ICTR-98-44-T
7-12-2004
(15810 — 15802)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

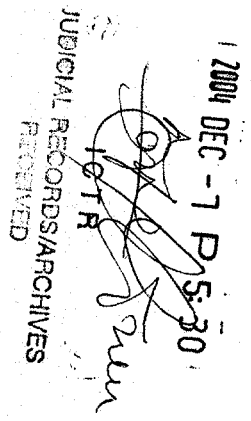
OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M., Presiding
Emile Short
G. Gustave Kam

Registrar: Adama Dieng

Date: 7 December 2004



THE PROSECUTOR
v.
Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
André RWAMAKUBA

Case No. ICTR-98-44-PT

DECISION ON SEVERANCE OF ANDRÉ RWAMAKUBA AND AMENDMENTS OF THE INDICTMENT

Article 20(4) of the Statute, Rule 82 (B) of the Rules of Procedure and Evidence

Office of the Prosecutor:
Don Webster
Holo Makwaia
Dior Fall
Gregory Lombardi
Bongani Dyani
Sunkarie Ballah-Conteh
Tamara Cummings-John
Takeh Sendze

Defence Counsel
Dior Diagne Mbaye and Félix Sow,
for Edouard Karemera
Charles Roach and Frédéric Weyl,
for Mathieu Ngirumpatse
Peter Robinson, for Joseph Nzirorera
David Hooper and Andreas O'Shea, for
André Rwamakuba

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 Gustave Kam ("Chamber");

CONSIDERING the "Prosecutor's Motion for Leave to Amend the Indictment of 18 February 2004", filed on 10 September 2004 ("Motion of September 2004");

CONSIDERING Mathieu Ngirumpatse's Replies and thereto, filed on 6 October 2004 and 9 November 2004 ("Defence") and Edouard Karemera's Response thereto, filed on 11 November 2004 ("Defence");

CONSIDERING "Joseph Nzirorera's Response to Motions to Amend Indictment and to Vary Final Witness List", filed on 4 November 2004 ("Defence") and the Prosecutor's Reply thereto, filed on 8 November 2004;

CONSIDERING the "Reply on behalf on Dr Rwamakuba to the Prosecution Motions to Amend the Indictment and to Vary their List of Witnesses", filed on 8 November 2004 ("Defence");

CONSIDERING the "Mémoire complémentaire à toutes fins de la Défense de M. Mathieu Ngirumpatse sur la *Prosecutor's Motion for Leave to Amend the Indictment of 18 February 2004*", filed on 3 December 2004 and the Prosecutor's Response thereto, filed on 6 December 2004;

CONSIDERING the "Prosecutor's Motion to Sever André Rwamakuba from the Joint Indictment and to Try Him Separately" ("Severance Motion") and the "Prosecutor's Motion for Leave to File and Amended Separate Indictment against Karemera, Ngirumpatse and Nzirorera" ("Separate Indictment Motion"), respectively filed on 12 and 19 November 2004;

CONSIDERING Joseph Nzirorera's "Response to Motion for Leave to File Amended Separate Indictment" ("Defence"), filed on 22 November 2004;

CONSIDERING Edouard Karemera's Response ("Defence") and Mathieu Ngirumpatse's Responses ("Defence"), filed on 24 November 2004;

CONSIDERING the "Response on behalf of Dr Rwamakuba to Prosecutor's Motion for Separate Trials" ("Defence"), filed on 24 November 2004;

HAVING HEARD the parties during the public hearing held on 25 November 2004;

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

INTRODUCTION

1. The Indictment against the accused Augustin Bizimana, Félicien Kabuga, Juvénal Kajelijeli, Edouard Karemera, Mathieu Ngirumpaste, Callixte Nzabomimana, Joseph Nzirorera and André Rwamakuba was confirmed on 22 August 1998.[1] An amended version against the accused Augustin Bizimana, Félicien Kabuga, Edouard Karemera, Mathieu Ngirumpaste, Callixte Nzabomimana, Joseph Nzirorera and André Rwamakuba was filed on 21 November 2001, pursuant to the Trial Chamber II Decision of 25 April 2001.[2] On 1st September 2003, Félicien Kabuga, who is still at large, was severed from the Indictment at the Prosecution request.[3] On 8 October 2003, Augustin Bizimana and Callixte Nzabonimana, who are also still at large, were severed from the Indictment, at the Prosecution request.[4]

2. The trial commenced on 27 November 2003 before a bench of the Trial Chamber III composed of Judge Vaz, presiding, and Judges Arrey and Lattanzi. On 14 May 2004, Judge Vaz withdrew from the case.[5] On 16 July 2004, the two remaining Judges in the case decided that it would be in the interests of justice to continue the trial with a substitute Judge, pursuant to Rule 15*bis*(D) of the Rules.[6] The accused Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba appealed that decision. The trial was suspended.

3. In its Decision of 28 September 2004 and its Reasons of 22 October 2004, the Appeals Chamber quashed the Ddecision of 16 July 2004 to continue the proceedings with a substitute Judge.[7] Following that decision, Judge Byron was assigned as Presiding Judge in this case on 1st November 2004. On 23 November 2004, a Trial Chamber section was constituted consisting of Judge Byron, presiding, Judges Short and Kam to adjudicate on the pre-trial motions in the present case whenever it deems necessary.

4. At the Status Conference of 17 November 2004, Judge Byron, sitting as single Judge pursuant to Rule 65*bis* of the Rules, granted an extension of time to the Defence for Rwamakuba to respond to the Prosecution Severance Motion and instructed the Prosecution to file the amended version of the Indictment for the three accused Edouard Karemera,

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[1] *Prosecutor v. Augustin Bizimana, Félicien Kabuga, Juvénal Kajelijeli, Edouard Karemera, Mathieu Ngirumpaste, Callixte Nzabomimana, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44, Confirmation and Non-Disclosure of the Indictment, 29 August 1998, *Report 1998*, p. 950.

[2] *Prosecutor v. Edouard Karemera*, Case No. ICTR-98-44, Decision on the Defence Motion, pursuant to Rule 72 of the Rules of Procedure and Evidence, Pertaining to, *inter alia*, Lack of Jurisdiction and Defects in the Form of the Indictment (TC), 25 April 2001.

[3] *Prosecutor v. Augustin Bizimana, Félicien Kabuga, Edouard Karemera, Mathieu Ngirumpaste, Callixte Nzabomimana, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44, Decision on the Prosecutor's Motion for severance of Félicien Kabuga's Trial and for Leave to the Accused's Indictment (TC), 1st September 2003

[4] *Augustin Bizimana, Félicien Kabuga, Edouard Karemera, Mathieu Ngirumpaste, Callixte Nzabomimana, Joseph Nzirorera and André Rwamakuba*, Decision on the Prosecutor's Motion for Separate Trials and for Leave to File an Amended Indictment (TC), 8 October 2003.

[5] *See Prosecutor v. Edouard Karemera, Mathieu Ngirumpaste, Joseph Nzirorera and André Rwamakuba (Karemera et al.)*, Case No. ICTR-98-44, Decision on Motions by Nzirorera and Rwamakuba for Disqualification of Judge Vaz (Bureau), 17 May 2004, para. 6.

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

[7] *Karemera et al.*, 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), 28 September 2004; *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.

Mathieu Ngirumpatse and Joseph Nzirorera, no later than Friday the 19th November 2004.[8] On 25 November 2004, the bench composed of Judge Byron, presiding, and Judges Short and Kam heard the parties pleadings on the Prosecution Motions to Amend the Indictment and to sever M. Rwamakuba.

ARGUMENTS OF THE PARTIES

Prosecution

5. In its Motion of 10 September 2004, the Prosecution seeks leave to amend the Indictment of 18 February 2004. In the Prosecution view, the proposed amendments would be of two kinds: the first category seeks to narrow and particularize the Indictment by complying with the Appeals Chamber Decision of 11 June 2004;[9] the second category seeks to clarify that the allegations concern multiple events and not a single event. The Prosecution alleges that the amendments do not add new charges and do rely on previously disclosed information.

6. In its Motions of 12 November 2004, the Prosecution moves to sever Rwamakuba from the joint Indictment of 18 February 2004 and to try him separately from the other accused. It argues that the requested severance is in the interests of justice, ensuring a fair trial without undue delay to the accused. The proposed amended version of the Indictment against Rwamakuba would be more narrow and concise, reducing also the proof at trial. Any reference to joint criminal enterprise as a form of commission would be deleted as well as four charges against Rwamakuba. The Prosecution seeks to add one count but contends that this count is alleged on the same factual basis as the existing count for extermination as a crime against humanity.

7. At the oral hearing held on 25 November 2004, the Prosecution indicated that it maintains its Motion of September 2004 until the Chamber has considered the Motion to sever Rwamakuba from the Indictment of 18 February 2004.[10] It recalled also that in its view, the Indictment of 18 February 2004 was still valid and constituted therefore the only valid basis of its current motions. The Prosecution argued that the Appeals Chamber Decisions of 28 September 2004 and 22 October 2004 did not vacate all decisions rendered by the previous bench. In the Prosecution view, it is inconceivable that the Decision of 13 February 2004 is tainted by an apprehension of bias because that decision was delivered following the instructions from the Appeals Chamber stated in its Decision of 19 December 2003. Finally, the Prosecution declared that if the Chamber decides that the only operative indictment in the present case is the Indictment of 21 November 2001, the Prosecution would file an amended indictment on that basis.

Defence

8. All Defence teams oppose the Prosecution Motions seeking leave to amend the Indictment of 18 February 2004. In their view, since the Appeals Chamber concluded in its Decision of 22 October 2004 that the previous bench was tainted by an appearance of bias, all previous decisions, and in particular the Decision of 13 February 2004 granting the

[8] *Karemera et al.*, Oral Decision, 17 November 2004, Transcripts, 17 November 2004, pp. 19-20.
[9] *Karemera et al.*, Decision on Validity of Appeal of Joseph Nzirorera Regarding Joint Criminal Enterprise Pursuant to Rule 72(E) of the Rules of Procedure and Evidence (AC), 11 June 2004, par. 11-12.
[10] See Transcripts, 25 November 2004, p. 7.

amendment of the Indictment, are null and void or, at least, cannot be given effect. Consequently, the Indictment of 21 November 2001 is the only valid indictment. The Defence for Nzirorera and for Ngirumpatse alleged that the proposed amendments contained new charges and that Prosecution has failed to file any supporting material, depriving the Trial Chamber of the ability to adjudicate on that request. Subsidiary, the Defence for Ngirumpatse requests that the Chamber withdraws the Decision of 13 February 2004 granting in part the Prosecution Motion for leave to amend the Indictment.

9. As regards to the Prosecution request for severance, the Defence for Rwamakuba opposes it considering that the Prosecution has failed to establish that such measure is in the interests of justice. On the contrary, it contends that the right of the accused to a fair trial would be violated if such request was granted. The Defence for Nzirorera supports the position of the accused Rwamakuba. The Defence for Karemera and for Ngirumpatse oppose the motion seeking severance.

DELIBERATIONS

10. On 22 October 2004, the Appeals Chamber gave its reasons for its earlier Decision of 28 September 2004 quashing the Decision of the remaining Judges to continue the proceedings with a substitute Judge. In its reasons, the Appeals Chamber found that

> the remaining Judges erred in the exercise of their discretion in reaching the Impugned Decision [of 16 July 2004] to continue the proceedings with a substitute Judge. The Appeals Chamber 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.[11]

11. Firstly, the Chamber notes that the Appeals Chamber Decision has the effect of requiring a "rehearing" of the proceedings in accordance with the provisions of Rules 15*bis*(C) and (D) of the Rules which read as follow

> (C) If, by reason of death, illness, resignation from the Tribunal, non-reelection, non-extension of term of office or for any other reason, a Judge is unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the Presiding Judge shall report to the President who may assign another Judge to the case and order either *a rehearing* or continuation of the proceedings from that point. However, *after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85,* the continuation of the proceedings can only be ordered with the consent of the accused, except as provided for in paragraph (D).
> (D) If, in the circumstances mentioned in the last sentence of paragraph (C), the accused withholds his consent, the remaining Judges may nonetheless decide to continue the proceedings before a Trial Chamber with a substitute Judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice. This decision is subject to appeal directly to a full bench of the Appeals Chamber by either party. If no appeal is taken or the Appeals Chamber affirms the decision of the Trial Chamber, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarised himself or herself with the record of the proceedings. Only one substitution under this paragraph may be made. (emphasis added)

[11] *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, par. 72.

12. In the present case, the trial commenced on 27 November 2003. The Prosecution started to present its evidence pursuant to Rule 85 of the Rules. Thirteen witnesses testified for the Prosecution.

13. The Chamber notes that, pursuant to the Rules, the proceedings before the Tribunal are divided in different stages. The Pre-Trial proceedings include the indictment, orders and warrants, disclosure of evidence by the parties, depositions and preliminary motions.[12] Conversely, the proceedings before the Trial Chamber are mainly dedicated to the case presentation by the parties and the hearing of the evidence.[13]

14. The Chamber is of the view that the *rehearing* of the proceedings, as stated in Rule 15*bis* (C) of the Rules and consequent upon the Appeals Chamber Decisions of 28 September 2004 and 22 October 2004, relates to that proceedings before the Trial Chamber and, therefore, to the presentation of evidence. The Chamber concludes also that all previous interlocutory orders or decisions previously related to the evidence presented during the trial which started in 27 November 2003 have to be disregarded and have no more effect.

15. Secondly, the Chamber notes that, in its Decision of 22 October 2004, the Appeals Chamber found that "[the particular circumstances] of the case could well lead a reasonable, informed observer to objectively apprehend bias".[14] The Appeals Chamber found that this appearance of bias extended to the entire bench.[15] The Appeals Chamber also emphasized that there was not a finding of actual bias, "but rather a finding, *made in the interests of justice*, that the circumstances of the case gave rise to *an appearance of bias*".[16]

16. The Chamber considers that it cannot and should not adjudicate on the nature, extent or degree of the appearance of bias which the Appeals Chamber found to exist. However, the Chamber recalls the provisions of Articles 12 and 20 of the Statute guaranteeing to the accused a fair hearing by impartial judges. The Chamber must therefore ensure that no doubts about impartiality could affect the rehearing.

17. The Trial Chamber recalls the jurisprudence of the *ad hoc* Tribunals which underline the right of an accused to be tried by a tribunal which is not only genuinely impartial but also appears to be impartial.[17] In particular, the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia ("ICTY") stated that "there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias."[18]

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[12] See Rules 47 to 72 of the Rules.
[13] See Rules 73 to 106 of the Rules.
[14] *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, par. 67.
[15] *Idem*, par. 69.
[16] *Idem*, par. 67 (emphasis added).
[17] *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement (AC), 21 July 2000, par. 182 (*Furundžija* Appeal Judgement); *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003, par. 39 et seq (*Rutaganda* Judgement). See also Special Court for Sierra Leone (SCSL), *Prosecutor v. Issa Hassan Sesay*, Case No. SCSL-2004-15-AR15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber (AC), 13 March 2004, par 15 ("Sesay Case").
[18] *Furundžija* Appeal Judgement, par.189.

18. Applying the impartiality requirement of the Statute, the Appeals Chamber continued to note that

> [t]here is an unacceptable appearance of bias if:
> i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
> ii) *the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.*[19]

19. After considering the standards to be applied where a challenge was made to a Judge on the ground of bias, the Appeals Chamber noted that Rule 15(A) of the ICTY Rules provides:

> [a] Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.

The ICTY Appeals Chamber concluded that Rule 15(A) of the Rules falls to be interpreted in accordance with the preceding principles.

20. This jurisprudence explains that, pursuant to the Rules, the appearance of bias affects the jurisdiction of the judge to adjudicate in a particular case. In applying this principle to the instant case where the Appeals Chamber ruled after decision making power had been exercised, not only in the Trial stage but also in the Pre-Trial stage of the proceedings, the Chamber has to be cognizant of the need to avoid any "appearance of bias". Even if there is no suggestion of actual bias, where appearances may give rise to doubts about impartiality, this alone may amount to an inadmissible jeopardy of the confidence which a Tribunal must inspire.[20] Justice must not only be done, but also should manifestly and undoubtedly be seen to be done.[21]

21. The Chamber notes that all the Defence teams for each of the accused contended that the Decision of 13 February 2004 granting in part the Prosecution Motion for leave to amend the Indictment was affected by an appearance of bias. The Chamber concludes that in the interests of justice, and as a consequence of the ruling of the Appeals Chamber Decision of 22 October 2004, that decision should no longer have effect.

22. The Chamber also considers that it has the power to make such a ruling independently of the Appeals Chamber ruling, where it concludes that it is required in the interests of

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[19] *Ibidem (emphasis added).*
[20] The European Court of Human Rights has generated a large amount of jurisprudence on the right to be tried by an independent and impartial tribunal and on the notion of "objective impartiality". See Eur.Ct.H.R., *Piersack v. Belgium*, Judgment of 1st October 1982, par. 30; Eur.Ct.H.R., Eur.Ct.H.R., *Thomann v. Switzerland*, Judgment of 10 June 1996, par. 30; *Ferrantelli and Santangelo v. Italy*, Judgment of 7 August 1996, par. 58; Eur.Ct.H.R., *Incal v. Turkey*, Judgment of 9 June 1998, par. 65; Eur.Ct.H.R., *Castillo Algar v. Spain*, Judgment of 28 October 1998, par. 45; Eur.Ct.H.R., *Pescador Valero v. Spain*, Judgment of 17 June 2003, par. 23 (Judgments available at < http://www.echr.coe.int/>).
[21] See *Sesay Case*, par. 16.

justice. The Chamber is endowed with inherent powers to make judicial findings that are necessary to achieve the primary obligation to guarantee a fair trial to the accused.[22]

As Judge David Hunt stated:

> It is the fundamental obligation of this Tribunal, imposed by Articles 20 and 21 of its Statute, to ensure the fair and expeditious trial of those indicted before it. [...] The Tribunal also has an inherent power, deriving from its judicial function, to control its proceedings in such a way as to ensure that justice is done.[23]

23. Accordingly, in the interests of justice and the rights of the accused, the Chamber concludes that the Decision of 13 February 2004 has to be given no more effect. The Chamber considers therefore that the only operative indictment in the present case is the amended Indictment filed on 21 November 2001.

24. By the Decisions of 1st September 2003 and 8 October 2003, the accused Félicien Kabuga, Augustin Bizimana and Callixte Nzabonimana were severed from the Indictment of November 2001. The Chamber notes that the accused Félicien Kabuga, Augustin Bizimana and Callixte Nzabonimana have not yet been arrested. The Chamber recalls that, pursuant to Article 20(4)(D) of the Statute of the Tribunal ("Statute"), those accused have the right to be tried in their presence, while the accused already in custody awaiting trial, have also the right to be tried without undue delay (Art. 20(4)(C) of the Statue). The Chamber is therefore of the view that, in the interests of justice, the severance of Félicien Kabuga, Augustin Bizimana and Callixte Nzabonimana enhances the protection of the rights of the accused who are already in detention and whose trial cannot be delayed as well as the rights of those who are not yet in detention.

25. Pursuant to Rule 82(B) of the Rules, the Chamber considers that the severance of the accused Félicien Kabuga, Augustin Bizimana and Callixte Nzabonimana protects the interests of justice.

26. Finally, the Chamber is aware of the particular circumstances of the case and of their consequences on the Prosecution Case. The Chamber recalls that the right to a fair trial applies both to the Defence and the Prosecution. The Chamber shall ensure the respect of the interests of justice.

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[22] See *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 199 (AC), 29 October 1997, par. 25, footnote 27: Consonant with the case-law of the International Court of Justice, the Appeals Chamber prefers to speak of "inherent powers" with regard to those functions of the International Tribunal which are judicial in nature and not expressly provided for in the Statute, rather than to "implied powers". The "implied powers" doctrine has normally been applied in the case-law of the World Court with a view to expanding the competencies of *political organs* of international organisations. [...] As is well known, reference to the Court's "inherent powers" was made by the International Court of Justice in the *Northern Cameroons* case (I.C.J. Reports 1963, p. 29) and in the *Nuclear Tests* case. In the latter case the Court stated that it "possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute... Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded" (*Nuclear Tests* case, I.C.J. Reports 1974, pp. 259-60, para. 23).

[23] *Prosecutor v. Simic et al.*, Case No. IT-95-9-PT, Separate Opinion of Judge David Hunt on Prosecutor's Motion for a Ruling Concerning the Testimony of a Witness (TC), 27 July 1999, par. 25. See also *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgement (AC), 15 July 1999, par. 322.

FOR THE ABOVE MENTIONED REASONS, THE CHAMBER

DECLARES that the operative Indictment in the present case is the amended Indictment filed on 21 November 2001;

CONFIRMS the severance of the accused Félicien Kabuga, Augustin Bizimana and Callixte Nzabonimana from the amended Indictment of 21 November 2001;

DECLARES MOOT the Prosecution Motions of 10 September 2004 and 12 and 19 November 2004;

ACCORDINGLY, DENIES those motions;

DECLARES MOOT Ngirumpatse's Request as stated in its Replies of 6 October 2004, 9 November 2004 and 3 December 2004;

ACCORDINGLY, DENIES that request;

If the Prosecution wishes to re-file its Motions seeking amendment of the Indictment and severance of the accused Rwamakuba, **STRONGLY URGES** the Prosecution to file a Motion to amend the Indictment of 21 November 2001, annexing a proposed Amended Indictment for the four accused Edouard Karemera, Mathieu Ngirumpaste, Joseph Nzirorera and André Rwamakuba, no later than fifteen (15) days after the present decision has been served on it;

AND ALSO STRONGLY URGES the Prosecution to file its Motion to sever Rwamakuba from the Indictment of 21 November 2001, annexing a proposed amended Indictment for André Rwamakuba and a proposed Indictment for the other accused Edouard Karemera, Mathieu Ngirumpaste and Joseph Nzirorera, no later than fifteen (15) days after the present decision has been served on it;

AUTHORIZES, if necessary, the Defence teams to file their replies five (5) days from the date of the service of the translation into French of the Prosecution Motions.

Judge Short appends a Dissenting Opinion.

Arusha, 7 December 2004, done in English.

Dennis C. M. Byron
Presiding Judge

Gustave Kam
Judge

[Seal of the Tribunal]

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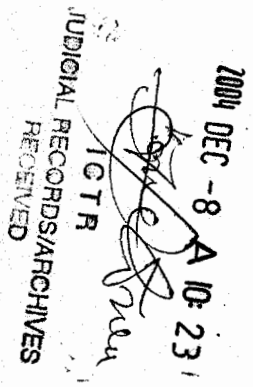

THE PROSECUTOR
v.
Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
André RWAMAKUBA

Case No. ICTR-98-44-PT

DISSENTING OPINION OF JUDGE SHORT ON SEVERANCE OF ANDRÉ RWAMAKUBA AND AMENDMENTS OF THE INDICTMENT

Article 20(4) of the Statute, Rule 82 (B) of the Rules of Procedure and Evidence

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David Hooper and Andreas O'Shea, for
André Rwamakuba

DISSENTING OPINION OF JUDGE SHORT

1. I am unable to agree with the majority conclusion that the legal consequence of the Appeals Chamber Decision is that all prior decisions of the Trial Chamber are invalidated and should no longer have effect.

2. It is arguable that since the majority of the Appeals Chamber relied partly on perception of bias to reverse the decision of the Trial Chamber to continue the Trial with a substitute Judge, the same perception taints the entire proceedings conducted by the Trial Chamber and that consequently, all prior decisions of the Trial Chamber, including the Decision of 13 February 2004, should no longer have effect. However, I do not think that it is at all clear that that is the only reasonable inference to be drawn from the Appeals Chamber Decision. Indeed, having regard to the fact that the sole issue for determination by the Appeals Chamber was the validity of the exercise by the two remaining Judges of their discretion under Rules 15*bis*(D) of the Rules of Procedure and Evidence ("Rules"), I am unable to conclude that it intended its Decision to have the effect of invalidating all prior decisions of the Trial Chamber. In my view, the finding by the Appeals Chamber of the appearance of bias on the part of the Judges should only be considered in the context of the exercise by the remaining Judges of their discretion under Rules 15*bis*(D) of the Rules.

3. This view seems to be supported by the Appeals Chamber's pronouncements in paragraph 71 of the Decision on the status of its decisions on Rwamakuba's interlocutory appeal concerning joint criminal enterprise as well as the interlocutory appeals filed by Ngiruumpatse and Nzirorera.

4. Moreover, I find it difficult to understand how, if this was the intended effect of the Appeals Chamber decision, Judge Shahabuddeen could have supported the majority Judgment and at the same time make a Declaration stating:

> I support today's decision only on two grounds. These are, first, the evaluation problem, referred to in paragraph 58 of the decision, and, second, the language problem referred to in paragraphs 59 and 60 of the decision. I do not consider it necessary to make a finding as to whether an appearance of bias attached to Judge Vaz, and I do not find that there was any such appearance in the case of the two remaining Judges.

5. It seems clear from Judge Shahabuddeen's position that he understood the Appeals Chamber Decision, for which he expressed support, to mean that the only issue the Appeals Chamber was deciding was the propriety of the decision of the two remaining Judges to proceed with the trial with a substitute Judge. He could not have understood the Decision to have the legal consequence of invalidating all prior Decisions taken by the Trial Chamber and at the same time make the said Declaration.

Arusha, 8 December 2004, done in English.

Emile Short

[Seal of the Tribunal]