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INTERNATIONAL CRIMINAL TRIBUNAL FOR 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: 29 December 2010

JUDICIAL RECORDS ARCHIVES
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THE PROSECUTOR

v.

ÉDOUARD KAREMERA AND
MATTHIEU NGIRUMPATSE

DECISION ON MATTHIEU NGIRUMPATSE'S MOTION TO SUBPOENA WITNESS
YLH

Rule 54 of the Rules of Procedure and Evidence

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CIII10-0205 (E)

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INTRODUCTION

1. On 1 September 2010, the Chamber denied Matthieu Ngirumpatse's motion seeking admission of YLH's written statement into evidence pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence, on the ground that it contained references to the acts and conduct of the Accused as charged in the Indictment.¹ On 18 October 2010, the Chamber granted Matthieu Ngirumpatse leave to vary his list of witnesses and to add YLH to testify before the Chamber. However, the Chamber did not grant Matthieu Ngirumpatse's request for YLH to testify by video-link.² On 27 October 2010, the Chamber reconsidered *proprio motu* its decision and ordered that YLH testify by video-link.³

2. Matthieu Ngirumpatse now requests the Chamber to subpoena Witness YLH to testify via video-link from his country of residence. In the alternative, he requests the Chamber to admit YLH's statement in its entirety or in a redacted form.⁴ The Prosecution opposes this motion.⁵

DELIBERATIONS

Issuance of a subpoena to Witness YLH

3. Under Rule 54, a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. This Rule encompasses the Chamber's power to require a prospective witness to attend at a nominated place and time in order to be interviewed. In order for a Chamber to grant a request for subpoena, the moving party must demonstrate that: (i) it has made reasonable attempts to obtain the voluntary cooperation of the witness; (ii) the witness's testimony can materially assist its case; and (iii) the witness's testimony must be necessary and appropriate for the conduct and the fairness of the trial.⁶

¹ *The Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse*, Case No. ICTR-98-44-T, ("*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. 12.

² *Karemera et al.*, Decision on "*Requête de Matthieu Ngirumpatse aux fins d'autoriser certains de ses témoins à déposer par vidéoconférence*", 18 October 2010, paras. 12 to 16.

³ *Karemera et al.*, Decision on "*Requêtes de Matthieu Ngirumpatse concernant ses témoins et l'admission de déclarations écrites*", 27 October 2010, para. 32.

⁴ "*Requête de M. Ngirumpatse aux fins de subpoena du témoin YLH et subsidiairement d'admission d'une déclaration écrite caviardée (Requête)*", et annexe confidentielle", filed on 1 December 2010.

⁵ Prosecutor's Response to "*Requête de M. Ngirumpatse aux fins de subpoena du témoin YLH*", filed on 6 December 2010 ("Response").

⁶ *Karemera et al.*, "Decision on Nzirorera's Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3", 12 July 2006, para. 9.

Chamber may also consider whether the information the applicant seeks to elicit through the use of subpoena is obtainable through other means.⁷ Furthermore, the Appeals Chamber in *Krstić* held that a subpoena should be issued if it is at least reasonably likely that an order would produce the degree of cooperation needed for the Defence to interview the witness.⁸

5. The Chamber recalls that it granted YLH leave to testify by video-link for security reasons.⁹ It then ordered Matthieu Ngirumpatse to produce evidence that YLH desired to testify and was available to do so. Instead, the Chamber was informed that YLH had refused to testify.

6. Matthieu Ngirumpatse attached copies of e-mail correspondence with YLH to his motion. Having initially agreed to testify in defence of Matthieu Ngirumpatse, YLH informed him on 30 November 2010 that he was unwilling to appear before the Tribunal as he would be exposed to an unacceptable degree of risk in his own trial in his country of residence.¹⁰ The Chamber is thus satisfied that Matthieu Ngirumpatse has made a reasonable attempt to obtain the voluntary cooperation of the witness.

7. The Prosecutor questions the merit of YLH's testimony.¹¹ However, the Chamber has already ruled on the relevance of the proposed testimony.¹² According to his written statement, YLH, a member of the Rwandan Administration until July 1994, would testify on various meetings held by the MRND until October 1992 (when he resigned from the MRND) and meetings during which the MRND's youth wing was allegedly created and on the character of Matthieu Ngirumpatse, whom he knows personally. The Chamber has already heard testimonies regarding the Accused's character, as well as meetings he attended or did not attend. Even though the Chamber earlier held that such considerations were linked to the trial, it does not consider the proposed testimony necessary and appropriate for the conduct and fairness of the trial. Moreover, taking into consideration YLH's comment when he informed Matthieu Ngirumpatse that he now declined to testify, the Chamber is not satisfied that a subpoena order would elicit the expected degree of cooperation. Lastly, and taking into account Matthieu Ngirumpatse's alternative motion, the Chamber considers that the information sought can be obtained by other means.

⁷ *Ibid.*, para. 10.

⁸ *Idem*; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A. "Decision on Application for Subpoenas", 1 July 2003, para. 17.

⁹ *Karemera et al.*, Decision on "*Requêtes de Matthieu Ngirumpatse concernant ses témoins et l'admission de déclarations écrites*", 27 October 2010, para. 32.

¹⁰ Annex to the Motion.

¹¹ Response, paras. 7 to 9.

¹² *Karemera et al.*, Decision on "*Requête de Matthieu Ngirumpatse aux fins d'autoriser certains de ses témoins à déposer par vidéoconférence*", 18 October 2010, para. 15.

Admission of YLH's written statement

8. The Chamber notes that Matthieu Ngirumpatse's alternative motion seeking admission of YLH's written statement pursuant to Rule 92 *bis* is in fact an application for reconsideration of its decision of 1 September 2010.

9. A Chamber has the inherent power to reconsider its own decisions, but may do so only in exceptional circumstances. Thus, a Chamber may reconsider any of its decisions when a new fact, previously unknown to it, is discovered and when there is reason to believe that an original decision was erroneous or that it constituted an abuse of power occasioning injustice on the part of the Chamber.¹³

10. The Chamber recalls that it declined to admit YLH's statement because it contained references to the acts and conduct of the Accused as pleaded in the Indictment.¹⁴ As Matthieu Ngirumpatse re-presents the same document and does not demonstrate any reason for reconsideration, his request is denied.

11. However, in the much further alternative, Matthieu Ngirumpatse presents a redacted version of YLH's written statement whose admission he seeks.

12. In order for a written statement to be admitted under Rule 92 *bis* (A), it must be ascertained that the statement does not contain references to the acts and conduct of the Accused as pleaded in the Indictment and that it satisfies the criteria laid down in Rule 89(C), namely that it is relevant and has probative value.¹⁵ What is required is not the definitive proof of reliability or credibility of the evidence but the showing of *prima facie* reliability and credibility on the basis of sufficient indicia.¹⁶ Furthermore, the non-exhaustive criteria set out in Rule 92 *bis*(A)(i) and (ii) and the formal requirements of Rule 92 *bis*(B) must be satisfied. Even where a statement satisfies all these conditions, a Chamber must exercise its discretion to admit such statement,

¹³ *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. *The Prosecutor v. Augustin Ndingiyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu*, Case No. ICTR-00-56-T, "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.

¹⁴ *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. 12.

¹⁵ *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Case No. ICTR-98-41-T ("*Bagosora et al.*"), "Decision on Prosecutor's Motion for the Admission of Written Statements under Rule 92 *bis*," 9 March 2004, para. 12.

¹⁶ *Karemera et al.*, "Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts", 29 May 2009, para. 15.

bearing in mind the overarching need to ensure a fair trial. Under Rule 92 *bis* (E), even where a Chamber finds a statement admissible, it shall also determine whether to admit it in whole or in part and whether to require the witness to appear for cross-examination. In addition to factors related to fair trial, another relevant factor consists in determining whether the evidence relates to a live and important issue between the parties, as opposed to a peripheral or marginally relevant one.¹⁷

13. The Chamber recalls that it has already determined that YLH's statement was relevant. After an analysis of the redacted version of YLH's statement by Matthieu Ngirumpatse, the Chamber notes that a different redaction should be effected. The redacted version of YLH's written statement which the Chamber finds admissible is attached to this decision in a confidential annex. The Chamber notes that YLH's written statement is admissible if the version as redacted by it is filed within 60 (sixty) days after it has been certified in accordance with Rule 92 *bis* (B). Lastly, the Chamber notes that the witness shall not be required to appear for cross-examination as the statement does not relate to a live and important issue between the parties.

FOR THESE REASONS, THE CHAMBER

- I. **DENIES** Matthieu Ngirumpatse's motion to subpoena Witness YLH;
- II. **FINDS** YLH's written statement admissible as redacted by the Chamber subject to certification pursuant to Rule 92 *bis* (B) of the Rules;
- III. **ORDERS** Matthieu Ngirumpatse to obtain certification of YLH's written statement pursuant to Rule 92 *bis* (B) of the Rules within 60 (sixty) days of this decision.

Arusha, 29 December 2010

[Signed]

Dennis C. M. Byron
Presiding Judge

[Signed]

Gberdao Gustave Kam
Judge

[Signed]

Vagn Joensen
Judge

[Seal of the Tribunal]



¹⁷ *Bagosora et al.*, "Decision on Prosecutor's Motion for the Admission of Written Witness Statements under Rule 92 *bis*", 9 March 2004, para. 16.