

ICTR - 99-50-AR50

12 FEBRUARY 2004

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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:

Judge Theodor Meron, Presiding Judge
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Inés Mónica Weinberg de Roca

Registrar:

Mr. Adama Dieng

Decision of:

12 February 2004

ICTR Appeals Chamber

Date: 12-ii-04
Action:
Copied To: Judges

THE PROSECUTOR

v.

**CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JEROME BICAMUMPAKA
PROSPER MUGIRANEZA**

Parties
ALOs / LOs
LSS
Archives
Rhye Bounzi

Case No. ICTR-99-50-AR50

**DECISION ON PROSECUTOR'S INTERLOCUTORY APPEAL AGAINST
TRIAL CHAMBER II DECISION OF 6 OCTOBER 2003
DENYING LEAVE TO FILE AMENDED INDICTMENT**

Counsel for the Prosecution

Mr. Paul Ng'arua
Mr. Ibukunolu Babajide
Mr. Elvis Bazawule
Mr. George Mugwany

Counsel for the Defence

Ms. Michelyne C. St. Laurent
Mr. Howard Morrison
Mr. Ben Gumpert
Mr. Pierre Gaudreau
Mr. Tom Moran

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "International Tribunal," respectively) is seised of the "Prosecutor's Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment," filed by the Prosecution on 3 November 2003 ("Appeal"). The Appeals Chamber hereby decides this interlocutory appeal on the basis of the written submissions of the parties.

Procedural History

2. On 26 August 2003, the Prosecution filed a request for leave to amend the indictment in the Trial Chamber ("Request").¹ Appended to the Request was an amended indictment dated 28 July 2003 ("Amended Indictment"), which the Prosecution sought to substitute for the operative indictment filed on 16 August 1999 ("Current Indictment"). Two of the Accused, Mugiraneza and Bicamumpaka, filed a joint response, arguing *inter alia* that the Prosecution's Request was untimely and would unduly postpone the commencement of trial.² The Accused Bizimungu also filed a separate response, which argued *inter alia* that the Amended Indictment contained new allegations regarding which the Defence had not made any investigations, such that the Defence would be prejudiced if required to meet the case set forth in the Amended Indictment.³ The Accused Mugenzi did not file a response to the Prosecution's Request.⁴ The Prosecution submitted replies to both responses.⁵

3. On 6 October 2003, the Trial Chamber issued its decision dismissing the Prosecution's Request ("Decision"). The Decision stated that the Request arose under Rule 50 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"). The Trial Chamber noted that, in exercising its discretion under Rule 50 of the Rules, it would consider "the particular circumstances of the case" and balance the rights of the Accused under Articles 19 and 20 of the Statute of the

¹ *Prosecutor v. Bizimungu et al.*, No. ICTR-99-50-I, Prosecutor's Request for Leave to File an Amended Indictment, 26 August 2003.

² *Prosecutor v. Bizimungu et al.*, No. ICTR-99-50-I, Prosper Mugiraneza's and Jérôme Bicamumpaka's Brief in Opposition to the Prosecutor's Request for Leave to File an Amended Indictment, 3 September 2003.

³ *Prosecutor v. Bizimungu et al.*, No. ICTR-99-50-I, Réponse de la défense de Casimir Bizimungu au "Prosecutor's Request for Leave to File an Amended Indictment," 24 September 2003.

⁴ See Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2003 ("Decision"), para. 30.

⁵ *Prosecutor v. Bizimungu et al.*, No. ICTR-99-50-I, Prosecutor's Reply to Casimir Bizimungu's Response to the Prosecutor's Request for Leave to Amend the Indictment, 2 October 2003; *Prosecutor v. Bizimungu et al.*, No. ICTR-99-50-I, Prosecutor's Reply to Prosper Mugiraneza's and Jérôme Bicamumpaka's Brief in Opposition to the Prosecutor's Request for Leave to File an Amended Indictment, 5 September 2003.

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International Tribunal, including the "right to be informed promptly and in detail of the nature and cause of the charge against him or her, and the right to a fair and expeditious trial without undue delay," against "the complexity of the case."⁶

4. The Trial Chamber held that some of the changes reflected in the Amended Indictment, namely removal of certain counts and deletion of the "Historical Context" section, did not necessarily require an amendment under Rule 50 of the Rules.⁷

5. The Trial Chamber next held that the Prosecution's intention to replace two counts charging genocide and complicity in genocide with a single count charging genocide and, in the alternative, complicity in genocide, was "irregular and would render the count bad for duplicity and will pose problems particularly when [the Trial Chamber] has to pronounce judgment and sentence on one or the other of the charges."⁸ The Trial Chamber found that it was "not in the interests of judicial economy" to allow that amendment.⁹

6. Finally, the Trial Chamber addressed the Prosecution's request to amend the Current indictment following the discovery of new evidence that was not available at the time the Current Indictment was confirmed. The Trial Chamber concluded that "the expansions, clarifications and specificity made in support of the remaining counts do amount to substantial changes which would cause prejudice to the Accused."¹⁰ The Trial Chamber stated, as an example, the fact that although the Current Indictment "contains broad allegations in support of the Counts," the Amended Indictment contains "specific allegations detailing names, places, dates and times wherein the Accused are alleged to have participated in the commission of specific crimes."¹¹ The Trial Chamber found that "such substantial changes would necessitate that the Accused be given adequate time to prepare his defence."¹²

7. The Trial Chamber also noted that trial was scheduled to begin on 3 November 2003. In the Trial Chamber's view, granting the Prosecution leave to amend the indictment would "not only cause prejudice to the Accused but would also result in a delay for the commencement of the trial for the reasons outlined above."¹³ In such circumstances, the Trial Chamber concluded that "it

⁶ Decision, para. 27.

⁷ *Ibid.*, para. 31.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*, para. 34.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*, para. 35.

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would not be in the interests of justice" to grant leave to amend the indictment.¹⁴ The Trial Chamber therefore denied the Prosecution's Request in its entirety.

8. The Trial Chamber subsequently certified the Decision for interlocutory appeal under Rule 73(B) of the Rules,¹⁵ and the Prosecution filed this Appeal. The Accused Mugiraneza filed a timely response,¹⁶ to which the Prosecution replied.¹⁷ The Accused Bizimungu moved for an extension of time in which to respond to the Appeal, which the Appeals Chamber granted;¹⁸ Bizimungu then filed a timely response to the Appeal on 25 November 2003,¹⁹ to which the Prosecution did not reply.

9. The Accused Bicamumpaka filed a response on 10 December 2003, 37 days after the filing of the Appeal and 14 days after the expiry of the extension granted to the Accused Bizimungu.²⁰ The Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, dated 16 September 2002 ("Practice Direction"), provides that responses to interlocutory appeals governed by the Practice Direction are due ten days after the filing of the appeal.²¹ The Appeals Chamber notes, however, that the Practice Direction does not specifically provide a deadline for responses to appeals that follow certification of the Trial Chamber, although the Appeals Chamber has recently suggested that the response time of ten days should also apply to appeals following certification.²² The Appeals Chamber affirms this interpretation of the Practice Direction. However, since that interpretation may not have been apparent to the Accused Bicamumpaka, the Appeals Chamber has decided to consider his response.

Jurisdiction

10. The Accused Mugiraneza raises a threshold challenge to the Appeals Chamber's jurisdiction, claiming that the Amended Indictment is not a proper proposed indictment because it was signed by the Prosecutor on 28 July 2003 but subsequently altered before the Request was filed on 26 August 2003. This objection is not well-founded. A motion for leave to amend an indictment

¹⁴ Decision, para. 35.

¹⁵ *Prosecutor v. Bizimungu et al.*, No. ICTR-99-50-I, Decision on the Prosecutor's Request Pursuant to Rule 73(B) for Certification to Appeal an Order Denying Leave to File an Amended Indictment, 29 October 2003.

¹⁶ Prosper Mugiraneza's Reply to the Prosecutor's Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 10 November 2003 ("Mugiraneza Response").

¹⁷ Prosecutor's Response to Mugiraneza's Opposition to Prosecutor's Appeal to File Amended Indictment, 17 November 2003.

¹⁸ Decision on Casimir Bizimungu's Motion for an Extension of Time, 20 November 2003.

¹⁹ Mémoire de l'intimé Casimir Bizimungu en réponse au "Prosecutor's Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment," 25 November 2003 ("Bizimungu Response").

²⁰ Mémoire de l'intimé Jérôme Bicamumpaka en réponse au "Prosecutor's Appeal Against Trial Chamber II Decision of October 6th 2003 Denying Leave to File Amended Indictment," 10 December 2003.

²¹ Practice Direction, arts. II.2, III.8.

²² *Prosecutor v. Bagosora et al.*, No. ICTR-98-41-AR93, Decision on Application for Extension of Time to File Response to Interlocutory Appeal, 3 November 2003, pp. 2-3.

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need only submit the proposed amendments to the indictment or the text of the proposed amended indictment. There is no requirement in Rule 50 that the proposed indictment be signed by the Prosecutor. Although the discrepancy between the date of signature and the date of finalization of the Amended Indictment might deserve an explanation (which the Prosecution has provided, namely that the results of further investigations warranted further changes between 28 July and 26 August 2003²³), the discrepancy does not deprive the Appeals Chamber of jurisdiction in this matter.

Discussion

11. The Appeals Chamber's recent decision in *Prosecutor v. Karemera et al.* ("*Karemera*") reaffirmed that Rule 50 of the Rules assigns the decision to allow an amendment to the indictment to the discretion of the Trial Chamber and that "appellate intervention is warranted only in limited circumstances."²⁴ The party challenging the exercise of discretion must show "that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion."²⁵

12. The Prosecution submits that the Trial Chamber balanced the right of the Accused to a trial without undue delay against the complexity of the case, but failed to take into account "a multiplicity of other material considerations or values against which the rights of the accused must be balanced to reach a correct decision."²⁶ First, the Prosecution charges that the Trial Chamber did not consider "the obtaining of new and additional evidence since the confirmation of the old Indictment."²⁷ The Appeals Chamber does not agree that the Trial Chamber ignored this factor. The Trial Chamber understood the Prosecution's position to be that "the Prosecution seeks leave to amend the current Indictment following the discovery of new evidence which was not available at the time of confirmation of the current Indictment."²⁸ The Trial Chamber then stated, in the context of its discussion of the merits of the Prosecution's Request: "The Chamber considers the Prosecution's further request to amend the current Indictment following its discovery of new

²³ Appeal, para. 46.

²⁴ *Prosecutor v. Karemera et al.*, No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003 ("*Karemera*"), para. 9.

²⁵ *Ibid.* (quoting *Prosecutor v. Milosević*, Nos. IT-99-37-AR73, IT-01-50-AR73 & IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 5 (footnotes omitted)).

²⁶ Appeal, para. 13.

²⁷ Appeal, para. 14.

²⁸ Decision, para. 29.

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evidence which was not available at the time of confirmation of the current Indictment which thereby necessitates the expansion of the remaining Counts.”²⁹ In light of these statements, it is plain that the Trial Chamber considered the fact that the Prosecution’s Request was based on newly obtained evidence.

13. The Prosecution also contends that the Trial Chamber failed to give due consideration to the fundamental purposes of the International Tribunal, including “the gravity or seriousness of the crimes with which the accused is/are indicted; the mandate or fundamental purpose of the [International] Tribunal to bring to justice all those responsible for the heinous crimes in Rwanda in 1994; the rights of victims; the obligation of the Prosecutor to prosecute the accused to the full extent of the law and to present before the [International] Tribunal all relevant evidence reflecting the totality of the accused’s participation in the crimes; and establishing the totality of truth of what happened in Rwanda and those who are responsible in order to promote justice and reconciliation.”³⁰ Although the Trial Chamber did not mention these factors in the Decision, it does not follow that they were not considered at all.³¹ Furthermore, *Karemera* cautioned against placing significant weight on such factors when they are invoked “without further elaboration.”³² The Prosecution’s Appeal, like the appeal in *Karemera*, “has not shown that proceeding to trial on the Current Indictment will impair the rights of victims or undermine the mandate of the International Tribunal.”³³ The Appeals Chamber therefore cannot conclude that the Trial Chamber exceeded its discretion by failing to give weight to the factors advanced by the Prosecution.

14. The Prosecution also argues that, while the Trial Chamber did balance the right of the Accused to a trial without undue delay against the complexity of the case, it failed to give this latter factor “appropriate weight.”³⁴ Yet the Trial Chamber expressly noted in paragraph 27 of the Decision that the “complexity of the case” is a factor to be balanced against the rights of the Accused. The Trial Chamber was not required to itemize in the Decision the various obstacles that, according to the Prosecution, impeded a faster investigation of this case. In such circumstances, it suffices that the complexity of the case was taken into account as a factor weighing in the Prosecution’s favour. The Prosecution’s objection that the complexity of the case should have tipped the balance is merely a claim that the Trial Chamber reached the wrong result, although it

²⁹ *Ibid.*, para. 32.

³⁰ Appeal, para. 17 (italics omitted).

³¹ See *Prosecutor v. Kupreškić*, No. IT-95-16-A, Appeal Judgment, 23 October 2001, para. 458 (“[F]ailure to list in the Trial Judgment, each and every circumstance placed before [the Trial Chamber] and considered, does not necessarily mean that the Trial Chamber either ignored or failed to evaluate the factor in question.”).

³² *Karemera*, para. 16.

³³ *Ibid.*, para. 23.

³⁴ Appeal, para. 26.

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considered the right factor. Disagreement with the result of an exercise of discretion, without more, is not a basis for appellate interference.

15. The Prosecution's next argument challenges the Trial Chamber's reliance on the finding that amending the indictment would have delayed the start of trial past the scheduled start date of 3 November 2003. The Trial Chamber found that the amendments involved "substantial changes" which would cause prejudice and that "such substantial changes would necessitate that the Accused be given adequate time to prepare his defence."³⁵ The Trial Chamber then concluded that the amendments would cause "a delay for the commencement of trial" and that it "would not be in the interests of justice to grant the Motion."³⁶ The Prosecution contends that the Trial Chamber treated the start date of 3 November 2003 as absolutely inflexible and not subject to change under any circumstance. The Prosecution submits that the Trial Chamber should instead have considered the possibility of postponing the trial date if an amendment to the indictment is justifiable in light of the totality of the circumstances.

16. The Prosecution is certainly correct that the Trial Chamber must consider all of the circumstances bearing on a motion to amend the indictment. Interference with the orderly scheduling of trial, however, is one such circumstance. The Appeals Chamber stated in *Karemera* that "a postponement of the trial date and a prolongation of the pretrial detention of the Accused" are "some, but not all"³⁷ of the considerations relevant to determining whether a proposed amendment would violate the right of the accused to a trial "without undue delay,"³⁸ which in turn bears on the broader question whether the amendment is justified under Rule 50 of the Rules. The Trial Chamber should also consider such factors as the nature and scope of the proposed amendments, whether the Prosecution was diligent in pursuing its investigations and in presenting the motion, whether the Accused and the Trial Chamber had prior notice of the Prosecution's intention to seek leave to amend the indictment, when and in what circumstances such notice was given, whether the Prosecution seeks an improper tactical advantage,³⁹ and whether the addition of specific allegations will actually improve the ability of the Accused to respond to the case against them and thereby enhance the overall fairness of the trial.⁴⁰ Likewise, the Trial Chamber must also consider the risk of prejudice to the Accused and the extent to which such prejudice may be cured by methods other than denying the amendment, such as granting adjournments or permitting the

³⁵ Decision, para. 34.

³⁶ *Ibid.*, para. 35.

³⁷ *Karemera*, para. 19.

³⁸ *Ibid.*, para. 13 (quoting Statute of the International Tribunal, Art. 20(4)(c)).

³⁹ See *ibid.*, paras. 15, 20-30; *Prosecutor v. Kovačević*, No. IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, dated 2 July 1998, paras. 29, 31.

⁴⁰ See *Karemera*, para. 27.

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Accused to recall witnesses for cross-examination.⁴¹ The above list is not exhaustive; particular cases may present different circumstances that also bear on the proposed amendments.

17. In this case, it cannot be said that the Trial Chamber failed to consider the above-listed points. To begin with, they were specifically argued by the Prosecution in its Request⁴² and summarized in the Decision.⁴³ Although the Decision does not mention them in its summary of its deliberations, that omission is not error of itself; the Trial Chamber is not required to enumerate and dispose of all of the arguments raised in support of a motion. Absent a showing that the Trial Chamber actually refused to consider any factors other than the determination that the amendment would delay the start of trial, or a showing that the Trial Chamber's conclusion was so unreasonable that it cannot have considered all pertinent factors, the Appeals Chamber must conclude that the Trial Chamber took account of all of the arguments put to it.

18. In this case, the Trial Chamber's Decision sufficiently shows that it considered factors other than delay in the commencement of trial. The Decision states that the factors of prejudice and delay are to some extent independent, i.e. the proposed amendments would "not only" prejudice the accused but "would also" cause a delay.⁴⁴ This language suggests that the potential delay, which was required to give the Accused "adequate time to prepare" their defence,⁴⁵ would not suffice to eliminate all of the prejudice to the Accused that would result from the Amended Indictment. In other words, the Trial Chamber concluded that the Accused would suffer prejudice in the conduct of their defence *even if they were given more time to prepare*, and that that prejudice was not sufficiently counterbalanced by any factors weighing in the Prosecution's favour.

19. The Trial Chamber's finding of incurable prejudice is supported by the submissions of the Accused that the Amended Indictment contains not only specific allegations that clarify the charges against the Accused – amendments that can actually enhance the overall fairness of the trial⁴⁶ – but also an expansion of the charges beyond the scope of the Current Indictment.⁴⁷ Although the Prosecution may seek leave to expand its theory of the Accused's liability after the confirmation of the original indictment, the risk of prejudice from such expansions is high and must be carefully weighed. On the other hand, amendments that narrow the indictment, and thereby increase the fairness and efficiency of proceedings, should be encouraged and usually accepted.

⁴¹ See *ibid.*, para. 28.

⁴² See Request, paras. 13-23.

⁴³ Decision, paras. 1-24.

⁴⁴ *Ibid.*, para. 35.

⁴⁵ *Ibid.*, para. 34.

⁴⁶ See *Karemura*, para. 27.

⁴⁷ See *Bizimungu Response*, paras. 23-26.

20. In this case, the Trial Chamber noted that the proposed changes in the Amended Indictment consist primarily of "expansions" as well as clarifications.⁴⁸ Had the Prosecution solely attempted to add particulars to its general allegations, such amendments might well have been allowable because of their positive impact on the fairness of the trial. However, the Prosecution chose to combine changes that narrowed the indictment with changes that expanded its scope in a manner prejudicial to the Accused. Rather than distinguishing these categories of changes, which might have enabled the Trial Chamber to allow the former without allowing the latter, the Prosecution's Motion and Amended Indictment intertwined the two, such that they were not readily separable. In this context, the Trial Chamber was justified in dismissing the entire request. The Trial Chamber was not required to disaggregate the changes that would have caused prejudice from those that would not. However, this holding does not preclude the Prosecution from coming forward with a new proposed indictment that would provide greater notice of the particulars of the Prosecution's case without causing prejudice in the conduct of trial.

21. The Prosecution has not met its burden of showing that the Trial Chamber failed to consider any of the relevant factors placed before it, nor was its conclusion so unreasonable as to compel appellate intervention in this matter. On the contrary, the Trial Chamber's dismissal of the Motion was reasonable and lay within the Chamber's discretion.

22. The Prosecution also challenges the Trial Chamber's refusal of its request to charge genocide and complicity in genocide alternatively but in a single count. The Prosecution relies on the Trial Chamber judgement in *Musema*, which stated that an accused cannot be convicted of both genocide and complicity in genocide, since one cannot be both a principal perpetrator of an act and an accomplice thereto.⁴⁹ While the Prosecution is correct that the *Musema* judgement would permit and indeed require that the crimes of genocide and complicity in genocide be charged in the alternative, it says nothing about charging them in the same count.

23. The rule against duplicity generally forbids the charging of two separate offences in a single count, although a single count may charge different means of committing the same offence.⁵⁰ The Appeals Chamber need not decide at this time whether genocide and complicity in genocide constitute separate offences or different means of committing the same offence. Regardless of which option is correct, the Trial Chamber was justified in concluding that there was no need to enter into this debate, which would have expended judicial time and resources in a manner that would have little effect on this case. This risk is evident from the suggestion of the Accused

⁴⁸ Decision, paras. 5.

⁴⁹ See *Prosecutor v. Musema*, No. ICTR-96-13-T, Judgement and Sentence, 27 January 2001, para. 175.

⁵⁰ See, e.g., 4 LaFare, Israel & King, *Criminal Procedure* § 19.3(c) (2d ed. 1999).

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Mugiraneza that the amendment might have led him to file a motion under Rule 72 of the Rules challenging the form of the indictment.⁵¹ The Trial Chamber's conclusion that arguments about potential duplicity were "problems" that were "not in the interests of judicial economy"⁵² is reasonable, particularly given that the Prosecution does not allege that it has suffered any prejudice from the denial of this amendment. The Trial Chamber was therefore justified in avoiding the filing of further motions challenging the validity of the indictment. Accordingly, the Trial Chamber acted within its discretion in refusing this amendment. This aspect of the Appeal is therefore dismissed.

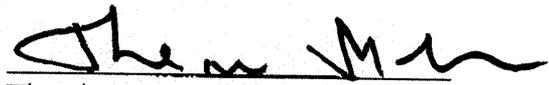
24. The Accused Bizimungu submits that the Prosecution should not be permitted to withdraw the section on "Historical Context" from the Current Indictment.⁵³ The Trial Chamber stated that the Prosecution could drop material from the Current Indictment without seeking leave to amend it under Rule 50 of the Rules.⁵⁴ The Accused Bizimungu did not seek certification to appeal this issue, so the Appeals Chamber is without jurisdiction to address it.

Disposition

25. The Appeals Chamber dismisses the Appeal.

Done in French and English, the English text being authoritative.

Done this 12th day of February 2004,
At The Hague,
The Netherlands.


Theodor Meron
Presiding Judge

Judge Pocar appends an individual opinion to this decision.



⁵¹ Mugiraneza Response, para. 23.b.

⁵² Decision, para. 31.

⁵³ Bizimungu Response, paras. 28-31.

⁵⁴ Decision, para. 31.

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INDIVIDUAL OPINION OF JUDGE POCAR

1. I concur with the decision of the Appeals Chamber to dismiss this appeal, and I also agree with its reasoning that the Trial Chamber correctly exercised its discretion under Rule 50 of the Rules. In my view, however, the decision should also state that an amendment to an indictment should not be allowed if the conditions for confirming the indictment, set forth in Rule 47 of the Rules, are not satisfied. In failing to do so, both in this appeal and in the *Karemera* appeal decision rendered on 19 December 2003, the Appeals Chamber has neglected to provide necessary guidance to Trial Chambers on a crucial issue that may affect a number of cases in the future.

2. To me, therefore, this decision remains incomplete, and furthermore, it may be misleading. In paragraph 11 of the decision, it is stated that "...Rule 50 of the Rules assigns the decision to allow an amendment to the indictment to the discretion of the Trial Chamber...." This may give the impression that a decision to allow an amendment rests solely in the discretion of a Trial Chamber, without more. I do not believe, however, that such a decision is solely a matter of discretion, because the conditions set forth in Rule 47 of the Rules must be taken into account by the Trial Chamber when it carries out its assessment. To dispel confusion, the Appeals Chamber should have pronounced on the issue even if the parties did not raise it expressly.

3. Article 18(1) of the Statute of the International Tribunal provides that "[t]he judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed." The confirmation of an indictment can therefore only take place if a *prima facie* case exists. This statutory requirement is echoed in Rule 47(E) of the Rules, which states that "[t]he reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 18 of the Statute, whether a case exists against the suspect."

4. Rule 50 of the Rules governs the amendment of indictments. This rule does not set forth conditions for allowing an amendment to an indictment. But it does preserve the rights of the accused in relation to new charges—for example, it provides for a further appearance to enable the accused to enter a plea on the new charges, and it also provides for a further period of thirty days to file preliminary motions pursuant to Rule 72 in relation to the new charges. Hence, after a request for an amendment is allowed, the new charges are subject to the same rules that would have applied if they had been presented in the original indictment.

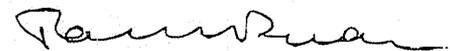


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5. In the same way, before an amendment is allowed, the inquiry must be governed by Rule 47, applicable to all indictments submitted, and a *prima facie* case must be presented. The illogic of any contrary view aside, the following may be noted. First, Rule 50 is placed in the same section in which the provisions for the confirmation of indictments are located, and no derogation from the general rule can be inferred from the text. Second, it cannot be that an amended indictment satisfies fewer requirements than those that were necessary for the original indictment's confirmation. Such an approach would allow the conditions set out in the Statute and Rule 47 to be circumvented in a given case on any number of additional amendments.

6. For these reasons, I believe that the Appeals Chamber should have stated, in this decision, that an amendment to an indictment should not be allowed if the conditions for confirming the indictment, articulated in Rule 47 of the Rules, are not satisfied.

Done this 12th day of February,
At The Hague,
The Netherlands.



Judge Fausto Pocar



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