

ICTR-98-44-T  
26-9-2007  
(31074-31069)

31074  
AM



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  
Vagn Joensen

**Registrar:** Adama Dieng

**Date:** 26 September 2007

THE PROSECUTOR

v.

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

A handwritten signature in black ink, appearing to read 'Edouard Karemera', is written over a vertical stamp that reads '2007-09-26 10:01:00'.

**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*

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## INTRODUCTION

1. The trial in this case started on 19 September 2005 with the presentation of the first Prosecution witnesses. On 22 March 2007, before Judge Vagn Joensen had joined the bench in the present case,<sup>1</sup> Judges Dennis Byron and Gberdao Gustave Kam denied Joseph Nzirorera's Motion for certification to appeal the Decision on Appeals Chamber Remand of Judicial Notice Defence of 11 December.<sup>2</sup> They considered that the motion fell within the ambit of the routine matters they were authorized to conduct in the absence of Judge Joensen, under Rule 15 *bis* (F) of the Rules of Procedure and Evidence ("Rules").<sup>3</sup>
2. On 31 May 2007, the Appeals Chamber laid down standards and principles defining what should be considered a "routine matter" under Rule 15 *bis* (F) of the Rules.<sup>4</sup>
3. On 17 July 2007, bearing in mind the Appeals Chamber principles, the Chamber, fully composed, then decided to vacate the prior Decision of 22 March 2007, rendering it necessary to rule afresh on Joseph Nzirorera's motion for certification to appeal the Decision.<sup>5</sup>
4. On 6 September 2007, the Chamber furthermore granted Joseph Nzirorera's Motion moving the Chamber to amend its decision of 11 December 2006 so as to vacate judicial notice of adjudicated facts no. 105, 106, 107, 108 and 117 respectively described in the Annex to the Decision.<sup>6</sup> Therefore, the Chamber, now fully composed, is ready to reconsider the Defence Motion for certification to appeal the Decision of 11 December 2006 ("Impugned Decision"), only as it applies to the remaining adjudicated facts.

<sup>1</sup> On 8 June 2007, Judge Vagn Joensen joined the bench as substitute Judge in accordance to Rule 15 *bis* (D), *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera* ("Karemera et al."), Certification of the Familiarisation with the Record of the Proceedings (Judge Joensen), 8 June 2007. See *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Continuation of the Proceedings (TC), 6 March 2007; *Karemera et al.*, Case No. ICTR-98-44-R15bis.3, Decision on Appeals Pursuant to Rule 15 *bis* (D) (AC), 20 April 2007.

<sup>2</sup> *Karemera et al.*, Decision on Defence Motion for Certification to Appeal Decision on Appeals Chamber Remand of Judicial Notice (TC), 22 March 2007; Original Decision: *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera* Case No. ICTR-98-44-T (Karemera et al.), Decision on Appeals Chamber Remand of Judicial Notice (TC), 11 December 2006

<sup>3</sup> *Karemera et al.*, Decision on Prosecutor's Motion for an Order to File Notice of Alibi (TC), 22 March 2007, para. 3. See: Interoffice Memorandum from the President to Judge Byron, filed on 13 March 2007; Rules of Procedure and Evidence, Rule 15 *bis* (F): "In case of illness or an unfilled vacancy or in any other similar circumstances, the President may, if satisfied that it is in the interests of justice to do so, authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members."

<sup>4</sup> *Karemera et al.*, Case No. ICTR-98-44-JAR73.9, Decision on "Joseph Nzirorera's Interlocutory Appeal of Decision on Obtaining prior Statements of Prosecution Witnesses after they have testified" (AC), 31 May 2007.

<sup>5</sup> *Karemera et al.*, Decision on Motions to Vacate Decisions (TC), 17 July 2007, para. 18.

<sup>6</sup> *Karemera et al.*, Decision on Joseph Nzirorera's Motions to Vacate Judicial Notice of Some Adjudicated Facts, 2 August 2007.

## DISCUSSION

### *Preliminary Matters*

5. The Defence for Ngirumpatse seeks certification to appeal the oral rulings of 30 November 2006 and 5 December 2006 as well as the Decision of 11 December 2006. However, since the Impugned Decision must be considered the sole authoritative statement of its findings and reasoning on the issue,<sup>7</sup> the Chamber will consider the application by the Defence for Ngirumpatse as seeking only certification to appeal the written Decision of 11 December 2006.

6. Although dated 18 December 2007, Ngirumpatse's motion was filed on 19 December 2007 since the document was sent after the close of business of the Tribunal.<sup>8</sup> Whilst Rule 73(C) of the Rules requires requests for certification to be filed within seven days of the Impugned Decision, in the interests of justice and due to the importance of the issue at stake, the Chamber will in this instance consider the motion, even though it was filed one day late.

7. The Chamber will also consider further submissions for certification filed by the Defence for Ngirumpatse seven days after notification of the French version of the Impugned Decision. A supplementary delay to this end had been requested of the Chamber in its earlier submission.<sup>9</sup> Again due to the importance and complexity of the Impugned Decision, and having due regard for the rights of the accused, in the interests of justice the Chamber will consider this submission. It is noted that no prejudice has been suffered by the Prosecution since the content of the further submissions is substantively the same as that of the earlier submissions.

### *On the Merits*

8. Whilst Rule 73(B) of the Rules precludes interlocutory appeal for Decisions rendered by a Trial Chamber on Motions filed under Rule 73, the same provision confers upon the Trial Chamber discretion to grant certification to appeal if: (i) the impugned decision involves an issue that would significantly affect the fair and expeditious conduct of the

<sup>7</sup> As specified in the oral rulings: T. 30 Nov. 2006, pp. 2-3. T. 5 Dec. 2006, pp. 67-68.

<sup>8</sup> 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."

<sup>9</sup> Ngirumpatse' Application, para. 10.

proceedings or the outcome of the trial; and (ii) an immediate resolution by the Appeals Chamber may materially advance the proceedings. Even when both of these requirements are satisfied, certification to appeal remains exceptional.<sup>10</sup>

9. The Chamber acknowledges that judicial notice gives the Prosecution an alternative means to meet its burden of proof on issues of fact,<sup>11</sup> and 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.

10. In arguing that the second criterion is satisfied, the Defence for Nzirorera submits that, had its appeal been granted, significant time would have been saved as witnesses refuting the judicially noticed facts would not have been called,<sup>12</sup> and the focus on salient issues would reduce the trial time<sup>13</sup> in the same manner anticipated by the Chamber's previous Decision granting the Prosecution certification to appeal.<sup>14</sup>

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.<sup>15</sup>

12. As the Appeals Chamber has 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.<sup>16</sup> Whereas certification to appeal has to be the "absolute exception" when deciding on the admissibility of evidence,<sup>17</sup> the present Impugned Decision involves only an

<sup>10</sup> *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.

<sup>11</sup> 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.

<sup>12</sup> Nzirorera Application, para. 9.

<sup>13</sup> Nzirorera Application, para. 10.

<sup>14</sup> Certification of Appeal of 2 December 2005, para. 5.

<sup>15</sup> 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.

<sup>16</sup> *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.

<sup>17</sup> *Ibid.*

evaluation of factual questions which are primarily for the trier of fact to weigh.<sup>18</sup> Certification is not appropriate with respect to the Chamber's application to specific facts of which judicial notice has been taken and no useful purpose would be served by requesting the Appeals Chamber to revisit legal principles which it has recently affirmed.

13. The Defence for Nzirorera further contends that certification is appropriate in the present case because the Impugned Decision involves "broad categories of evidence."<sup>19</sup> The Defence for Nzirorera and the Defence for Ngirumpatse 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.<sup>20</sup>

14. While this is not a criterion for certification as such, it is an example of other Trial Chambers finding exceptional circumstances for certification.<sup>21</sup> The Impugned Decision does involve broad categories of evidence but this alone does not justify certification to appeal if its resolution by the Appeals Chamber would not materially advance the proceedings.<sup>22</sup> Moreover, the Chamber finds that certification to appeal is not granted for types of decisions, but rather for specific issues that merit exceptional relief. In the present case, the Chamber is not satisfied that the Impugned Decision raises an issue that, if immediately resolved by the Appeals Chamber, would materially advance the proceedings.

15. The Chamber finds that the withdrawal of Judge Short from the case, submitted by the Defence for Ngirumpatse as a factor further warranting certification,<sup>23</sup> is not relevant to the test for certification. Further, since the proceedings have been continued with a substitute judge, this point is no longer relevant. The Chamber is also of the view that the time required

<sup>18</sup> *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), 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;"); see also *Prosecutor v. Dragomir Milosevic*, Case No. IT-02-54-T, Decision on Interlocutory Appeals against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts (AC), 26 June 2007.

<sup>19</sup> Nzirorera's Application, para. 11 (referring to Certification of Appeal of 2 December 2005, para. 5).

<sup>20</sup> *Ibid.* para. 8; Ngirumpatse's Application, paras. 7-9; Ngirumpatse's Iterative Application, paras. 8-10. All three Applications refer to Certification of Appeal of 2 December 2005.

<sup>21</sup> *Prosecutor v. Bagosora et al.*, Certification of Appeal Concerning Access to Protected Defence Witness Information (TC), 29 July 2005, para. 2.

<sup>22</sup> 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 2003, para. 4; *Prosecutor v. Bagosora et al.*, Certification of Appeal on Admission of Testimony of Witness DP Concerning Pre-1994 Events (TC), 11 March 2003, para. 4.

<sup>23</sup> Ngirumpatse's Iterative Application, paras. 4, 5, 7 and 11.

to resume the trial process with a substitute judge is not equivalent to showing 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, 26 September 2007, done in English.



Dennis C. M. Byron  
Presiding Judge



Gberdao Gustave Kam  
Judge



Vagn Joensen  
Judge

[Seal of the Tribunal]

