

ICTR-98-44-AR72.6
14 November 2005
(1054/H - 1051/H)

1054/H
EJ



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

Registrar: Mr. Adama Dieng

Decision of: 14 November 2005

ICTR Appeals Chamber
Date: 14 November 2005
Action: R.T.
Copied To: See Part of Service +
Concerned SLO, LO, etc.
J. J. J.

**Edouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA**

v.

THE PROSECUTOR

Case No. ICTR-98-44-AR72.6

**DECISION ON VALIDITY OF JOSEPH NZIRORERA'S APPEAL OF
DECISION "RESERVING" MOTION TO DISMISS FOR LACK OF
JURISDICTION: JOINT CRIMINAL ENTERPRISE AND COMPLICITY**

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 Ngirumpatse

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
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NAME / NOM: KAFFI... KUMELID... A... AFANDE.
SIGNATURE: [Signature] DATE: 14/11/2005

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1. This Bench of three Judges of the Appeals Chamber is seized of Joseph Nzirorera's "Interlocutory Appeal of Decision 'Reserving' Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise and Complicity", filed on 19 September 2005 ("Appellant" and "Appeal", respectively). The Appeal takes issue with part of Trial Chamber III's "Decision on Defence Motions Challenging the Indictment as Regards the Joint Criminal Enterprise Liability" of 14 September 2005 ("Impugned Decision"),¹ which determined to "reserve" its deliberations on the challenge to joint criminal enterprise liability and complicity, contained in Joseph Nzirorera's "Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise" of 4 May 2004. In the relevant part of the Impugned Decision the Trial Chamber found that this motion was one challenging jurisdiction pursuant to Rule 72 of the Rules of Procedure and Evidence of the Tribunal ("Rules").²

2. The Appeal is filed under Rule 72(B)(i) of the 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 that 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.

4. The Appellant submits that the amended indictment "does not relate to violations of Articles 2 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 complicity in genocide,"³ as

¹ As amended by the *Corrigendum* filed on 16 September 2005.

² Impugned Decision, para. 2.

³ Appeal, para. 15. *See also* para. 18.

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the indictment alleges. As such, the Appellant argues that the Tribunal lacks jurisdiction to proceed with the charges for such conduct.⁴ Before the Appeals Chamber, the Appellant submits that the Trial Chamber committed an error in deciding to reserve its deliberations on the matter.

5. In its Response, the Prosecution speaks to the merits of the appeal but does not contest that the appeal is one of jurisdiction pursuant to Rule 72(B)(i).⁵

Validity of Appeal under Rule 72(D)

8. This case concerns the failure of the Trial Chamber to decide on the application of the "extended" form of joint criminal enterprise liability to complicity in genocide. Thus, the Appellant's challenge concerns *in fine* whether the indictment relates to violations of Articles 2 and 6 of the Statute.⁶ For the purposes of review under Rule 72(D), this Appeal is comparable to the one examined by the Appeals Chamber in the "Decision on Validity of Joseph Nzirorera's Appeal of Decision on Defence Motion Challenging the Jurisdiction of the Tribunal – Joint Criminal Enterprise".⁷ There, the same appellant challenged the indictment on the ground that the crimes set out in Article 2, 3, and 4 of the Statute do not fall within the "extended" form of joint criminal enterprise liability under Article 6(1) of the Statute when the alleged crimes were committed as part of a vast criminal enterprise of nationwide scope.⁸ As in the present Appeal, the appellant there also alleged that customary international law could not support a more expansive reading of "extended" joint criminal enterprise liability for crimes of the Statute of the Tribunal.⁹

9. The appeal in the above case 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.

⁴ See *id.*

⁵ See Prosecutor's Response to Joseph Nzirorera's Interlocutory Appeal of Decision "Reserving" Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise and Complicity, 29 September 2005.

⁶ Appeal, para. 15.

⁷ *The Prosecutor v. Karemera et al.*; Case No. ICTR-98-44-AR72.5, 14 October 2005.

⁸ *Id.*, para. 8.

⁹ *Id.*, para. 15.

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Disposition

11. For the foregoing reasons, the Bench **DECIDES** that the Appeal satisfies the requirements of Rule 72(D)(iv) or the Rules and may proceed as of right and **ORDERS** the parties to file further written briefs as follows:

1. The Appellant shall file an appeal within ten days of the filing of this decision;
2. The Prosecution shall file a response within ten days of the filing of the appeal;
3. The Appellant may reply to any response 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 November 2005,
At The Hague,
The Netherlands.




Judge Theodor Meron
Presiding Judge

[Seal of the Tribunal]