



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

Arusha International Conference Centre
P.O.Box 6016, Arusha, Tanzania - B.P. 6016, Arusha, Tanzanie
Tel: 255 27 2504207-11 2504367-72 or 1 212 963 2850 Fax: 255 27 2504000/2504373 or 1 212 963 2848/49

IN TRIAL CHAMBER III

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

Registrar: Mr. Adama Dieng

Date Filed: 10 February 2009

The PROSECUTOR

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-T

JUDICIAL RECORDS ARCHIVE
RECEIVED

2009 FEB 10 P 2:59

Prosecutor's Motion to Sever Mathieu Ngirumpatse pursuant to Rule 82(B)

For the Prosecutor:

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

For the Accused:

Ms. Dior Diagne and Mr. Moussa Félix Sow for *Édouard Karemera*
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for *Mathieu Ngirumpatse*
Mr. Peter Robinson and Patrick Nimy Mayidika Ngimbi for *Joseph Nzirorera*

Overview

1. It is a matter of record in these proceedings that the accused Mathieu Ngirumpatse has been ill and has been unable to be physically present in the courtroom since 19 August 2008. Mr. Ngirumpatse did, however, consent to allow the trial to continue despite his inability to be physically present in the courtroom.¹ As a result of this waiver of his right to be physically present during his trial, this Chamber heard evidence from Edouard Karemera's Defence witnesses during the period 11 – 14 November 2008. Ngirumpatse was represented by his counsel during his absence from the courtroom and arrangements were made to provide him with video-taped recordings of the proceedings.
2. Over the past several months Ngirumpatse has filed several motions requesting that (i) his complete medical files be forwarded to his Defence team, and only his Defence team; (ii) that he be afforded additional medical treatment from independent medical consultants; (iii) that he be transferred to The Hague for additional medical treatment; and (iv) that he be released provisionally so that he could convalesce in more conducive surroundings and benefit from medical care in Europe or North America.²
3. By decision of 6 February 2009 this Trial Chamber denied all of Mr. Ngirumpatse's applications concerning his requests for additional medical treatment and provisional release. The Chamber reasoned that, according to the Chief Medical Officer of the Tribunal, Mr. Ngirumpatse receives adequate medical treatment in his present location and that transfer to Europe or North American could not significantly improve the medical treatment that he receives currently.
4. During a Status Conference held on 9 February 2009, Mr. Ngirumpatse's Defence counsel made submissions that would cause any discerning, impartial observer to question whether Mr. Ngirumpatse's waiver of his right to be physically present during his trial was given knowingly, willingly and unequivocally.³ The Ngirumpatse Defence seemed to suggest that, in light of this Chamber's decision of 6 February 2009 and Dr. Epee's updated medical report, Ngirumpatse no longer wished to waive his right to be physically present during his trial and instead insists that the trial be adjourned for an additional three months, after which time further medical treatment and re-assessment of his condition may permit him to attend his trial in person.⁴

¹ T. 6 November 2008, p.3.

² Reference is made to footnotes 1 and 2 in this Trial Chamber's *Decision sur les diverses requêtes relatives à l'état de santé de Mathieu Ngirumpatse* (6 February 2009) in which all submissions that were filed on the issue are cited.

³ T. 9 February 2009 (Draft transcript), p. 32.

⁴ T. 9 February 2009 (Draft transcript), pp. 24-28.

5. Immediately following these submissions by the Ngirumpatse Defence team, this Chamber adjourned the Status Conference and ordered the parties to make oral submissions on Thursday 12 February 2009 concerning (i) Ngirumpatse’s motion for a three-month stay of proceedings; and (ii) whether the Chamber should, once again, consider the matter of severing Ngirumpatse from this joint trial.

6. While the Prosecution may still wish to address this matter orally on 12 February 2009, as this Chamber has anticipated, the Prosecution nonetheless files this present written submission in order to narrow the issues and to clarify its position well in advance. In so doing, the Defence may focus their oral submissions in response to the Prosecutor’s current motion and this Chamber may tailor its deliberations accordingly. The Prosecution does not invite written submissions from the other parties; instead, it is suggested that the Defence respond orally during a reprise of the Status Conference on 12 February 2009 and that the Prosecution be given an opportunity to reply.

Stay of Proceedings

7. The Prosecution opposes any further stay of proceedings. Even though Dr. Epee’s recent medical update is encouraging, there is no guarantee that Ngirumpatse will recover sufficiently to attend court sessions in Arusha after another three months have passed.⁵ Given Ngirumpatse’s current dissatisfaction with the arrangements that can be made to facilitate his participation in his trial from a distant location, the prospect of repeated and even more prolonged delays to await his full recovery are now increased. His prognosis is too uncertain to assume that a three-month stay of proceedings will suffice to ensure his physical presence in the courtroom for his trial.

8. It should be recalled that since the close of our eighth trial session on 16 July 2008, when Ngirumpatse was still in good health, this Trial Chamber has only held four trial days (11-14 November 2008). The entire trial session anticipated for 17 August – 3 October 2008 was cancelled. Most of the trial session anticipated for 20 October – 14 November 2008 was cancelled.⁶ And presently, having prepared to hear Edouard Karemera’s Defence witnesses beginning 12 February 2008, Ngirumpatse’s unexpected motion for a stay of proceedings anticipates at least another three-month delay. The prospect of additional delays, even beyond the three months that are now being proposed, is too great. It would not advance the interest of justice to further delay the completion of this joint trial.

⁵ T. 9 February 2009 (Draft transcript), p.17.

⁶ See Decision on the Presentation of Edouard Karemera Evidence (16 July 2008). Evidence was only heard on 11, 12, 13 and 14 November 2008.

9. Consequently, the Prosecution opposes the motion for a stay of proceedings. If this Chamber makes a determination that Ngirumpatse has indeed revoked his waiver to allow the trial to continue while he remains unable to attend its proceedings in person, the Prosecution moves this Chamber under Rule 82(B) to sever Ngirumpatse from the joint trial so that Edouard Karemera and Joseph Nzirorera may continue to present their Defence cases.

Motion for Severance under Rule 82(B)

10. Rule 82 (B) provides that:

The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

11. In proceedings where a party moves a Trial Chamber for severance that party would ordinarily bear the legal burden of establishing, to the Chamber’s satisfaction, the prejudice or violation of the interests of justice for which severance is the appropriate cure.⁷

12. While the Prosecution would ordinarily prefer that this joint trial proceed as originally envisaged, with all three Accused in a single proceeding, the vagaries of Mr. Ngirumaptse’s health have approached the point where it unfairly prejudices the rights of the other two Accused to a speedy trial. Previously the Prosecution took the position that there should be no consideration of severing Ngirumpatse if there was any prospect of his making a viable recovery “within the next six months”, by April 2009.⁸ However, our assessment has changed.

13. On the surface it would appear that Mr. Ngirumpatse’s ill health does not occasion a conflict of interest with the other two Accused in our trial since all three have expressed a willingness to delay the trial indefinitely. Notwithstanding, however, this Chamber has an obligation to weigh, globally, the interests of justice and to make a fair determination of this application to sever.

14. Beyond Edouard Karemera and Joseph Nzirorera, it should be abundantly clear that other Accused in the ICTR who currently await trial will also be unfairly prejudiced if judicial resources are absorbed by unwieldy delays in bringing this joint trial to completion. The judges and the various court officers, legal advisors, and prosecution counsel whose human and material resources may not be used to maximum efficiency during another three-month hiatus make it incumbent upon this Chamber to weigh the pros and cons of having them lie dormant while we await more definitive information about Mr. Ngirumpatse’s prognosis. Dr Epee, in her recent medical update,

⁷ *Prosecutor v Bizimungu*, Decision on Justin Mugenzi’s Motion Alleging Undue Delay, 14 June 2007, para 8.
⁸ Prosecution Submission on Severance of Ngirumpatse pursuant to Rule 82(B), 3 November 2008, para 11.

certainly has not stated that Mr. Ngirumpatse will recover in three months; her clarification during the Status Conference was that he was receptive to treatment, and that further assessment could only be made after another three months.

15. It also bears noting that, yet once again, Defence witnesses for Edouard Karemera have arrived in Arusha to give their evidence, and that they may have to be turned away from the courtroom steps if the trial does not continue without further interruption. It may be advisable for this Chamber to make a detailed inquiry of WVSS to determine how many witnesses are currently present in Arusha and how many are en route, and to inquire if those witnesses would make themselves available, yet again, if this trial is interrupted.

16. For these reasons, and for reasons that may be set forth with greater elaboration during the reprise of our Status Conference on 12 February 2009, the Prosecution moves this Chamber to sever Mathieu Ngirumpatse from the joint trial, and to allow the Defence cases of Edouard Karemera and Joseph Nzirorera to proceed.

Consequences of severance, if ordered

17. If this Chamber severs Mathieu Ngirumpatse the Prosecutor would oppose any Defence motion for a new trial or to exclude evidence from the trial record. The Prosecution does not propose to amend its indictment or to modify its case in any manner. Indeed, the Prosecution has already fully presented its case against each Accused, individually and severally, and this Trial Chamber found a case to answer for each accused at the close of the prosecution case. Each Accused will be expected to mount a Defence against the entirety of the Prosecution case, as presented against them jointly, before this very same Trial Chamber.

18. This stance is consistent with Rule 82(A) which clarifies that in joint trials, each accused shall be accorded the same rights as if he were being tried separately. The Prosecution purports to have proven its case against each Accused individually, albeit in a joint proceeding. This Chamber's adjudication of the Defence motions for judgment of acquittal at the close of the Prosecution case also weighed the entire trial record to assess the evidence against each Accused individually. It follows that each Accused is expected to defend against the entirety of the Prosecution case at the close of trial, notably in regard to its allegations of conspiracy, accessorial liability and co-perpetration. Although joint, several and independent Defences were anticipated from each of the three Accused in a single proceeding, this Chamber's severance of Ngirumpatse may require the Accused to rebut common Prosecution evidence in separate Defence proceedings. This may have

the consequence of lengthening the trials and duplicating evidence in separate proceedings, which are logistical considerations. But fundamentally, each Accused will confront the same Prosecution case, which was the objective of the joint indictment.

19. The jurisprudence of the ad hoc Tribunals supports this position. In *Brdjanin*, the Prosecution had already presented a significant portion of its case when *Talic* was severed. Although the Trial Chamber organized a Status Conference to review the indictment and to consider evidentiary matters, the only change that was made to the joint indictment was to remove the charging language and the bold-typeface font in its references to the severed party.⁹ None of the evidence was excluded.¹⁰ It bears noting that neither the Trial Chamber Judgment nor the Appeal Chamber Judgment against *Brdjanin* was required to address any allegation of prejudice for having maintained the trial record of the joint proceeding against the lone Accused.

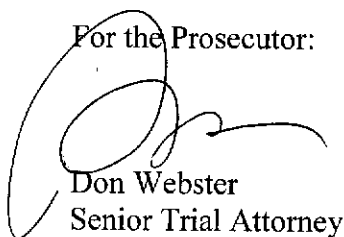
20. The Prosecution will offer additional observations in its response to the Defence submissions, whether offered orally on 12 February 2009 or in writing before then.

WHEREFORE, the Prosecution prays that this Chamber sever Mathieu Ngirumpatse from the joint trial; order the trial to continue against Edouard Karemera and Joseph Nzirorera immediately; and order the case against Mathieu Ngirumpatse to be adjourned *sine die*, until such time as Mathieu Ngirumpatse is well enough to be physically present in the courtroom for his separate trial.

Respectfully submitted.

Dated in Arusha, this 10th day of February 2009

For the Prosecutor:



Don Webster
Senior Trial Attorney

⁹ Transcript of Status Conference and Oral Decision, *Prosecutor v. Radoslav Brdjanin*, ICTY Case No. IT-99-36-T, 7 October 2002, ("Brdjanin Transcript").

¹⁰ *Id.*, Brdjanin Transcript, pg. 10311, Judge Agius: The accused Brdjanin has also asked that the parties be invited to make submissions on which evidence from the Brdjanin-Talic case is relevant to his case and should be incorporated now in the records of his case for the purpose of proceeding with his -- forward with his trial. The Trial Chamber sees no point in extending any such invitation to the parties, who are free to come to any agreement on this matter amongst themselves if they want to or if they feel the need for it. The Trial Chamber does not at this point see the need to give any directions to either of the parties in this context. The last request of the accused Brdjanin is that the case be stayed as far as the receipt of evidence is concerned until a new indictment has been filed and approved by the Trial Chamber or a Judge thereof, and until accused Brdjanin has been able to exercise whatever rights the rules and justice may provide him with regard to the new indictment. The Trial Chamber has no option but to reject this request, which in part is based on the fact of the prior filing of a new indictment.



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input checked="" type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Trial Chamber III A. N'Gum	
	<input type="checkbox"/> Chief, CMS J.-P. Fomété	<input type="checkbox"/> Appeals Chamber / Arusha Chamber II F. A. Talon		<input type="checkbox"/> Appeals Chamber / The Hague K. K. A. Afande R. Muzigo-Morrison	
From:	<input type="checkbox"/> Chamber (names)	<input type="checkbox"/> Defence (names)	<input checked="" type="checkbox"/> Prosecutor's Office Webster / Visser (names)	<input type="checkbox"/> Other: (names)	
Case Name:	The Prosecutor vs. Karemera et al.			Case Number: ICTR-98-44-T	
Dates:	Transmitted: 10 February 2009		Document's date: 10 February 2009		
No. of Pages:	6 pages	Original Language:	<input type="checkbox"/> English	<input checked="" type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda
Title of Document:	Prosecutor's Motion to Sever Mathieu Ngirumpatse pursuant to Rule 82(B)				
Classification Level:		TRIM Document Type:			
<input type="checkbox"/> Ex Parte		<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence	<input type="checkbox"/> Submission from non-parties
<input type="checkbox"/> Strictly Confidential / Under Seal		<input type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Notice of Appeal	<input checked="" type="checkbox"/> Submission from parties
<input type="checkbox"/> Confidential		<input type="checkbox"/> Disclosure	<input type="checkbox"/> Order	<input type="checkbox"/> Appeal Book	<input type="checkbox"/> Accused particulars
<input checked="" type="checkbox"/> Public		<input type="checkbox"/> Judgement	<input type="checkbox"/> Motion	<input type="checkbox"/> Book of Authorities	

II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

CMS SHALL take necessary action regarding translation.

Filing Party hereby submits only the original, and **will not submit** any translated version.

Reference material is provided in annex to facilitate translation.

Target Language(s):

English French Kinyarwanda

CMS SHALL NOT take any action regarding translation.

Filing Party hereby submits **BOTH the original and the translated version** for filing, as follows:

Original	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda
Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

CMS SHALL NOT take any action regarding translation.

Filing Party **will be submitting the translated version(s)** in due course in the following language(s):

English French Kinyarwanda

KINDLY FILL IN THE BOXES BELOW

<input type="checkbox"/> The OTP is overseeing translation. The document is submitted for translation to: <input type="checkbox"/> The Language Services Section of the ICTR / Arusha. <input type="checkbox"/> The Language Services Section of the ICTR / The Hague. <input type="checkbox"/> An accredited service for translation; see details below: Name of contact person: Name of service: Address: E-mail / Tel. / Fax:	<input type="checkbox"/> DEFENCE is overseeing translation. The document is submitted to an accredited service for translation (fees will be submitted to DCDMS): Name of contact person: Name of service: Address: E-mail / Tel. / Fax:
---	--

III - TRANSLATION PRIORITISATION (For Official use ONLY)

<input type="checkbox"/> Top priority	COMMENTS	<input type="checkbox"/> Required date:
<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: