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11-7-2007  
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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

29406  
JMP

OR: ENG

**TRIAL CHAMBER III**

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

**Registrar:** Adama Dieng

**Date:** 11 July 2007

**THE PROSECUTOR**

v.

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

JUDICIAL PROCEEDINGS/ARCHIVE

2007 JUL 11 A 11: 26

**DECISION ON JOSEPH NZIRORERA'S MOTION FOR STAY OF PROCEEDINGS  
WHILE HE IS UNFIT TO ATTEND TRIAL OR CERTIFICATION TO APPEAL**

*Article 20 of the Statute, Rule 73(B) of the Rules of Procedure and Evidence*

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## INTRODUCTION

1. On 27 June 2007 when Defence Counsel for Mathieu Ngirumpatse was scheduled to continue his cross-examination of Prosecution Witness Jean Bosco Twahirwa, the Chamber received a note from UN Medical Officer Epée Hernandez certifying that Joseph Nzirorera was unfit to attend trial for three days.<sup>1</sup> Defence Counsel for Nzirorera then requested that the cross-examination of the witness be stayed until Nzirorera was fit to attend trial.<sup>2</sup>

2. The Chamber, in an Oral Decision, denied the request and decided to hear the evidence of the witness in the absence of Joseph Nzirorera.<sup>3</sup> When Defence Counsel for Nzirorera indicated that the health situation of his client was likely to recurrently make him unfit to attend trial, the Chamber decided to hold an *in camera* conference with the Parties on how to proceed when an accused is unfit to attend.<sup>4</sup>

3. At the resumption of proceedings on 28 June 2007, Defence Counsel for Joseph Nzirorera made an Oral Motion requesting the Chamber to reconsider its Oral Decision to continue the proceedings in the absence of Nzirorera, or to grant certification to appeal a Chamber's Decision to continue the proceedings in the absence of the Accused.<sup>5</sup>

4. The Chamber granted, in part, the request for reconsideration and modified its previous Oral Decision by allowing the cross-examination by Defence Counsel for Joseph Nzirorera to be postponed until Nzirorera was fit to attend trial again. The Chamber maintained that cross-examination by Defence Counsel for Mathieu Ngirumpatse and Edouard Karemera should continue in the absence of Nzirorera.<sup>6</sup> The Chamber further considered that certification was appropriate in this case. It indicated that it would give its

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<sup>1</sup> T. 27 June 2007, p.1.

<sup>2</sup> *Ibid.*, pp. 1-2.

<sup>3</sup> T. 27 June 2007, p. 11.

<sup>4</sup> *Ibidem.*

<sup>5</sup> T. 28 June 2007, p. 1.

<sup>6</sup> T. 28 June 2007, p. 7.

reasons for granting certification in writing, as well as include guidelines for how to proceed in the future when an accused is unfit to attend trial.<sup>7</sup>

5. The present written Decision must be considered as the authoritative statement of the Chamber's findings and reasoning concerning the above-mentioned oral rulings. The Chamber will first set out relevant guidelines for deciding how to proceed in the absence of an accused person. The Chamber will then will address the issue of certification to appeal its Oral Decision denying Mr. Nzirorera's request to stay the proceedings in the absence of the Accused.

***On the Continuation of Proceedings in the Absence of an Accused***

6. In support of his motion that proceedings be stayed, the Defence Counsel for Joseph Nzirorera argued that his client wanted to attend the cross-examination and did not consent to it proceeding in his absence. He submitted that since the UN Medical Officer had certified that the Accused was unfit to attend his trial, Rule 82 *bis* of the Rules of Procedure and Evidence ("Rules") providing for the power of the Chamber to continue the proceedings in the absence of an accused person while the later refuses to attend was not applicable. He recalled that the right of an accused to attend his own trial is fundamental. The Defence Counsel acknowledged that this right is not absolute, but submitted that according to the Appeals Chamber's Decision in the *Zigiranyirazo* case ("*Zigiranyirazo* Decision"), these situations are limited to instances where the accused refuses to attend or disrupts the proceedings.<sup>8</sup> Furthermore, in the Defence's view, the Trial Chamber Decision of 19 April 2007 in the *Bagosora et al.* case, in which the Chamber decided to continue in the absence of the Accused Anatole Nsengiyumva,<sup>9</sup> could not be applied under the present circumstances as in that case, the concerned Accused had already closed his case.

7. Defence Counsel for Karemera supported the motion and further argued that it is not sufficient for an accused who is unfit to attend trial to read the transcripts because his illness is also an impediment to reading the transcripts. He further submitted that it is not possible to observe the demeanour of a witness by reading the transcripts.<sup>10</sup>

<sup>7</sup> *Ibidem*.

<sup>8</sup> The Defence made a reference to *Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal (AC), 30 October 2006 ("*Zigiranyirazo* Appeals Chamber Decision").

<sup>9</sup> *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Nsengiyumva Motions to Call Doctors and to Recall Eight Witnesses (TC), 19 April 2007, para.1.

<sup>10</sup> T. 28 June 2007, p. 3.

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8. Defence Counsel for Ngirumpatse also supported the motion and argued further that the Rules only allow for the proceedings to be continued in the absence of an accused when the later refuses to attend; as such, there is no legal basis to order that the proceedings be continued without the consent of the Accused when he wants to attend the proceedings but is unfit to do so.<sup>11</sup>

9. The Prosecution, while conceding that the right of the Accused to be present at his trial is fundamental, argued that the Chamber properly applied the proportionality principle set out in the *Zigiranyirazo* Decision when it decided to continue the proceedings in the absence of Joseph Nzirorera as this Accused had followed the Prosecution witness' examination-in-chief.<sup>12</sup> It furthermore submitted that no information was elicited from the witness concerning any acts of Nzirorera and asserted that by reading the transcripts with the assistance of his Defence Counsel, Nzirorera could follow the witness' testimony during his absence and might – upon showing good cause – request that the witness be recalled for further cross-examination. It submitted that the Chamber's Decision was in line with the Trial Chamber Decision of 19 April 2007 in the *Bagosora et al.* case.

10. The Prosecution further stated that the rights of Witness Jean Bosco Twahirwa should also be taken into account. It recalled that the witness had already been called to Arusha to testify in this trial during the previous session, had been compelled to come again during the present session, and had already waited two weeks before testifying.<sup>13</sup>

11. According to Article 20(4)(d) of the Statute of the Tribunal, an accused has a right to be tried in his or her presence. The Chamber acknowledges that the physical presence of an accused before the Chamber, as a general rule, is one of the most basic and common principles of a fair criminal trial.<sup>14</sup>

12. However, the Chamber notes that the right of an accused to be present at his or her trial is not absolute, as stated by the Appeals Chamber in the *Zigiranyaro* case.<sup>15</sup> In the *Zigiranyirazo* Decision, the Appeals Chamber held:

In assessing a particular limitation on a statutory guarantee on a fundamental right, the Appeals Chamber bears in mind the proportionality principle, pursuant to which any restriction on a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective. The explicit exception provided by Rule 80(B) and the ICTY Appeals Chamber's reference to "substantial

<sup>11</sup> T. 28 June 2007, p. 4.

<sup>12</sup> T. 28 June 2007, p. 5.

<sup>13</sup> T. 28 June 2007, p. 6.

<sup>14</sup> See *Zigiranyirazo* Appeals Chamber Decision, para. 11.

<sup>15</sup> *Zigiranyirazo* Appeals Chamber Decision, para. 14.

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trial disruptions" provide a useful measure by which to assess other restrictions on the right to be present at trial.<sup>16</sup>

13. The issue in the *Zigiranyirazo* case was whether the Trial Chamber had exceeded its discretion by deciding without the consent of the accused to hear a key witness by video link. The Appeals Chamber agreed "that the objectives advanced by the Trial Chamber [were] of general importance: witness protection, the proper assessment of an important prosecution witness and the need to ensure a reasonably expeditious trial", but was not satisfied that the Trial Chamber, in the circumstances of the case, had properly exercised its discretion in deciding to impose limitations on Zigiranyirazo's right to be present at his trial.<sup>17</sup>

14. In the present case, the objective at stake is the need to ensure a reasonably expeditiously trial which, as acknowledged by the Appeals Chamber, is of general importance. The issue at stake is whether there are limitations which can be placed on the access of an accused to the examination of a witness, without materially and disproportionately impairing his rights pursuant to Article 20(4)(d) of the Statute to be tried in his presence.

15. The Chamber recalls that a Trial Chamber may admit witness evidence, not obtained in the presence of an accused, which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment, either in the form of a written statement pursuant to Rule 92 *bis* or by taking judicial notice of adjudicated facts on the basis of, for instance, witness evidence in other proceedings before the Tribunal pursuant to Rule 94.<sup>18</sup>

16. In a Decision of 16 June 2006, the Appeals Chamber addressed the issue of admitting evidence pursuant to Rule 92 *bis* and Rule 94 in relation to the Accused being charged as members of a joint criminal enterprise, as follows:

As to all other adjudicated facts relating to the criminal responsibility of the accused, it is for the Trial Chambers, in the careful exercise of their discretion, to assess each particular fact in order to determine whether taking judicial notice of it—and thus shifting the burden of producing evidence rebutting it to the accused—is consistent with the accused's rights under the circumstances of the case. This includes facts related to the existence of a joint criminal

<sup>16</sup> *Ibidem* (footnote omitted).

<sup>17</sup> *Zigiranyirazo* Appeals Chamber Decision, para. 17.

<sup>18</sup> Rules 92 *bis* of the Rules of Procedure and Evidence provides:

A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.

Rule 94(B) of the Rules provides:

At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.

enterprise and the conduct of its members other than the accused—and, more generally, facts related to the conduct of physical perpetrators of a crime for which the accused is being held criminally responsible through some other mode of liability. Contrary to the contentions of Mr. Nzirorera and Mr. Ngirumpatse, there is a distinction between such facts and those related to the acts and conduct of the accused themselves. In the *Galić* case, in the context of Rule 92 *bis*, the ICTY Appeals Chamber considered and rejected an argument similar to that raised by the Accused here:

The appellant emphasises that Rule 92 *bis* excludes from the procedure laid down any written statement which goes to proof of the acts and conduct of the accused as charged in the indictment. He says that, as the indictment charges the appellant with individual criminal responsibility -

(i) as having aided and abetted others to commit the crimes charged, and  
(ii) as the superior of his subordinates who committed those crimes,  
the acts and conduct of those others and of his subordinates “represent his own acts”. The appellant describes those “others” as “co-perpetrators”, and he says that the “acts and conduct of the accused as charged in the indictment” encompasses the acts and conduct of the accused’s co-perpetrators and/or subordinates. This argument was rejected by the Trial Chamber.

The appellant's interpretation of Rule 92 *bis* would effectively denude it of any real utility. That interpretation is inconsistent with both the purpose and the terms of the Rule. It confuses the present clear distinction drawn in the jurisprudence of the Tribunal between (a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those others. It is only a written statement which goes to proof of the latter acts and conduct which Rule 92 *bis* (A) excludes from the procedure laid down in that Rule.<sup>89</sup> The Appeals Chamber considers this analysis equally applicable in the Rule 94(B) context.<sup>19</sup>

17. In the Chamber's view, hearing witness evidence which goes to proof of a matter other than the acts and conduct of an accused who is unfit to attend his trial is less intrusive on the accused's right to be present at his trial than admitting witness evidence pursuant to Rule 92 *bis* and Rule 94, bearing in mind that the Defence Counsel of the accused will be present and that the accused – upon showing good cause – may request that witnesses be recalled for further cross-examination.

18. A similar position was also expressed in the *Bagosora et al.* case. In that trial where four accused are jointly prosecuted in a joint criminal enterprise case, the Trial Chamber held that the examination-in chief by an accused in the absence of a co-accused who was unfit to attend trial did not unfairly impair the right of the co-accused to be tried in his presence as the evidence that was likely to be elicited from the witness would not be directed against him.<sup>20</sup>

<sup>19</sup> *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera* (“*Karemera et al.*”), Case No. ICTR- 98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2006, para. 52, citing *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002.

<sup>20</sup> *Bagosora et al.*, Decision on Nsengiyumva Motions to Call Doctors and to Recall Eight Witnesses (TC), 19 April 2007, para.1.

19. Based on these considerations the Chamber finds that hearing the testimony of a witness which goes to proof of matters other than the acts and conduct as charged in the indictment against the said accused, such as the alleged acts and conduct of the co-accused, in the absence of an accused who is unfit to attend his trial, does not materially and disproportionably impair his rights to be present at his trial.

20. In view of this principle, the Chamber is of the view that since the evidence that was likely to be elicited from Witness Jean Bosco Twahirwa only concerned the alleged acts and conduct of the accused Mathieu Ngirumpatse, cross-examination of the witness could continue although Joseph Nzirorera was unfit to attend the trial.

21. However, as the cross-examination by Defence Counsel for Joseph Nzirorera was scheduled to be done on a Friday when the Chamber only sits in the morning, and as Nzirorera, according to the UN Medical Officer, would be fit to attend trial again the following Monday, the Chamber, upon reconsideration of its Decision,<sup>21</sup> found that the need to ensure a reasonably expeditious trial was not seriously affected by allowing the cross-examination by Defence Counsel for Nzirorera to be postponed until the following Monday.

#### ***On the Certification to Appeal the Chamber's Decision***

22. In support of his motion for certification to appeal the Chamber's Decision, Defence Counsel for Joseph Nzirorera submitted that the Decision to hear evidence in the absence of Nzirorera touches upon a fundamental right of the Accused to be tried in his presence. He further submitted that the issue has not been addressed before by the Appeals Chamber and is likely to occur recurrently due to Nzirorera's health situation and will seriously affect the length of the trial.

23. The Defence Counsels for Edouard Karemera and Mathieu Ngirumpatse and the Prosecutor supported the request for certification.

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<sup>21</sup> According to the established jurisprudence, a Chamber has the inherent power to reconsider its decisions when (i) a new fact has been discovered that was not known to the Chamber at the time it made its original Decision, (ii) there has been a material change in circumstances since it made its original Decision, or (iii) 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 injustice thereby warranting the exceptional remedy of reconsideration. See: *Karemera et al.*, Case No. ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure, 31 October 2005, para. 3; *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness, 11 October 2005, para. 8 (note also the authorities cited in footnotes contained within that paragraph).

24. Rule 73(B) of the Rules provides that Decisions on a party's motion are without interlocutory appeal. However, the Rule confers a discretion on the Chamber to grant certification to appeal when certain clearly delimited conditions are fulfilled: the applicant must satisfy the two prong test and show (i) how the impugned Decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial, and (ii) that an "immediate resolution by the Appeals Chamber may materially advance the proceedings". Even then, certification to appeal must remain exceptional.<sup>22</sup> Certification is not determined on the merits of the appeal against the impugned decision.<sup>23</sup>

25. In the present instance, the Chamber is satisfied that the health of Joseph Nzirorera may make him unfit to attend trial recurrently. Therefore, should all proceedings be stayed during periods when the Accused is unfit to attend trial, the completion of the trial could be further seriously delayed. The Chamber also notes that the Appeals Chamber has not before been seized to address the issue whether evidence can be heard in the absence of an accused who is unfit to attend trial, and this issue touches upon a fundamental right of an accused as previously stated by the Appeals Chamber. Furthermore, should the Chamber's Decision to continue proceedings in the absence of an accused in accordance with the above-mentioned guidelines be overturned upon an appeal of the judgement, it might affect the outcome of the appeal judgment.

26. Accordingly, the Chamber is satisfied that the requirements for granting certification to appeal as articulated in Rule 73(B) are met in the present case.

**FOR THE ABOVE MENTIONED REASONS, THE CHAMBER**

**I. REJECTS** the Defence Request to stay proceedings in the absence of Joseph Nzirorera;

**II. GRANTS** in part the Defence Request to reconsider its Decision so that the cross-examination by Defence Counsel for Joseph Nzirorera of Witness Jean Bosco Twahirwa be postponed;

<sup>22</sup> *Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible' (TC), 18 March 2004, para. 15; *Prosecutor v. Nyiramasuhuko et al.*, Case No ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 10.

<sup>23</sup> *Karemera et al.*, Decision on Defence Motion for Certification to Appeal Decision Granting Special Protective Measures for Witness ADE (TC), 7 June 2006, para. 5.

**III. GRANTS** the Defence Motion for certification to appeal the present Decision in all aspects, including the standards set out by this Chamber to continue hearing evidence in the absence of an accused.

Arusha, 11 July 2007, done in English.



Dennis C. M. Byron

Presiding Judge



Gberdao Gustave Kam

Judge



Vagn Joensen

Judge



