well as six others who appeared for cross-examination following the admission of their written statements under Rule 92 *bis*. Having noted that Matthieu Ngirumpatse was finding it difficult to confirm that his witnesses would appear before the Tribunal, the Chamber instructed him to inform it, no later than 1 December 2010, whether or not his witnesses would be available and willing to testify in January 2011.

2. On 1 December 2010, Matthieu Ngirumpatse filed a motion to withdraw some witnesses from his list and replace them with others. He also requested the Chamber to reconsider some earlier decisions.¹ The Prosecution partially objected to the Motion.² Matthieu Ngirumpatse filed a reply.³

DELIBERATIONS

Withdrawal of Witnesses

3. Matthieu Ngirumpatse indicated that he was withdrawing the following witnesses from his list: TB, A4, JCD, AB, BGC, MT, BFP and WEF.⁴ The Prosecution does not object to the withdrawal. The Chamber grants the request. However, the Chamber notes that Witnesses AB and BGC were not on Matthieu Ngirumpatse's final list of witnesses, and that they were not admitted thereto in the Chamber's earlier decisions.

Availability of the witnesses

4. Following the Chamber's instruction, Matthieu Ngirumpatse informed the Chamber that Witnesses YBZ⁵ and BU⁶ were ready and available to testify. The Chamber therefore notes that Witnesses YBZ and BU will be heard during the next session of the trial. Witness BU will be heard via video-link pursuant to an earlier decision of the Chamber.⁷

¹ *Requête de M. Ngirumpatse en modification de sa liste de témoins et récapitulatif des témoins restant à auditionner* ("Motion") et *Annexes confidentielles*, filed on 1 December 2010.

² Prosecutor's Response to "*Requête de M. Ngirumpatse en modification de sa liste de témoins et récapitulatif des témoins restant à auditionner*", filed on 6 December 2010 ("Response").

³ "*Réplique à la réponse du Procureur suite à la requête de M. Ngirumpatse en modification de sa liste de témoins*". Counsel for Matthieu Ngirumpatse stated that an electronic copy of the document was filed on 13 December 2010. It appears however that the document was not received by the Registry on the said date. The following day, Counsel for Matthieu Ngirumpatse brought this matter to the attention of the Registry which informed the Chamber accordingly. The Chamber took the said documents into account in its deliberations.

⁴ Motion, paras. 5 to 9.

⁵ Annex 8 to the Motion.

⁶ Annex 9 to the Motion.

⁷ *Karemera et al.*, "Decision on Matthieu Ngirumpatse's Motions Relating to his Witnesses and the Admission of Written Statements", 27 October 2010, para. 28.

5. Matthieu Ngirumpatse did not provide any information to support the statement that Witness CHI wanted to testify and was available for cross-examination following the conditional admission of his written statement under Rule 92 *bis*.⁸ In any event, an e-mail sent by the Defence to the Witnesses and Victims Support Section (WVSS) suggests that Witness CHI's presence was not guaranteed.⁹ The Chamber considers that Ngirumpatse should file a definitive list of witnesses in the interests of justice. The Chamber therefore orders Matthieu Ngirumpatse to submit within five days following this decision, specific information on the witness's availability to come and testify, failing which he will be withdrawn from the list of witnesses.

Addition of Witnesses HAM, BGG and VER to Matthieu Ngirumpatse's list of witnesses

6. Matthieu Ngirumpatse seeks leave to add Witnesses HAM and BGG to his list on the ground that their testimonies are vital.¹⁰ The Prosecution does not object to the request.¹¹

7. Rule 73 *ter* (E) provides that, after commencement of the Defence case, the Defence, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses. In making its determination, the Chamber must take into account various factors such as the materiality of the proposed testimony, the complexity of the case, possible prejudice to the parties, ongoing investigations, replacement of witnesses and corroboration of their statements, as well as the delays caused.¹²

8. The Chamber notes that the proposed testimonies of Witnesses HAM and BGG are material to the case and relate to the evidence already heard on the one hand from Witnesses GW and FAT in respect of Witness HAM and, on the other hand, from Albert Rukerantare, André Nzabanterura, Pascal Baylon Ndengejeho, for example, in respect of Witness BGG. However,

⁸ Motion, para. 55.

⁹ Ms Hounkpatin's e-mail to WVSS relating to Matthieu Ngirumpatse's witnesses for the trial session commencing on 10 January 2011, dated 13 December 2010.

¹⁰ Motion, paras. 13, 16, 17, 21 to 24.

¹¹ Response, paras. 3 and 4.

¹² *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, "Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E)", 26 June 2003, paras. 14 to 22; "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E)", 21 May 2004, paras. 8 to 14. *The Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi and Élie Ndayambaje*, Case No. ICTR-98-42-T, "Decision on Prosecutor's Motion for Leave to Add a Handwriting Expert to His List of Witnesses", 14 October 2004, para. 11; *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* ("Media Case"), Case No. ICTR-99-52-T, "Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses", 26 June 2001, para. 17; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-I, "Decision on the Prosecution's Motion to Vary the Witness List", 27 August 2004, para. 7; *The Prosecutor v. Augustin Nindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu*, Case No. ICTR-00-56-T ("Nindiliyimana et al."), "Decision on Sagahutu's Motion to Vary his Witness List", 26 May 2008, para. 5; *Nindiliyimana et al.*, "Decision on Augustin Bizimungu's Motion to Vary his Witness List", 24 October 2007, para. 3; *Nindiliyimana et al.*, "Decision on Nzuwonemeye's Request to Vary his Witness List", 31 January 2008, para. 3; *The Prosecutor v. Rukundo*, Case No. ICTR-2001-70-T, "Decision on the Defence Motions for Additional Time to Disclose Witness Identifying Information, to Vary its Witness List and for Video-Link Testimony and on the Prosecution's Motion for Sanctions", 11 September 2007, para. 10.

given the professions of the two proposed witnesses at the material time, the fact that they confirmed their willingness and availability to come and testify during the next trial session,¹³ the fact that the Prosecution does not object to their inclusion,¹⁴ the fact that the number of witnesses allowed, namely 35, would not be exceeded and that there would be no excessive delays as a result, the Chamber grants Matthieu Ngirumpatse leave to add Witnesses HAM and BGG to his list of witnesses.

9. Matthieu Ngirumpatse seeks leave to add Witness VER to his list on the ground that it was only recently that his defence team met with him. Witness VER is a journalist who conducted and recorded an audio visual interview of Marcel Guérin, whom Matthieu Ngirumpatse is unable to locate, in connection with the acts committed in north eastern Rwanda prior to and after 6 April 1994, and the crimes committed by the RPF. Matthieu Ngirumpatse also submits that the proposed testimony would complete the journalistic interview marked for identification during Jean Mpambara's interview.¹⁵ The Prosecution objects to the addition of Witness VER to Matthieu Ngirumpatse's list of witnesses, arguing that the proposed testimony is similar to that of Witnesses SAB and KAH.¹⁶

10. The Chamber recalls that it has already heard testimonies from many witnesses on RPF's alleged crimes in Rwanda. The Chamber finds that Matthieu Ngirumpatse failed to show in what way Witness VER's expected testimony on the matter, which would be mainly hearsay, would be different from that of witnesses such as Cyprien Ngendahimana, Martin Ndamage, Faustin Ntilikina, Jonas Maniliho, Christian de Beule, Emmanuel Neretse, Jean Ghiste or PTR on the crimes allegedly committed by the RPF in Rwanda. Matthieu Ngirumpatse failed to show that it was in the interests of justice to vary his list of witnesses in order to include Witness VER. The Chamber therefore denies Matthieu Ngirumpatse's request to add Witness VER to his list.

Reconsideration of the Decision of 27 October 2010 relating to Witnesses SAB and KAH

11. The Chamber notes from the outset that, in his motion, Matthieu Ngirumpatse refers to Witness HKA instead of Witness KAH. The Chamber will therefore refer to the said witness using his pseudonym, KAH.

12. On 27 October 2010, the Chamber dismissed Matthieu Ngirumpatse's motion to add Witnesses SAB and KAH to his list, since he had failed to show any reasons that could justify such variation of his list pursuant to Rule 73 *ter* (E).¹⁷ Matthieu Ngirumpatse seeks reconsideration of the said decision,¹⁸ but the Prosecution objects to his request.¹⁹

¹³ Annexes 3 and 4 to the Motion.

¹⁴ Response, para. 3.

¹⁵ See T., 16 September 2010.

¹⁶ Response, para. 9.

¹⁷ *Karemera et al.*, "Decision on Matthieu Ngirumpatse's Motions Relating to his Witnesses and the Admission of Written Statements", 27 October 2010, para. 30.

¹⁸ Motion, paras. 28 to 31.

¹⁹ Response, paras. 5 to 10.

13. The Chamber has inherent power to reconsider its own decisions, but only in exceptional circumstances. Thus, the Chamber may reconsider one of its decisions where a new fact has been discovered that was not previously known to the Chamber, and where there is reason to believe that the Chamber's original decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice which warrants reconsideration.²⁰

14. The Chamber notes that Matthieu Ngirumpatse does not present any argument to show that the criteria for reconsideration have been met in the instant case. The Chamber however notes that this motion contains information relating to the proposed testimonies of Witnesses SAB and KAH which was not included in his initial motion.²¹ Nevertheless, the Chamber finds that the information provided at this stage does not constitute a new fact as the Defence must have been in possession of it when it filed its first motion, or because it represents a change in the circumstances since the Chamber's initial decision. The Chamber therefore finds that Matthieu Ngirumpatse failed to show any reasons to justify his request for reconsideration of the Decision of 27 October 2010 relating to Witnesses SAB and KAH.

Reconsideration of the Decision of 29 October 2010 relating to Witness REA's video-link testimony

15. On 29 October 2010, the Chamber denied Matthieu Ngirumpatse's motion to hear Witness REA via video-link.²² At the time, Matthieu Ngirumpatse had argued that Witness REA feared for his security were he to travel outside his State of residence and that his testimony would be similar to those of Witnesses YLH and BU.²³ Matthieu Ngirumpatse now seeks reconsideration of this decision and requests that Witness REA be authorized to testify from his State of residence or from the same State as Witness BU.²⁴ The Prosecution did not make any submissions on this matter.

16. The Chamber recalls that it had earlier denied Matthieu Ngirumpatse's motion because of his failure to show that the video-link testimony was necessary in the light of the Tribunal's settled case law on the matter.²⁵ Following Matthieu Ngirumpatse's failure to show the existence

²⁰ *Karemera et al.*, "Decision on Joseph Nzirorera's Second Motion for Finding of "No Case to Answer" and Motion for Reconsideration", 3 June 2008, para. 5; *Karemera et al.*, "Decision on Reconsideration of Protective Measures for Prosecution Witnesses", 30 October 2006, para. 2; *Karemera et al.*, "Decision on Joseph Nzirorera's Motion for Reconsideration of 2 December 2008 Decision", 27 February 2009, para. 2. *Ndindiliyimana et al.*, "Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials", 3 November 2004, para. 21.

²¹ Motion, paras. 28 to 30, 32 and 33.

²² *Karemera et al.*, *Décision relative à la requête urgente de Matthieu Ngirumpatse aux fins d'audition de témoins*, 29 October 2010.

²³ *Requête urgente de Matthieu Ngirumpatse aux fins d'audition de témoins et annexes confidentielles*, filed on 28 October 2010, para. 2.

²⁴ Motion, paras. 44 and 45.

²⁵ *Karemera et al.*, *Décision relative à la requête urgente de Matthieu Ngirumpatse aux fins d'audition de témoins*, 29 October 2010, paras. 4 and 5.

of any circumstance warranting consideration, the Chamber denies his motion for reconsideration of the decision relating to Witness REA.

Witness REA's testimony by deposition

17. Matthieu Ngirumpatse requests in the alternative that Witness REA's testimony be given by deposition pursuant to Rule 71.²⁶ He contends that the restriction of Witness REA's freedom of movement is an exceptional reason under Rule 71, and that it is in the interests of justice to resort to the procedure provided by this Rule. The Prosecution did not make any written submissions on this matter.

18. Rule 90 provides that, in principle, witnesses should be heard directly by the Chamber. Nevertheless, a Chamber may order that a witness give testimony by means of a deposition in exceptional circumstances and in the interests of justice. Moreover, the formal requirements set out in Rule 71 (B) must be met. According to case law, four criteria must be met in determining "the interests of justice": (1) that the testimony of the witness is sufficiently important to make it unfair to proceed without it; (2) that the witness is unable or unwilling to come to the Tribunal; (3) that the opposing party will not suffer prejudice in the exercise of its right to confront the witness; (4) that practical considerations (including logistical difficulty, expense and security risks) of holding a deposition in the proposed location do not outweigh the potential benefits to be gained by doing so.²⁷ The Chamber notes that Matthieu Ngirumpatse did not produce any document relating to Witness REA's situation. The Chamber also finds that he did not show that the witness cannot or does not wish to travel to the Tribunal, that the opposing party's right to cross-examine the witness will not be prejudiced, that the practical considerations of giving a deposition in the proposed location do not outweigh the potential benefits to be gained from doing so, or in what way Witness REA's deposition is sufficiently important to make it unfair to proceed without it. The Chamber recalls in connection with the latter point that Matthieu Ngirumpatse had previously argued that Witness REA's testimony would be similar to that of Witness BU, which the Chamber was expected to hear during the following session. The Chamber further notes that the Motion is inconsistent with the formal requirements set out in Rule 71 (B). The Chamber therefore denies the request for leave to take Witness REA's testimony by deposition.

YLH

19. Noting that Matthieu Ngirumpatse filed a separate motion seeking a subpoena, the Chamber will consider this matter in a separate decision.²⁸

²⁶ Motion, paras. 46 and 47.

²⁷ *Bagosora et al.*, "Decision on Prosecutor's Motion for Deposition of Witness OW", 5 December 2001, paras. 12 to 14, citing *Delalić et al.*, "Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference, 28 May 1997.

²⁸ Motion, para. 48.

Reconsideration of the Decision relating to Witness FRZ

20. The Chamber ruled admissible Witness FRZ's written statement under Rule 92 *bis*, subject to its certification and cross-examination of the deponent.²⁹ Matthieu Ndirumpatse contends that the witness, who is detained in Rwanda, is unavailable to testify as he was forbidden to do so. He therefore requests the Chamber to admit Witness FRZ's written statement without cross-examining him.³⁰ The Prosecution objects to this request, arguing that the reasoning behind the Chamber's decision has not changed and that the admission of the written statement without the Prosecution cross-examining the witness would be prejudicial to the Prosecution. The Prosecution also submits that Witness FRZ's refusal to testify before the Chamber does not detract from the fact that his written statement relates to crucial issues in the trial.³¹

21. The Chamber notes that Rwanda's Ministry of Justice authorized the transfer of Witness FRZ so that he could testify before the Tribunal,³² and that Article 76 of the Rwandan Law on the *Gacaca* courts does not forbid a convicted person from testifying before a court.³³ The Chamber therefore finds that this is a situation whereby the witness does not wish to testify, rather than a case where the witness cannot testify. The Chamber recalls that it ordered Witness FRZ's cross-examination because of the content of his written statement which relates to issues

²⁹ *Karemera et al.*, "Decision on Matthieu Ndirumpatse's Motions Relating to His Witnesses and the Admission of Written Statements", 27 October 2010, paras. 12 and 13.

³⁰ Motion, paras. 50 and 51.

³¹ Response, paras. 11 to 14.

³² Letter from Rwanda's Ministry of Justice dated 10 November 2010 relating to the availability of Witness FRZ to testify before the Tribunal (confidential).

³³ Article 76 of Organic Law No. 16/2004 of 19 June 2004 establishing the organization, competence and functioning of *Gacaca* courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994:

Persons convicted of the crime of genocide or crimes against humanity in pursuance of this organic law are liable to the withdrawal of their civil rights in the following manner :

1- perpetual and total loss of civil rights, in conformity with the penal Code, for persons classified in the first category ;

2- persons falling within the second category as prescribed in points 1 and 2 of article 51 of this organic law, are liable to permanent deprivation of the right:

a. to vote ;

b. to eligibility ;

c. to be an expert witness in the rulings and trials, except in case of giving mere investigations;

d. to possess and carry fire arms;

e. to serve in the armed forces;

f. to serve in the police;

g. to be in the public service;

h. to be a teacher or a medical staff in public or private service.

3. Persons in the first and the second category shall be put on the list which shall

be posted at the office of the *Secteur* of their domicile.

that are highly contested by the parties. The Chamber holds that Matthieu Ngirumpatse did not show any reasons to warrant reconsideration of the Chamber's decision.

Reconsideration of the decision relating to Witness MBA

22. By its Decision of 27 October 2010, the Chamber ruled that Witness MBA must appear for cross-examination so that his written statement could be admitted pursuant to Rule 92 *bis*. Matthieu Ngirumpatse seeks reconsideration of this Decision so that Witness MBA's written statement may be admitted without the deponent having to be cross-examined. Matthieu Ngirumpatse argues that Witness MBA fears for himself and his family and does not wish to testify.³⁴ The Prosecution objects to this request as there has not been any change in the circumstances and the written statement relates to crucial issues in the trial. The Prosecution further contends that admitting the written statement without cross-examination would be prejudicial to it.³⁵

23. The Chamber recalls that its observation that Witness MBA's written statement relates to the creation of the *Interahamwe*, the civil defence programme, the preparation of lists of people to be killed, the erection of roadblocks and the content of Matthieu Ngirumpatse's speeches, which are crucial issues in the trial.³⁶ The Chamber further notes that Matthieu Ngirumpatse did not produce any documents to support his arguments, or show the existence of circumstances warranting reconsideration. The Chamber therefore denies his motion for reconsideration.

Reconsideration of the decision relating to Witness 522

24. Matthieu Ngirumpatse seeks reconsideration of the Chamber's decision to subpoena Witness 522 so that his written statement can be admitted under Rule 92 *bis*.³⁷

25. Matthieu Ngirumpatse submits that Witness 522, who was expected to testify during the previous trial session, had been involved in a serious road accident just before his departure for Arusha. He added that the witness was seriously injured and cannot travel to Arusha. The Prosecution objects to the request.³⁸

26. The Chamber notes that there is no document to support Matthieu Ngirumpatse's request although he had all the time to obtain such information for 1 December 2010. The Chamber therefore denies his request for reconsideration of the Decision ordering cross-examination of Witness 522.

³⁴ Motion, para. 52.

³⁵ Response, para. 14.

³⁶ *Karemera et al.*, Decision on "Requête de Matthieu Ngirumpatse visant à l'admission de déclarations sur le fondement de l'article 92 bis du Règlement", 1 September 2010, para. 48.

³⁷ Motion, para. 53.

³⁸ Response, paras. 12 to 14.

Reconsideration of the decision relating to Witness AHO

27. The Chamber recalls that it had initially ruled Witness AHO's written statement admissible, subject to cross-examination of the deponent and certification of the statement.³⁹ It subsequently reconsidered its decision and decided to admit the written statement without cross-examination.⁴⁰ Matthieu Ngirumpatse now seeks admission of the written statement without certification, on the ground that Witness AHO refuses certification of his statement because he fears the impact of this procedure on his own trial currently pending before the European Court of Human Rights.⁴¹ The Prosecution objects to this request.⁴²

28. The Chamber recalls that, according to the procedure set out in Rule 92 *bis*, written statements are normally submitted for admission after certification. It is for reasons of judicial economy that the Chamber has up to now ruled written statements admissible subject to their certification. The Chamber notes that Rule 92 *bis* does not contain any provision allowing admission of a written statement without certification in the present situation. Indeed, such cases are not provided for by Rule 92 *bis* (C). The Chamber further notes that the fact that Witness AHO now refuses to submit to the process of certification of his written statement casts doubts on its substance. The Chamber therefore denies admission of Witness AHO's uncertified written statement.

Witnesses yet to be heard

29. In the light of the various communications and written submissions by the Defence for Matthieu Ngirumpatse and the decisions of the Chamber, the Chamber recalls that the following witnesses from Matthieu Ngirumpatse's list must testify during the last trial session, scheduled for January 2011: Witnesses HAM, BGG, YBZ, BU and Matthieu Ngirumpatse. In view of the uncertainty of Witness CHI's availability, Matthieu Ngirumpatse must provide more information as stated above. Lastly, the Chamber notes with regard to Witness YLH that he is unwilling to testify, and will respond to Matthieu Ngirumpatse's request for a subpoena in a subsequent decision.

FOR THESE REASONS, THE CHAMBER,

- I. GRANTS LEAVE** to withdraw Witnesses A4, JCD, AB, BGC, MT, BFP and WEF from Matthieu Ngirumpatse's list of witnesses.

³⁹ *Karemera et al.*, Decision on "Requête de Matthieu Ngirumpatse visant à l'admission de déclarations sur le fondement de l'article 92 bis du Règlement", 1 September 2010, para. 14.

⁴⁰ *Karemera et al.*, Décision relative à la Requête de Matthieu Ngirumpatse aux fins d'autoriser certains de ses témoins à déposer par vidéoconférence, 18 October 2010, paras. 17 to 21.

⁴¹ Motion, para. 54.

⁴² Response, para. 15.

- II. **NOTES** that Witnesses YBZ and BU are available to testify during the next trial session.
- III. **DIRECTS** Matthieu Ndirumpatse to inform the parties, WVSS and the Chamber within five days following this decision, whether or not he will call Witness CHI during the next trial session.
- IV. **GRANTS** Matthieu Ndirumpatse's motion to add Witnesses HAM and BGG to his list and **ORDERS** that they testify during the next trial session, together with Witnesses YBZ, BU and Matthieu Ndirumpatse.
- V. **DENIES** Matthieu Ndirumpatse's motion in all other respects.

Arusha, 28 December 2010, done in French

[Signed]
 Dennis C. M. Byron
 Presiding

[Signed]
 Gberdao Gustave Kam
 Judge

[Signed]
 Vagn Joensen
 Judge

[Seal of the Tribunal]
