

PETER ROBINSON.com: Motion to Dismiss Judicial Notice
Appeal - ICTR

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA**

CASE No. ICTR-98-44-AR73.5

IN THE APPEALS CHAMBER

Before: The Appeals Chamber

Registrar: Mr. Adama Dieng

Date Filed: 13 December 2005

THE PROSECUTOR

v.

**EDOUARD KAREMERA,
MATHIEU NGIRUMPATSE
JOSEPH NZIRORERA**

JOSEPH NZIRORERA'S MOTION TO DISMISS ISSUES
OF INTERLOCUTORY APPEAL FOR WHICH CERTIFICATION
WAS NOT GRANTED

The Office of the Prosecutor:

Mr. Don Webster

Mr. Gregory Lombardi

Mr. Iain Morley

Mr. Gilles Lahaie

Defence Counsel:

Mr. Peter Robinson

Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera

Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ngirumpatse

1. Joseph Nzirorera respectfully moves the Appeals Chamber to dismiss those portions of the *Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (9 December 2005) which purport to appeal the Trial Chamber's *Decision on Prosecution Motion for Judicial Notice* (9 November 2005) on issues for which certification to appeal was not granted in the *Certification of Appeal Concerning Judicial Notice* (2 December 2005).

Procedural History

2. On 9 November 2005, the Trial Chamber issued its *Decision on Prosecution Motion for Judicial Notice*. In the Decision, it declined to take judicial notice of 3 alleged "facts of common knowledge" under Rule 94(A) including the existence of genocide, widespread and systematic attacks upon a civilian population, and the non-international character of the armed conflict in Rwanda.^[1] The Trial Chamber also declined to take judicial notice of 153 alleged "adjudicated facts" on the grounds that most of them went directly or indirectly to the guilt of the accused, some were taken out of context, and one was a legal characterization and not a fact.^[2]

3. The prosecution sought certification to appeal the following three aspects of the Trial Chamber's decision:

- (A) the refusal to take judicial notice of five facts which the Prosecutor sought to have judicially noticed as facts of common knowledge;
- (B) the refusal to take judicial notice of, as adjudicated facts, facts 1-30, 33-74, 79-85, and 111-152, on the basis that "most of these facts may go directly or indirectly to the guilt of the Accused, notably in relation with the pleading of their participation in a joint criminal enterprise; and
- (C) the refusal to take judicial notice of, as adjudicated facts, facts 86-110, on the basis that these facts were taken out of context and put together to build new facts which have not been adjudicated."^[3]

4. On 2 December 2005, the Trial Chamber issued its *Certification of Appeal Concerning Judicial Notice*. It noted that the prosecution had “advanced a number of issues” in its request for certification.^[4] It went on to hold that:

“One of the issues raised by the Impugned Decision, which the Prosecution submits satisfies the criteria to invoke an exercise of the Chamber’s discretion is the Chamber’s refusal to take judicial notice of a number of facts, as adjudicated facts, on the basis that they might go directly or indirectly to the guilt of the Accused, notably in relation to the pleading of their participation in a joint criminal enterprise. It submits that, if interpreted widely, no fact could be judicially noticed, as, presumably most facts introduced by the Prosecution will go towards proving, either directly or indirectly, the guilt of the accused.

“The Chamber is of the view that **this issue** satisfies both criteria for certification...” (emphasis added)^[5]

5. Therefore, the certification issued by the Trial Chamber involved only one issue—the scope of adjudicated facts which may be the subject of judicial notice as they relate to the guilt of the Accused—which was the second of the three issues for which certification to appeal was sought.

6. The prosecution, however, has seized the occasion to appeal the Impugned Decision on all of the three issues that were set forth in its motion for certification, and even one additional issue for which certification was not even sought.^[6]

Jurisdiction of the Appeals Chamber

7. Rule 73(B) provides that:

“Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

8. A Trial Chamber’s certification to appeal a decision does not automatically give license to a party to include all issues related to the decision in its appeal. The Appeals Chamber’s jurisdiction to hear an interlocutory appeal is limited to certification of those “issue[s] which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.” The Trial Chamber in this case found that only one issue met those criteria.

9. The principle that interlocutory appellate review pursuant to Rule 73(B) is limited to only those issues specified by the Trial Chamber was painfully brought home to Mr. Nzirorera’s defence in this case by the Appeals Chamber in its *Decision of Interlocutory Appeals Regarding Participation of Ad Litem Judges* (11 June 2004). That was an appeal from the Trial Chamber’s *Decision Relative Aux Requetes de Karemera et Nzirorera aux Fins d’Invalidation de l’Acte d’Acusation Pour Vices et Procedure et de Forme* (29 March 2004).

10. The Trial Chamber had ruled that ad litem judges had the power under Article 12 quarter of the Statute to review and confirm an amended indictment and that the motion of Mr.

Nzirorera was a frivolous one warranting sanctions pursuant to Rule 73(F). On 7 April 2004, the Trial Chamber granted certification to appeal the decision, holding that:

“Now, as regards the motion for certification of 31 March and 6 April 2004 against the decision on motions by Karemera and Nzirorera to invalidate the indictment for defects in form and procedure, motion dated 29 -- or decision dated 29 March 2004, the Chamber points out that by the decision, the Judges intended to clarify the limits on the authority of *ad litem* Judges by making a clear distinction between their authority in the preliminary phase of trial, during which they do not have the same authority as the permanent Judges, and a distinction of their authority after commencement of trial. It is during the latter phase that they have full legal authority, including authority to participate in a decision of the Chamber authorising modifications to the indictment. The Chamber points out that that is exactly what it did in its decision of 13 February 2004, which was not a confirmation of the indictment, as argued by the Defence, under Article 18 of the Statute.

However, the Chamber is of the opinion that the decision under discussion may have a direct impact on the continuation of trial and may have bearing on the expediency of the trial, and the Appeals Chamber's resolving of the issue may help expedite the proceedings. As such, the Chamber grants the certification of appeal.”^[7]

11. Mr. Nzirorera thereafter filed his appeal, contending that the Trial Chamber had erred in holding that *ad litem* Judges had the power to confirm the amended indictment and had erred in finding the motion to have been frivolous pursuant to Rule 73(F).

12. The Appeals Chamber rejected the latter issue, “NOTING that the Trial Chamber granted certification orally on 7 April 2004 for the Appellants to pursue their Appeals in respect only of the question whether *ad litem* judges can participate in motions dealing with the amendment of the indictment during trial,”^[8] and “CONSIDERING also that, although Trial Chambers should use the power to impose sanctions cautiously, a decision to impose monetary

sanctions on counsel for frivolous motions or abuse of process pursuant to Rule 73(F) of the Rules is not subject to appeal under the Statute of the International Tribunal or the Rules, and that, in any event, **the certification granted by the Trial Chamber in this case does not cover an appeal from the decision to impose such sanctions.**^[9] (emphasis added)

13. The same situation applies to the instant appeal by the prosecution. In both rulings, the Trial Chamber granted certification to appeal, but in its reasons, identified one issue which it held met the test for certification. The Appeals Chamber held in Mr. Nzirorera's appeal that this precluded consideration of other issues contained in the Impugned Decision. The same principle must be now applied to the prosecution.

14. In an interlocutory appeal in the *Nyiramasuhuko* case, the Appeals Chamber clearly stated that "the right of appeal is limited to appeals which have been certified by the Trial Chamber on a particular issue, and the Appeals Chamber will limit its ruling to matters which have been properly raised through certification."^[10]

15. In an interlocutory appeal in the *Bizimungu* case, the Appeals Chamber declined to exercise jurisdiction over an issue sought to be appealed by the prosecution which, although not referred to in the decision granting certification, it claimed was "implicitly" certified for review.^[11]

16. In an earlier decision in the *Bizimungu* case, the Appeals Chamber found that, although certification to appeal the Trial Chamber's decision on the prosecution's motion to amend the indictment had been granted, it was without jurisdiction to address an issue relating to

the same decision raised by the accused where certification had not been granted as to that issue. [\[12\]](#)

17. The Appeals Chamber has also applied the same issue-by-issue approach to appeals of preliminary motions pursuant to Rule 72(B). In its *Decision on Validity of Appeal of Joseph Nzirorera Regarding Joint Criminal Enterprise Pursuant to Rule 72(E) of the Rules of Procedure and Evidence* (11 June 2004) a three-Judge Bench of the Appeals Chamber scrutinized each of two grounds of appeal from the same Trial Chamber decision separately to determine whether each of them met the criteria for an appeal under Rule 72(B).

18. Likewise, in *Prosecutor v Hadzihasanovic & Kubura*, a three-Judge Bench of the ICTY Appeals Chamber held that two grounds of appeal from a Trial Chamber decision were cognizable on interlocutory appeal, while a third ground from the same decision was not. [\[13\]](#)

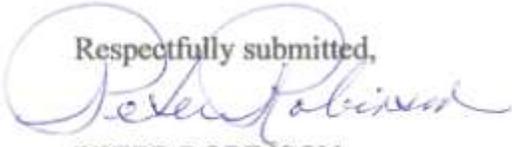
19. These precedents of the Appeals Chamber establish that the scope of an interlocutory appeal is strictly limited to the issue(s) upon which certification is granted. Certification is not a general license to bring forth all complaints about the Impugned Decision, but is limited to those issues for which the Trial Chamber has found that “would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

Conclusion

20. The prosecution has turned an appeal on a narrow but important issue of the meaning of “facts bearing directly or indirectly upon the guilt of the Accused” into a bully pulpit for obtaining a judicial proclamation that genocide occurred in Rwanda. [\[14\]](#) The prosecution devoted

less than one page in its 28 page brief to the issue for which certification was granted. This was a seriously misguided venture into the appellate abyss.

21. The Appeals Chamber is respectfully requested to dismiss those issues raised in the prosecution's brief which do not bear upon the issue for which certification to appeal was granted.

Respectfully submitted,

PETER ROBINSON
Lead Counsel for Joseph Nzirorera

^[1] *Decision* at paras. 7,9,11

^[2] *Decision* at para 15

^[3] *Motion for Certification to Appeal Trial Chamber's Decision on Prosecution Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts dated 9 November 2005* (15 November 2005) at para. 2

^[4] *Certification* at para. 3

^[5] *Certification* at paras. 4-5

^[6] Genocide as an adjudicated fact (#153)

^[7] Transcript of 7 April 2004 at pp. 55-56

^[8] *Decision of Interlocutory Appeals Regarding Participation of Ad Litem Judges* (11 June 2004) at page 2

^[9] page 4

^[10] *Nyiramasuhuko v Prosecutor*, No. ICTR-98-42-AR73, *Decision on Pauline Nyiramasuhuko's Request for Reconsideration* (27 September 2004) at para. 7

^[11] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-AR73, *Decision on Prosecution Appeal of Witness Protection Measures* (16 November 2005) at paras 5-6

^[12] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-AR5, *Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment* (12 February 2004) at para. 24

^[13] No. IT-01-47-AR72, *Decision Pursuant to Rule 72(E) as to Validity of Appeal* (21 February 2003) at para.

^[14] See "Prosecutor No Longer Bound to Prove Genocide Occurred Says Rwandan Civil Society, www.allafrica.com/stories/2005.11300135.html (30 November 2005) reporting on meeting with ICTR prosecutor by Rwandan civil society associations.