

ICTR-98-44-PT  
31-3-2005  
(17989-17986)

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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Byron, Presiding  
Emile Francis Short  
Gberdao Gustave Kam

**Registrar:** Adama Dieng

**Date:** 31 March 2005

**THE PROSECUTOR**

v.

**Edouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA**

**Case No. ICTR-98-44-PT**

2005 MAR 31 P 3:59  
ICTR  
JUDICIAL ARCHIVES

**DECISION ON JOSEPH NZIRORERA'S APPLICATION FOR CERTIFICATION TO  
APPEAL THE DECISION DENYING HIS REQUEST FOR COOPERATION TO  
GOVERNMENT OF FRANCE**

*Rule 73(B) of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**  
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**Defence Counsels for Édouard Karemera**  
Dior Diagne Mbaye and Félix Sow

**Defence Counsel for Mathieu Ngirumpatse**  
Frédéric Weyl

**Defence Counsel for Joseph Nzirorera**  
Peter Robinson

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

**SITTING** as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding Judge,  
Judge Emile Francis Short and Judge Gberdao Gustave Kam ("Chamber");

**BEING SEIZED** of "Joseph Nzirorera's Application for Certification to Appeal Denial of  
Request for Cooperation to Government of France " ("Motion"), filed by the Defence for  
Nzirorera ("Defence") on 1<sup>st</sup> March 2005;

**CONSIDERING** that the Prosecution has not filed its Reply within the time-limit prescribed  
by Rule 73(E) of the Rules of Procedure and Evidence ("Rules");

**HEREBY DECIDES** the Motion, pursuant to Rule 73 of the Rules.

**DEFENCE'S SUBMISSION**

1. The Defence applies for certification to appeal the Decision on Nzirorera's Request  
for Cooperation to Government of France dated 23 February 2005 ("Decision of 23 February  
2005").<sup>1</sup> To justify its application, the Defence alleges that the four grounds of appeal it  
intends to raise meet the criteria set out by Rule 73(B) of the Rules for certification and that  
the impugned Decision involves issues that would significantly affect the fair conduct of the  
proceedings or the outcome of the trial and for which an immediate resolution is needed. The  
Defence relies upon arguments already presented in its previous Motion seeking certification  
to appeal the Decision denying motion to vacate sanctions.<sup>2</sup> It contends that the Presiding  
Judge of Trial Chamber III exercises supervisory authority over the Chamber and a  
reasonable observer would conclude that the appearance of bias found by the Appeals  
Chamber Decision of 22 October 2004<sup>3</sup> extends to Decisions delivered by the new Bench in  
the present case. It argues that the Chamber erred in giving effect to Decision of 29  
September 2003, issued by the former Bench,<sup>4</sup> in light of the findings of the Appeals  
Chamber Decision of 22 October 2004,<sup>5</sup> and in light of its own Decision not to give effect to  
the prior Bench's Decision on leave to amend the Indictment.

<sup>1</sup> *Prosecutor v. Edouard Karemera, Mathieu Ngirumpaste and Joseph Nzirorera*, Case No. ICTR-98-44  
(*Karemera et al.*), *Décision relative à la requête de Joseph Nzirorera aux fins d'obtenir la coopération du  
Gouvernement français*, 23 February 2005.

<sup>2</sup> Joseph Nzirorera's Application for Certification to Appeal Denial of Motion to Vacate Sanctions, filed on 1<sup>st</sup>  
March 2005.

<sup>3</sup> *Prosecutor v. Edouard Karemera, Mathieu Ngirumpaste, Joseph Nzirorera and André Rwamakuba*, Case No.  
ICTR-98-44, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a  
Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 22 October 2004, par.  
67.

<sup>4</sup> *Prosecutor v. Edouard Karemera, Mathieu Ngirumpaste, Joseph Nzirorera and André Rwamakuba*, Case No.  
ICTR-98-44, Decision on the Defence Motion for Disclosure of Items Deemed Material to the Defence of the  
Accused (TC).

<sup>5</sup> *Prosecutor v. Edouard Karemera, Mathieu Ngirumpaste, Joseph Nzirorera and André Rwamakuba*, Case No.  
ICTR-98-44, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a  
Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 22 October 2004.

2. The impugned Decision would also affect the right of the Accused to a fair trial by denying him the necessary assistance for the preparation of his case. The Defence claims that Article 28 of the Statute of the Tribunal ("Statute") only requires as showing that the material sought from the requested State involves the same events as those included in the Indictment. The Chamber would not have to adjudicate on the admissibility of the evidence as such but on its relevance for investigatory purposes. The Defence relies upon previous Decisions issued by both *ad hoc* Tribunals.<sup>6</sup> It reiterates that the requested document contains important information surrounding the same events that will be the subject of the Accused's trial and relevant for the preparation of the Defence case.

3. Finally, the Defence submits that the Chamber erred in denying its Motion by applying the wrong standard for determining whether a conflict was international or internal. The denial of access to the requested document would impact upon the outcome of the war crimes charges stated in Count 7 of the Indictment. Immediate resolution of the issue of the criteria to be applied to determine whether the conflict is international or internal would be necessary to guide the Chamber in numerous Decisions concerning admissibility of evidence. The Defence relies on a previous Decision of the Tribunal where certification was granted considering that the issue of relevance of evidence was likely to recur throughout the trial.<sup>7</sup>

**DELIBERATIONS**

4. The Chamber recalls Rule 73 (B) of the Rules, which stipulates:

Decisions rendered on such motions 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.

5. The Chamber notes that Decisions rendered under Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for the very limited circumstances stipulated in the above-mentioned Rule. The Chamber may grant certification to appeal if both conditions of the said Rule are satisfied: the applicant must show (i) how the impugned Decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial, and (ii) that an "immediate resolution by the Appeals Chamber may materially advance the proceedings". Both of these conditions require a specific demonstration, and are not determined on the merits of the appeal against the impugned Decision.

<sup>6</sup> *Prosecutor v. Tadic*, Case No. IT-94-I-A, Judgment (AC), 15 July 1999; *Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 10 March 2004; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance (TC), 7 February 2005.

<sup>7</sup> *Prosecutor v. Bizimungu et al*, Case No. ICTR-99-50-T, Decision on the Accused Mugiraneza's Motion for Certification to Appeal the Chamber's Decision of 5 February 2004 (TC), 24 March 2004.

6. Based on the facts related to the case, the Chamber is of the view that the Defence has failed to show how the Decision involves an issue that that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial. As the Chamber stated in the impugned Decision, the charges against the Accused are not based on any alleged responsibility of the Accused in the assassination of President Habyarimana. The potential involvement of the RPF in the said assassination cannot relieve a person who is alleged to have committed international crimes in 1994 in Rwanda of his/her own criminal responsibility. It has not been shown that there is any Defence to the Indictment which could be supported by the requested document.


7. The other arguments raised by the Defence do not add any more support to its Motion. The Chamber notes that, contrary to Defence's contentions, the impugned Decision did not apply the Decision of 29 September 2003 on the Defence Motion for Disclosure of Items Deemed Material to the Defence of the Accused. It expressly stated that the said Decision was not relevant to the current Motion filed by the Defence.<sup>8</sup> As regards the supervisory power of the Presiding Judge of Trial Chamber III over the Chamber and the alleged appearance of bias related to, the Chamber notes that the issue has been solved by a Decision delivered by the President, finding that

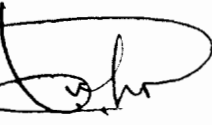
Nothing in the memorandum of Judge Vaz, nor in any rule or practice of the Tribunal concerning the position of a Presiding Judge of a Trial Chamber, could reasonably be construed as interfering with the judicial independence and impartiality of the judges in *Karemera et al.* It is significant, in this regard, that the Defence does not suggest that Judge Vaz had any role to play in the appointment of these judges and, furthermore, requests that they continue to sit on the case.<sup>9</sup>

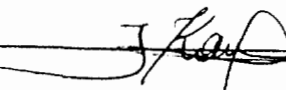
9. The Chamber considers therefore that the requirements set out by Rule 73(B) of the Rules are not met.

**FOR THE ABOVE MENTIONED REASONS, THE CHAMBER  
DENIES the Motion.**

Arusha, 31 March 2005, done in English.

  
Dennis C. M. Byron  
Presiding Judge

  
Emile Francis Short  
Judge

  
Gberdao Gustave Kam  
Judge

[Seal of the Tribunal]



<sup>8</sup> See par. 8 of the impugned Decision.

<sup>9</sup> *Karemera et al.*, Decision on Motion to Reassign Case to Different Trial Chamber (Pres.), 22 March 2005, par. 2.