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ICTR-98-44-T
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(45314-45299)

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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: 3 March 2009

THE PROSECUTION

v.

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

JUDICIAL RECORDS/ARCHIVES
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DECISION ON CONTINUATION OF TRIAL

Articles 19 and 20 of the Statute and Rule 82(B) of the Rules of Procedure and Evidence

Office of the Prosecution:

Don Webster
Iain Morley
Saidou N'Dow
Gerda Visser
Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Matthieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera
Peter Robinson and Patrick Nimy Mayidika Ngimbi

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INTRODUCTION

1. This trial started on 19 September 2005. After 169 trial days, on 4 December 2007, the Prosecution closed its case.¹ The Defence case started on 7 April 2008. In August 2008, during Édouard Karemera's presentation of his case, Matthieu Ngirumpatse became ill and the ICTR Chief Medical Officer, Dr. Épée Hernandez, estimated that Ngirumpatse would be unfit to attend trial for one month. The Chamber ordered a stay of proceedings accordingly.
2. On 28 October 2008, the Chamber held a status conference in the absence of Matthieu Ngirumpatse, who was still unfit to attend, but in the presence of his counsel. On that occasion, Dr. Épée Hernandez stated that Ngirumpatse would need treatment for at least six months before it was possible to assess whether and when he would again be fit to attend trial. However, Counsel for Ngirumpatse indicated that Ngirumpatse had agreed on an exceptional basis that four witnesses could be heard in his absence before the next session.
3. On 6 November 2008, in view of the submissions of Matthieu Ngirumpatse's counsel, the Chamber decided not to consider severance at that time but ordered a stay of proceedings until February 2009 for the trial to continue in his absence with his consent.²
4. On 9 February 2009, the Chamber held a status conference, again in the absence of Matthieu Ngirumpatse who was unfit to attend, but in the presence of his counsel. Dr. Épée Hernandez stated that Ngirumpatse would need further treatment for three months before an assessment could be made as to whether or when he would be fit to attend trial. The Chamber then invited the Parties to make submissions on the continuation of the trial.
5. On 10 February 2009, the Prosecution filed a motion to sever Matthieu Ngirumpatse from the trial pursuant to Rule 82(B) of the Rules of Procedure and Evidence ("Rules").³ Following an order of the Chamber,⁴ the three Accused filed written submissions.⁵ The Parties made further submissions in a hearing on 16 February 2009. The Registry also made

¹ The Prosecution case was closed save for the cross-examination of Witness BDW who completed his examination during the following trial session.

² T. 6 November 2008, p. 3.

³ Prosecutor's Motion to Sever Mathieu Ngirumpatse Pursuant to Rule 82(B), filed on 10 February 2009 ("Motion for Severance"). In its Motion for Severance, the Prosecution indicated that "[w]hile the prosecution may still wish to address this matter orally on 12 February 2009, as this Chamber had anticipated, the Prosecution file[d] nonetheless this [...] written submission in order to narrow the issues and to clarify its position well in advance.", para. 6.

⁴ *Karemera et al.*, Case No. ICTR-98-44-T, Scheduling Order (TC), 11 February 2009.

⁵ Joseph Nzirorera's Opposition to Prosecution Motion for Severance, filed 13 on February 2009 ("Nzirorera's Submissions"); Soumission de Édouard Karemera sur le maintien du process joint, filed on 13 February 2009 ("Karemera's submissions"); Opposition de M. Ngirumpatse à la disjonction d'instances demandées par le Procureur ("Ngirumpatse's Submissions"), filed on 13 February 2009.

submissions during the oral hearing, followed by written filings on the same issues.⁶

6. All Parties have objected to the trial proceedings being continued in the absence of Matthieu Ngirumpatse without his consent and all three Accused have objected to Ngirumpatse being severed from the trial. Counsel for Ngirumpatse, supported by Counsel for the Co-Accused, has in the alternative moved for the proceedings to be stayed for a further three months to allow for an update on Ngirumpatse's condition. If his condition has improved sufficiently by then to enable him to participate in his defence from his place of treatment, Ngirumpatse consents to the trial then continuing in his absence.⁷

7. The Chamber will, therefore, after assessing the information available regarding Ngirumpatse's health condition, address whether the trial can, after a further stay of proceedings, continue in Ngirumpatse's absence, whether the trial should be stayed indeterminately until he might be fit to attend again or whether Ngirumpatse should be severed from the trial.

DELIBERATIONS

The Information Available regarding Ngirumpatse's Condition

8. Matthieu Ngirumpatse has declined to waive his right to medical confidentiality and consequently opposes the disclosure of information on the nature of his illness to other persons, including the Chamber and the other Parties, save other doctors.⁸

9. Information regarding his medical condition has been provided to the Chamber and the Parties either in written form or during oral hearings from Dr. Épée Hernandez, the Registrar and Matthieu Ngirumpatse's counsel.⁹

10. On 18 August 2008, the Chamber was informed that Matthieu Ngirumpatse was ill, would not be fit to attend trial for one week and that he would be transferred to the Hospital in Moshi.¹⁰ On 25 August 2008, Dr. Épée Hernandez reported that Ngirumpatse would not be

⁶ The Registrar's Submission on Mission Requests filed by the Ngirumpatse's Defence Team, filed on 16 February 2009

⁷ Ngirumpatse's Submissions, para. 17-18; T. 16 February 2009, p. 29; Karemera's Submissions, pp. 4 and 7.

⁸ T. 16 February 2009, p. 10.

⁹ See Interoffice Memoranda from Dr. Épée, dated 19 August 2008, 21 August 2008, 1 September 2008, 5 December 2008, 26 January 2009, 27 February 2009; Observations du Greffier suite à l'Ordonnance de la Chambre du 29 septembre 2008 relative à la situation médicale de M. Ngirumpatse, filed on 1 October 2008; Oral hearings of 28 October 2008, 9 February 2009, 16 February 2009.

¹⁰ T. 18 August 2008, pp. 2-3, 10.

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fit for a minimum of one more month.¹¹ The Chamber and the Parties were later informed on 5 September 2008, that Ngirumpatse had been brought back to Arusha and that on 8 October 2008, he had been transferred to Nairobi to undergo further tests.¹² Ngirumpatse has been in Nairobi since then, receiving care in a fully equipped medical facility capable of treating his pathology.¹³

11. At the status conference on 28 October 2008, Dr. Épée Hernandez reported as follows: Matthieu Ngirumpatse was suffering from a longstanding condition which according to himself had begun in 1976, but was only recently discovered by the UN Medical Clinic; his prognosis was “reserved”; there was a possibility that his present condition could improve as “medicine can do miracles” but he would not be fit to attend trial for a further six months.¹⁴ Moreover, his treatment was provoking significant side effects. He was generally quite weak, had to stay in bed and was awake for one or two hours only.¹⁵ The treatment he was receiving was the same treatment he would receive anywhere else for the condition in question, including in Europe.¹⁶ His treatment required that he stay in Nairobi for six months while being treated. Dr. Épée Hernandez’s opinion that he would be incapacitated for 6 months or even one year was confirmed by a panel of doctors in Nairobi.¹⁷ However, after three months of treatment, it would be possible to do a provisional evaluation of his condition.¹⁸

12. As of 3 November 2008, Counsel for Matthieu Ngirumpatse indicated that Ngirumpatse had been unable to read anything whatsoever.¹⁹

13. At the status conference on 9 February 2009, Dr. Épée Hernandez stated that Matthieu Ngirumpatse’s clinical condition was improving remarkably. His medication would continue for three more months at which point the doctors would be able to provide a more comprehensive report. However, this did not reflect on his ability to be present in the courtroom.²⁰

14. At the oral hearing on 16 February 2009, Dr. Épée Hernandez stated that Matthieu Ngirumpatse would not be fit to attend trial for a further nine months, but this was

¹¹ T. 25 August 2008, pp. 3, 9.

¹² T. 28 October 2008, pp. 7-8.

¹³ See Observations du Greffier suite à l’Ordonnance de la Chambre du 29 Septembre 2008 relative à la situation médicale de M. Ngirumpatse, filed on 1 October 2008.

¹⁴ T. 28 October 2008, p. 8-10.

¹⁵ T. 28 October 2008, p. 10.

¹⁶ T. 28 October 2008, p. 10.

¹⁷ T. 28 October 2008, pp. 11, 14, 15.

¹⁸ T. 28 October 2008, p. 14.

¹⁹ T. 3 November 2008, p. 5.

²⁰ T. 9 February 2009, p. 17.

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nonetheless only a speculative projection.²¹ His health condition cannot be completely cured, but can be stabilised.²² His condition is within her field of expertise and her assessments have been made in consultation and in agreement with Ngirumpatse's attending physician and two professors with the relevant expertise from the hospital where he is being treated.²³

15. In a report of 27 February 2009, Dr. Épée Hernandez stated that Ngirumpatse is currently clinically stable, and is continuing with his specific treatment. Although laboratory results have not shown response to the treatment, the medical team has decided to give Ngirumpatse six more months of treatment, after which he will be reassessed.²⁴

Continuation of the Trial in Ngirumpatse's Absence

16. At the status conference on 6 November 2008, Counsel for Matthieu Ngirumpatse indicated that if the proceedings were further stayed until the beginning of 2009, Ngirumpatse would consent to the proceedings being continued in his absence provided that adequate facilities were put in place for him to follow the proceedings from his place of treatment and that he had by then recovered sufficiently for him to participate in his defence.²⁵

17. As a consequence, the Chamber granted the requested stay of proceedings. The Chamber also changed the order for the presentation of the defence cases so that Ngirumpatse would be the last to present his case, scheduled the trial to recommence with sittings only three days a week to allow Ngirumpatse to familiarise himself with the proceedings and consult with his Counsel on a weekly basis before the commencement of the next week's session.²⁶

18. Furthermore, on the Chamber's orders, the Registry arranged for a weekly delivery of hardcopies of transcripts, documents used during trial, and motions and other written submissions, DVDs containing the same material plus the video recordings of the trial and provided Ngirumpatse with a laptop to view the DVDs.²⁷

²¹ T. 16 February 2009, pp. 8, 19.

²² T. 16 February 2009, p. 9.

²³ T. 16 February 2009, pp. 8, 14.

²⁴ Interoffice Memorandum, Progress Medical report for Mathieu Ngirumpatse, From Dr. Épée Hernandez, 27 February 2009.

²⁵ T. 6 November 2008, pp. 3.

²⁶ *Karemera et al.*, *Décision sur les diverses requêtes relatives à l'état de santé de Mathieu Ngirumpatse (TC)*, 6 February 2009 (« Decision of 6 February 2009 »).

²⁷ Registry's Submission Under Rule 33(B) of the Rules on the Efforts Made by the Registry to Provide Facilities to Mathieu Ngirumpatse Since his Admission into Hospital, filed on 16 February 2009 ("Registry's Submissions on facilities provided to Ngirumpatse"); T. 16 February 2009, pp. 5-6.

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19. In an interim medical report of 26 January 2009, Dr. Épée Hernandez reported that Matthieu Ngirumpatse's treatment has side effects which make him weak. The duration of the weakness varies between one and two days involving some few hours during which he is unfit. Otherwise, Ngirumpatse is clinically well controlled, oriented in time, people and place and capable to achieve intellectual exercise. Other than when suffering from side effects, Ngirumpatse is able to have two hours of concentrated reading in the morning and afternoon at his own pace. He can also watch DVDs and provide comments on them.²⁸ Dr. Épée Hernandez later clarified that two hours in the morning and afternoon meant one hour in the morning and one hour in the afternoon.²⁹

20. At the status conference on 9 February 2009 and in his written submissions, Counsel for Matthieu Ngirumpatse indicated that the conditions for Ngirumpatse's consent to the trial proceeding in his absence were not met.³⁰ All Parties objected to the proceedings continuing in Ngirumpatse's absence should he not consent.³¹

21. The presence of an accused at his trial is considered a fundamental right pursuant to Article 20(4)(d) of the Statute of the Tribunal ("Statute").³² Any restriction on a fundamental right, such as the right to be present during the proceedings, must be the least intrusive instrument amongst those which might achieve the desired result.³³ The Chamber considers, along with the Parties, that there are other available options, less intrusive on the rights of the Accused, than continuing the proceedings in Ngirumpatse's absence without his consent.

22. Counsel for Matthieu Ngirumpatse, supported by the Co-Accused seeks a three-month stay on the basis that, in light of Dr. Épée Hernandez's report to the Chamber on 9 February 2009, one can reasonably think that Ngirumpatse's medical condition will have sufficiently improved so that he will be able to contribute to his defence from his hospital bed.³⁴ The Prosecution opposes a further stay of proceedings.³⁵

²⁸ Interoffice Memorandum, Interim Medical Report for Mr. Mathieu Ngirumpatse, from Dr. Épée Hernandez, 26 January 2009.

²⁹ T. 16 February 2009, pp. 19-20.

³⁰ Ngirumpatse's Submissions, para. 6-10.

³¹ T. 9 and 16 February 2009.

³² See also *Strugar*, Case No. IT-01-42-T, Decision re the Defence Motion to Terminate Proceedings (TC), 26 May 2004, para. 32; *Zigiranyirazo*, Case No. ICTR-2001-73-AR73, Decision on interlocutory Appeal (AC), 30 October 2006, para. 12; S/25704, Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808, 3 May 1993, para. 101.

³³ *Stanišić and Simatović*, Case IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of the Proceedings (AC), para. 16.

³⁴ Ngirumpatse's Submissions, para. 19, 59.

³⁵ Motion for Severance, para 7.

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23. The Chamber relies on the assessment of Matthieu Ngirumpatse's ability to attend trial that has been made by the Tribunal's Chief Medical Officer, Dr. Épée Hernandez, in consultation and agreement with Ngirumpatse's attending physician and specialists with the relevant expertise.

24. It follows from these assessments that, in three months, the doctors will have a better foundation for assessing when, if ever, Matthieu Ngirumpatse will be able to attend trial, but that, in any event, he will not be able to do so before nine months.

25. For the proceedings to continue in Matthieu Ngirumpatse's absence would, in the Chamber's opinion, require that Ngirumpatse be able to familiarise himself with the proceedings reasonably contemporaneously, that is on a weekly basis. The familiarisation process would include a viewing of the videotapes of the proceedings and/or a reading of the transcripts together with the documents used during trial as well the motions and other written submission which are extraordinarily numerous in this case. Ngirumpatse's present condition would only allow him to concentrate on this material about 6 hours a week before consulting with his Counsel, which in the Chamber's opinion, is by far insufficient for the trial to continue with the required minimum of expeditiousness.

26. The Chamber considers that Counsel for Matthieu Ngirumpatse's suggestion that Ngirumpatse may be in a significantly better condition in three months is highly speculative since the treatment which affects his ability to follow the proceedings will be continued for further six months and since he has so far not responded to it.

27. Taking into account that the proceedings – apart from the exceptional examination of four witnesses – have now been stayed for more than six months, and that the updated assessment to be made in three months would, in the best case, support a prognosis that Matthieu Ngirumpatse will be fit to attend trial in nine months, the Chamber finds that the delay of the trial has reached a proportion that makes it imperative for the Chamber to now address whether Ngirumpatse should be severed from the trial or whether the proceedings be stayed until it is determined either that Ngirumpatse is fit to participate or that he is unable to do so for the foreseeable future.

Stay of Proceedings

28. Whether to sever Matthieu Ngirumpatse from this trial or to stay the proceedings until he becomes fit to attend trial or it be ascertained that he will not be fit to attend trial in the