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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: 3 March 2009

THE PROSECUTION

v.

Édouard KAREMERA
Matthieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

DECISION ON CONTINUATION OF TRIAL

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

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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

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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 maintient 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

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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

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11 T. 25August 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.

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]

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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.

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]

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28 Interoffice Memorandum, Interim Medical Report for Mr. Mathieu Ngirumpatse, from Dr. Épée Hernadez, 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.

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

foreseeable future, if ever, involves a balancing of several legal principles. The primary concern is that the decision must not violate the fundamental right of all three Accused to a fair trial pursuant to Article 20(2) of the Statute or unfairly violate the right of the Co-Accused, Édouard Karemera and Joseph Nzirorera, to be tried without undue delay pursuant to Article 20(4)(c) of the Statute.

29. In the *Bizimungu et al.* case, the Trial Chamber stated that the "Accused's right to be tried without undue delay should be balanced with the need to ascertain the truth about the serious crimes with which the Accused is charged."[36] In the same case, the Appeals Chamber stated that the fundamental purpose of the Tribunal must not be taken into account as a factor when determining whether there has been undue delay.[37]

30. A finding of undue delay depends on the circumstances of each case.[38] A joint trial might last longer than that of a single accused case without necessarily infringing upon the right to be tried without undue delay. According to the Appeals Chamber in *Bizimungu et al.*, the determination of whether an accused person's right to be tried without undue delay has been violated must necessarily include a consideration of, *inter alia*: the length of the delay; the complexity of the proceedings such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, and the complexity of facts and law; the conduct of the parties; the conduct of the relevant authorities; and the prejudice to the accused, if any.[39]

31. In the *Bizimungu et al.* case, the Trial Chamber held that when making a determination as to whether there has been undue delay, a chamber will only consider delay that has already occurred and will not speculate on whether an accused's right to trial without undue delay

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[36] *Mugenzi*, Case No. ICTR-99-50-I, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), dated 8 November 2002 but filed on 11 November 2002, para. 32.

[37] Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 denying the Motion to Dismiss the indictment, Demand Speedy trial and for Appropriate relief (AC), 27 February 2004, p. 3.

[38] *Mugenzi*, Case No. ICTR-99-50-I, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)) (TC), dated 8 November 2002 but filed on 11 November 2002, para. 33.

[39] *Bizimungu et al.*, Case No. ICTR-99-50, Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance (TC), 14 June 2007, para. 11; Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 denying the Motion to Dismiss the indictment, Demand Spee dy trial and for Appropriate relief (AC), 27 February 2004, p. 3; *Ngirumpatse et al.*, Case No. ICTR-98-44, Decision on Prosecutor's Motion for Joinder of Accused and on the Prosecutor's Motion for Severance of the Accused (TC), 29 June 2000, para. 38; *Bagosora et al.*, Case No. ICTR-98-41, Decision on the Prosecutor's Request for Leave to Amend the Indictment (TC), 23 October 1999.

might be violated at a future date.[40] Further, the reasonableness of a period of delay cannot be translated into a fixed length of time and is dependant on consideration of a number of factors.[41] A full inquiry into the role of the parties in the alleged undue delay should also be undertaken.[42]

32. However, the delays at issue in *Bizimungu et al.* were the general pace of the trial and not delays caused by the inability of an accused to attend trial for a lengthy period. In the present case, the Chamber finds it relevant to also take into consideration that a stay of proceedings for Matthieu Ngirumpatse to be fit to attend trial again, will, according to the doctor's assessment, in the best case result in a further delay of nine months in addition to the current delay of six months.

33. Matthieu Ngirumpatse, in support of his request for a further stay of proceedings, refers extensively to the *Stanišić* case. He argues that in the *Stanišić* case the Appeals Chamber held that, with respect to the fundamental rights of the accused, a three-month stay of proceedings was the best solution.[43] Following this holding, the Trial Chamber decided to order a further three-month stay, which amounted to a ten-month stay, as a result of Stanišić's health situation.[44]

34. The Chamber has undertaken a careful review of the current proceedings and considers that the reasons that led the Chamber to order further stay of proceedings in the *Stanišić* case do not apply to the present instance. The Chamber notes that in the *Stanišić* case, the trial commenced on 28 April 2008 and was adjourned on 16 May 2008. At that time, only one Prosecution witness had been heard by the Trial Chamber which considered that the case would have to recommence and that consequently the case was still at pre-trial stage.[45] The

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40 *Bizimungu et al.*, Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance (TC), 14 June 2007, para. 14.

41 *Bizimungu et al.*, Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance (TC), 14 June 2007, para. 14; *Kanyabashi*, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of the proceedings (TC), 23 May 2000, para. 68; *Kanyabashi*, Case No. ICTR-98-42, Decision on the Defence Motion for the Provisional Release of the Accused (TC), 21 February 2001, para. 11; *Bizimungu et al.*, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of His Right to Trial Without Undue Delay (TC), 29 May 2007, para. 27.

42 Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 denying the Motion to Dismiss the indictment, Demand Speedy trial and for Appropriate relief (AC), 27 February 2004, p. 3.

43 Ngirumpatse's Submissions, para.46-47.

44 Ngirumpatse's Submissions, para.

45 *Stanišić and Simatović*, Case IT-03-69-PT, Decision on Provisional Release (TC), 26 May 2008, para. 62-63.

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Accused had not participated at all in the trial proceedings.[46] Both Accused were provisionally released until the commencement of the trial.

35. In contrast, in the present case, the three Accused have been in detention since 1998 and in trial since November 2003. The current trial started on 19 September 2005 and is at a much more advanced stage than in *Stanišić*. The Prosecution finished presenting its case at the end of 2007 and the first Accused has started to present his evidence. Thus a further stay of proceedings will complicate matters significantly, and cause significant prejudice to the accused.

36. Édouard Karemera and Joseph Nzirorera submit that they do not mind waiting for Matthieu Ngirumpatse's health to improve and will not suffer any prejudice from this delay. The Chamber, however, does not accept the Accused's submission that there is no prejudice from such a delay. While the Chamber accepts that the Parties' positions regarding prejudice resulting from delays are extremely important factors to take into account in a determination of this nature, they are not the sole or decisive factors. Parties may allege prejudice where a Chamber finds that there is none; equally, a party may submit that it suffers no prejudice and it is open to a Chamber to find that this is indeed the case.

37. The suspension of the proceedings has resulted in considerable difficulties for the Parties. Some of Édouard Karemera's witnesses have come to Arusha several times without being able to testify, or only after prolonged delay. For example, two of Karemera's witnesses came to Arusha on two occasions and stayed for a total of almost two months. The witnesses did not take the stand on the first occasion but did testify on the second occasion, one for less than a day and the other for two days. Others witnesses have remained in Arusha for approximately one month, only to testify for less than a day and a half. The cross-examination of one defence witness has been pending since 16 July 2008.

38. In short, the case of one accused has been brought to a halt mid-way through and the others are at a standstill. Such a situation must be assessed in light of the presumption of innocence. The Chamber finds that, given how far the trial has proceeded, and that the defence cases are prepared to proceed imminently and expected to finish within the year, it has become seriously prejudicial to simply let the accused sit in detention while Matthieu Ngirumpatse's health problems are addressed. In the circumstances, the Chamber finds that

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[46] *Stanišić and Simatović*, Case IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of the Proceedings (AC), para. 3.

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the delay in the proceedings, to this point, has become such that the rights of the accused to be tried without undue delay have been violated.

Severance

39. Pursuant to Rule 82(B), a Trial Chamber may order separate trials of persons jointly charged if (i) it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or (ii) to protect the interests of justice. It is clear from the use of the conjunctive word 'or' that either condition, if satisfied, will be sufficient to enable the Trial Chamber to make an order of severance.[47] The provisions of Sub-Rule 82(B) gives discretion to the Trial Chamber in the determination of whether an accused jointly charged should be granted separate trial.[48]

40. The Trial Chamber in the *Delalić et al.* case stated that both the preconditions of causing serious prejudice to the accused, and the protection of the interest of justice, involve the exercise of judicial discretion.[49] The same Trial Chamber considered that it was obvious from the formulations of the reasons for granting separate trials pursuant to Rule 82(B) that the overriding principle is the interest of justice.[50] The jurisprudence states that judicial economy and expediency of trials are two of the essential pre-conditions to be borne in mind when a Trial Chamber considers a case under Rule 82(B).[51]

41. An order for severance may be made after a trial has begun as the prejudice of a joint trial may only become apparent as the trial unfolds.[52] In the *Bagosora et al.* case, the Trial Chamber stated that "[a] factor militating against severance, however, is that the prejudice

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47 *Delalić et al.*, Case no. IT-96-21, Decision on the Motion by Defendant Delalić Requesting Procedures for Final Termination of the Charges Against Him (TC), 1 July 1998, para. 34.

48 *Simić et al.* Decision on Defence Motion to Sever Defendants and Counts (TC), 15 March 1999; *Brđjanin and Talić*, Decision on request to Appeal (TC), 16 May 2000; *Brđjanin and Talić*, Decision on Prosecution's Oral Request for the Separation of Trials, 20 September 2002, para. 19. *Delalić et al.*, Decision on the Motion by Defendant Delalić Requesting Procedures for Final Determination of the Charges Against Him (TC), 1 July 1998, para. 35; *Ntahobali*, Case No. ICTR-97-21-T, Decision on Ntahobali's Motion for Separate Trial (TC), 2 February 2005, para. 32. *Nyiramasuhuko and Ntahobali*, Case No. ICTR-97-21-T, Joint Case No. ICTR-98-42-T, Decision on Nyiramasuhuko's Motion for Separate Proceedings, a New Trial, and a Stay of Proceedings (TC), 7 April 2006, para. 64; *Ntabakuze*, Decision (Appeal of the Trial Chamber I "Decision on Motions by Ntabakuze for severance and to establish a reasonable schedule for the presentation of prosecution witnesses" of 9 September 2003 (AC), 28 Octobre 2003, p. 5.

49 *Delalić et al.*, Decision on the Motion by Defendant Delalić Requesting Procedures for Final Determination of the Charges Against Him (TC), 1 July 1998, para. 35.

50 *Delalić et al.*, Decision on the Motion by Defendant Delalić Requesting Procedures for Final Determination of the Charges Against Him (TC), 1 July 1998, para. 36.

51 *Brđjanin and Talić*, Decision on Motion by Momir Talić and for a separate Trial and fot Leave to File Reply, 9 March 2000, para. 26.

52 *See Brđjanin and Talić* case; *Bagosora et al.*, Decision on Motions by Ntabakuze for Severance and to Establish Reasonable Schedule for the Presentation of Prosecution Witnesses (TC), 9 September 2003, para. 20.

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was apparent or discoverable before trial and that the case has proceeded for significant period."[53]

42. Matthieu Ngirumpatse submits that the Tribunal's completion strategy cannot play any role in the determination of the interests of justice[54] The Chamber agrees and is mindful that, in the event of a conflict between the principles involved, judicial economy and expeditiousness are secondary to the right of the Accused to a fair trial.

43. The Defence submits that there is no conflict of interests between the three Accused that would justify severance. They want to continue in a joint trial.[55] Although there may not be any conflict of interests between the Accused resulting from an antagonistic defence,[56] the Chamber considers that the prejudice sustained by Édouard Karemera and Joseph Nzirorera from the further delay, if the proceedings were to be stayed until Ngirumpatse might become fit to attend trial again, constitutes a conflict of interest.

44. All three Accused submit that they will be prejudiced in the event of a severance of Ngirumpatse from the case, and that severance will not serve judicial economy. The charges against them, including the charge of being members of the same joint criminal enterprise, are closely interlinked.

45. They argue that they have divided the issues between them, in accordance with the Chamber's orders. If severance is granted, Joseph Nzirorera and Édouard Karemera will have to call a number of the witnesses on Matthieu Ngirumpatse's witness list and would need a considerable delay of proceedings to prepare this part of their defence. Similarly, in his separate trial, Ngirumpatse would have to call a number of witnesses from Nzirorera's and Karemera's witness lists.

46. The Accused further submit that witnesses who have agreed to testify in the defence of one of the Accused may not be willing to testify if called by another Accused. Each Accused may not be willing to testify if called by another Accused. Witnesses will be put under considerable hardship and suffer additional security risks if they have to come to Arusha more than once to testify and may refuse to do so. Thus severance would only benefit the

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53 *Bagosora et al.*, Decision on Motions by Ntabakuze for Severance and to Establish Reasonable Schedule for the Presentation of Prosecution Witnesses (TC), 9 September 2003, para. 28.

54 Ngirumpatse's Submissions, para. 57.

55 Ngirumpatse's Submissions, para. 34.

56 Though the jurisprudence is clear that the possibility of "mutually antagonistic defences" does not constitute a conflict of interests capable of causing serious prejudice. *See Simić et al.*, Case No. IT-95-9-PT, Decision on Defence Motion to Sever Defendants and Counts, 15 March 1999; *Brđjanin and Talić*, Case No. IT-99-36, Decision on Prosecution's Oral Request for the Separation of Trials, 20 September 2002, para. 21.

Prosecution and prejudice the Defence as a whole and have damageable and irreversible consequences.[57]

47. The Chamber does not agree that severance will induce a partial presentation of facts and evidence. On the contrary, because the Prosecution has finished the presentation of its case, each and every accused, has a clear knowledge of the case against him. Each of them will also have the opportunity to present evidence against the case presented against him by the Prosecution.

48. Joseph Nzirorera further argues that, considering that his request at the pre-trial stage for severance was denied, it would be the height of unfairness if the Trial Chamber were to allow only the Prosecution to develop a full picture of this case while depriving the Defence of developing the full picture during the Defence evidence.[58] The Chamber reminds Joseph Nzirorera that the reasons that lead it to deny him his request for severance in 2000 were very different from the situation this trial is facing at the moment.

49. The Chamber recalls that the reasons that lead it to deny Joseph Nzirorera's request for severance in 2000 were very different from the situation this trial is facing at the moment. The Chamber moreover recalls that in June 2007, Counsel for Nzirorera indicated that instead of proceeding in the absence of an accused, the Chamber should consider the alternative solution of severing the case.[59]. Then in July 2007, when Nzirorera appealed the Trial Chamber's Decision to proceed in his absence, he indicated that "[i]nstead, if [the Chamber] were concerned with the expeditiousness of the trial in face of illness of the accused which was likely to re-occur, the Trial Chamber should have considered other alternatives, such as severance of Mr. Nzirorera's case from that of his co-accused, as suggested by Mr. Nzirorera."[60]

50. The Chamber notes that some single accused persons before this Tribunal have been accused of conspiracy to commit genocide. In light of those proceedings, it is evident that ordering severance of this case will not prevent Matthieu Ngirumpatse or the two other Accused from defending themselves against the charge of conspiracy to commit genocide.[61] The Chamber considers that the same conclusion applies to the allegation of participation in a

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57 Ngirumpatse's Submissions, para. 39-42.

58 Nzirorera's Submissions, para. 35.

59 T. 27 June 2007, p. 12.

60 Joseph Nzirorera's Appeal from Decision to Proceed in the Absence of the Accused, filed 16 July 2007, para. 30.

61 *See e.g. Zigiranyirazo, Kambanda, Kajelijeli, Rugambarara* cases where single accused where charged with conspiracy to commit genocide.