



ICTR-98-44-T
11-11-2010
(52349-52340)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

52349
F

Case No. ICTR-98-44-T
English
Original: FRENCH

TRIAL CHAMBER III

Before: Judge Dennis C. M. Byron, presiding
Judge Gberdao Gustave Kam
Judge Vagn Joensen

Registrar: Adama Dieng

Date: 27 October 2010

The Prosecutor

v.

Édouard Karemera

Matthieu Ngirumpatse

JUDICIAL RECORDS/ARCHIVES
UNICTR
2010 NOV 11 A 8:41
X
[Signature]

Decision on Matthieu Ngirumpatse's Motions Relating to his Witnesses and the Admission of Written Statements

Rules 73 *ter* (E) and 92 *bis* of the Rules of Procedure and Evidence

Office of the Prosecutor:
Don Webster
Takeh Sendze
Maria Wilson

Defence Counsel for Édouard Karemera:
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Matthieu Ngirumpatse:
Chantal Hounkpatin and Frédéric Weyl

CIII10-0159 (E)

Translation certified by LSS, ICTR

52348

INTRODUCTION

1. On 14 September 2010, Matthieu Ngirumpatse filed a motion to vary his list of witnesses.¹
2. On 11 October 2010, Matthieu Ngirumpatse requested the Chamber to reconsider its Decisions of 11 November 2009 and 1 September 2010, in which it refused to admit a number of written statements, pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence. He requests that the written statements be admitted in their entirety or, alternatively, that some of them be admitted in their redacted form. Still, in the alternative, he requests that the persons who made certain written statements be added *viva voce* to his list of witnesses. Matthieu Ngirumpatse further requests that the Chamber admit two written statements that he did not attach to his original motion, as well as two new written statements.²
3. On 12 October 2010, Matthieu Ngirumpatse filed a motion, requesting that two witnesses who were on the list of Joseph Nzirorera, who was deceased,³ be added to his list of witnesses. The next day, he filed a supplemental motion for the addition of two other witnesses.⁴ In an e-mail of 12 October 2010, the Prosecutor stated that he was not opposed to Matthieu Ngirumpatse's initial motion.
4. Following instructions from the Chamber, Matthieu Ngirumpatse also filed his observations in respect of Witness LA.⁵
5. The Prosecutor filed a response on 20 October 2010 in which he addressed issues relating to Matthieu Ngirumpatse's request to vary his witness list.⁶ Matthieu Ngirumpatse filed a reply thereto on 25 October 2010.⁷

DELIBERATIONS

6. As a preliminary matter, the Chamber notes that although most of the documents were filed confidentially, there is no reason, in the instant case, why this decision should not be public.

¹ *Requête de Matthieu Ngirumpatse suite à la décision du 30 septembre 2010*, filed on 14 October 2010.

² *Requête de Matthieu Ngirumpatse suite à la décision du 30 septembre 2010*, filed on 11 October 2010 ("Motion Relating to the Written Statements").

³ *Deuxième requête de Matthieu Ngirumpatse suite à la décision du 1^{er} septembre 2010*, filed on 12 October 2010 ("First Motion for Adoption of Witnesses").

⁴ *Complément à la deuxième requête de Matthieu Ngirumpatse suite à la décision du 30 septembre 2010*, filed on 13 October 2010 ("Second Motion for Adoption of Witnesses").

⁵ *Observations de M. Ngirumpatse suite à la décision de la Chambre du 30 septembre 2010 sur l'audition du témoin LA*, filed on 5 October 2010.

⁶ Prosecutor's Response to "*requête de Matthieu Ngirumpatse suite à la décision du 30 septembre 2010, modification de la liste des témoins*", filed on 20 October 2010.

⁷ *Réplique de Matthieu Ngirumpatse à la réponse du Procureur à sa requête suite à la décision du 30 septembre 2010*, filed on 25 October 2010.

Motion for reconsideration for the admission of written statements in their entirety

52347

7. The Chamber has inherent power to reconsider its own decisions. However, the Chamber uses such power only in exceptional circumstances.⁸ Thus, the Chamber may reconsider one of its decisions if a new fact is discovered that was not known to the Chamber at the time of the decision, or where there is reason to believe that the previous decision was erroneous or constituted an abuse of power thereby occasioning injustice on the part of the Chamber and, therefore, warranting reconsideration.⁹

8. Matthieu Ngirumpatse submits that the Chamber's decision extends beyond the Prosecutor's objections to his requests for admission of written statements.¹⁰ It falls to the Moving Party to satisfy the Chamber that the motions filed are well-founded. It is not sufficient to state that a motion has been filed pursuant to the law, without showing how it meets the established requirements, in order to convince the Chamber that a motion is actually well-founded. Matthieu Ngirumpatse has not demonstrated that the requirements for reconsideration have been met in the instant case. The Chamber therefore refuses to admit all the written statements of Witnesses PNE, FSU, V14, RGF and FRW (Decision of 11 November 2009) and Witnesses EFT, YLH, VG, NKL-Alain Marie Ghislain De Brouwer, LAT, BR7, 409, PBR, LAC, CH1, ZRT, AH1, CT, AHJ, 521, WEJ, AHK, KNK, ROL, AHM, FRZ, BRF, MBA, WCJ, HBW, BR5 LIB, ZNB, ZNW, PBQ, BFP, Z1 and Z2.

Motion for admission of redacted versions of previously rejected written statements

9. In its Decision of 30 September 2010, the Chamber granted leave to Matthieu Ngirumpatse to file redacted versions of the written statements that were held inadmissible because they contained evidence which has to do with the acts and conduct of the Accused as charged in the Indictment.¹¹

10. Matthieu Ngirumpatse, in fact, filed 26 redacted statements.

Redacted statements of EFT, VG, LAT, BR7, 409, PBR, CHI, ZRT, 521, WEJ, AHK, FRZ, MBA, WCJ, HBW, BR5, LIB, ZNB, ZNW, PBQ, BFP, BRF and Z2

11. The Prosecutor contends that Matthieu Ngirumpatse complied with the Chamber's decision with respect to 21 of the redacted statements.¹²

⁸ *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Reconsideration of 2 December 2008 Decision, 27 February 2009, para. 2.

⁹ *Karemera and consorts*, Decision on Joseph Nzirorera's Second Motion for Finding of "No Case to Answer" and Motion for Reconsideration, 3 June 2008, para.5; Decision on Reconsideration of Protective Measures for Prosecution Witnesses, 30 October 2006, para. 2; *The Prosecutor v. Augustin Ndindiyimana, François-Xavier Nzuwonemeye, and Innocent Sagahutu* ("*Ndindiyimana et al.*"), Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials, 3 November 2004, para. 21.

¹⁰ Motion relating to written statements, para. 34.

¹¹ *Karemera et al.*, Decision on "*Requête de Matthieu Ngirumpatse visant à la certification de la Décision du 1 septembre 2010*", 30 September 2010.

¹² Prosecutor's Response to "*Requête de Matthieu Ngirumpatse suite à la Décision du 30 Septembre 2010*", filed on 15 October 2010, para. 21.

12. After analyzing the said redacted statements attached to Matthieu Ndirumpatse's motion, the Chamber finds that the statements of EFT, VG, LAT, BR7, 409, PBR, CHI, ZRT, 521, WEJ, AHK, MBA, WCJ, BR5, LIB, ZNB, ZNW, PQB, BFP, BRF, FRZ, HBW and Z2 no longer contain assertions relating to the acts and conduct of the Accused as charged in the Indictment which prevent their admission under Rule 92 *bis* of the Rules. The Chamber therefore finds these statements admissible, provided that the certification formalities set out in Rule 92 *bis* (B) of the Rules are fulfilled.

13. With regard to the redacted statements of PBR, CHI, 521, WEJ, MBA, WCJ, FRZ and HBW, the Chamber, owing to the content of the proposed testimony, finds them admissible, subject to the persons who made the statements being cross-examined and to the certification formalities provided for in Rule 92 *bis* (B) of the Rules being fulfilled.

Other redacted statements

14. The Chamber finds AHM's statement admissible, subject to the fulfilment of the certification formalities provided for in Rule 92 *bis* (B) of the Rules and provided that the phrase "[i]n 1992, for instance, I saw Matthieu Ndirumpatse at one of those meetings] is also redacted.

Motion for admission of the written statements of FO and SDA that were not filed

15. In its Decision of 1 September 2010, the Chamber refused to admit the written statements of FO and SDA because Matthieu Ndirumpatse had indicated in his motion of 28 June 2010 that he would file them subsequently, whereas on the day of the decision he had not yet done so.¹³

16. The Prosecutor objects to their admission because of Matthieu Ndirumpatse's failure to present all his arguments in his initial motion. Regarding FO, the Prosecutor submits that his statement contains evidence relating to the acts and conduct of the Accused as charged in the Indictment.¹⁴

17. The Chamber notes that Matthieu Ndirumpatse tendered the written statements of FO and SDA, which were dated 15 July 2010 and 20 May 2010, respectively. Matthieu Ndirumpatse provides no explanation for his inability to file the statements, so as to enable the Chamber to rule on them on 1 September 2010. While the Chamber would be quite right to refuse to consider the two written statements, it believes that it is in the interests of justice to consider them, so that Matthieu Ndirumpatse does not suffer any prejudice.

18. With respect to the written statement of FO, the Chamber finds that it contains passages relating to the acts and conduct of the Accused as charged in the Indictment, notably vis-à-vis allegations of incitement to kill the Tutsi and stir up hatred towards them. The statement also contains allegations of evidence fabrication which public interest demands that they be heard orally.

¹³ *Karemera et consorts*, Decision of 1 September 2010 (French), para. 10.

¹⁴ Prosecutor's Response.

52345

In the Chamber's opinion, this statement can be admitted only if passages touching on the acts and conduct of the Accused as charged in the Indictment and on evidence fabrication are expunged therefrom. Its admission is also subject to its certification in accordance with Rule 92 *bis* (B) of the Rules.

19. With regard to the written statement of SDA, the Chamber considers that it is relevant and has probative value, for it touches on Matthieu Ngirumpatse's personality; it does not contain evidence relating to the acts and conduct of the Accused as alleged in the Indictment. SDA's statement is admissible, subject to its certification in accordance with Rule 92 *bis* (B) of the Rules.

Motion to vary witness list

20. The Chamber recalls that Rule 73 *ter* (E) of the Rules provides that after commencement of the Defence case, the Defence, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to vary its initial list. In rendering its decision, the Chamber must take into consideration such factors as the importance of the proposed testimony, the complexity of the case, the possibility of causing prejudice to the other Parties, ongoing investigations, replacement of witnesses and corroboration of their accounts.¹⁵

New written statements of Z3 and SPI

21. Matthieu Ngirumpatse requests the Chamber to admit the statements of Z3 and SPI, claiming that they are both consistent with Rule 92 *bis* of the Rules.¹⁶ The Prosecutor objects to their admission on grounds that the persons who made them are not on Matthieu Ngirumpatse's witness list and that Z3's statement relates to the acts and conduct of the Accused as charged in the Indictment.¹⁷

22. The Chamber, first of all, notes that neither SPI nor Z3 appears on Matthieu Ngirumpatse's witness list. The Chamber therefore believes that before examining the admissibility of the written statements of SPI and Z3, it must verify whether it is in the interests of justice to grant Matthieu Ngirumpatse leave to vary his witness list and therein include SPI and Z3.

23. The Chamber notes Matthieu Ngirumpatse's submission that the proposed testimony of Z3 is of a cumulative nature vis-à-vis the statements of Léonidas Murembya and Gustave Mbonyumutwa, as well as the anticipated statement of YBZ. He contends that SPI's testimony cumulates notably with Pascal Ndengejeho's evidence.¹⁸ The Chamber finds that Matthieu Ngirumpatse has not established the factors that justify a variation of his witness list, to enable him to include Z3 and SPI. However, the Chamber considers that the admission of SPI's written statement on the political context of Rwanda, mainly prior to the 1994 events, would not cause prejudice to the other Parties in

¹⁵ *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E), 26 June 2003, para. 14; Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E), 21 May 2004, paras. 8 to 14.

¹⁶ Motion relating to written statements, paras. 164 to 170 (French version).

¹⁷ Prosecutor's Response, paras. 24 to 29.

¹⁸ Motion relating to written statements, paras. 164 and 168 (French version).

52344

this case. With regard to the written statement of Z3, the Chamber is of the view that it is relevant and has probative value, and that its admission will not cause prejudice to the other Parties. However, this statement contains portions relating to the acts and conduct of the Accused as charged in the Indictment, and such portions must be redacted for the said statement to be admissible. The Chamber further considers that, in view of the content of the proposed testimony, it is necessary to cross-examine Z3.

Motion for adoption of written statements filed by Joseph Nzirorera

24. The Chamber notes that both Witnesses 40a and Godelieve Barushwanubusa were Joseph Nzirorera's witnesses, whose written statements it had found admissible under Rule 92 *bis* of the Rules, on condition that they appear for cross-examination by the Prosecutor. The Prosecutor does not object to their addition to Matthieu Ndirumpatse's witness list.

Witness 40a (PR)

25. The Chamber recalls that it has already acknowledged that the transcripts of Witness 40a that it held admissible, subject to the witness' appearance for cross-examination, covered, *inter alia*, issues touching on various MRND rallies and relations between MRND and the *Interahamwe*. Indeed, these are issues which concern Matthieu Ndirumpatse particularly. Considering that this witness was among the witnesses that were still to be heard in Joseph Nzirorera's defence case, calling him to testify at this late phase of the trial does not cause prejudice to the other Parties. Consequently, the Chamber grants leave to add this witness to Matthieu Ndirumpatse's witness list and directs that he be heard under the same circumstances as had already been ordered previously by the Chamber on 24 May 2010.

Godelieve Barushwanubusa (BAR)

26. On 15 July 2009, the Chamber found Godelieve Barushwanubusa's written statement admissible, subject to his appearance for cross-examination.¹⁹ The proposed testimony concerns MRND's alleged weapons trafficking, which is at the core of the charges against Matthieu Ndirumpatse. Considering that this witness was among the witnesses that were still to be heard in Joseph Nzirorera's defence case, calling him to testify at this late phase does not cause prejudice to the other Parties. Consequently, the Chamber grants leave to add this witness to Matthieu Ndirumpatse's witness list and directs that he be heard under the same circumstances as had already been ordered previously by the Chamber on 15 July 2009.

¹⁹ *Karemera et al.*, Decision on Joseph Nzirorera's Motions for Admission of Written Statements and Witness Testimony, 15 July 2009, paras. 54 and 55.

52343

Jean-Baptise [sic] Ndahihoranye

27. Matthieu Ngirumpatse submits that initially, as far back as 7 April 2008, Jean-Baptise [sic] Ndahihoranye was on his witness list. However, since Joseph Nzirorera decided to call him to testify, he had to drop him from his own list.²⁰

28. The Chamber recalls that this witness was, in fact, supposed to testify for Joseph Nzirorera on issues that touch on Matthieu Ngirumpatse's defence in order to counter the incriminating evidence given, in particular, by Witness UB. These are issues that concern Matthieu Ngirumpatse's defence case. The Chamber acknowledged that it was in the interests of justice to hear him, and laid down conditions for his hearing, which had to be done by video-link. The Chamber considers that it is in the interests of justice to grant Matthieu Ngirumpatse leave to add him to his witness list. Furthermore, considering that Jean-Baptise [sic] Ndahihoranye was among the witnesses that were still to be heard in Joseph Nzirorera's defence case, calling him to testify at this late phase of the trial does not cause prejudice to the other Parties. Consequently, the Chamber grants leave to add this witness to Matthieu Ngirumpatse's witness list and directs that he be heard by video-link.

Charles Bandora

29. The Chamber recalls that it had refused to admit Charles Bandora's written statement on the basis of Rule 92 *bis* of the Rules.²¹ The Chamber also recalled that Charles Bandora was not on Joseph Nzirorera's witness list.²² Joseph Nzirorera clearly indicated on his last witness list, filed on 10 May 2010, that Charles Bandora was not on his list of witnesses authorized by the Chamber.²³ Additionally, the Chamber notes Matthieu Ngirumpatse's submission that Charles Bandora's testimony would refute Witness HH's allegations that Matthieu Ngirumpatse attended a meeting during which HH was introduced as president of the *Interahamwe* of his *secteur*.²⁴ However, Matthieu Ngirumpatse has failed to show how it would be in the interests of justice to grant him leave to vary his list of witnesses to include Charles Bandora. Consequently, the Chamber denies Matthieu Ngirumpatse's request.

Motion for addition of new witnesses to his witness list viva voce

30. Matthieu Ngirumpatse seeks leave to add new witnesses to his witness list *viva voce*. They are Witnesses ZNQ, KAH, 523 and SAB. The Chamber, however, notes that Matthieu Ngirumpatse has not advanced any arguments in respect of any of these four witnesses that could justify a variation of his witness list to include them. With regard to Witness 523, Matthieu Ngirumpatse does

²⁰ Second Motion for adoption of witnesses, para. 2.

²¹ *Karemera et al.*, Decision on Joseph Nzirorera's Motions for Admission of Written Statements and Witness Testimony, 15 July 2009.

²² *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Variation of his Witness List, 7 April 2010.

²³ Joseph Nzirorera's Updated Expected Order of Appearance for Remaining Witnesses and Motion for Permission to Exceed 55 Witnesses, filed on 10 May 2010.

²⁴ Second motion for adoption of witnesses, para. 4.

52342

not even mention the content of the proposed testimony. Consequently, the Chamber denies Matthieu Ngirumpatse's motion to add ZNQ, KAH, 523 and SAB to his witness list *viva voce*.

Witness LA

31. The Chamber notes the submissions filed by Matthieu Ngirumpatse concerning Witness LA, whose testimony was admitted pursuant to Rule 92 *bis* of the Rules, upon a motion by Joseph Nzirorera. Considering that the issues covered during his testimony were not addressed in the already-admitted transcripts, the Chamber grants Matthieu Ngirumpatse leave to recall the witness.

Reconsideration of the decision to hear YLH by video-link

32. On 18 October 2010, the Chamber granted leave for addition of YLH to Matthieu Ngirumpatse's witness list *viva voce*. However, the Chamber denied his request to hear the witness by video-link, since Matthieu Ngirumpatse had filed no supporting document. After the decision was rendered, the Chamber received fresh information on this witness and is now satisfied that there is a valid reason preventing the witness from going to Arusha. In fact, the name of YLH is on the list of persons wanted by Rwanda for genocide and the Chamber is of the view that a safe conduct did not afford him the necessary protection given his situation. The Chamber therefore orders that this witness be heard by video-link.

Non-payment of fees and costs

33. The Chamber considers that it is proper to withhold the payment of all fees and costs associated with the motion for reconsideration of the 1 September 2010 Decision and the applications for admission of new written statements.

FOR THESE REASONS, THE CHAMBER,

- I. **GRANTS IN PART** the various requests filed by Matthieu Ngirumpatse relating to his witness list.
- II. **FINDS ADMISSIBLE** the redacted written statements of EFT, VG, LAT, BR7, 409, PBR, CHI, ZRT, 521, WEJ, AHK, MBA, WCJ, BR5, LIB, ZNB, ZNW, PQB, BFP, Z2, BRF and SPI, subject to the fulfilment of the certification formalities set out in Rule 92 *bis* of the Rules, and to the filing of the identification forms of the persons who made the statements.
- III. **FINDS ADMISSIBLE** SDA's written statement, subject to the fulfilment of the certification formalities set out in Rule 92 *bis* of the Rules, and to the filing of the identification form of the person who made the statement.
- IV. **FINDS ADMISSIBLE** FO's written statement, subject to the fulfilment of the certification formalities set out in Rule 92 *bis* of the Rules and to the filing of the identification form of the person who made the statement inasmuch as portions relating to the acts and conduct of the Accused as charged in the Indictment and to evidence fabrication are expunged therefrom.
- V. **FINDS ADMISSIBLE** Z3's written statement, subject to the fulfilment of the certification formalities set out in Rule 92 *bis* of the Rules, the filing of the identification form of the

Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse, Case No. ICTR-98-44-T

CIII10-0159 (E)

person who made the statement and to his appearance for cross-examination, inasmuch as the portions relating to the acts and conduct of the Accused as charged in the Indictment and to evidence fabrication are expunged therefrom.

- VI. **FINDS ADMISSIBLE** AHM's redacted written statement, barring the sentence that begins with the words "[i]n 1992, for instance, I saw Matthieu Ngirumpatse at one of those meetings", subject to the fulfilment of the certification formalities set out in Rule 92 *bis* of the Rules and to the filing of the identification form of the person who made the statement.
- VII. **FINDS ADMISSIBLE** the written statements of Witnesses PBR, CHI, 521, WEJ, MBA, WCJ, FRZ and HBW, subject to certification of the statements under the conditions prescribed by Rule 92 *bis* of the Rules during their appearance before the Tribunal and to the filing of the identification forms of the persons who made the statements, insofar as the witnesses appear for cross-examination.
- VIII. **ORDERS** Matthieu Ngirumpatse to file, in open court, the written statements found admissible, once the certification formalities are fulfilled by redacting, if need be, identifying information about the persons who made the statements.
- IX. **GRANTS LEAVE TO** Matthieu Ngirumpatse to add Witnesses 40a and Godelieve Barushwanubusa to his witness list and **ORDERS** that the witnesses appear for cross-examination.
- X. **ORDERS** that the Prosecutor will have one hour to cross-examine PBR, CHI, 521, WEJ, MBA, WCJ, FRZ, HBW, Z3, 40a and Godelieve Barushwanubusa, while Matthieu Ngirumpatse will have 15 minutes to re-examine each witness.
- XI. **ORDERS** that formalities for certification of the written statements admitted, subject to the witness's appearance for cross-examination, be done when the witness appears before the Tribunal.
- XII. **GRANTS LEAVE TO** Matthieu Ngirumpatse to add Jean-Baptise [*sic*] Ndahihoranye to his witness list *viva voce*.
- XIII. **FINDS** that the application to vary his witness list, so as to add YLH, lacks merit.
- XIV. **ORDERS** that YLH be heard by video-link.
- XV. **DENIES** Matthieu Ngirumpatse's motions in all other respects.
- XVI. **ORDERS** the Registrar to withhold payment of all fees and costs associated with the motion for reconsideration of the 1 September 2010 Decision and the applications for admission of new written statements.

52340

Done in Arusha on this 27th day of October 2010, in French.

[Signed]

Dennis C. M. Byron
Presiding Judge

[Signed]

Vagn Joensen
Judge

[Signed]

Gberdao Gustave Kam
Judge

