



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Byron, Presiding  
Florence Rita Arrey  
Gberdao Gustave Kam

**Registrar:** Adama Dieng

**Date:** 24 June 2005

**THE PROSECUTOR**

**v.**

**Félicien KABUGA**

***Case No. ICTR-98-44B-PT***

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**DECISION ON THE AMENDED INDICTMENT**

***Rules 47 and 50 of the Rules of Procedure and Evidence***

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**Office of the Prosecutor:**

Stephen Rapp  
Charity Kagwi  
Amanda Reichman

***Accused still at large***

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (“Tribunal”),

**SITTING** as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Florence Rita Arrey, and Gberdao Gustave Kam (“Chamber”);

**BEING SEIZED** of the Prosecutor’s Motion for Confirmation of Amended Indictment Pursuant to Rule 50 of the Rules of Procedure and Evidence filed on 2 October 2003 (“First Motion”);

**BEING FURTHER SEIZED** of the Prosecutor’s Motion for Leave to File Substitute Amended Indictment filed on 1 October 2004 (“Second Motion”);

**NOTING** that the Accused, Félicien Kabuga, is still at large and cannot therefore respond to the Prosecutor’s Motions;

**HAVING REVIEWED** the Supporting Materials filed by the Prosecutor on 19 October 2004, and listed in the confidential Annexure to this Decision;

**CONSIDERING** the Statute of the Tribunal (“Statute”), especially Article 18, and the Rules of Procedure and Evidence (“Rules”), notably Rule 50;

**RECALLING** the Decision of 1 September 2003 granting the Prosecutor’s Motion for Severance and Leave to Amend the Indictment;[\[1\]](#)

**NOW DECIDES**, pursuant to Rule 73(A) of the Rules, solely on the basis of the written Motions of the Prosecutor.

## **INTRODUCTION**

1. The first Indictment was filed against Félicien Kabuga in August 1997.[\[2\]](#) On 28 August 1998, a second Indictment was confirmed including Félicien Kabuga among other Accused.[\[3\]](#) On 1 September 2003, before the trial in *Karemera et al.* started, the Chamber granted the Prosecutor’s Motion for Severance and Leave to Amend the Indictment with regard to Félicien Kabuga only. Following the Decision on Severance and Amendment, the Prosecutor filed his First Motion and his Second Motion. Following the Chamber’s request through the Court Management Section, the Prosecutor filed Supporting Materials on 19 October 2004 exclusively to the Chamber’s attention.

## **ARGUMENTS OF THE PROSECUTION**

2. In the First Motion, the Prosecutor requests confirmation of the Amended Indictment, pursuant to Rule 50(A) of the Rules. The Prosecutor argues that the Motion can be disposed of without awaiting a Defence response because the Accused is a fugitive, has not appeared before any Trial Chamber and has no legal representation. The Prosecutor adds that the President is expected to assign a Judge to confirm the Amended Indictment pursuant to the same provision, because the Confirming Judge, Judge Navanethem Pillay, is no longer serving at the Tribunal.

3. In the Second Motion, the Prosecutor files a Substitute Amended Indictment which reflects the latest case law, with special regard to the pleading of the form of criminal responsibility, and which provides greater specificity. The Prosecutor also indicates that he strikes Count 6 (Murder as a Crime against Humanity) because of the inconsistency of the accounts on the single incident charged. The Prosecutor affirms that under the new Rule 50(A)(i) of the Rules, the Amended Indictment must be examined, following the standards set forth in Rule 47(E) of the Rules. Subsequently, the Prosecutor requests a review of the Amended Indictment, submitted with the Second Motion, and files the documents listed in the Confidential Annex of this Decision, as Supporting Materials.

### DELIBERATIONS

4. Trial Chamber III was assigned to hear the joint trial of seven Accused<sup>[4]</sup> including Félicien Kabuga. Then the Chamber ordered the severance of the trial of Félicien Kabuga from the other Accused and granted leave to amend the Indictment by ordering the filing of a separate Amended Indictment against Félicien Kabuga not later than 30 days from the Decision of 1 September 2003. Therefore the Chamber is still seized of the present case.

5. In this case, the Accused was previously charged jointly with other Accused. Although there was an initial appearance with respect to the other Accused who were already in custody, there was no initial appearance made with respect to Félicien Kabuga since to date he has not been apprehended. In addition, Félicien Kabuga has not been served with the previous Indictment. If and when he is brought before the Tribunal, he will appear on the Amended Indictment. Furthermore, since the Decision of 1 September 2003, the Rules have been amended, and the new Rule 50 requires the Trial Chamber to examine the *prima facie* case before granting leave to amend an Indictment. Also in accordance with the new rule, the filing of supporting material is necessary for the determination of a *prima facie* case.

6. Considering the above circumstances, the Chamber is of the opinion that it is in the interests of justice to examine the Amended Indictment to ensure that it is adequately amended. The review to determine a *prima facie* case examines the supporting materials provided by the Prosecutor, in light of Article 18 of the Statute and Rule 47(E) of the Rules. This implies an assessment of whether the allegations included in the Indictment are supported by the materials disclosed by the Prosecutor to the Chamber.

7. Moreover, Article 20(4)(a) of the Statute states that the accused has a right “[t]o be informed promptly and in detail in a language which he or she understands of the nature and cause of the charges against him or her”. Responsible to ensure a fair trial and the preservation of the rights of the Accused, the Chamber must consider whether the Indictment is sufficiently specific thereby providing adequate detail to the Accused for the preparation of his defence. In addition, the *Ntakirutimana* Appeals Judgement<sup>[5]</sup> requires that the Prosecutor specifies in the Indictment the material facts on which he builds his case. In light of those provisions and the jurisprudence, the Chamber emphasises that the Prosecutor should ensure that the relevant material facts in his possession are pleaded in the Indictment.

8. The Chamber finds that the allegation whereby Félicien Kabuga placed his business and his home at the disposal of the *Interahamwe* “for the training in the use of arms” as referenced in Paragraphs 28 and 43 of the Amended Indictment, is without supporting material. The Chamber therefore finds no

*prima facie* case for this assertion. Consequently the Prosecutor should provide material in his possession to support the allegation, or remove it from the Amended Indictment.

9. A *prima facie* case has been found for the subsequent factual allegations, but the Chamber notes that the Indictment remains deficient as follows:

(i) In general the dates referred to the Indictment should be in accordance with the supporting materials provided by the Prosecutor;

(ii) Some material acts appearing in the supporting materials are not pleaded in the indictment;

(iii) In Paragraph 5 of the Indictment, there is an allegation of an agreement between Félicien Kabuga, Ferdinand Nahimana, Jean-Bosco Barayagwiza, Joseph Nzirorera, Edouard Karemera, Mathieu Ndirumpatse and Anatole Nsengiyumva “to kill or cause serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, the Tutsi ethnic group, as described in paragraphs 6 through 15”, and none of the materials disclosed supports the existence of such an agreement;

(iv) In Paragraphs 7, 48 and 63 of the Indictment, the allegation that RTLM was founded in furtherance of the hate campaign is not supported by any of the materials disclosed. A similar allegation in Paragraph 17 of the Indictment that RTLM was founded in order to further the anti-Tutsi campaign is also not sustained by the supporting materials.

(v) In relation to Paragraphs 9, 19, 34, 50, 59, 66 and 76 of the Indictment, the allegation that RTLM “broadcast information identifying the location of Tutsi” is not supported by any of the materials disclosed.

(vi) With regard to Paragraphs 11, 21 and 36 of the Indictment, the agreement related to the establishment of FDN to support the *Interahamwe* “to kill and cause serious bodily or mental harm to members of the Tutsi population” was not found to be supported by the materials disclosed.

(vii) Finally, the allegation in Paragraphs 13, 22 and 37 of the Indictment that Félicien Kabuga, apart from being the president of the provisional committee, was signatory to several bank accounts is not supported by the materials disclosed.

10. Concerning the charges of individual criminal liability, the Chamber finds that wherever the Prosecutor alleges that the Accused had *de facto* control over RTLM, *Interahamwe* and administrative officers among others alleged perpetrators and was in a position to prevent or punish criminal conduct, especially in Paragraphs 2, 8, 18, 31, 49, 56, 64 and 72 of the Amended Indictment, additional details are required to allow the Accused to know the charges against him. As the Chamber has previously ruled in *Zigiranyirazo* Case,<sup>[6]</sup> the pleading of family ties is not sufficient to support an allegation of command responsibility. The Chamber also finds that the allegation contained in Paragraph 44 of the Amended Indictment has not given sufficient particulars about the control the Accused allegedly exercised and the protection allegedly provided to the Accused by persons under his alleged control. Those details in Paragraphs 2 and 44 should be provided by including further information upon which this allegation is grounded.

**FOR THOSE REASONS, THE CHAMBER,**

**I. ORDERS** the Prosecutor to provide

(A) the required details in the Indictment as mentioned in Paragraphs 9 and 10 above, and

(B) additional material to support Paragraphs 28 and 43 of the Amended Indictment within five days, or to remove them;

**II. ORDERS** the Prosecutor to file the Amended Indictment before 28 June 2005.

Arusha, 24 June 2005, done in English

Dennis C. M. Byron  
Presiding

Florence Rita Arrey  
Judge

Gberdao Gustave Kam  
Judge

[Seal of the Tribunal]

**List of Supporting Materials disclosed to the Chamber on 19 October 2004**

**REDACTED**

[1] *The Prosecutor v. Édouard Karemera et al.* (Case No. ICTR-98-44-I), Decision on the Prosecutor's Motion for Severance of Félicien Kabuga's Trial and for Leave to Amend the Accused's Indictment (TC), 1 September 2003.

[2] *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-97-22-I, 30 October 1997.

[3] *The Prosecutor v. Augustin Bizimana, Édouard Karemera, Callixte Nzabonimana, André Rwamakuba, Mathieu Ndirumpatse, Joseph Nzirorera, Félicien Kabuga, Juvénal Kajelijeli*, Case No. ICTR-98-44-I, Confirmation and Non Disclosure of the Indictment (Judge Navanethem Pillay), 29 August 1998.

[4] *The Prosecutor v. Augustin Bizimana, Édouard Karemera, Callixte Nzabonimana, André Rwamakuba, Mathieu Ndirumpatse, Joseph Nzirorera, and Félicien Kabuga*, Case No. ICTR-98-44-I. The Case against Juvénal Kajelijeli has already been severed: Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Juvénal Kajelijeli (TC), 6 July 2000.

[5] *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004.

[6] *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-R50, Decision on the Prosecution Conditional Motion for Leave to Amend the Indictment and on the Defence Counter-Motion Objecting to the Form of the Recast Indictment (TC), 2 March 2005, Paras. 17-20.