

ICTR-98-44-T
8-1-2004
(9025-9019)

9025
-HM

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA
TRIAL CHAMBER III

Before: Judge Lloyd G. Williams, Q.C., presiding
Judge Andréia Vaz
Judge Khalida Rachid Khan

Registrar: Adama Dieng

Date Filed: 8 October 2003

2004 JAN -8 1 P 4:58
JUDICIAL DEPARTMENT
ICTR

THE PROSECUTOR

v.

AUGUSTIN BIZIMANA
EDOUARD KAREMERA
MATHIEU NGIRUMPATSE
CALLIXTE NZABONIMANA
JOSEPH NZIRORERA
ANDRÉ RWAMAKUBA

DECISION ON THE PROSECUTOR'S MOTION FOR SEPARATE TRIALS AND FOR
LEAVE TO FILE AN AMENDED INDICTMENT

*Rules 72 and 82 (severance of trials) and 50 and 73 (amendment of indictment) of the Rules of
Procedure and Evidence*

Office of the Prosecutor:

Don Webster
Ifeoma Ojemeni
Simone Monasebian
Tamara Cummings-John

Defence Counsel:

Didier Skornicki and John Traversi
Charles Roach and Frédéric Weyl
Peter Robinson and Dior Diagne
David Hooper and Andreas O'Shea

Translation certified by LSS, ICTR

The Prosecutor v. Augustin Bizimana, Edouard Karemera, Mathieu Ngirumpatse, Callixte Nzabonimana, Joseph Nzirorera, André Rwamakuba, Case No. ICTR-98-44-I

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“The Tribunal”),

SITTING as Trial Chamber III composed of Judges Lloyd G. Williams, Q.C., presiding, Andrésia Vaz and Khalida Rachid Khan (“the Chamber”);

BEING SEIZED of a Prosecutor’s Motion of 23 August 2003, (i) for separate trials, pursuant to Rules 72 and 82 of the Rules of Procedure and Evidence (“the Rules”) and (ii) for leave to amend the Indictment, pursuant to Rules 73 and 50 of the Rules;

CONSIDERING the main and Supplemental Responses by the Defence for Joseph Nzirorera, filed on 5 and 22 September 2003, respectively; and the Prosecutor’s Reply to the main Response filed on 15 September 2003;

CONSIDERING the documents presented by Counsel for the Accused seeking postponement of the trial and the holding of a pre-trial conference,¹ wherein the Defence Counsel indirectly addressed some of the issues raised in the Prosecutor’s Motion;

CONSIDERING the Trial Chamber’s Decision of 29 August 2003 granting the Prosecutor’s Motion for severance of Félicien Kabuga;

RULING solely on the basis of the parties’ written briefs filed pursuant to Rule 73(A) of the Rules;

NOW CONSIDERS THE MOTION under the following two headings.

I. Motion for separate trials

Prosecution

1. The Prosecution argues that the severance of the trials would make it possible to commence the trial of the four accused persons currently in detention, without waiting for the arrest of the other three Accused who are still at large. The Prosecution alleges that such severance would be founded in law, that it is in the interests of justice and that it would not cause any prejudice to the Accused, even if the commencement of the trial were to be postponed, considering that such postponement would be for a brief period.

¹ The documents are: Counsel for André Rwamakuba, *Request for Further Time to Respond to Prosecutor’s Motion to File an Amended Indictment*, filed on 17 September 2003; Counsel for Mathieu Ngirumpatse, *Motion for a Pre-Trial Hearing Concerning Trial Date of November 3, 2003*, filed on 19 September 2003, Counsel for Joseph Nzirorera, *Potential Contentious Issues and Suggestion for Status Conference*, filed on 22 September 2003; Counsel for Edouard Karemera, *Requête à fin de Fixation d’une audience préalable de procédure relative à l’ouverture du process au fond prévu le 3 novembre 2003*, filed on 23 September 2003.

Defence

2. None of the Defence Counsel objects to the Prosecution motion. On the contrary, the Defence for André Rwamakuba recalls that the parties had already agreed on such severance during a pre-trial conference, as long as the severance implied amending the indictment so as to withdraw the names of the Accused persons who are still at large, as well as any element in the indictment referring specifically to them.

Deliberations

3. The Chamber notes that the defendants have no objection to the severance, and that such severance would enhance the protection of the rights of the Accused who are already in detention and whose trial cannot be delayed without a valid reason, as well as those who are not yet in detention. The Chamber recalls that such severance is also justified by the Chamber's inability to try the Accused in absentia, pursuant to Article 20.4(D) of the Statute. The Chamber therefore finds that the separation of the trials of Augustin Bizimana and Callixte Nzabonimana is in the interests of justice, as required by Rule 82(B). The Chamber recalls having already ordered the severance of Félicien Kabuga's trial in its decision of 29 August 2003.

II. Motion for Leave to amend the indictment

Prosecution

4. The Prosecution argues that the said amendment is justified since it will make it possible:

- (i) To narrow the material scope of the trial, since only seven of the eleven initial counts remain, namely, conspiracy to commit genocide (Count 1), direct and public incitement to commit genocide (Count 2), genocide (Count 3) *or in the alternative* complicity in genocide (Count 4), rape (Count 5), extermination (Count 6) as crimes against humanity, killing and violence to health and mental well-being as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 7) – and that new evidence unearthed since the original indictment was prepared has been incorporated to further substantiate the charges against the Accused;
- (ii) To limit the coming trial to the four Accused persons currently in custody;
and
- (iii) To further comply with the recent jurisprudence of the Tribunal and to the current charging practices of the Office of the Prosecutor.

5. The Prosecution asserts that such an amendment does not in any way constitute a new indictment and would not at all affect the rights of the accused to a fair trial. On the contrary, the

amendment would guarantee an expeditious trial. Consequently, the Prosecution requests the Chamber:

- (i) To grant it leave to amend the indictment confirmed on 28 August 1998 against Mathieu Ndirumpatse, Joseph Nzirorera, Edouard Karemera and André Rwamakuba, as proposed in Annex A of its motion;
- (ii) To maintain the legal effects of the Indictment confirmed on 28 August 1998 against the other co-Accused who are still at large, namely, Félicien Kabuga, Augustin Bizimana and Callixte Nzabonimana;
- (iii) To direct the Registry to transmit the amended indictment to the Accused and their Counsel;
- (iv) To expeditiously schedule a further initial appearance for the Accused to enable them to enter a plea pursuant to Rule 50(B) of the Rules;
- (v) To maintain all the legal effects of the indictment confirmed on 29 August 1998 against the four co-Accused, pending their further initial appearance.

Defence

6. The Defence for Joseph Nzirorera makes a counter request before the Chamber that it should not confirm the amended indictment until the Prosecution has complied with the provisions of Rule 47(B) by disclosing all the supporting materials for the said amended Indictment. The Defence submits that such disclosure would enable the Chamber to exercise the jurisdiction conferred upon it by virtue of Rule 47(E). The Defence argues that, contrary to the Prosecution's submissions, the documents that the Prosecution has so far disclosed contain no evidence to support paragraphs 15.7, 16.1, 16.2, 17, 20.3, 24.1, 24.3, 24.4, 24.5, 31.3, 31.4, 31.6, 31.7, 32.10 and 32.12, and that, consequently, the Prosecution has not yet complied with the requirements of Rule 47(B).

7. In its Supplemental Response to the Prosecution Motion, the Defence for Joseph Nzirorera states that it had been agreed with the Prosecution that the supporting materials relating to the new allegations would be disclosed within the next few days. Thus, the Defence no longer objects to the motion for leave to file an amended indictment, but maintains that the Chamber cannot decide as long as the said supporting materials have not been disclosed. The same Defence also points out the vagueness of the proposed amended indictment, citing in particular count 5, which does not mention the perpetrator, the victim or victims, the date or dates and the place where the alleged crimes were committed. The Defence further draws attention to paragraphs 9, 10, 15, 15.2, 16, 20, 21, 28, 30, 31, 31.7, 31.8, 38, 46 and 56 of the said indictment, in which the Prosecution charges MRND as an organization, whereas ICTR Statute provides that only natural persons are subject to the jurisdiction of the Tribunal. The Defence therefore requests the Chamber to order the Prosecution to provide the necessary details about the liability of Joseph Nzirorera. Lastly, the Defence stresses that paragraphs 5, 6, 7, 10, 31.31, 34 and 35 impose liability upon Joseph Nzirorera as a superior pursuant to Article 6.3,

The Prosecutor v. Augustin Bizimana, Edouard Karemera, Mathieu Ngirumpatse, Callixte Nzabonimana, Joseph Nzirorera, André Rwamakuba, Case No. ICTR-98-44-I

without clearly identifying the criminal acts alleged to have been committed by the subordinates, such as the date, place, identity of the perpetrators (the subordinates) and the victims. The Defence therefore requests the Chamber to strike off the said paragraphs from the amended indictment.

8. The Defence for André Rwamakuba submits that the Prosecution's proposed amendment in reality constitutes not only an entirely new indictment and a fundamental change in the Prosecution case, but also a departure from existing case law on the amendment of an indictment. According to the Defence, the proposals have strong implications for the rights of the Accused to be tried fairly and without undue delay.

9. The Defence for Matthieu Ngirumpatse also submits that the indictment presented by the Prosecution is new, and that its confirmation by the Chamber would lead to delays, especially since new evidence has not yet been disclosed to the Defence.

The Prosecution (Reply)

10. In reply, the Prosecution points out that its motion is based on Rule 50 and not Rule 47 of the Rules, which implies that the Prosecution is under no obligation to submit supporting materials to the Chamber or to the Confirming Judge. The Prosecution relies on a decision by the Trial Chamber I in *Nyiramasuhuko* and *Ntahobali*, where the Defence had raised similar arguments to which the judges replied that Rule 47 did not apply to the procedure for the amendment of an indictment.² The Prosecution, moreover, asserts that the said indictment is supported by the witness statements and all the documents it disclosed earlier, and that, pursuant to Rule 66 of the Rules, it intends to make further disclosure in support of the new factual allegations contained in the amended indictment. Lastly, the Prosecution points out that, according to the Tribunal's current case law, the obligation to disclose supporting materials takes effect only after confirmation of the amendment of the indictment.³ Consequently, the Prosecution requests the Chamber to deny Joseph Nzirorera's counter-request.

Deliberations

11. Some of the Accused request that the supporting materials for the proposed amendments to the indictment be disclosed to them before the Chamber grants the Prosecution motion. Now, the Tribunal has consistently held that, at this stage of the proceedings, the Prosecution is obliged

² See *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalon Ntahobali*, ICTR-97-21-I, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 10 August 1999.

³ In this connection, the Prosecution cites: *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Ntahobali*, ICTR-97-21-I, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 10 August 1999; *The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziraryo*, ICTR-97-29-I, Decision on Prosecutor's Request for Leave to File an Amended Indictment, 12 August 1999; *The Prosecutor v. Joseph Kanyabashi*, ICTR-96-15-T, Reasons for the Decision on the Prosecutor's Request for Leave to Amend the Indictment, 12 August 1999; *The Prosecutor v. Anatole Nsengiyumva*, ICTR-96-12-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 2 September 1999; *The Prosecutor v. Ferdinand Nahimana*, ICTR-96-11-T, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 5 November 1999; *The Prosecutor v. Jean Bosco Barayagwiza*, ICTR-97-19-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 11 April 2000; *The Prosecutor v. Eliezer Niyitegeka*, ICTR-96-14-I, Decision on Prosecutor's Request for Leave to File an Amended Indictment, 21 June 2000.

The Prosecutor v. Augustin Bizimana, Edouard Karemera, Mathieu Ndirumpatse, Callixte Nzabonimana, Joseph Nzirorera, André Rwamakuba, Case No. ICTR-98-44-I

to disclose the supporting materials to the Defence only after the Chamber has granted the Prosecution leave to amend the indictment. Consequently, the request of the Accused relating to the disclosure of the supporting materials must be denied.

12. The Chamber notes that the Accused object to the amendment because they would not have sufficient time to prepare their defence for a trial which is due to commence on 3 November 2003, and especially as any new adjournment would further prolong the provisional detention, which would aggravate the situation of the Accused. Thus, the Defence for André Rwamakuba argues that such amendment of the indictment at this stage of the proceedings would certainly prejudice the Accused's right to be tried without undue delay.⁴ The Chamber concurs with this argument.

13. In its request, the Prosecution argues that the proposed amendment aims to capitalise on the evidence gathered from the investigations conducted since the confirmation of the indictment, and to introduce a new form of participation, namely, joint criminal enterprise. Thus, the Prosecution hopes to provide more substantive information to the Accused concerning the charges brought against them. The Chamber is of the opinion that the Prosecution is submitting a completely new indictment, and recalls that the defects in the initial indictment had already been corrected by Trial Chamber II, which had directed the Prosecution to make the necessary amendments.⁵ In application of the said Decision, the Prosecution on 21 November 2001 amended the indictment confirmed on 29 August 1998. As far as the Chamber is concerned, a further amendment is not necessary, as matters stand. Furthermore, such an amendment would affect the rights of the Accused to be tried within a reasonable time, by extending their detention on remand, and would also not be consonant with judicial economy.

14. The Chamber grants the Prosecutor's request to retain only seven of the eleven counts in the initial indictment. Consequently, the Prosecution's request to withdraw four of the counts is granted.⁶ The Prosecution must file within a maximum of three days, from today, an indictment which has been amended accordingly. The Prosecution must, at the same time, file an annex containing all the amendments made to the previous indictment to enable the Chamber to keep track of the changes.

FOR THE FOREGOING REASONS

THE CHAMBER

I. GRANTS the Prosecutor's Motion for separate trials.

II. PARTIALLY grants the Prosecutor's Motion for Leave to amend the Indictment and **ORDERS** the Prosecution to file an amended indictment as indicated in paragraph 14 above, while respecting the form required by the said paragraph;

⁴ See in particular Article 20.4(C) of the Statute.

⁵ Trial Chamber II, Decision on the Defence Motion, Pursuant to Rule 72 of Rules of Procedure and Evidence, Pertaining to, *inter alia*, Lack of Jurisdiction and Defects in the form of the Indictment, 25 April 2001.

⁶ The counts are: murder, persecution and inhumane acts as crimes against humanity and serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.

The Prosecutor v. Augustin Bizimana, Edouard Karemera, Mathieu Ngirumpatse, Callixte Nzabonimana, Joseph Nzirorera, André Rwamakuba, Case No. ICTR-98-44-I

III. DENIES the Prosecutor's Motion in all other respects;

IV. DENIES the Defence Motion relating to prior disclosure of supporting materials.

Arusha, 8 October 2003

[Signed]

Lloyd G. Williams, Q.C
Presiding Judge

Andrésia Vaz
Judge

Khalida Rachid Khan
Judge

(Seal of the Tribunal)





**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

Arusha International Conference Centre
P.O.Box 6016, Arusha, Tanzania - B.P. 6016, Arusha, Tanzanie
Tel: 255 57 504207-11 504367-72 or 1 212 963 2850 Fax: 255 57 504000/504373 or 1 212 963 2848/49

**PROOF OF SERVICE – ARUSHA
PREUVE DE NOTIFICATION – ARUSHA**

Date:	12 January 2004	Case Name / Affaire:	The Prosecutor vs.
			- Joseph NZIRORERA - Mathieu NGIRUMPATSE - Edward KAREMERA - André RWAMAKUBA
		Case No /Affaire No.:	ICTR-98-44-T

		received by / reçu par:	ALO:	received by / reçu par
To: A:	<input type="checkbox"/> TC1			
	<input type="checkbox"/> Judge E. Møse, President	<input type="checkbox"/>
	<input type="checkbox"/> Judge J. R. Reddy	<input type="checkbox"/>
	<input type="checkbox"/> Judge S. A. Egorov	<input type="checkbox"/>
	<input type="checkbox"/> Judge N. Pillay (Nahimana et al.)	<input type="checkbox"/>
	<input type="checkbox"/> Judge A. Z. Gunawardana (Nahimana et al.)	<input type="checkbox"/>
	<input type="checkbox"/> Judge K. R. Khan (Ndindabahizi)	<input type="checkbox"/>
	<input type="checkbox"/> Judge S. B. Bossa (Ndindabahizi)	<input type="checkbox"/>
	<input type="checkbox"/> J. Neuwirth, SLO	<input type="checkbox"/>
	<input type="checkbox"/> E. Nahamya, Co-ordinator		
	<input type="checkbox"/> TC2			
	<input type="checkbox"/> Judge W. H. Sekule	<input type="checkbox"/>
	<input type="checkbox"/> Judge A. Z. Gunawardana	<input type="checkbox"/>
	<input type="checkbox"/> Judge A. Ramarosan	<input type="checkbox"/>
	<input type="checkbox"/> Judge K. R. Khan (Bizimungu et al.)	<input type="checkbox"/>
	<input type="checkbox"/> Judge L. G. Muthoga (Bizimungu et al.)	<input type="checkbox"/>
	<input type="checkbox"/> Judge S. B. Bossa (Nyiramasuhuku et al.)	<input type="checkbox"/>
	<input type="checkbox"/> C. Eboe-Osuji, SLO	<input type="checkbox"/>
	<input type="checkbox"/> A. Leroy, Co-ordinator		
	<input checked="" type="checkbox"/> TC3			
	<input type="checkbox"/> Judge L. G. Williams	<input type="checkbox"/>
	<input type="checkbox"/> Judge Y. Ostrovsky	<input type="checkbox"/>
	<input type="checkbox"/> Judge P. Dolenc	<input type="checkbox"/>
	<input checked="" type="checkbox"/> Judge A. Vaz 12/12/04 (3)	<input type="checkbox"/>
	<input type="checkbox"/> Judge J. R. Reddy (Gacumbitsi)	<input type="checkbox"/>
	<input type="checkbox"/> Judge S. A. Egorov (Gacumbitsi)	<input type="checkbox"/>
	<input type="checkbox"/> Judge K. R. Khan	<input type="checkbox"/>
	<input checked="" type="checkbox"/> Judge F. R. Arrey (Karempera et al.) 12/11/04	<input type="checkbox"/>
	<input checked="" type="checkbox"/> Judge F. Lattanzi (Karempera et al.)	<input type="checkbox"/>
	<input type="checkbox"/> E. O'Donnell, SLO	<input type="checkbox"/>
	<input checked="" type="checkbox"/> R. Adjovi, Co-ordinator 15.5.04	<input type="checkbox"/>
	<input checked="" type="checkbox"/> R. Diarra, Co-ordinator (Karempera et al.)	<input type="checkbox"/>
	<input checked="" type="checkbox"/> OTP / BUREAU DU PROCUREUR			
	<input type="checkbox"/> Trial Attorney in charge of case:.....	D. Webster	received by 12/01/04
	<input checked="" type="checkbox"/> DEFENSE			
<input type="checkbox"/> Accused / Accusé:.....	J. Nzirorera, M. Ngirumpatse, E. Karemera & A. Rwamakuba	complete / remplir "CMS4 FORM"	S. BANGA 12/01/04	
<input type="checkbox"/> Lead Counsel / Conseil Principal:....	F. Robinson, C. Reach, D. Skornicki & D. Hooper	by fax complete / remplir "CMS3bis FORM"	12/01/04	
<input type="checkbox"/> In / à Arusha Arusha (signature)	<input type="checkbox"/>	
<input type="checkbox"/> Co-Counsel / Conseil Adjoint:....	D. Diagne, F. Weyl, R. Martel & A. O'Shea	by fax complete / remplir "CMS3bis FORM"	
<input type="checkbox"/> In / à Arusha Arusha (signature)	<input type="checkbox"/>	
All Decisions:	<input type="checkbox"/> Appeals Chamber Unit, The Hague	<input type="checkbox"/>	S. Chenault, Jurist Linguist	
All Decisions & Important Public Documents:		<input type="checkbox"/> Press & Public Affairs	<input type="checkbox"/> Legal Library	
From:De:	<input type="checkbox"/> J.-P. Fométá (Chief, CMS) <input type="checkbox"/> N. Diallo (TC1) <input type="checkbox"/> R. Kouambo (TC2) <input checked="" type="checkbox"/> C. Hometowu (TC3) <input type="checkbox"/> F. A. Talon (Appeals)			
Cc:	<input type="checkbox"/> A. Dieng <input type="checkbox"/> A. Miller, OLA, NY <input type="checkbox"/> L. G. Munlo <input type="checkbox"/> M. Niang <input type="checkbox"/> S. van Driessche			
	<input type="checkbox"/> WVSS-D <input type="checkbox"/> WVSS-P <input checked="" type="checkbox"/> E. O'Donnell 12/1/04 <input type="checkbox"/> DCMS <input type="checkbox"/> P. Enow			
Subject Objet:	Kindly find attached the following document(s) / Veuillez trouver en annexe le(s) document(s) suivant(s):			

Documents name / titre du document
DECISION ON THE PROSECUTOR'S MOTION FOR SEPARATE TRIALS AND FOR LEAVE TO FILE AN AMENDED INDICTMENT, RULES 72 AND 82 (SEVERANCE OF TRIALS) AND 50 AND 73 (AMENDMENT OF INDICTMENT) OF THE RULES OF PROCEDURE AND EVIDENCE

Date Filed / Date enregistrée Pages
8/1/2004 7