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UNITED NATIONS
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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: 02 December 2008

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THE PROSECUTION

v.

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

**DECISION ON JOSEPH NZIRORERA'S MOTIONS FOR RECONSIDERATION OF
24 OCTOBER 2008 ORDER, FOR EXTENSION OF TIME, SUBPOENAS AND
VIDEO-LINK AND ON PROSECUTION'S MOTION FOR AN ORDER TO
NZIRORERA TO REDUCE HIS WITNESS LIST**

Rules 46, 54, 71(D), 73ter 90 and 92bis of the Rules of Procedure and Evidence

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Peter Robinson and Patrick Nimy Mayidika Ngimbi

[Signature]

INTRODUCTION

1. The Prosecution closed its case on 25 January 2008. On 6 March 2008, the Chamber invited the parties to make submissions on various matters pertaining to the management of the Defence case pursuant to Rule 73ter of the Rules of Procedure and Evidence ("Rules"), and issued further orders to each Accused.¹
2. Joseph Nzirorera has filed several submissions under Rule 73ter following orders from the Chamber but they did not meet the Chamber's directions.² On 30 July 2008, the Chamber addressed a warning to Nzirorera's Counsel because none of Nzirorera's filings complied with the Chamber's orders pursuant to Rule 73ter(B).
3. On 20 October 2008, the Prosecution filed a motion requesting the Chamber to order Joseph Nzirorera to reduce his witness list, to disclose written statements from the witnesses he intends to call which are in his possession and to file an application under Rule 92bis of the Rules for the witnesses whose evidence he intended to offer in written form.³ The Defence did not respond to this motion but requested an extension of time to respond.⁴
4. On 24 October 2008, the Chamber issued an order requiring Joseph Nzirorera to file the final list of appearance of his witnesses, reduced to approximately 55 witnesses fitting within a 45 trial-day length, and an application for all the written statements he intended to adduce in lieu of oral testimony under Rule 92bis no later than 7 November 2008.⁵
5. During proceedings on 6 November 2008 relating to the possible severance of this case, consequent on the prolonged illness of Mathieu Ngirumpatse, the Chamber directed that Joseph Nzirorera would present his defence following the one of Édouard Karemera. The

¹ *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, ("*Karemera et al.*"), Reconsidération de la Décision du 27 février 2008 relative à la reprise du procès et au commencement de la présentation des moyens de preuve a décharge (TC), 6 March 2008.

² Joseph Nzirorera's First Rule 73ter Filing, filed on 31 March 2008; Joseph Nzirorera's Second Rule 73ter Filing, filed on 24 April 2008; Joseph Nzirorera's Third Rule 73ter Filing, filed on 2 June 2008 (On 30 July 2008, the Chamber ordered the Registry that this filing, originally filed *ex parte*, be filed confidentially); Joseph Nzirorera's Fourth Rule 73ter Filing, filed on 13 August 2008; Joseph Nzirorera's Fifth Rule 73ter Filing, 8 September 2008.

³ Prosecutor's Motion for and Order Pursuant to Rule 54 and 73ter(D) to Reduce the Number of Witnesses being called by Joseph Nzirorera, filed on 20 October 2008 ("Motion of 20 October 2008").

⁴ Joseph Nzirorera's Motion for Extension of Time, filed on 24 October 2008 ("Motion for Extension of Time").

⁵ *Karemera et al.*, Order to Joseph Nzirorera to Reduce his Witness List (TC), 24 October 2008 ("Order of 24 October 2008").

Chamber noted that Joseph Nzirorera had not appealed the Order of 24 October 2008 and declared that it would not vary its order, nor grant additional time for compliance.⁶

6. On 7 November 2008, Joseph Nzirorera filed a motion for reconsideration of the Chamber's Order of 24 October 2008.⁷ The Prosecution opposes the motion and seeks an order imposing sanctions on Nzirorera.⁸

7. Joseph Nzirorera has also filed four motions moving the Chamber to issue a subpoena directed respectively to Fabien Bunani,⁹ Eugène Mbarushimana,¹⁰ Faustin Twagiramungu¹¹ and Pascal Ntawumenyumunsi,¹² to appear at a time designated by the Trial Chamber to give testimony on his behalf.

8. On 13 October 2008, Joseph Nzirorera filed confidentially a motion for testimony by video-link of one individual he intends to call as a witness.¹³

DELIBERATIONS

Prosecution's Motion for an Order to Reduce the Number of Witnesses Being Called by Joseph Nzirorera and Nzirorera's Motion for Extension of Time

9. In its Motion of 20 October 2008, the Prosecution moved the Chamber: (1) to order Joseph Nzirorera to reduce the number of witnesses who will be called to give oral testimony,

⁶ T. 6 November 2008, p. 13.

⁷ *Karemera et al.*, Order to Joseph Nzirorera to Reduce His Witness List, 24 October 2008 ("Order of 24 October 2008").

⁸ Prosecutor's Response to Joseph Nzirorera's Motion for Reconsideration: Order to Joseph Nzirorera to reduce his Witness List and Cross-Motion to Impose Sanction on Nzirorera for Breach of Court Order, filed on 10 November 2008.

⁹ Joseph Nzirorera's Motion for Subpoena to Fabien Bunani, filed on 22 September 2008.

¹⁰ Joseph Nzirorera's Motion for Subpoena to Eugène Mbarushimana, filed on 13 October 2008; Prosecutor's Response to Joseph Nzirorera's Motion for Subpoena to Eugène Mbarushiman, filed on 20 October 2008; Reply Brief: Joseph Nzirorera's Motion for Subpoena to Eugène Mbarushimana, filed on 21 October 2008.

¹¹ Joseph Nzirorera's Motion for Subpoena to Faustin Twagiramungu, filed on 16 October 2008; Prosecutor's Response to Joseph Nzirorera's Motion for Subpoena to Faustin Twagiramungu, filed on 21 October 2008; Reply Brief: Joseph Nzirorera's Motion for subpoena to Faustin Twagiramungu, filed on 22 October 2008.

¹² Joseph Nzirorera's Motion for Subpoena to Pascal Ntawumenyumunsi, filed on 17 November 2008; Prosecutor's Response to Joseph Nzirorera's Motion for Subpoena to Pascal Ntawumenyumunsi, filed on 24 November 2008.

¹³ Joseph Nzirorera's Motion for Testimony by Video-link [Name redacted], filed on 13 October 2008; Confidential Prosecution Response to Joseph Nzirorera's Motion for Testimony by Video-Link [Name Redacted], filed on 20 October 2008; Reply Brief: Joseph Nzirorera's Motion for Testimony by Video-link [Name redacted], filed on 21 October 2008.)

and to file a revised submission pursuant to Rule 73ter(B); (2) to order Nzirorera to disclose written statements in his possession from witnesses he intends to call; (3) to Order Nzirorera to file an application pursuant to Rule 92bis for the witnesses whose evidence he intends to offer in written form; all of those by 14 November 2008.

10. On 24 October 2008, the Chamber ordered Joseph Nzirorera to file his reduced witness list of approximately 55 witnesses fitting in a 45-trial-day length of time, and his application pursuant Rule 92bis for the witnesses whose evidence he intends to offer in written form, by 7 November 2008. Consequently, the Prosecution submissions on those issues are moot.

11. The Chamber notes that Joseph Nzirorera filed his Motion for Extension of Time to respond to the Motion of 20 October 2008 after the Chamber rendered its Order of 24 October 2008. Considering this Chamber's Order of 24 October 2008, as well as the previous orders from the Chamber regarding Joseph Nzirorera's obligations pursuant to Rule 73ter, the Chamber declares that Joseph Nzirorera's Motion for Extension of Time is moot and abusive of the process.

Reconsideration of Chamber's Order of 24 October 2008

12. Joseph Nzirorera submits that the fact that the Chamber advanced the presentation of his defence case before Mathieu Ngirumpatse's defence case, is a change in circumstances that merits reconsideration of the Chamber's Order of 24 October 2008.

13. A Chamber has an inherent power to exercise its discretion and reconsider its decisions. Reconsideration is however an exceptional measure only available when: (1) a new fact has been discovered that was not known to the Chamber at the time it made its original decisions; (2) there has been a material change in the circumstances since it made its original decision; or (3) there is reason to believe that its original decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice thereby warranting the exceptional remedy for reconsideration.¹⁴

¹⁴ See Karemera et al., Decision in the Defence Motions for reconsideration of Protective Measures for Prosecution Witnesses (TC), 29 August 2005, para. 8; The Prosecutor v. Hormisdas Nsengimana, Case No. ICTR-2001-69, Decision on Hormisdas Nsengimana's Motion for reconsideration of the Decision of 26 April 2007 (TC), 10 May 2007, para. 11; The prosecutor v. Nyiramasuhuko et al., Decision on Ntahobali's Motion for Reconsideration of the Decision of 2 March 2006 (TC), 11 June 2007, para. 9; The Prosecutor v. Augustin Nindiliyimana et al., Decision on Nzuwonemeye's Request for reconsideration of the Chamber's Decision

14. This application for reconsideration must fail as none of the above criteria is fulfilled. The illness of Mathieu Ngirumpatse required that the order for the presentation of the defence be altered so that Nzirorera follow Karemera instead of Ngirumpatse as previously ordered. However, the Rule 73ter filings should have been made before the commencement of the defence case irrespective of the order in which the defence is presented. Consequently the fact that the order of the presentation of the defence case has changed is not a new fact or a material change in the circumstances which could have any impact on the impugned order. The failure to take advantage of the opportunity to appeal provided by the certification to appeal granted in the order of 24 October 2008 could imply that it is not contended that there is any error or abuse of power. It certainly implies that the application to reconsider is frivolous. The Chamber is satisfied that Nzirorera has had abundant time and facilities for preparation of his defence and that there are no exceptional circumstances that warrant a reconsideration of its order. The motion is denied and declared to be abusive of the process.

Applications for Subpoenas

15. The result of the failure of Joseph Nzirorera to comply with the Chamber's 73ter orders is that the Chamber does not know whether the individuals named by Nzirorera's four applications for subpoena will be part of Joseph Nzirorera's witness list. Those four motions are so denied. Furthermore, the Chamber notes that Nzirorera's Motion for Subpoena to Pascal Ntawumenyumumsi was filed subsequent to the Chamber's Order of 24 October 2008. The Chamber finds that this motion is abusive of the process.

Motion for Video-Link

16. For reasons identical to the ones developed in relation to Nzirorera's first three motions for subpoena, the Chamber is unable to know if the individual named in Nzirorera's Motion for Video-Link will be part of Joseph Nzirorera's final witness list. Consequently this motion is denied.

Misconduct of Joseph Nzirorera's Counsel

17. The Chamber considers that conduct of Counsel for Joseph Nzirorera is

dated 9 June 2008 (TC), 16 July 2008, para. 3; Karemera et al., Decision on Motion for Reconsideration of Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza (TC), 29 September 2008, para. 4.

obstructing the proceedings, and is contrary to the interests of justice.

18. Peter Robinson was assigned to this case as Lead Counsel for Joseph Nzirorera on 24 April 2002. The Chamber has supervised the disclosure of information required by the Rules and notes that despite some breaches the Accused has received voluminous material. In addition the Chamber has noted the detailed cross-examination of Prosecution witnesses. For these and other reasons the Chamber is satisfied that Lead Counsel has had adequate time and facilities to prepare the defence of Joseph Nzirorera. The Rules of this Tribunal envisage that, before the commencement of the defence, information about the witnesses to be called and other evidence to be adduced needs to be provided under judicial supervision to ensure that the obligation to complete the trial without undue delay is observed. In addition, the issue of fairness to other parties needs to be managed. It is not only the Prosecution that is affected. In a multi-accused trial, the Chamber considers that fairness to the co-accused requires that each accused present the requested information in sufficient time to allow adequate facilities and time for the preparation of the defence of the co-accused. Persistent failure to comply with the related orders obstructs the proceedings and is contrary to the interests of justice.¹⁵ It is also contrary to the Code of Professional Conduct for Defence Counsel.¹⁶

19. In his recent filings counsel for Nzirorera has suggested that he is still conducting investigations. Even if that is true, it is not an acceptable explanation for failure to comply with the related orders. In the event that continued investigations reveal information that warrants a variation of the witness list, the Rules make specific provision for that eventuality.

20. Counsel for Joseph Nzirorera has also suggested that he cannot compile his final witness list until the Chamber has ruled on his applications for presenting written statements in lieu of oral testimony under Rule 92*bis*. This submission is particularly vexatious. Counsel for Joseph Nzirorera has been filing numerous motions. In relation to the 92*bis* motions, the Chamber considered that piecemeal application on a statement by statement basis would be inappropriate and ordered him to make one omnibus filing relating to all applications.¹⁷ He is in breach of that order and has not made the filing. The chamber has already noted that

¹⁵ *Karemera et al.*, Injonction à la défense d'Édouard Karemera de s'expliquer sur les violations d'ordonnances de la Chambre quant à la présentation de sa preuve, 2 July 2008 ; Order to Joseph Nzirorera on the Presentation of his Defence Evidence, 30 July 2008.

¹⁶ Code of Professional Conduct for Defence Counsel, 8 June 1998, as of 14 March 2008. Introduction, Article 12.

¹⁷ *Karemera et al.*, Order to Joseph Nzirorera to Reduce His Witness List, 24 October 2008.

Joseph Nzirorera intended to call an excessive number of witnesses to prove the same facts and ordered a reduction of his witness list for that reason. It is clear that this principle would apply to written as well as oral testimony. It is inconsistent with that order to request assessment on the basis of individual statements until the entire filing of the witness list is presented as the Chamber would need to see the whole picture.

21. In addition, making filings in this manner improperly exploits the method of remuneration adopted by the Tribunal. Moreover it presents unreasonable burdens on the Chamber and other Parties. The chamber is satisfied that this is not coincidental but is typical and strategic. The Chamber is also satisfied that it evinces an intention to unreasonably delay and impede the process.

22. The Chamber recalls that it first directed Joseph Nzirorera to disclose information required under Rule 73ter on 27 February 2008 and that Joseph Nzirorera is assisted by a complete Defence team. Lead Counsel has the primary responsibility and Co-counsel may be in a position of subordination. However, in cases of persistent non compliance with court orders co-counsel must assume some responsibility.

23. The Chamber has already addressed, in application of Rule 46, a warning to Joseph Nzirorera's Lead Counsel and Co-Counsel for failure to comply with the Chamber's orders regarding the filing of Rule 73ter information.¹⁸ This warning has had no apparent effect. Conduct of counsel continues to abuse the process, obstruct the proceedings and to be contrary to the interests of justice. Sanctions are required.

24. The Chamber considers that distinctions in the degree of misconduct should be drawn to the extent that Lead Counsel has greater responsibility. The Chamber considers therefore that it should merely renew its warning to Co-Counsel. In relation to Peter Robinson, the Chamber considers that his misconduct should be communicated to the professional body regulating the conduct of counsel in his State of admission. Rule 46(B) prescribes that the approval of the President is required before such communications is dispatched. As the President of the Tribunal is part of this Chamber, the Registrar will be directed to act on the approval of the Vice-President.


25. In addition the Chamber considers that fees related to the abusive and redundant process should be denied and directs the Registrar accordingly.

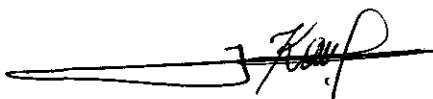
¹⁸ Order to Joseph Nzirorera on the Presentation of his Defence Evidence, 30 July 2008.


FOR THESE REASONS, THE CHAMBER

- I. **DISMISSES** the Prosecution's Motion as Moot;
- II. **DISMISSES** Joseph Nzirorera's Motion for Reconsideration in its entirety;
- III. **DISMISSES** Joseph Nzirorera's Motion for Extension of Time;
- IV. **DISMISSES** Joseph Nzirorera's Motions for Subpoena to Fabien Bunani, Eugène Mbarushimana Faustin Twagiramungu and Pascal Ntawumenyumunsi;
- V. **DISMISSES** Joseph Nzirorera's Motion for Video-Link
- VI. **DIRECTS** the Registrar to deny counsel for Joseph Nzirorera all fees to the related abusive and redundant motions;
- VII. **RECALLS** its Order of 24 October 2008; and **ORDERS** Joseph Nzirorera to file *inter partes* his Pre-Defence Brief and his application pursuant Rule 92*bis* for the witnesses whose evidence he intends to offer in written form by Monday 8 December 2008;
- VIII. **ADDRESSES**, in application of Rule 46, another warning to Patrick Nimy Mayidika Ngimbi, for failure to comply with the Chamber's orders; and
- IX. **INSTRUCTS** the Registry to liaise with the Vice-President regarding possibility of the notification of the misconduct of Lead Counsel Peter Robinson to the professional body regulating the conduct of counsel in his State of admission.

Arusha, 02 December 2008, done in English.


Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


Vagn Joensen
Judge





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)

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	<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 K. Ardault (names)	<input type="checkbox"/> Defence (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
Case Name:	The Prosecutor vs. Édouard Karemera et al.		Case Number: ICTR-98-44	
Dates:	Transmitted: 2 December 2008		Document's date: 2 December 2008	
No. of Pages:	8	Original Language:	<input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda	
Title of Document:	DECISION ON JOSEPH NZIRORERA'S MOTIONS FOR RECONSIDERATION OF 24 OCTOBER 2008 ORDER, FOR EXTENSION OF TIME, SUBPOENAS AND VIDEO-LINK AND ON PROSECUTION'S MOTION FOR AN ORDER TO NZIRORERA TO REDUCE HIS WITNESS LIST			
Classification Level:		TRIM Document Type:		
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II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

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<input type="checkbox"/> Filing Party hereby submits only the original, and will not submit any translated version.			
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<input type="checkbox"/> Filing Party hereby submits BOTH the original and the translated version for filing, as follows:			
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<input type="checkbox"/> Filing Party will be submitting the translated version(s) in due course in the following language(s):			
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<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:	

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<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: