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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER III

ENGLISH  
Original: FRENCH

Before: Judge Andréia Vaz, presiding  
Judge Florence Rita Arrey  
Judge Flavia Lattanzi

Registrar: Adama Dieng

Decision of: 19 March 2004

THE PROSECUTOR  
v.  
ÉDOUARD KAREMERA  
MATHIEU NGIRUMPATSE  
JOSEPH NZIRORERA  
ANDRÉ RWAMAKUBA

Case No. ICTR-98-44-T

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**DECISION GRANTING THE DEFENCE CERTIFICATION TO APPEAL  
AGAINST THE DECISION OF 13 FEBRUARY 2004 AMENDING THE  
INDICTMENT AND THE ORAL DECISION OF 23 FEBRUARY 2004  
RULING THE AMENDED INDICTMENT TO BE IN COMPLIANCE WITH  
THE DECISION OF 13 FEBRUARY 2004  
(Rule 73 (B) of the Rules of Procedure and Evidence)**

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CIII04-0037 (E)

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Translation certified by LSS, ICTR

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the Tribunal),

**SITTING** as Trial Chamber III (the Chamber), composed of Judge Andréia Vaz, presiding, Judge Florence Rita Arrey and Judge Flavia Lattanzi;

**BEING SEIZED** of

(i) the “Requête aux fins de certification d’appel contre la Décision relative à la requête du Procureur aux fins d’être autorisé à modifier l’Acte d’accusation en date du 13 février 2004”, filed by Defence for the Accused, Ngirumpatse, on 23 February 2004 (the Ngirumpatse Motion);

(ii) the alternative request for certification to appeal in the “Requête aux fins d’injonction au Procureur de se conformer à la Décision de la Chambre de première instance III autorisant la modification de l’Acte d’accusation”, filed by Defence for the Accused, Karemera, on 23 February 2003 [sic] (the Karemera Motion);

**NOTING** the respective responses by the Prosecution filed on 2 and 3 March 2004,<sup>1</sup>

**CONSIDERING** the “Décision relative à la requête du Procureur aux fins d’être autorisé a modifier l’Acte d’accusation du 13 février 2004” (the Decision of 13 February 2004),

**CONSIDERING** the Amended Indictment filed by the Prosecution on 18 February 2004,<sup>2</sup>

**CONSIDERING** the Oral Decision of 23 February 2004 dismissing the Karemera Motion referred to above, and confirming the Amended Indictment as being in compliance with the Decision of 13 February 2004 (the Decision of 23 February 2004),<sup>3</sup>

**CONSIDERING** the Statute of the Tribunal (the Statute) and the Rules of Procedure and Evidence (the Rules) and, in particular, Rule 73(B) of the Rules which states: [sic]

<sup>1</sup> Prosecutor’s Response to Ngirumpatse’s Request for Certification to Appeal Trial Chamber III’s Decision of 13 February 2004 Authorizing the Prosecutor to Amend the Indictment and Prosecutor’s Response to Ngirumpatse’s Request for Certification to Appeal Trial Chamber III’s Decision of 13 February 2004. See also Amendment of the title to the Prosecutor’s Response to Karemera’s Request for Certification to Appeal Trial Chamber III’s Decision of 13 February 2004 (amending the title of the second document to Prosecutor’s Response to Karemera’s Request for Certification to Appeal Trial Chamber III’s Decision of 13 February 2004).

<sup>2</sup> See Prosecutor’s Filing in Compliance with the Trial Chamber III Décision relative à la Requête du Procureur aux fins d’être autorisé à modifier l’Acte d’accusation du 13 février 2004.

<sup>3</sup> See Transcript, 23 February 2004, pp. 1 and 2. (original version in English)

**NOW DECIDES** as follows, pursuant to Rule 73(A) of the Rules, on the basis of the written submissions filed by the parties.

*Motions*

1. Defence for Karemera and Defence for Ngirumpatse seek certification to appeal against the Decision of 13 February 2004 granting the Prosecution leave to amend the Indictment. Additionally, Defence for Karemera seeks certification to appeal against the Oral Decision of 23 February 2004, which ruled the Amended Indictment of 18 February 2004 to be in compliance with the Decision of 13 February 2004.

2. Defence for Ngirumpatse submits that the requirements of Rule 73(B) of the Rules have been satisfied in the following regards:

(i) The Amended Indictment changes the prosecution case substantially at an advanced stage in the proceedings, thereby prejudicing the Accused considering that the defence case, which was prepared on the basis of the Indictment of 21 November 2001, has been muddled consequently;

(ii) Approval of the new Indictment makes it imperative to carry out new investigations and to start the preliminary procedures afresh; and

(iii) The Amended Indictment renders the charges more vague:

(a) by introducing a collective form of responsibility for the Accused for all the acts committed throughout the territory of Rwanda during the period over which the Tribunal has jurisdiction, which collective responsibility has now been attributed to MRND and its leadership structure;

(b) by introducing the notion of joint criminal enterprise; and

(c) by making general allegations without a date or a definition.

3. Defence for Karemera submits that the allegation is still made in the Amended Indictment of 18 February 2004 that the Accused was present during the attacks that occurred in Bisesero in May 1994, contrary to the Decision of 13 February 2004.<sup>4</sup> The Defence considers that the persistence of these allegations causes substantial prejudice to the Accused.

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<sup>4</sup> The Defence is here making reference to paras. 33 and 34 and to Order II of the Decision of 13 February 2004.

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*Responses*

4. The Prosecution responds that the requirements of Rule 73(B) have not been met, and that neither Defence for Karemera nor Defence for Ngirumpatse has established how the Chamber erred in law in respect of the legal principles at issue.

5. The Prosecution submits further, with regard to the Ngirumpatse Motion:

(i) That the Defence is confusing the procedure under Rule 72(B)(ii) of the Rules with that under Rule 73(B) when it states that the Amended Indictment is vague;

(ii) That the Chamber took into account any prejudice that may likely be caused to the Accused before it granted the motion to amend the Indictment, and provided remedies for such prejudice;

(iii) That the Appeals Chamber has already made a pronouncement on the matter, ruling that the Trial Chamber had the discretion to decide whether to proceed with trial or to adjourn it to enable the Defence to carry out any necessary investigations. In this wise, according to the Prosecution, resolution of the matter by the Appeals Chamber is not likely to advance the proceedings.

6. The Prosecution submits, with regard to the Karemera Motion:

(i) That the Defence does not establish how its requests for certification to appeal meet the conditions under Rule 73(B);

(ii) That the Chamber did not find any prejudice suffered by the Accused by reason of the Prosecution's lack of diligence; that it found that any lack of diligence on the part of the Prosecution was not through bad faith or as a result of a deliberate cause of action, and that, in any case, the Chamber found that the amendments sought were in the interests of the Defence because they contained more specific charges against the Accused.

**Deliberations**

*Applicable provision*

7. Rule 73(B) of the Rules provides that:

Decisions rendered on such motions [under Rule 73(A)] are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

*Admissibility of the motions*

8. The Ngirumpatse Defence Motion was filed with the Registry on 23 February, that is, more than seven days after the Decision of 13 February 2004. Although the date indicated at the top of each page of the Motion suggests that the Motion was transmitted by fax on 20 February 2003, this does not prove that the Motion was transmitted within the time-frame specified under Rule 73(B). The Chamber accepts, however, to examine Ngirumpatse's request for certification, notwithstanding the absence of an unequivocal fax transmission report.

9. The requests for certification to appeal by Defence for Karemera were filed on 23 February. Only the request for certification to appeal the Decision of 23 February was filed within the required time-frame. However, the Decision of 23 February 2004 cannot be dissociated from that of 13 February 2004. In these circumstances, the Chamber accepts to admit the two requests for certification.

*Merits of the motions*

10. The Chamber took into consideration a number of factors before granting leave to amend the Indictment. These included diligence shown by the Prosecution in regard to its investigations and the time limit for filing the motion, as well as any likely prejudice that would be suffered by the Accused as a result of the amendment, considering at what stage of the proceedings the request is made. Given the power that is incumbent upon the Chamber to assess each of these factors, the Chamber considers that the Decision of 13 February 2004 deals with issues that have the potential of significantly compromising the outcome of the trial.<sup>5</sup>

11. While the Chamber is still of the opinion that a trial de novo should not take place, it is satisfied that an immediate resolution by the Appeals Chamber would avert other debates between the parties on this issue, as well as on the issue of recalling witnesses who have already been heard. An immediate resolution of these issues by the Appeals Chamber would materially advance the proceedings.

12. Accordingly, it is in the interests of justice to grant certification to appeal against the Decisions of 13 and 23 February 2004, which are inseparable.

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<sup>5</sup> With regard to the factors in question, and the powers of assessment of a Trial Chamber seized of a motion to amend an indictment, see Appeals Chamber, *The Prosecutor v. Édouard Karemera et al*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, paras. 13, 15 and 17. See also, *Id.*, *The Prosecutor v. Casimir Bizimungu et al*, Case No. ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004, para. 16.

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*The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba, Case No. ICTR-98-44-T*

**FOR THESE REASONS,**

**THE CHAMBER**

**GRANTS** the motions for certification to appeal against the Decisions of 13 and 23 February 2004.

Arusha, 19 March 2004

[Signed] **Andrésia Vaz**  
Presiding

[Signed] **Flavia Lattanzi**  
Judge

[Signed] **Florence Rita Arrey**  
Judge

[Seal of the Tribunal]

