



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

3656/H

ICTR-98-44-AR50  
24 September 2010  
{3656/H - 3647/H}

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding  
Judge Fausto Pocar  
Judge Liu Daqun  
Judge Theodor Meron  
Judge Carmel Agius

ICTR Appeals Chamber  
Date: 24<sup>th</sup> September 2010  
Action: R. Shamba  
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Registrar: Mr. Adama Dieng

Decision of: 24 September 2010

ÉDOUARD KAREMERA  
MATTHIEU NGIRUMPATSE

v.

THE PROSECUTOR

Case No. ICTR-98-44-AR50

**DECISION ON INTERLOCUTORY APPEAL OF ÉDOUARD KAREMERA  
AND MATTHIEU NGIRUMPATSE AGAINST ORAL DECISION OF  
23 AUGUST 2010**

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of interlocutory appeals filed by Édouard Karemera<sup>1</sup> and Matthieu Ndirumpatse<sup>2</sup> on 2 September 2010, against the oral decision of Trial Chamber III of the Tribunal ("Trial Chamber") of 23 August 2010<sup>3</sup> and the accompanying "Reasons for Oral Decision of 23 August 2010 and on Oral Applications for Certification to Appeal".<sup>4</sup> The Prosecution responded on 13 September 2010.<sup>5</sup> Karemera and Ndirumpatse replied respectively on 17 September 2010.<sup>6</sup>

#### A. Background

2. On 1 July 2010, Joseph Nzirorera, one of the co-Accused in the *Karemera et al.* trial, died.<sup>7</sup> As a result, the Trial Chamber cancelled the remainder of the trial session and postponed the commencement of Ndirumpatse's defence case until the following trial session, beginning on 23 August 2010.<sup>8</sup>

3. On 13 August 2010, the Trial Chamber terminated the proceedings against Nzirorera.<sup>9</sup> Following this decision, Ndirumpatse and Karemera filed motions requesting the Trial Chamber to order the Prosecution to amend the Indictment to remove all references to Nzirorera as an accused

<sup>1</sup> *Soumission en appel de Édouard Karemera contre la décision orale du 23 août 2010 et la décision « Reasons for Oral Decision of 23 August 2010 and on Oral Applications for Certification to Appeal », 2 September 2010 ("Karemera Appeal").*

<sup>2</sup> *Appel urgent de M. Ndirumpatse contre la décision orale de la Chambre de première instance N°III en date du 23 août 2010 statuant sur la poursuite du procès, et demande de suspension de la procédure, 2 September 2010 ("Ndirumpatse Appeal").*

<sup>3</sup> *The Prosecutor v. Édouard Karemera and Matthieu Ndirumpatse*, Case No. ICTR-98-44-T, T. 23 August 2010 p. 18 ("Impugned Decision").

<sup>4</sup> *The Prosecutor v. Édouard Karemera and Matthieu Ndirumpatse*, Case No. ICTR-98-44-T, Reasons for Oral Decision of 23 August 2010 and on Oral Applications for Certification to Appeal, 26 August 2010 ("Reasons for Impugned Decision"). See also *The Prosecutor v. Édouard Karemera and Matthieu Ndirumpatse*, Case No. ICTR-98-44-T, Corrigendum to Reasons for Oral Decision of 23 August 2010 and on Oral Applications for Certification to Appeal, 1 September 2010.

<sup>5</sup> Prosecutor's Consolidated Response to "*Appel Urgent de M. Ndirumpatse contre la décision orale de la Chambre de première instance No III en date du 23 Août 2010 statuant sur la poursuite du procès, et demande de suspension de la procédure*" and *Soumission en Appel de Édouard Karemera contre la décision orale du 23 Août 2010 et la décision: Reasons for Oral Décision [sic] of 23 August 2010 and an Oral Application for Certification to Appel [sic]*", 13 September 2010 ("Prosecution Response").

<sup>6</sup> *Réplique de Édouard Karemera à la « Prosecutor's Consolidated Response », 17 September 2010 ("Karemera Reply"); Réplique de M. Ndirumpatse à la réponse consolidée du procureur sur l'appel urgent contre la décision orale de la Chambre de première instance N°III en date du 23 août 2010, 17 September 2010 ("Ndirumpatse Reply").*

<sup>7</sup> See *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision Relating to Registrar's Submission Notifying the Demise of Accused Joseph Nzirorera, 13 August 2010 ("Decision Terminating Proceedings Against Nzirorera"), para. 1.

<sup>8</sup> See Reasons for Impugned Decision, para. 1.

<sup>9</sup> Decision Terminating Proceedings Against Nzirorera.

and to remove all paragraphs of the indictment relating to allegations against Nzirorera.<sup>10</sup> Ngirumpatse and Karemera further requested the Trial Chamber to remove from the trial record all evidence adduced by the Prosecution against Nzirorera or by Nzirorera and to stay the proceedings pending the determination of these matters.<sup>11</sup>

4. On 23 August 2010, the Trial Chamber issued an oral decision determining that the evidence already adduced would remain on the trial record and rejecting the request to stay the proceedings.<sup>12</sup> It also ordered the Prosecution to amend the Indictment by removing Nzirorera's name from the title and the counts of the Indictment, by deleting any reference to him as an accused in the case, and by referring to Nzirorera's name in a normal rather than bold font<sup>13</sup> in order to indicate that he was not a co-Accused. The Prosecution filed an amended Indictment the same day.<sup>14</sup> On 26 August 2010, the Trial Chamber issued written reasons for its oral decision and granted Karemera and Ngirumpatse certification to appeal.<sup>15</sup>

#### B. Submissions

5. Karemera requests the Appeals Chamber to order the Prosecution to amend the Indictment to remove all specific allegations against Nzirorera and all allegations common to the co-accused in relation to which the Prosecutor only adduced evidence against Nzirorera.<sup>16</sup> He further submits that Nzirorera's name should be removed from the *chapeau* paragraphs of the Indictment.<sup>17</sup> Karemera also argues that all Prosecution and Defence evidence which is specific to Nzirorera should be removed from the trial record.<sup>18</sup> In this regard, he asserts that the Trial Chamber should decide whether to maintain as part of the record exhibits tendered into evidence by Nzirorera's counsel that are common to the three co-Accused.<sup>19</sup>

6. In support of his Appeal, Karemera argues that the Trial Chamber erred in relying on the *Norman et al.* case before the Special Court for Sierra Leone, which retained all the evidence on the

<sup>10</sup> *The Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse*, Case No. ICTR-98-44-T, *Requête sur la nécessité de modifier l'acte d'accusation et de retirer les éléments de preuve devenus sans objet*, 23 August 2010, para. 29; *The Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse*, Case No. ICTR-98-44-T, *Mémoire pour Matthieu Ngirumpatse à la suite de l'ordonnance du 12 août 2010*, 20 August 2010, para. 26.

<sup>11</sup> *Idem.*

<sup>12</sup> Impugned Decision.

<sup>13</sup> *Idem.*

<sup>14</sup> *The Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse*, Case No. ICTR-98-44-T, Prosecutor's Submission of Eighth Amended Indictment pursuant to Trial Chamber III Order of 23 August 2010, 23 August 2010 ("Indictment of 23 August 2010").

<sup>15</sup> Reasons for Impugned Decision, p. 7. See also *The Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse*, Case No. ICTR-98-44-T, T. 24 August 2010 p. 10.

<sup>16</sup> Karemera Appeal, paras. 34, 79.

<sup>17</sup> Karemera Appeal, para. 79.

<sup>18</sup> *Idem.*

<sup>19</sup> Karemera Appeal, para. 80. See also Karemera Reply, para. 33.

trial record after the death of Samuel Hinga Norman, who was one of the co-accused in that case.<sup>20</sup> In this regard, he points to the fact that the trial in that case had been finished for three months when Norman died whereas the trial is ongoing in the present case.<sup>21</sup> He contends that the Trial Chamber similarly erred in relying on the *Brdanin* case.<sup>22</sup> He recalls that accused in joint trials are to be accorded the same rights as if they were being tried separately.<sup>23</sup> He asserts that an accused should not be held responsible for a co-accused's criminal responsibility, and he contends that maintaining the Indictment and evidence as they currently stand has this effect and requires him to defend the case against Nzirorera.<sup>24</sup> Karemera submits that the fact that joint criminal enterprise is pleaded does not change this fact or relieve the Prosecution from proving that each accused was individually part of the joint criminal enterprise.<sup>25</sup> He further asserts that the co-Accused in his case did not pursue a joint defence strategy.<sup>26</sup> He argues that the Impugned Decision violates the principle of equality of arms and his right to be informed precisely and in detail of the charges against him and to make submissions in relation to the Indictment.<sup>27</sup>

7. Karemera also submits that the Appeals Chamber should declare all hearings undertaken since 23 August 2010 on the basis of the Indictment of 23 August 2010 to be void and order the suspension of the trial to remedy the prejudice and to allow the Defence time to examine the new Indictment.<sup>28</sup>

8. Ngirumpatse requests the Appeals Chamber to reverse the Impugned Decision and to decide upon the issues of the amendment of the Indictment, the status of the evidence adduced in relation to Nzirorera, and the suspension of the proceedings, or alternatively, to remand these matters to the Trial Chamber.<sup>29</sup> He further seeks a stay of proceedings in light of the grave violation of his right to a fair trial resulting from the continuation of the trial on the basis of a challenged Indictment and evidence on the record.<sup>30</sup>

9. Ngirumpatse submits that the present case is similar to the separation of an accused from a joint trial and recalls that when André Rwamakuba was separated as an accused from the present

<sup>20</sup> Karemera Appeal, paras. 10, 13, 15, referring to *Prosecutor v. Samuel Hinga Norman et al.*, Case No. SCSL-04-14-T, Decision on Registrar's Submission of Evidence of Death of Accused Samuel Hinga Norman and Consequential Issues, 21 May 2007 ("*Norman et al.* Decision"). See also Karemera Reply, paras. 2-7.

<sup>21</sup> Karemera Appeal, paras. 11, 12, 14. See also Karemera Reply, paras. 6, 7, 34, 35, 40.

<sup>22</sup> Karemera Reply, paras. 8-11.

<sup>23</sup> Karemera Appeal, para. 16.

<sup>24</sup> Karemera Appeal, paras. 17, 19, 28, 29. See also Karemera Appeal, paras. 36, 38, 39, 42-45, 49, 61, 64, 73; Karemera Reply, paras. 38, 41-44.

<sup>25</sup> Karemera Appeal, paras. 20-26. See also Karemera Reply, paras. 47-56.

<sup>26</sup> Karemera Appeal, paras. 45, 48, 50-55; Karemera Reply, paras. 28-32.

<sup>27</sup> Karemera Appeal, paras. 39, 66-72. See also Karemera Reply, paras. 18, 23, 25-27, 46.

<sup>28</sup> Karemera Appeal, paras. 81-83.

<sup>29</sup> Ngirumpatse Appeal, p. 13.

<sup>30</sup> Ngirumpatse Appeal, p. 13; Ngirumpatse Reply, para. 26.

case, allegations against him were completely removed from the Indictment.<sup>31</sup> Similarly, he points to other cases before the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Court in which an accused died prior to the commencement of trial and the accused's name was removed from the indictment.<sup>32</sup> With respect to the *Norman et al.* case before the Special Court for Sierra Leone, he recalls that that case differed from the present one in that the *Norman et al.* trial had finished when Norman died and that none of the parties objected to proceeding on the basis of the existing indictment and evidence.<sup>33</sup>

10. Ngirumpatse recalls that accused in joint trials are to be accorded the same rights as in separate trials and asserts that the Impugned Decision violates the principle of equality of arms.<sup>34</sup> He submits that it would be unjust for the Trial Chamber to judge allegations against Nzirorera against which he was unable to defend himself and to use such evidence to convict Ngirumpatse through the doctrine of joint criminal enterprise.<sup>35</sup> Ngirumpatse asserts that allegations in the Indictment against Nzirorera are not comparable to the listing of other names of people alleged to have been members of the joint criminal enterprise in the Indictment.<sup>36</sup> He further contends that the co-Accused did not pursue a common defence case.<sup>37</sup>

11. The Prosecution responds that the Appeals should be dismissed.<sup>38</sup> It submits that the Trial Chamber weighed the relevant legal principles and exercised its discretion consistently with the fair trial rights and judicial economy.<sup>39</sup> The Prosecution asserts that the Trial Chamber's approach to the amendment of the Indictment was consistent with that in the *Brđanin* case at the ICTY in which the indictment was amended when Momir Talić was severed from the case such that he was no longer

<sup>31</sup> Ngirumpatse Appeal, paras. 36-40, referring to *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-PT, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment, 14 February 2005 ("Decision to Sever Rwamakuba").

<sup>32</sup> Ngirumpatse Appeal, paras. 45-49, referring to *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-PT, Order Terminating Proceedings Against Mehmed Alagić, 21 March 2003; *Prosecutor v. Milan Kovačević*, Case No. IT-97-24 (no specific reference given); *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-PT, Decision on Motion by the Prosecutor for Withdrawal of Indictment Against Stipo Alilović, 23 December 1997; *Prosecutor v. Duško Sikirica et al.*, Case No. IT-95-8-I, Order Granting Leave for Withdrawal of Charges Against Nikica Janjić, Dragan Kondić, Goran Lajić, Dragomir Šaponja, and Nedjeljko Timarac, 5 May 1998; *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9 (no specific reference given); *Prosecutor v. Dragan Zelenović et al.*, Case No. IT-96-23/2 (no specific reference given); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87 (no specific reference given); *Prosecutor v. Joseph Kony et al.*, Case No. ICC-02/04-01/05, Decision to Terminate the Proceedings Against Raska Lukwiya, 11 July 2007. See also Ngirumpatse Reply, paras. 15, 20, 21.

<sup>33</sup> Ngirumpatse Appeal, paras. 50-52, referring to *Norman et al.* Decision. See also Ngirumpatse Reply, paras. 13, 14, 20.

<sup>34</sup> Ngirumpatse Appeal, paras. 34, 35. See also Ngirumpatse Reply, paras. 10, 12, 23, 24.

<sup>35</sup> Ngirumpatse Appeal, paras. 54, 55, 65, 66, 68, 69. See also Ngirumpatse Reply, paras. 18, 19.

<sup>36</sup> Ngirumpatse Appeal, paras. 56, 57; Ngirumpatse Reply, paras. 16, 17.

<sup>37</sup> Ngirumpatse Appeal, paras. 58-63; Ngirumpatse Reply, para. 22.

<sup>38</sup> Prosecution Response, para. 44.

<sup>39</sup> Prosecution Response, paras. 31, 41.

named as an accused, but his name continued to feature in the indictment.<sup>40</sup> It contends that the cases referred to by Karemera and Ngirumpatse in which the names of accused who were severed from cases were removed from the indictments differed in that the trials had not yet begun in those cases.<sup>41</sup>

12. The Prosecution asserts that by arguing that they will have to answer charges brought against Nzirorera, Karemera and Ngirumpatse misconstrue the nature of joint criminal enterprise pleadings.<sup>42</sup> It recalls that they will only be held liable for crimes committed by individuals named in the joint criminal enterprise insofar as they are themselves shown to have shared in the common purpose and participated in the joint criminal enterprise.<sup>43</sup> It asserts that evidence led in this regard is relevant and admissible.<sup>44</sup> It notes that this is consistent with the *Brdanin* case before the ICTY and the *Norman et al.* case before the Special Court for Sierra Leone.<sup>45</sup> It recalls that Nzirorera had almost finished his defence case at the time of his death and argues that it would be neither possible nor desirable to separate the evidence at this stage given the interconnectedness of the cases.<sup>46</sup> It asserts that any potential prejudice arising from the situation can be remedied by allowing Karemera and Ngirumpatse to call witnesses from Nzirorera's witness list and that Karemera and Ngirumpatse can make submissions about specific evidence in their final submissions.<sup>47</sup> Finally, the Prosecution submits that the request for a stay of proceedings should be dismissed as Ngirumpatse has not shown how his defence strategy has been affected by Nzirorera's death.<sup>48</sup>

### C. Discussion

13. The Karemera and Ngirumpatse Appeals raise three principal questions: (1) whether the Trial Chamber erred in its order relating to amendments to the Indictment; (2) whether the Trial Chamber erred in retaining all the evidence already adduced on the record; and (3) whether the Trial Chamber erred in denying a stay of proceedings.<sup>49</sup>

<sup>40</sup> Prosecution Response, paras. 22, 23, referring to *Prosecutor v. Radoslav Brdanin and Momir Talić*, Case No. IT-99-36-PT, Corrected Version of Fourth Amended Indictment, 10 December 2001, *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-T, Fifth Amended Indictment, 7 October 2002, *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-T, Sixth Amended Indictment, 9 December 2003 ("*Brdanin* Sixth Amended Indictment").

<sup>41</sup> Prosecution Response, para. 29.

<sup>42</sup> Prosecution Response, para. 24.

<sup>43</sup> Prosecution Response, paras. 25, 27.

<sup>44</sup> Prosecution Response, para. 32.

<sup>45</sup> Prosecution Response, paras. 33-35.

<sup>46</sup> Prosecution Response, paras. 26, 36, 38-40.

<sup>47</sup> Prosecution Response, paras. 37, 42.

<sup>48</sup> Prosecution Response, para. 43.

<sup>49</sup> Reasons for Impugned Decision, p. 7.

14. These matters relate to the general conduct of trial proceedings and are thus matters within the discretion of the Trial Chamber.<sup>50</sup> The Appeals Chamber's examination is therefore limited to establishing whether the Trial Chamber abused its discretion by committing a discernible error.<sup>51</sup> The Appeals Chamber will only overturn a Trial Chamber's discretionary decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.<sup>52</sup>

#### 1. Amendment of the Indictment

15. The Appeals Chamber finds that Karemera and Ngirumpatse have failed to demonstrate a discernible error in the Trial Chamber's order in relation to the amendment of the Indictment. It is clear from the Indictment of 23 August 2010, which implements the Impugned Decision, that Nzirorera is no longer an accused in the case. While his name continues to appear in the Indictment of 23 August 2010, his name has been removed from the title and the counts, and his status is now no different from other alleged members of the joint criminal enterprise who are not charged in this case. While there are some paragraphs in the Indictment of 23 August 2010 which only refer to Nzirorera,<sup>53</sup> there are similarly also paragraphs which only refer to other alleged members of the joint criminal enterprise who are likewise not accused in the present case.<sup>54</sup> In this regard, the Appeals Chamber notes that André Rwamakuba's name appears in the Indictment of 23 August 2010 as an alleged member of the joint criminal enterprise<sup>55</sup> despite the fact that his case was severed from the *Karemera et al.* case in 2005.<sup>56</sup>

16. The Appeals Chamber recalls that where joint criminal enterprise is pleaded as a mode of liability, the Prosecution must plead the identity of the alleged members of the joint criminal

<sup>50</sup> *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.16, Decision on Appeal Concerning the Severance of Matthieu Ngirumpatse, 19 June 2009 ("*Karemera et al.* Decision of 19 June 2009"), para. 16; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.10, Decision on Nzirorera's Interlocutory Appeal Concerning His Right to Be Present at Trial, 5 October 2007, para. 7.

<sup>51</sup> *Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTR-02-78-AR73.2, Decision on Gaspard Kanyarukiga's Interlocutory Appeal of a Decision on the Exclusion of Evidence, 23 March 2010 ("*Kanyarukiga* Decision of 23 March 2010"), para. 7; *Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTR-02-78-AR73, Decision on Kanyarukiga's Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents, 19 February 2010 ("*Kanyarukiga* Decision of 19 February 2010"), para. 9; *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR91.2, Decision on Joseph Nzirorera's and The Prosecutor's Appeals of Decision Not to Prosecute Witness BTH for False Testimony, 16 February 2010 ("*Karemera et al.* Decision of 16 February 2010"), para. 15.

<sup>52</sup> *Kanyarukiga* Decision of 23 March 2010, para. 7; *Kanyarukiga* Decision of 19 February 2010, para. 9; *Karemera et al.* Decision of 16 February 2010, para. 15; *Karemera et al.* Decision of 19 June 2009, para. 16.

<sup>53</sup> Indictment of 23 August 2010, paras. 32, 62, 63.

<sup>54</sup> *See, e.g.*, Indictment of 23 August 2010, paras. 26, 48.

<sup>55</sup> Indictment of 23 August 2010, para. 6(ii).

<sup>56</sup> *See* Decision to Sever Rwamakuba, p. 17.

enterprise.<sup>57</sup> While Nzirorera is no longer an accused in the case, it is still open for the Prosecution to allege that he was a member of the joint criminal enterprise. This being the case, it is proper for the Prosecution to name him in the Indictment while making clear that he is not one of the accused. In this regard, the Appeals Chamber notes that, contrary to Ngirumpatse's submission, in other cases where proceedings have been terminated in relation to one accused due to that accused's death but where joint criminal enterprise was pleaded, the deceased accused's name has continued to be referred to in the Indictment.<sup>58</sup>

## 2. Retention of Evidence

17. Turning to the issue of retaining the body of evidence adduced to date on the record, the Appeals Chamber also finds that Karemera and Ngirumpatse have failed to demonstrate that the Trial Chamber committed a discernible error in this regard.<sup>59</sup> Although the Trial Chamber retained all the evidence on the record, it specifically clarified that in its deliberations it would "separate the evidence that relates only to Nzirorera and that which relates to a joint criminal enterprise or conspiracy or aiding and abetting amongst Nzirorera and others".<sup>60</sup> In adopting this approach, it correctly recalled that "[t]here is clear statutory language and jurisprudence which emphasize the individual nature of criminal responsibility in this Tribunal [and that] [e]ven if Accused persons are joined together into one trial, this in no way diminishes the Prosecution's burden to prove each element of each crime individually against each of the co-Accused."<sup>61</sup> The Appeals Chamber does not find this "streamlined approach"<sup>62</sup> unreasonable.

18. Furthermore, the Appeals Chamber recalls that a similar approach was adopted in the *Brđanin* case before the ICTY, in which Momir Talić was severed from the case eight months after

<sup>57</sup> *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Judgement, 28 November 2006, para. 22; *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement, 7 July 2006, para. 24.

<sup>58</sup> See, e.g., *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, in which Momir Talić was separated from the case and later died, but his name continued to appear in the Indictment (see *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-T, Decision on Prosecution's Oral Request for the Separation of Trials, 20 September 2002 ("*Brđanin and Talić* Decision of 20 September 2002"); *Brđanin* Sixth Amended Indictment); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, in which Vlatko Stojiljković died but his name continued to appear in the Indictment (see *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-PT, Third Amended Indictment, 19 July 2002, p. 1; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Third Amended Joinder Indictment, 21 June 2006, paras. 14, 20, 48, 61). See also *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, in which charges against Momir Nikolić and Dragan Obrenović were dismissed following their guilty pleas and both their names continued to appear in the amended indictment (see *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Decision on Prosecution's Motion for Leave to File Third Amended Indictment, 17 June 2003; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Amended Joinder Indictment, 26 May 2003).

<sup>59</sup> See Impugned Decision; Reasons for Impugned Decision, p. 7.

<sup>60</sup> Reasons for Impugned Decision, para. 9.

<sup>61</sup> Reasons for Impugned Decision, para. 14.

<sup>62</sup> Reasons for Impugned Decision, para. 10.



the trial started.<sup>63</sup> Not only did Talić's name continue to appear in the indictment,<sup>64</sup> but the evidence already on the record was retained.<sup>65</sup> In the *Brdanin* Trial Judgement, the Trial Chamber noted that "[it] ha[d] taken into consideration the evidence given against the former co-accused Momir Talić, whose case was severed from that of the Accused and who subsequently passed away, as far as it [was] relevant to the case against the Accused."<sup>66</sup> Accordingly, the Trial Chamber in that case followed the same approach proposed by the Trial Chamber in the present case.

19. The Appeals Chamber is further unconvinced by the arguments of Karemera and Ngirumpatse that the Trial Chamber erred in considering the *Norman et al.* case before the Special Court for Sierra Leone in which the Trial Chamber proceeded to render the judgement on the basis of the whole trial record despite the fact that Samuel Hinga Norman died prior to the judgement being rendered.<sup>67</sup> While the Trial Chamber considered the *Norman et al.* case, it also noted that it was "factually different in many respects to the instant case".<sup>68</sup> The most notable difference between the two cases is the fact that all the evidence had been heard in the *Norman et al.* trial at the time of Norman's death, while Nzirorera's Defence case was almost complete and Ngirumpatse's had not yet started.

20. The Trial Chamber was clearly seized of the fact that Nzirorera's case was not finished at the time of his death and of the possible impact of this on the fairness of the proceedings. In considering this issue, the Trial Chamber noted that "[g]iven the inter-connectedness of the defense strategies, it would not be in the interests of justice to eliminate the entire body of evidence related to the allegations against Nzirorera."<sup>69</sup> Both Karemera and Ngirumpatse submit that the Trial Chamber erred in finding that the three accused had pursued a joint defence strategy. However, the Appeals Chamber notes that when the issue of severing Ngirumpatse was before the Trial Chamber in 2009, the Defence opposed the severance partly on the basis that "they [had] divided the issues between them."<sup>70</sup> Accordingly, while the Defence may not have pursued a common defence

<sup>63</sup> The trial started on 23 January 2002 and Talić was severed from the case on 20 September 2002. See *Brdanin and Talić* Decision of 20 September 2002, para. 2, p. 9.

<sup>64</sup> See *Brdanin* Sixth Amended Indictment, paras. 10, 12, 13, 19, 20, 20.1, 21, 23.1, 24-26, 27.2.

<sup>65</sup> Indeed the *Brdanin and Talić* Decision of 20 September 2002 provided that the severance would come into force following the completion of the cross-examination of a witness whose testimony had been suspended when Talić fell ill. *Brdanin and Talić* Decision of 20 September 2002, para. 29, p. 9.

<sup>66</sup> *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-T, Judgement, 1 September 2004, para. 36.

<sup>67</sup> Reasons for Impugned Decision, para. 7, referring to *Norman et al.* Decision.

<sup>68</sup> Reasons for Impugned Decision, para. 7.

<sup>69</sup> *Idem.*

<sup>70</sup> *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Continuation of Trial, 3 March 2009, para. 45. See also *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Joseph Nzirorera's Opposition to Prosecution Motion for Severance, 13 February 2009, para. 37; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Soumission de Édouard Karemera sur le maintien du procès joint*, 13 February 2009, pp. 3, 8; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Joseph Nzirorera's Opposition to Severance of Ngirumpatse Case and Ancillary Applications, 3 November 2008, para. 15.

strategy, it was reasonable for the Trial Chamber to find that their cases were significantly inter-connected. In light of this, the Trial Chamber sought to remedy any potential prejudice arising from Nzirorera's case not having been completely finished by explicitly providing that Karemera and Ngirumpatse could seek leave to call any witness on Nzirorera's witness list who was not called or to recall Théoneste Bagosora who had not finished testifying on behalf of Nzirorera at the time of Nzirorera's death.<sup>71</sup>

21. While Karemera and Ngirumpatse suggest that the Trial Chamber's decision implies that they must now not only defend themselves but also Nzirorera, the Appeals Chamber is not convinced by this argument. As noted above, the Trial Chamber explicitly recalled the principle of individual criminal responsibility and that the Prosecution must prove each element of each crime individually against each of the co-Accused.<sup>72</sup> To the extent that they are charged with joint criminal enterprise and may thus be held accountable for acts of others in accordance with the common criminal purpose, the Appeals Chamber notes that Nzirorera's death does not affect the burden to be met by the Prosecution in relation to Karemera and Ngirumpatse.

### 3. Stay of Proceedings

22. Finally, in light of its findings on the amendment of the Indictment and the maintenance of the evidence on the trial record, the Appeals Chamber finds that there is no basis upon which to grant a stay of proceedings.

### D. Disposition

23. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Karemera and Ngirumpatse Appeals in their entirety.

Done in English and French, the English version being authoritative.

Done this twenty-fourth day of September 2010,  
At The Hague,  
The Netherlands.



[Seal of the Tribunal]

  
\_\_\_\_\_  
Judge Patrick Robinson  
Presiding

<sup>71</sup> Reasons for Impugned Decision, para. 8, p. 7.

<sup>72</sup> Reasons for Impugned Decision, para. 14.