

ICTR-98-44-T
22-3-2007
(28570-28565)

28570
#114



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
sitting pursuant to Rule 15 bis (F) of the Rules of Procedure and Evidence

Registrar: Adama Dieng

Date: 22 March 2007

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIROHERA
Case No. ICTR-98-44-T

JUDICIAL RECORDS/ARCHIVES
RECEIVED

2001 MAR 22 1 P 5:04

**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL
DECISION ON APPEALS CHAMBER REMAND OF JUDICIAL NOTICE**

Rule 73(B) of the Rules of Procedure and Evidence

Office of the Prosecutor:
Don Webster
Alayne Frankson-Wallace
Iain Morley
Saidou N'Dow
Gerda Visser
Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Mathieu Ndirumpatse
Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera
Peter Robinson and Patrick Niny Mayidika Ngimbi

INTRODUCTION

1. The trial started on 19 September 2005. On 11 December 2006, following the Appeals Chamber's directions,¹ the Trial Chamber, composed of Judges Dennis C. M. Byron, presiding, Emile Francis Short and Gberdao Gustave Kam, took judicial notice of three facts of common knowledge and 107 adjudicated facts pursuant to Rule 94 of the Rules of Procedure and Evidence.² It denied the remainder of the Prosecution's request.

2. The Defence for Nzirorera and the Defence for Ngirumpatse then applied to that Chamber for certification to appeal the Decision of 11 December 2006.³ The Prosecution opposed these Defence motions.⁴

3. On 19 January 2007, Judge Short decided to withdraw from the case. In accordance with Rule 15 *bis* (D) of the Rules, the remaining Judges decided on the continuation of the proceedings with a substitute judge.⁵ The President also authorized the Chamber, composed of Judges Byron and Kam, to conduct routine matters, such as the delivery of decisions, in the absence of the substitute judge.⁶

DISCUSSION

Preliminary Matters - Scope and Timeliness of Ngirumpatse's Application

4. The Defence for Ngirumpatse seeks certification to appeal not only the Decision of 11 December 2006 but also the oral rulings of 30 November 2006 and 5 December 2006. As

¹ *Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2005, para. 57 ("Appeals Chamber Decision").

For the foregoing reasons, the Appeals Chamber

UPHOLDS the Prosecution's Interlocutory Appeal in part, except as to Fact 1 listed under its Annex A;

DENIES Nzirorera's Motion;

DIRECTS the Trial Chamber to take judicial notice under Rule 94(A) of the Rules of Facts 2, 5, and 6 listed under Annex A of the Prosecution's Interlocutory Appeal; and

REMANDS this matter to the Trial Chamber for further consideration of Facts 1-30, 33-74, and 79-152 listed under Annex B of the Prosecution's Interlocutory Appeal, in a manner consistent with this Decision.

² *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Appeals Chamber Remand of Judicial Notice (TC), 11 December 2006 ("Impugned Decision").

³ Joseph Nzirorera's Application for Certification to Appeal Decision on Appeals Chamber Remand of Judicial Notice, filed on 18 December 2006; Requête en certification d'appel pour M. Ngirumpatse sur la Decision on Appeals Chamber Remand of Judicial Notice - Rules 94 of the Rules of Procedure and Evidence, filed on 18 December 2006; Iterative Requête en certification d'appel pour M. Ngirumpatse sur la Decision on Appeals Chamber Remand of Judicial Notice - Rules 94 of the Rules of Procedure and Evidence, filed on 5 March 2007.

⁴ Prosecutor's Response to Joseph Nzirorera's Application, filed on 20 December 2006.

⁵ *Karemera et al.*, Decision on Continuation of the Proceedings (TC), 6 March 2007 ("Decision on Continuation of the Proceedings").

⁶ See Rules of Procedure and Evidence, Rule 15 *bis* (F); and InterOffice Memorandum from the President to Judge Byron, filed on 13 March 2007.

By

already specified in the oral rulings,⁷ the Impugned Decision must be considered as the sole authoritative statement of the Chamber's findings and reasoning concerning this issue. The Chamber will therefore consider the application by the Defence for Ndirumpatse as only seeking certification to appeal the written Decision of 11 December 2006.

5. According to Rule 73(C) of the Rules of Procedure and Evidence, "requests for certification shall be filed within seven days of the filing of the impugned decision". In the present case, Ndirumpatse's motion is dated 18 December 2006 but was actually filed on 19 December 2007 since the document was sent after close of business of the Tribunal.⁸ In the interests of justice, due to the importance of the issue at stake, the Chamber will consider Ndirumpatse's motion, even if it was filed one day late.

6. The Defence for Ndirumpatse filed further submissions for certification seven days after notification of the French version of the Impugned Decision. In its earlier submission, it had requested that the Chamber grant it a supplementary delay to this end.⁹ In light of the import and complexity of the Impugned Decision and having due regard for the rights of the accused, it is in the interests of justice that this further submission be also considered. In addition, as the content of the further submissions are in substance the same as the content of the earlier submissions, no prejudice has been suffered by the Prosecution.

On the Merits

7. Rule 73(B) of the Rules provides that Trial Chamber's decisions rendered on motions filed by the parties under Rule 73 are without interlocutory appeal. However, the same provision confers a discretion on the Trial Chamber to grant certification to appeal when certain clearly delimited conditions are fulfilled: the applicant must show (i) how the impugned decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial, and (ii) that an "immediate resolution by the Appeals Chamber may materially advance the proceedings".

⁷ T. 30 Nov. 2006, pp. 2-3; T. 5 Dec. 2006, pp. 67-68.

⁸ See Article 29 of Directive for the Registry of the International Criminal Tribunal for Rwanda, Judicial and Legal Services Division, Court Management Section: "(1) After-hours filing refers to the filing of documents on weekends or public holidays or outside of the following hours local time: 9 a.m. to 5.30 p.m., Monday through Thursday and 9 a.m. to 2 p.m. on Friday, or on weekends or public holidays. (2) A party anticipating a late filing must notify the Court Management Section during business hours to request permission and instructions for after-hours filing."

⁹ Ndirumpatse' Application, para. 10.

8. The moving party must demonstrate that both requirements of Rule 73(B) are satisfied, and even then, certification to appeal must remain exceptional.¹⁰

9. Judicial notice provides for alternative means for the Prosecution to meet its burden of proof on issues of facts.¹¹ As the Chamber recalled in reference to Appeals Chamber's prior rulings, "at the crux of [judicial notice] is the concept of judicial economy and expediency, and, as such, the scope of its application goes to the heart of the concepts of fairness and expediency".¹² The Chamber therefore accepts the Defence's contention that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. It must now determine whether an immediate resolution of the issues by the Appeals Chamber would materially advance the proceedings.

10. The Defence for Nzirorera and the Defence for Ngirumpatse submit that this requirement is met for different reasons. The Defence for Nzirorera argues that were its appeal granted, significant time savings would result in the Defence case as it would no longer need to include witnesses to refute the facts of which judicial notice was taken by the Chamber.¹³ Referring to the Chamber's previous decision granting certification to appeal to the Prosecution,¹⁴ it emphasizes that should the Defence appeal be granted, it would similarly have an impact on the trial time and would enable the parties to focus on the salient issues.¹⁵

11. The present motions recapitulate legal arguments which have already been resolved by the Appeals Chamber, or challenge the Chamber's application of those legal principles to the specific circumstances of the case and the facts sought for admission under judicial notice. In the Chamber's view, certification on these grounds would not materially advance the proceedings.¹⁶

12. No useful purpose would be served by requesting the Appeals Chamber to revisit legal principles which it has recently affirmed. Nor would certification be appropriate in

¹⁰ *Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible' (TC), 18 March 2004, para. 15; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 10.

¹¹ Appeals Chamber Decision, para. 37 (citing *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgement (AC), 20 May 2005, para. 192). See also Appeals Chamber Decision, paras. 42 & 49; Impugned Decision, para. 22.

¹² *Karemera et al.*, Certification of Appeal Concerning Judicial Notice (TC), 2 December 2005, para. 5 ("Certification of Appeal of 2 December 2005"); See also Impugned Decision, para. 21.

¹³ Nzirorera Application, para. 9.

¹⁴ Certification of Appeal of 2 December 2005, para. 5.

¹⁵ Nzirorera Application, para. 10.

¹⁶ See *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Nsengiyumva Request for Certification to Appeal Decision on Exclusion of Evidence (TC), 6 November 2006; *Prosecution v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Justin Mugenzi's Application for Certification for Interlocutory Appeal of the Decision on the Prosecution's Motion for Judicial Notice (TC), 11 December 2006.

respect of their application to specific facts of which judicial notice has been taken. As the Appeals Chamber stated, the Chamber has the responsibility, as a trier of fact, to determine in the exercise of its discretion which evidence to admit during the course of the trial.¹⁷ Certification to appeal has to be the "absolute exception" when deciding on the admissibility of the evidence.¹⁸ The current Impugned Decision falls within that category of decisions which involves an evaluation of factual questions which are primarily for the trier of fact to weigh.¹⁹

13. The Defence for Nzirorera further contends that certification is appropriate in the present case because the Impugned Decision involves "broad categories of evidence."²⁰ The Defence for Nzirorera and the Defence for Ndirumpatse also submit that certification to appeal is proper in this case as the Impugned Decision relates to an issue for which the Chamber previously granted certification.²¹

14. The Chamber recalls that the preceding is not a criterion for certification as such, but rather is an example of an exceptional circumstance where the requirements for certification were found to have been met by other Trial Chambers.²² While it is true that the Impugned Decision involves broad categories of evidence, this fact alone cannot justify certification to appeal an issue if its resolution by the Appeals Chamber would not materially advance the proceedings.²³ Moreover, the Chamber finds that certification to appeal is not granted in respect of types of decisions, but rather in respect of specific issues which merit the exceptional relief that is an interlocutory appeal. In the present case, the Chamber is not satisfied that the Impugned Decision raises an issue the immediate resolution of which by the Appeals Chamber would materially advance the proceedings.

¹⁷ *Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR 98-42-AR73-2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5.

¹⁸ *Ibid.*

¹⁹ *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on the Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts (AC), 28 October 2003 ("CONSIDERING that the main issue in this appeal concerns the legal test for the admission of adjudicated facts under Rule 94(B),⁹ and that, in considering this issue, the Appeals Chamber will not consider the alleged error in relation to each of the facts rejected by the Impugned Decision, the application of that test to each rejected fact being a matter to be decided by the Trial Chamber on the criteria hereinafter set forth;").

²⁰ Nzirorera's Application, para. 11 (referring to Certification of Appeal of 2 December 2005, para. 5).

²¹ *Ibid.*, para. 8. Ndirumpatse's Application, paras. 7-9; Ndirumpatse's Iterative Application, paras. 8-10. All three Applications refer to Certification of Appeal of 2 December 2005.

²² *Prosecutor v. Bagosora et al.*, Certification of Appeal Concerning Access to Protected Defence Witness Information (TC), 29 July 2005, para. 2.

²³ Where certification was granted in respect of a decision involving broad categories of evidence, Trial Chambers found that the resolution of the issue would be materially advanced by the proceedings. See *Prosecutor v. Bagosora et al.*, Decision on Prosecution Request for Certification of Appeal on Admission of Testimony of Witness DBY (TC), 2 October 2005, para. 4; *Prosecutor v. Bagosora et al.*, Certification of Appeal on Admission of Testimony of Witness DP Concerning Pre-1994 Events (TC), 11 March 2005, para. 4.

15. The Defence for Ngirumpatse also submits that certification is all the more warranted following the withdrawal of Judge Short from the case.²⁴ In this regard, the Chamber holds the view that the Defence for Ngirumpatse has failed to demonstrate how the withdrawal of Judge Short is of relevance to the test for certification. The remaining Judges have decided to continue the proceedings with a substitute judge.²⁵ The time that will be required to resume the trial process with that judge cannot be considered as equivalent to showing that the Impugned Decision involves an issue for which an immediate resolution by the Appeals Chamber will materially advance the proceedings.

16. In view of these circumstances, the Chamber is not satisfied that the second requirement of the test for granting certification has been met.

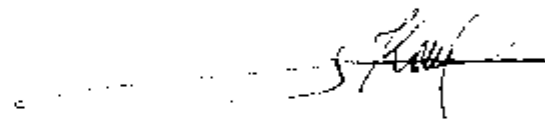
FOR THOSE REASONS, THE CHAMBER DENIES the Defence Motions.

Arusha, 22 March 2007, done in English.



Dennis C. M. Byron

Presiding Judge



Gberdao Gustave Kam

Judge

[Seal of the Tribunal]



²⁴ Ngirumpatse's Iterative Application, paras. 4, 5, 7 and 11.

²⁵ Decision on Continuation of the Proceedings.



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input checked="" type="checkbox"/> Trial Chamber III C. K. Hometownu	<input type="checkbox"/> Appeals Chamber / Arusha F. A. Talon
	<input type="checkbox"/> Chief, CMS J.-P. Fomélé	<input type="checkbox"/> Deputy Chief, CMS M. Diop	<input type="checkbox"/> Chief, JPU, CMS K. K. A. Afande	<input type="checkbox"/> Appeals Chamber / The Hague R. Burriess
From:	<input checked="" type="checkbox"/> Chamber III Sébastien Jodoia (names)	<input type="checkbox"/> Defence (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other (names)
Case Name:	The Prosecutor vs. Edouard Karemera et al.			Case Number: ICTR-98-44-T
Dates:	Transmitted: 22 March 2007		Document's date: 22 March 2007	
No. of Pages:	6	Original Language:	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
Title of Document:	DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL DECISION ON APPEALS CHAMBER REMAND OF JUDICIAL NOTICE			
Classification Level:	<input type="checkbox"/> Strictly Confidential / Under Seal <input type="checkbox"/> Confidential <input checked="" type="checkbox"/> Public			
TRIM Document Type:	<input type="checkbox"/> Indictment <input type="checkbox"/> Warrant <input type="checkbox"/> Correspondence <input type="checkbox"/> Submission from non-parties <input checked="" type="checkbox"/> Decision <input type="checkbox"/> Affidavit <input type="checkbox"/> Notice of Appeal <input type="checkbox"/> Submission from parties <input type="checkbox"/> Disclosure <input type="checkbox"/> Order <input type="checkbox"/> Appeal Book <input type="checkbox"/> Accused particulars <input type="checkbox"/> Judgement <input type="checkbox"/> Motion <input type="checkbox"/> Book of Authorities			

II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

CMS SHALL take necessary action regarding translation

☒ Filing Party hereby submits only the original, and will not submit any translated version.

☐ Reference material is provided in annex to facilitate translation.

Target Language(s):

☒ English ☐ French ☐ Kinyarwanda

CMS SHALL NOT take any action regarding translation.

☐ Filing Party hereby submits BOTH the original and the translated version for filing, as follows:

Original	in	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda
Translation	in	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

CMS SHALL NOT take any action regarding translation.

☐ Filing Party will be submitting the translated version(s) in due course in the following language(s):

☐ English ☐ French ☐ Kinyarwanda

KINDLY FILL IN THE BOXES BELOW

<input type="checkbox"/> The OTP is over-seeing translation. The document is submitted for translation to: <input type="checkbox"/> The Language Services Section of the ICTR / Arusha. <input type="checkbox"/> The Language Services Section of the ICTR / The Hague. <input type="checkbox"/> An accredited service for translation; see details below: Name of contact person: Name of service: Address: E-mail / Tel. / Fax:	<input type="checkbox"/> DEFENCE is over-seeing translation The document is submitted to an accredited service for translation (fees will be submitted to DCDMS): Name of contact person: Name of service: Address: E-mail / Tel. / Fax:
---	---

III - TRANSLATION PRIORITISATION (For Official use ONLY)

<input type="checkbox"/> Top priority	COMMENTS	<input type="checkbox"/> Required date:
<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines:



International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

Arusha International Conference Centre
P.O. Box 6018, Arusha, Tanzania - B.P. 6016, Arusha, Tanzania
Tel. 255 57 504207-11 504367-72 or 1 212 983 2850 Fax 255 57 504000/504373 or 1 212 983 2848/49

PROOF OF SERVICE – ARUSHA
PREUVE DE NOTIFICATION – ARUSHA

Date: 23 March 2007

Case Name / Affaire:

The Prosecutor vs.

- Joseph NZIRORERA
- Mathieu NGIRUMPATSE
- Edouard KAREMERA

Case No / Affaire No.:

ICTR-98-44-T

To:
A:

- ☐ TC1
☐ Judge E. Mose, President
☐ Judge J. R. Reddy
☐ Judge S. A. Egorov
☐ Judge F. R. Arrey (Karera)
☐ SLO
☐ C. Gosnell, Co-ordinator

received by / reçu par:

ALO:

received by / reçu par

- ☐ TC2
☐ Judge W. H. Sekule
☐ Judge A. Ramaroso
☐ Judge K. R. Khan (Bizimungu et al.)
☐ Judge A. J. N. de Silva
☐ Judge S. B. Bossa (Nyiramasuhuko et al.)
☐ Judge L. G. Muthoga (Bizimungu et al.)
☐ Judge F. R. Arrey (Muvunyi)
☐ Judge E. F. Short (Bizimungu et al.)
☐ Judge T. Hikmet (Ndindiyimana et al.)
☐ Judge S. K. Park (Ndindiyimana et al.)
☐ SLO
☐ A. Leroy, Co-ordinator
☐ A. Marong (Ndindiyimana et al.)

- ☒ TC3
☐ Judge A. Vaz (Seromba)
☐ Judge I. M. Weinberg de Roca (Ziganyirwa)
☐ Judge K. R. Khan
☒ Judge D. C. M. Byron
☐ Judge L. G. Muthoga (Ziganyirwa)
☐ Judge F. R. Arrey (Rukundo)
☐ Judge E. F. Short (Karera et al.)
☒ Judge K. Hökberg (Seromba & Rwamakuba)
☐ Judge G. G. Kamukama (Seromba, Karemera et al. & Rwamakuba)
☒ E. O'Donnell, SLO
☐ C. Denis, Co-ordinator (Karemera et al. & Rwamakuba)
☐ H. Gogo, Co-ordinator (Seromba)

☒ OTP / BUREAU DU PROCUREUR

☒ Senior Trial Attorney in charge of case: D. Webster

received by

☒ DEFENSE

☐ Accused / Accusé: J. Nzirorera, M. Ngirumpatse & E. Karemera

complete / remplir "CMS4 FORM"

☐ Lead Counsel / Conseil Principal: P. Robinson, C. Hounkpatin & D. Diagne

☐ In / à Arusha Arusha

(signature)

☐ by fax complete / remplir "CMS3bis FORM"

☐ Co-Counsel / Conseil Adjoint: P. N. M. Ngimbi, F. Weyl & F. Sow

☒ In / à Arusha Arusha

(signature)

☒ by fax complete / remplir "CMS3bis FORM"

All Decisions: ☐ Appeals Chamber Unit, The Hague

☐ S. Chenault, Jurist Linguist

All Decisions & Important Public Documents:

☐ Press & Public Affairs

☐ Legal Library

From: ☐ J.-P. Fomété (Chief, CMS) ☐ N. Diallo (TC1) ☐ R. Kouambo (TC2) ☒ C. Hometowu (TC3) ☐ F. A. Talon (Appeals/Team IV)

De: ☐ A. Oeng ☐ A. Miller, OLA, NY ☐ D. Registrar ☐ S. Menon ☐ M. Niang ☐ S. van Driessche

Cc: ☐ WVSS ☐ Spokesperson ☐ E. O'Donnell ☐ DCDMS ☐ P. Enow

Subject: ☐ Kindly find attached the following document(s) / Veuillez trouver en annexe le(s) document(s) suivant(s):

Documents name / titre du document
DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL
DECISION ON APPEALS CHAMBER REMAND OF JUDICIAL NOTICE
Date Filed / Date enregistrée
22/03/2007
Pages
6