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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: 24 May 2005

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-PT

JUDICIAL DEPARTMENT/ARCHIVES
ICTR
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DECISION ON JOSEPH NZIRORERA'S MOTION FOR ORDER FINDING PRIOR
DECISIONS TO BE OF "NO EFFECT"

Rules 46(A) and 73 of the Rules of Procedure and Evidence

Office of the Prosecutor:

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[Signature]

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

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

BEING SEIZED of "Joseph Nzirorera's Motion for Order Finding Prior Decisions to Be of "No Effect" ("First Motion"), filed by the Defence of the Accused Nzirorera ("Defence") on 25 February 2005;

CONSIDERING the Prosecution's Response, filed on 16 March 2005;

BEING SEIZED further of the Defence "Motion to Strike Prosecutor's Response To Nzirorera's Motion for Order Finding Prior Decisions to Be of No Effect and Motion for Warning pursuant to Rule 46(A)" ("Second Motion"), filed on 17 March 2005;

CONSIDERING the Prosecution's Response thereto, filed on 18 March 2005;

HEREBY DECIDES the Motions pursuant to Rules 73 of the Rules of Procedure and Evidence ("Rules").

INTRODUCTION

1. The trial against the Accused commenced on 27 November 2003. During the course of the proceedings, one of the Judges withdrew from the case,¹ and the remaining Judges decided to continue the trial with a substitute Judge pursuant to Rule 15bis(D) of the Rules.²

2. This Decision to proceed was successfully challenged by the Accused before the Appeals Chamber which granted the Appeals on the points of assessment of credibility in the absence of an opportunity to observe the demeanour of witnesses and apprehension of bias.³ It should be stressed at the outset that the Appeals Chamber found that there was "no actual bias". Its ruling was based purely on an abundance of caution to ensure that interest of justice was guaranteed.⁴

3. As a result of this ruling, the current Chamber, in preparing to hear the case anew, has determined that Decisions regarding evidentiary matters no longer have any bearing on the current proceedings and the previous Decision of 13 February 2004 granting leave to amend the Indictment should be disregarded.⁵ The question now before the Chamber is whether certain Decisions rendered by the previous Bench should also be disregarded.

ARGUMENTS OF THE PARTIES

¹ See *Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-94-44-PT (*Karemera et al.*), Decision on Motions by Nzirorera and Rwamakuba for Disqualification of Judge Vaz (Bureau), 17 May 2004, para. 6.

² *Karemera et al.*, Decision on Continuation of Trial (TC), 16 July 2004.

³ *Karemera et al.*, 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 (*Appeals Chamber Reasons of 22 October 2004*).

⁴ *Ibid.*, par. 67.

⁵ *Karemera et al.*, Decision on Severance of André Rwamakuba and Amendments of the Indictment (TC), 7 December 2004.



4. In the First Motion, the Defence requests the Chamber to declare that certain Decisions issued by the previous Bench are of "no effect". The Motion refers to 26 written Decisions, and all oral Decisions rendered during trial and written Decisions denying certification to appeal oral Decisions, in which the Judge in respect of whom the Appeals Chamber has found an appearance of bias participated and which contained rulings adverse to the Accused. The Defence contends that its request ought to logically follow from the rulings made by the Appeals Chamber and by this Trial Chamber in its Decision of 7 December 2004.⁶

5. The Prosecution does not oppose a finding that written Decisions on evidence issues⁷ and all oral decisions must be disregarded. It concedes that the Decision on the Amended Indictment of 18 February 2004⁸ is disregarded since the said Indictment is no longer valid. It submits that since numerous Decisions on disclosure were complied with, a finding that these decisions should be disregarded would be meaningless.

6. The Prosecution only objects that three categories of Decisions should be disregarded:

- It contends that since the reasonable apprehension of bias did not occur until 5 September 2005 and the Decisions on State co-operation⁹ were delivered before that date, they should still have effect.
- It objects to any statement nullifying prior Decisions on Witness Protective Measures as it could leave Witnesses G and T without critical protections.
- It argues that Decisions ordering sanctions against the Lead Counsel for the Accused¹⁰ should not be nullified because such a finding would render meaningless the Chamber's Decision rejecting Nzirorera's Motion to vacate the same sanctions.¹¹

7. In the Second Motion, the Defence requests the Chamber to strike the Prosecution's Response because it was filed out of time, and to issue a warning to the Prosecution pursuant to Rule 46(A) of the Rules, or alternatively, to grant it time to reply to the Prosecution's Response.

⁶ See *Appeals Chamber Reasons* of 22 October 2004; *Karemera et al.*, Decision on Severance of André Rwamakuba and Amendments of the Indictment (TC), 7 December 2004.

⁷ Namely, *Karemera et al.*, Decision on Defence Motion for an Order to Prosecution Witnesses to Produce, At Their Appearance, Their Diaries and Other Written Materials from 1992 to 1994 and their Statements Made Before Rwandan Judicial Authorities (TC), 24 November 2003; *Karemera et al.*, Decision on the Defence Motion to Strike Testimony of Witnesses GBG and GBV, 30 April 2004; Decision on Prosecutor's Motion for Judicial Notice (TC), 30 April 2004.

⁸ *Karemera et al.*, Decision on the Preliminary Defence Motion to Dismiss the Amended Indictment for Defects in Form (TC), 7 April 2004.

⁹ Namely, *Karemera et al.*, Decision on the Defence Motion to Order the Government of Rwanda to Show Cause (TC), 4 September 2003; *Karemera et al.*, Decision on the Requests to the Governments of the United States of America, Belgium, France, and Germany for Cooperation (TC), 4 September 2003.

¹⁰ Namely, *Karemera et al.*, Decision on the Defence Motion to Order the Government of Rwanda to Show Cause (TC), 4 September 2003; *Karemera et al.*, Decision on the Defence Request for Leave to Interview Potential Prosecution Witnesses Jean Kambanda, Georges Ruggiu, and Omar Seushago (TC), 29 September 2003; *Karemera et al.*, Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2003; *Karemera et al.*, Decision on the Motion of Nzirorera to Dismiss the Indictment for Lack of Jurisdiction: Chapter VII of the United Nations Charter (TC), 29 March 2004; *Karemera et al.*, Decision on the Motions by Karemera and Nzirorera for Invalidation of the Indictment for Defects in Procedure and Form (TC), 29 March 2004.

¹¹ *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-94-44-PT, Decision on Motion to Vacate Sanctions (TC), 23 February 2005.

DELIBERATIONS

8. As a preliminary matter, the Chamber observes that the Prosecution's Response, though late, was filed before it was ready to be considered. In these circumstances, the Prosecution did not retard the progress of the proceedings nor cause any prejudice to the Accused. In the interest of justice, the Chamber has taken cognizance of the Prosecution's submissions. The Chamber recalls its Oral Decision delivered on 24 March 2005 on time-limits to file Replies¹² and reminds the parties to contribute to the proper administration of justice and file their pleadings within the prescribed time-limit. The Rules do not prescribe any right to respond to a Reply to a Motion. It is a liberty which may be allowed by the Chamber. In this case, the submissions filed by the parties are sufficient to rule on the merits and it is not necessary to make the requested provision for the Defence to reply to the Prosecution's Response. In all these circumstances, the Chamber does not consider that any warning under Rule 46(A) of the Rules is warranted. Accordingly, the Second Motion falls to be rejected.

9. On the merits, the Chamber notes that the Defence and the Prosecution agree, although on different grounds, that the Decisions delivered by the previous Bench and relating to evidentiary matters, disclosure and the amendment of the Indictment have no further effect. That agreement appropriately reflects the Chamber's Decision of 7 December 2004¹³ and does not require repetition.

10. The Chamber considers that the same principle should apply to the Decisions on State co-operation. They also related to evidentiary matters. In addition, they had a temporary effect, and would not necessarily prevent renewing the request if such is required as a result of changed circumstances in the approximately eighteen months that have elapsed. With respect to the current effectiveness of Decisions on protective measures,¹⁴ the Chamber recalls furthermore that its *proprio motu* Order of 10 December 2004 superseded the prior Decisions granting protective measures for Prosecution witnesses. It is therefore pointless for the Chamber to declare that these Decisions should be disregarded. If the Prosecution is not satisfied that the said Order provides appropriate protective measures to some specific witnesses, it can bring a Motion requesting amendment of these measures.

11. The Decisions in which sanctions were ordered by the prior Bench, related to applications which fall within the categories already discussed and which would have no continuing effect on the trial. Following the rulings made above on the other categories, it would be pointless to make a declaration that these Decisions should be disregarded.

12. The Defence contends that the orders for sanctions have a continuing effect by permanently depriving Counsel for the Accused of fees relating to those motions and should be declared to be of no effect. The sanctions orders are not substantive. They are merely ancillary or consequential to the substantive motions. They reflect the conclusion by the Trial Chamber that bringing those motions was frivolous or was an abuse of process. This is a new trial starting on the principle of a clean slate. Those orders for sanctions do not prevent the Defence from making fresh applications, during the rehearing, containing substantive

¹² See Transcripts, 24 March 2005, p. 6.

¹³ *Karemera et al.*, Decision on Severance of André Rwamakuba and Amendments of the Indictment (TC), 7 December 2004; *Karemera et al.*, Dissenting Opinion of Judge Short on Severance of André Rwamakuba and Amendments of the Indictment (TC), 8 December 2004.


¹⁴ *Karemera et al.*, Decision on the Defence Motion for Modification of a Decision of 12 July 2000 on Protective Measures for Prosecution Witnesses (TC), 7 October 2003; *Karemera et al.*, Decision on the Prosecutor's Request for Special Protective Measures for Witnesses G and T (TC), 20 October 2003.

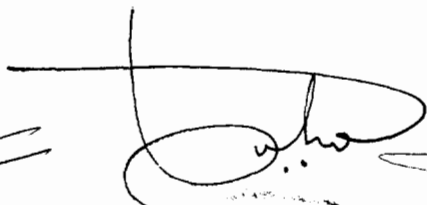
requests similar to those which led to the said sanctions, if it has an appropriate basis to do so. The Chamber wishes to emphasize that it will consider each motion on its merits so that nothing in this Decision must be construed as a license to bring motions that are frivolous or are an abuse of process. In these circumstances, the orders for sanctions have no bearing on or relevance to the rehearing. The Chamber considers that the same principle should therefore be applied.


FOR THE ABOVE REASONS, THE CHAMBER

DENIES the First and the Second Motions.

Arusha, 24 May 2005, done in English.


 Dennis C. M. Byron
 Presiding Judge


 Emile Francis Short
 Judge


 Goerdao Gustave Kam
 Judge

