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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 23 June 2009

JUDICIAL RECORDS ARCHIVE

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THE PROSECUTOR

v.

Édouard KAREMERA
Matthieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

**DECISION ON ÉDOUARD KAREMERA'S MOTION RELATING TO HIS RIGHT
TO BE TRIED WITHOUT UNDUE DELAY**

Article 21(4)(d) of the Statute

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HM

INTRODUCTION

1. In its Decision on Continuation of Trial of 3 March 2009, the Trial Chamber held that “the delay in the proceedings, to this point, has become such that the rights of the accused to be tried without undue delay have been violated.”¹ In a motion filed on 18 May 2009, Édouard Karemera moves the Trial Chamber to remedy the violation of his right to be tried without undue delay by revoking the Indictment against him, bringing an immediate end to the proceedings in his case and ordering his immediate release.² The Prosecution opposes Karemera's Motion.³

DELIBERATIONS

2. Article 21(4)(d) of the Statute of the International Tribunal, reflecting international human rights standards,⁴ provides for the right to be tried without undue delay. This was specified by the Appeals Chamber in the *Kvočka et al.* case: “The right to an expeditious trial is an inseparable and constituent element of the right to a fair trial.”⁵

3. Édouard Karemera interprets the Chamber's holding regarding his right to be tried without undue delay as referring to the six-year period since the start of his first trial in 2003.⁶ However, as is clear from the Decision on Continuation of Trial, the delay to which the Chamber was referring in its holding actually ran from August 2008, when Ngirumpaste became ill, to March 2009, when Ngirumpaste was severed from the trial.⁷ Accordingly, the

¹ *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpaste, Joseph Nzirorera*, Case No. ICTR-98-44-T (“*Karemera et al.*”), Decision on Continuation of Trial, 3 March 2009, para. 38 (“*Karemera Decision on Continuation*”). The Chamber notes that while the remedy of severance ordered by the Chamber in this decision has been overturned on appeal, the Appeals Chamber's findings do not affect the particular ruling at issue in this decision: *Karemera et al.*, Decision on Appeal concerning the Severance of Matthieu Ngirumpaste, 19 June 2009.

² Requête relative à la violation du droit à être jugé sans retard excessif, filed on 18 May 2009 (“*Karemera's Motion*”).

³ Prosecutor's Response to Édouard Karemera's “Requête relative à la violation du droit à être jugé sans retard excessif,” filed on 25 May 2009 (“*Prosecutor's Response*”).

⁴ See, e.g., Article 14(3)(c) of the International Covenant on Civil and Political Rights of 16 December 1966, 999 U.N.T.S. 171; Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, CETS 005.

⁵ *The Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-AR73.5, Decision on Interlocutory Appeal by the Accused Zoran Žigić Against the Decision of Trial Chamber I Dated 5 December 2000, 25 May 2001, para. 20.

⁶ *Ibid.*, paras 6-10, referring to *The Prosecutor v. Jean Bosco Barayagwiza*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999 (“*Barayagwiza Decision*”).

⁷ *Karemera Decision on Continuation*, para. 38. The full paragraph reads as follows: “In short, the case of one accused has been brought to a halt mid-way through and the others are at a standstill. Such a situation must be assessed in light of the presumption of innocence. The Chamber finds that, given how far the trial has proceeded, and that the defence cases are prepared to proceed imminently and expected to finish within the year, it has become seriously prejudicial to simply let the accused sit in detention while Matthieu Ngirumpaste's

question before the Chamber is whether the relief sought by Karemera is an appropriate remedy for the violation of his right to be tried without undue delay over a period of eight months as a result of the inability of one of his co-Accused to participate in the trial due to illness.

4. The Appeals Chamber has held that “any violation, even if it entails a relative degree of prejudice, requires a proportionate remedy.”⁸ A remedy for a human rights violation is to be granted on a case-by-case basis, taking into account the subject matter as well as the nature of the right allegedly violated.⁹ In particular, the nature and form of the remedy should be proportional to the gravity of harm that is suffered.¹⁰

5. Édouard Karemera submits that the appropriate remedy in the present case is the withdrawal of the Indictment against him, the termination of the proceedings in his case and his immediate release.¹¹

6. In the jurisprudence of the *ad hoc* tribunals, the remedy of the termination in the proceedings has been found to be an extraordinary remedy applicable in exceptional circumstances. The Appeals Chamber has held that while a Trial Chamber may use its discretion, in light of the circumstances of a case, to decline to exercise jurisdiction, it should only do so “where to exercise that jurisdiction in light of serious and egregious violations of the accused’s rights would prove detrimental to the court’s integrity.”¹² The Appeals Chamber has held such circumstances to include those “where an accused is very seriously mistreated, maybe even subject to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment.”¹³ Outside of such exceptional circumstances, the Appeals Chamber has held that the remedy of the termination of the proceedings would “be disproportionate.”¹⁴

health problems are addressed. In the circumstances, the Chamber finds that the delay in the proceedings, to this point, has become such that the rights of the accused to be tried without undue delay have been violated.”

⁸ *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, 31 May 2000, para. 125 (“*Semanza Appeal Decision*”).

⁹ *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44-T (“*Rwamakuba*”), Decision on Appropriate Remedy, 31 January 2007, para. 68 (“*Rwamakuba Decision on Remedy*”).

¹⁰ *Rwamakuba*, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007, para. 27 (“*Rwamakuba Appeal Decision on Remedy*”); *Semanza Appeal Decision*, para. 125.

¹¹ Karemera’s Motion.

¹² *Barayagwiza*, Decision, para. 74.

¹³ *The Prosecutor v. Dragan Nikolić*, Case No. T-94-2-PT (“*Nikolić*”), Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, para. 114; *Nikolić*, Decision on Interlocutory Appeal Concerning Legality of Arrest, paras. 28, 30; *The Prosecutor v. Juvénal Kajelijeli*, Case No. IT98-44A, Appeal Judgement, 23 May 2005, para. 206.

¹⁴ *Nikolić*, Decision on Interlocutory Appeal Concerning Legality of Arrest, para. 30; *Kajelijeli Appeal Judgement*, para. 206

7. The remedy of the termination of the proceedings is also an exceptional remedy in other international jurisdictions. In the *Lubanga* case, at the International Criminal Court, the Appeals Chamber described the threshold for the imposition of a stay in the proceedings as follows:

Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. [...] Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as a the potent agent of justice.¹⁵

The threshold for the application of the remedy of the termination of the proceedings is similarly elevated in the decisions of the Human Rights Committee¹⁶ and the European Court of Human Rights,¹⁷ where it has only been ordered in cases involving egregious violations, such as a 13 year delay in the delivery of a written appeals court decision.¹⁸

8. In the present case, while the Chamber gives due weight to the violation of Édouard Karemera's right to be tried without undue delay, it does not find that this violation rises to a level of egregiousness justifying the exceptional remedy of the withdrawal of the indictment, the termination of the proceedings and his immediate release.

9. First, Édouard Karemera's case does not fall within the exceptional category of cases where the termination of the proceedings is warranted. Karemera relies on the Appeals Chamber's decision of November 1999 in which it ordered the immediate release of Jean-Bosco Barayagwiza.¹⁹ In *Barayagwiza*, the Appeals Chamber found that a number of the

¹⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-772, Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, para. 39.

¹⁶ See, e.g., *Currie v. Jamaica*, CCPR/C/50/D/377/1989 (31 March 1994) (granting release to a defendant unable to appeal death sentence to Constitutional Court of Jamaica due to lower appeals court's failure to issue written opinion 13 years after judgment); *Pratt and Morgan v. Jamaica*, CCPR 210/1986 and 225/1987 (6 April 1989) *Pratt and Morgan v. Jamaica*, CCPR 210/1986 and 225/1987 (6 April 1989) (commuting the sentence of two death row inmates on account of a 3 year, 9 month delay in the delivery of a written appeal decision and an Art. 7 violation in not informing defendants of a stay of execution granted the day before until 45 minutes prior to the scheduled execution).

¹⁷ See, e.g., *Majaric v. Slovenia*, ECHR Application no. 28400/95 (8 February 2000) (finding a delay of 4 years, 5 months to be a violation and imputing it to the domestic court and the government's failure to properly organize the court system, but granting a remedy of only 300,000 Slovenian Tolars); *Krejcir v. the Czech Republic*, ECHR Application no. 39298/04, 8723/05 (26 March 2009) (finding a violation of Arts 5(3) and 5(4), but holding that the finding of the violation constituted just satisfaction); *Yankov v. Bulgaria*, ECHR Application no. 39084/97 (11 December 2003) (finding a violation of Arts. 3, 5(3), 5(4), 5(5), 6(1), 10 and 13, and awarding a total of 12,000 Euros); *Eckle v. German*, Application no. 8130/78 (15 July 1982) (finding a delay of 17 years to be a violation of Art. 6(1), but a finding of violation was considered just satisfaction in addition to sentence mitigation).

¹⁸ See *Currie v. Jamaica*, CCPR/C/50/D/377/1989 (31 March 1994).

¹⁹ Karemera's Motion, para. 6.

accused's human rights had been violated and that this was the result of the Prosecutor's negligent and egregious failure to prosecute his case.²⁰ The Appeals Chamber thus found that "to proceed with Barayagwiza's trial when such violations have been committed, would cause irreparable damage to the integrity of the judicial process" and that an immediate release was "the only effective remedy for the cumulative breaches of the accused's rights."²¹ On the other hand, the delay in Karemera's proceedings was the result of the illness of a co-Accused, not of prosecutorial misconduct, and it was not accompanied by other violations of Karemera's rights. As such, the facts in the *Barayagwiza* decision are clearly distinguishable from those in Karemera's case and his reliance on the *Barayagwiza* decision is misplaced.

10. Second, the Chamber finds that the prejudice suffered by Édouard Karemera as a result of the violation of his right to be tried without undue delay is not so material as to warrant the termination of the proceedings against him. The Chamber notes that it has sought to expedite the proceedings in a number of ways and thus minimize the difficulties caused by the stay in the proceedings, including by severing Matthieu Ngirumpatse's case from Karemera's²² (a decision which Karemera has successfully appealed),²³ limiting the number of witnesses and court time to what is necessary for the fair and proper conduct of the proceedings,²⁴ changing the order of appearance of witnesses to save time,²⁵ and proactively dealing with delays caused by translation issues.²⁶ In addition, the Chamber also notes that Karemera himself has in previous submissions before the Chamber as well as in submissions before the Appeals Chamber denied suffering any prejudice and has in fact consented to further delays in his case.²⁷

²⁰ *Barayagwiza* Decision, paras 106. See also *ibid.*, para. 109. The Appeals Chamber found that Barayagwiza's rights to challenge the legality of his detention, to be promptly charged, to be informed of the charges against him, to an initial appearance without delay and to be tried without undue delay had been violated.

²¹ *Ibid.*, para. 108. The Appeals Chamber's decision of March 2000, in which it reconsidered its earlier decision, also makes it clear that the remedies of the dismissal of charges and the immediate release of the accused were remedies that were justified by the "role played by the failings of the Prosecutor as well as the intensity of the violation of the rights of the Appellant.": *Barayagwiza*, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para. 71.

²² *Karemera et al.*, Decision on Continuation of Trial, 3 March 2009.

²³ *Karemera et al.*, Decision on Appeal concerning the Severance of Matthieu Ngirumpatse, 19 June 2009.

²⁴ See, e.g., *Karemera et al.*, Order to Joseph Nzirorera to Reduce his Witness List, 24 October 2008.

²⁵ See, e.g., *Karemera et al.*, Scheduling Order, 8 May 2009.

²⁶ See, e.g., *Karemera et al.*, Order Directing the Parties to File Submissions Regarding the Translation of Trial Exhibits, 22 June 2009.

²⁷ Soumission de Édouard Karemera sur le maintien du process joint, filed on 13 February 2009, p. 4; Mémoire d'Appel suite à la Décision du 03 Mars 2009 relative à la Continuation du Procès, filed on 2 April 2009, paras 14-16, 39, 55.

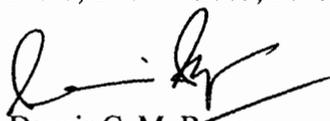
11. Third, the Chamber recalls that the Appeals Chamber has held that the *ad hoc* tribunals must maintain the correct balance between “the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.”²⁸ In the circumstances of this case, including the nature and extent of the violation of Édouard Karemera’s right to be tried without undue delay and the advanced stage of the proceedings, the Chamber finds that it is in the interests of justice for his trial to continue.

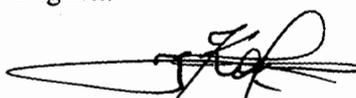
12. The Prosecution argues that the Chamber has already provided Édouard Karemera with a remedy for the violation of his right to a trial without undue delay by severing Mathieu Ngirumpatse from this trial.²⁹ To the extent that the Chamber’s order of severance has been reversed, this argument is now moot.³⁰ The Chamber nonetheless points out that while severance is indeed a measure that can avoid further prejudicing an accused’s right to be tried without undue delay,³¹ it cannot retroactively provide a remedy for the past violation of this right. As such, regardless of whether the Chamber decides to once again sever Ngirumpatse from this trial, it will remain open to Karemera to invoke, at the close of this case, the issue of the violation of his right to be tried without undue delay between August 2008 and March 2009 as a result of delays caused by Ngirumpatse’s illness in order to seek an appropriate remedy.

FOR THESE REASONS, THE CHAMBER

DENIES Karemera’s Motion in its entirety.

Arusha, 23 June 2009, done in English.


Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge TPIR


Vagn Joensen
Judge



²⁸ *Dragan Nikolić*, Decision on Interlocutory Appeal Concerning Legality of Arrest, para. 30; *Kajelijeli* Appeal Judgement, para. 206

²⁹ Prosecutor’s Response, para. 19, referring to *Karemera* Decision on Continuation.

³⁰ *Karemera et al.*, Decision on Appeal concerning the Severance of Matthieu Ngirumpatse, 19 June 2009.

³¹ *Karemera* Decision on Continuation, para. 38.