

ICTR-98-44-PT
12-4-2005
(18075-18072)

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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: 12 April 2005

THE PROSECUTOR

v.

**Edouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-PT

JUDICIAL RECORDS/ARCHIVES
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**DECISION ON MOTION TO DISMISS AMENDED INDICTMENT FOR
VIOLATION OF ARTICLE 12QUATER OF THE STATUTE**

Article 12quater of the Statute

Office of the Prosecutor:

Don Webster
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Defence Counsels for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsels for Mathieu Ngirumpatse
Frédéric Weyl

Defence Counsel for Joseph Nzirorera
Peter Robinson

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

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

BEING SEIZED of a "Motion to Dismiss Amended Indictment for Violation of Article 12quater of the Statute" ("Motion"), filed by the Defence for Nzirorera ("Defence") on 24 March 2005;

CONSIDERING the Prosecution's Response thereto filed on 29 March 2005 and the Defence's Reply thereto filed on 4 April 2005;

HEREBY DECIDES the Motion, pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules").

ARGUMENTS OF THE PARTIES

Defence's Motion

1. The Defence alleges that the Amended Indictment must be dismissed because it has not been reviewed and confirmed in conformity with the Statute. It contends that Rule 50(A) of the Rules, as amended in 2004, requires the Chamber to review supporting material and determine whether a *prima facie* case exists. The said Rule would require that the Chamber applies Rule 47(E) of the Rules which explicitly refer to Article 18 of the Statute of the Tribunal ("Statute"). In the Defence's view, when deciding whether to grant leave to amend an Indictment, the Chamber would exercise a reviewing power of the Amended Indictment, from which, according to Article 12quater of the Statute, *ad litem* Judges are prohibited to participate. The Defence submits that the present Chamber exercised a reviewing power in its Decision of 14 February 2005 granting leave to amend the Indictment, contrary to the provisions of the Statute.¹

2. The Defence argues that the Appeals Chamber Decision of 11 June 2004,² dismissing its previous appeal on this issue, did not dispose of the matter. It interprets it to mean that the Decision whether to grant leave to amend the Indictment is independent from the Decision whether a *prima facie* case has been made out after review of supporting material. The Defence contends that the said Appeals Chamber Decision did interpret the action of the Trial Chamber as simply granting leave to amend the Indictment. It asserts that if the Security Council wanted *ad litem* Judges to review Amended Indictments, it could have said so in Article 12quater of the Statute.

Prosecution's Response

3. The Prosecution opposes the Motion considering that the arguments brought by the Defence are the same as those previously raised and rejected by the Appeals Chamber in its

¹ *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera and André Rwamakuba (Karemera et al.)*, Case No. ICTR-98-44-PT, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment (TC), 14 February 2005 (*Trial Chamber Decision* of 14 February 2005).

² *Prosecutor v. Edouard Karemera and Joseph Nzirorera*, Case No. ICTR-98-44-AR73.4, Decision on Interlocutory Appeals Regarding Participation of *Ad Litem* Judges (AC), 11 June 2004 (*Appeals Chamber Decision* of 11 June 2004).

Decision of 11 June 2004.³ In the Prosecution's view, the Appeals Chamber's statement could not be clearer that the power of *ad litem* Judges to adjudicate on a Motion to amend the Indictment is independent of the question of what standards they should apply when deciding, whether those standards are imposed by the amendments to Rule 50 of the Rules or otherwise.

Defence's Reply

4. The Defence contends that the position of the Prosecution is ambiguous. It recalls that the Prosecution's original position was that the Defence interpretation of Rule 50 of the Rules was a possible reading.⁴ It reiterates its previous arguments and submits that there is no rational distinction between reviewing an original Indictment and reviewing an Amended Indictment. It moves for the Chamber to grant the Motion and ask the President to assign a Bench of permanent Judges to review the Amended Indictment. Alternatively, it requests that the Chamber grants certification to appeal so to allow the Appeals Chamber to interpret its own Decision. Finally, it submits that a denial of the Motion, without granting certification for appeal, could cause reversal of a Judgment on final appeal.

DELIBERATIONS

5. The Chamber considers that all the questions raised by the instant Motion have already been decided. In its previous Decision of 14 February 2005, the Chamber also found that the Appeals Chamber's Decision had disposed of the matter.⁵ In addition, the Chamber stated that "[w]hen adjudicating on a Motion seeking leave to file an Amended Indictment after the initial appearance, the Trial Chamber does not act as a confirming Judge under Article 18 of the Statute because it applies the procedure and standards set out in Rule 47(E) and (F)".⁶ The Chamber will nonetheless reiterate its *ratio decidendi*.

6. Review of the Indictment under Article 18 of the Statute and leave to amend the Indictment under Rule 50 of the Rules are different steps in the proceedings. When reviewing and confirming the Indictment, the Judge of the Trial Chamber exercises the primary step to determine whether a suspect can be prosecuted before the Tribunal. He or she reviews in whole what will constitute the basis of the case against the Accused and determines whether the Indictment will be confirmed or dismissed. That fundamental function is enshrined in Article 18 of the Statute. It is precisely that exclusive function which Article 12quarter (2)(b)(ii) of the Statute addresses by prescribing that *ad litem* Judges shall not have power "to review an Indictment pursuant to Article 18 of the present Statute".

7. Conversely, Article 14 of the Statute prescribes that Rules of Procedure and Evidence shall be adopted for the conduct of the pre-trial phase of the proceedings, trials and appeals. In the instant case, we have long passed the preliminary Article 18 of the Statute stage of the proceedings and are within the phase governed by the Rules of Procedure and Evidence. Rule 50 of the Rules provides that leave to amend the Indictment can be granted after the initial appearance by a Trial Chamber pursuant to Rule 73 of the Rules. Thus it is clear that it is a Trial chamber or a Judge designated by it, and not a confirming Judge, that can decide the matter.⁷ Its function relates to examine the requested amendments in the light of the further supporting material provided by the Prosecution and to determine whether sufficient grounds

³ Appeals Chamber Decision of 11 June 2004.

⁴ The Defence cites the *Prosecutor's Reply to the Defence Submissions on the Consolidated Motion to Sever Rwamakuba from the Joint Indictment and for Leave to Amend the Indictment*, filed on 10 February 2005, par. 11.

⁵ Trial Chamber Decision of 14 February 2005.

⁶ *Ibid.*, par. 24.

⁷ See Rule 50(A)(i) of the Rules.

are established to prosecute the Accused on the basis of these amendments. Article 18 of the Statute and Rule 50 of the Rules imply the exercise of functions which are not identical.

8. The Appeals Chamber did not decide otherwise when finding that “*ad litem* Judges, sitting as members of a Trial Chamber, are [...] empowered to participate in the consideration and decision of a motion for leave to amend an indictment pursuant to Rule 50 of the Rules and, that it is independent of the question whether, in deciding to grant leave to amend an indictment, the Trial Chamber shall apply the standards set out in Sub-Rules 47(E) and (F) of the Rules.”⁸ In conformity with Rule 50(A)(ii) of the Rules, the “participation in the consideration and decision of a Motion for leave to amend an Indictment” necessarily implies that the Judges will apply the standards of Rules 47(E) and (F). Contrary to the Defence’s contention, the Appeals Chamber’s ruling is unambiguous.

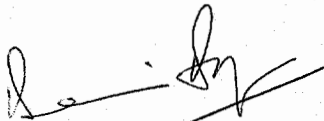
9. In order to avoid a multiplicity of Motions, the Chamber will now adjudicate on the Defence application for certification of appeal. The submission that that certification should be granted to allow the Appeals Chamber to interpret its prior Decision must inevitably fail. For reasons expressed above, the Chamber cannot see any basis for a certification which will only invite the Appeals Chamber to reconsider its previous Decision on arguments it has already rejected.

10. The present matter has already been brought before the Chamber and the Appeals Chamber on the basis of the same arguments which have been systematically rejected.⁹ The Chamber recalls the Defence’s obligation to act in the interests of justice and to avoid repetitive filing of the same Motion which could be considered frivolous or an abuse of process.¹⁰

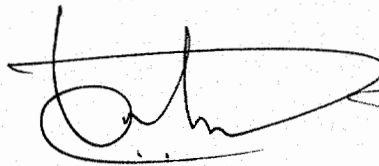
FOR THE ABOVE MENTIONED REASONS, THE CHAMBER

DENIES the Motion in all aspects.

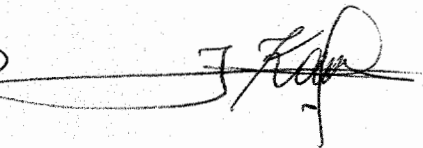
Arusha, 12 April 2005, done in English.



Dennis C. M. Byron
Presiding Judge



Emile Francis Short
Judge



Gberdao Gustave Kam
Judge

[Seal of the Tribunal]

⁸ Appeals Chamber Decision of 11 June 2004, p. 4 (emphasis added).

⁹ Trial Chamber Decision of 14 February 2005; Appeals Chamber Decision of 11 June 2004.

¹⁰ See Rules 46(A) and 73(F) of the Rules.