



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

1043/H  
CH

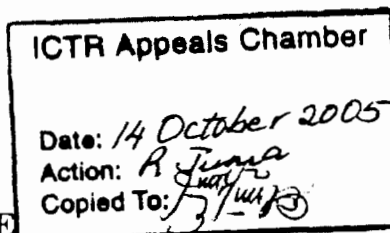
ICTR-98-44-AR72.5  
14<sup>th</sup> October 2005  
(1043/H - 1039/H)

IN THE APPEALS CHAMBER

**Before:** Judge Theodor Meron, Presiding Judge  
Judge Mohamed Shahabuddeen  
Judge Mehmet Güney

**Registrar:** Mr. Adama Dieng

**Decision of:** 14 October 2005



Edouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA

v.

**THE PROSECUTOR**

Case No. ICTR-98-44-AR72.5

2005 OCT 14 10:00  
C. R. M. J.

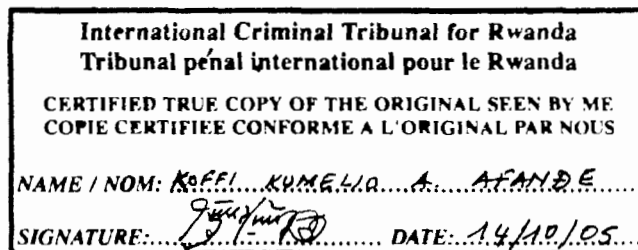
**DECISION ON VALIDITY OF JOSEPH NZIRORERA'S APPEAL OF  
DECISION ON DEFENCE MOTION CHALLENGING THE JURISDICTION  
OF THE TRIBUNAL – JOINT CRIMINAL ENTERPRISE**

**Office of the Prosecutor:**

Mr. Hasan Bubacar Jallow  
Mr. James Stewart  
Mr. Don Webster  
Mr. George Mugwanya

**Counsel for the Defence:**

Mr. Peter Robinson for Joseph Nzirorera  
Ms. Dior Diagne Mbaya and Mr. Felix Sow for Edouard Karemera  
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ndirumpatse



1. This Bench of three Judges of the Appeals Chamber is seized of Joseph Nzirorera's "Appeal of Decision Denying Preliminary Motion on Joint Criminal Enterprise",<sup>1</sup> filed on 19 August 2005 ("Appellant" and "Appeal", respectively). The Appeal takes issue with part of Trial Chamber III's "Decision on Defence Motion Challenging the Jurisdiction of the Tribunal – Joint Criminal Enterprise" of 5 August 2005 ("Impugned Decision"),<sup>2</sup> which found that there was jurisdiction to prosecute the Appellant under the "extended" or third form of joint criminal enterprise liability, recognized by the jurisprudence of the Tribunal, for crimes under Articles 2, 3 and 4 of the Statute of the International Tribunal where the enterprise is alleged to be of vast scope.

2. The Appeal is filed under Rule 72(B)(i) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), which provides that decisions on preliminary motions may not be appealed on an interlocutory basis, except, *inter alia*, "in the case of motions challenging jurisdiction, where the appeal by either party lies as of right." Pursuant to Rule 72(D):

"For purposes of paragraphs (A)(i) and (B)(i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:

- (i) any of the persons indicated in Articles 1, 5, 6 and 8 of the Statute;
- (ii) the territories indicated in Articles 1, 7 and 8 of the Statute;
- (iii) the period indicated in Articles 1, 7 and 8 of the Statute; or
- (iv) any of the violations indicated in Articles 2, 3, 4 and 6 of the Statute."

3. Pursuant to Rule 72(E) of the Rules, this Bench must determine whether the Appeal is "capable of satisfying the requirements" of Rule 72(D) of the Rules; if it is not, the Appeal must be dismissed.<sup>3</sup>

4. The Appellant submits that the amended indictment "does not relate to violations of Articles 2, 3, 4, and 6 of the Statute because customary international law and the Statute of the Tribunal [do] not authorize the 'extended' form of Joint Criminal Enterprise liability for genocide, crimes against humanity, and war crimes through a vast enterprise", as the indictment alleges.<sup>4</sup> As such, the Appellant argues that the Tribunal lacks jurisdiction to proceed with the case.

<sup>1</sup> As amended by the *Corrigendum* filed on 10 August 2005 ("Appeal").

<sup>2</sup> See especially para. 7.

<sup>3</sup> Rule 72(E) of the Rules.

<sup>4</sup> Appeal, para. 12.

5. In its Response, the Prosecution first contends that the Appeal was too long because it exceeded the maximum 15-page limit set in paragraph (C)(2)(a)(1) of the Practice Direction on the Length of Briefs and Motions on Appeal ("Practice Direction"), which governs this appeal.<sup>5</sup> Second, the Prosecution requests the Appeals Chamber to dismiss the Appellant's Appeal on the ground that the Trial Chamber was correct in holding that the Tribunal has jurisdiction to prosecute the Appellant under the "extended" form of joint criminal enterprise liability for crimes under Articles 2, 3 and 4 of the Statute of the Tribunal, regardless of the size of the criminal enterprise.<sup>6</sup> The Prosecution does not, however, question whether the Appeal satisfies the requirements of Rule 72(D) of the Rules and as such relates to the Tribunal's jurisdiction within the meaning of Rule 72(B)(i).

6. In his Reply, the Appellant argues that his opening motion was not in contravention of the page limits stipulated in the Practice Direction because, "[t]o assist in expediting the proceedings on this interlocutory appeal", he "combined his brief on the merits with the issue of jurisdiction."<sup>7</sup> He asserts that, because paragraph (C)(2)(d)(1) of the Practice Direction allows for briefs of 30-pages in length for the merits of an interlocutory appeal, the appeal should be accepted as validly filed. In his Reply the Appellant also offers additional support for the arguments, found in his Appeal brief, on the jurisdiction of the Tribunal to hear the merits of his case.

#### Length of Appeal Brief

7. The Appeal motion is 27 pages in length. Paragraph (C)(2)(a)(1) of the Practice Direction of the Tribunal requires that such motions be a maximum of 15 pages, or 4500 words, whichever is greater. Paragraph (C)(2)(d)(1) of the Practice Direction allows for briefs on the merits of an interlocutory appeal to be up to 30 pages, or 9,000 words, whichever is greater. The motion at hand clearly is governed by paragraph (C)(2)(a)(1); it is not a brief on the merits of an appeal but rather a "motion of a party wishing to appeal where appeal lies as of right" within the meaning of Rule 72(B)(i). Ordinarily, the brief on the merits of the interlocutory appeal should not be filed in the same document as the motion seeking to appeal. Nevertheless, because as discussed below the Appeals Chamber agrees that the matter meets the criteria for interlocutory appeal, the Appeals Chamber considers that the appeal process can be expedited in this case by considering the

<sup>5</sup> 16 September 2002.

<sup>6</sup> Prosecutor's Response to Joseph Nzirorera's "Appeal of Decision Denying Preliminary Motion on Joint Criminal Enterprise", No. ICTR-98-44-PT, 29 August 2005, para. 2.

<sup>7</sup> Appellant's Reply Brief: Appeal of Decision Denying Preliminary Motion on Joint Criminal Enterprise, No. ICTR-98-44-AR72.5, 1 September 2005, para. 2.

Appellant's submission to be validly filed as both a motion and a merits brief. Accordingly, the Appellant will not be permitted to file an additional brief on the merits.

#### Validity of Appeal under Rule 72(D)

8. This case concerns the correct interpretation of Article 6(1) and whether the indictment, as pleaded to include an "extended" form of joint criminal enterprise liability for crimes under Articles 2, 3 and 4 that are allegedly committed as part of a vast criminal enterprise of nationwide scope, falls within it. For the purposes of this Decision, the Appellant's motion is similar to the argument of the appellant in a recent decision from the Tribunal. In the *Rwamakuba* Decision, the appellant challenged the indictment on the ground that it did not relate to any of the violations indicated in Article 6 of the Statute.<sup>8</sup> He argued that Article 6(1) should be read in a limited fashion so as to exclude jurisdiction to try a charge of genocide under Article 2 of the Statute on a theory of joint criminal enterprise liability.<sup>9</sup>

9. As in the case at hand, in the *Rwamakuba* case the appeal challenged the indictment on the ground that it did not relate to any of the violations so indicated in Article 6(1) of the Statute of the Tribunal. And consonant with the case at hand, the appellant argued that customary international law in 1994 could not support a more expansive reading of joint criminal enterprise liability. The appeal met the requirements of Rule 72(D)(iv) of the Rules, allowing it to proceed as of right. Similarly, the case at hand clearly satisfies the requirements of Rule 72(D)(iv) of the Rules and may therefore proceed as of right under Rule 72(B)(i) of the Rules, as requested.

#### Disposition

10. For the foregoing reasons, the Bench **DECLARES** that the Appeal was validly filed and **ORDERS** that the parties may file further written briefs as follows:

1. The Appellant, having taken it upon himself to file his arguments on the merits as part of the motion to proceed, shall not be permitted to file a subsequent brief;
2. The Prosecution may file a brief addressing the merits of the Appeal within 14 days of this decision;

---

<sup>8</sup> *Prosecutor v. Rwamakuba*, No. ICTR-98-44-AR72.4, Decision on Validity of Appeal of André Rwamakuba against Decision Regarding Application of Joint Criminal Enterprise to the Crime of Genocide Pursuant to Rule 72(E) of the Rules of Procedure and Evidence, 23 July 2004.


<sup>9</sup> *Ibid.*, para. 11.

3. The Appellant may reply to any response or brief filed by the Prosecution within four days of the filing of such response.

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

Done this 14th day of October 2005,  
At The Hague,  
The Netherlands.



  
Judge Theodor Meron  
Presiding Judge

[Seal of the Tribunal]