Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. Adama Dieng**

Decision of: **8 December 2006**

Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE
(Appellants)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-99-52-A

DECISION ON JEAN-BOSCO BARAYAGWIZA'S MOTION FOR CLARIFICATION AND GUIDANCE FOLLOWING THE DECISION OF THE APPEALS CHAMBER DATED 16 JUNE 2006 IN *PROSECUTOR V. KAREMERA ET AL.* CASE AND PROSECUTOR'S MOTION TO OBJECT TO THE LATE FILING OF JEAN-BOSCO BARAYAGWIZA'S REPLY

Counsel for Jean-Bosco Barayagwiza
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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of "The Appellant Jean-Bosco Barayagwiza's Urgent Motion for Clarification and Guidance Following the Decision of the Appeals Chamber Date 16th June 2006 in *Prosecutor v Karemera et al.* [*sic*]" filed by Jean-Bosco Barayagwiza on 17 August 2006 ("Motion" and "Appellant", respectively). The Prosecution responded to the Motion on 24 August 2006 requesting the Appeals Chamber to dismiss it and impose sanctions.[1]

2. The Appellant filed his Reply out of time on 18 September 2006.[2] He requests the Appeals Chamber to accept the late Reply on the grounds that his "lead counsel was on holiday out of the jurisdiction between August 21st 2006 and September 7th 2006".[3] The Appellant further submits that, because of his limited communications with Lead Counsel during that period of time and in light of the fact that he "has been attempting since February 2006 to have [his] co-counsel's name removed from the record", he was "unable in the absence of lead counsel to file a reply any sooner".[4] By a motion filed on 20 September 2006, the Prosecution objects to the late filing of the Reply, arguing that "[t]he excuses given by Counsel for the late filing ought not be considered 'good cause' for the purposes of Rule 116" of the Rules of Procedure and Evidence of the Tribunal ("Rules").[5] In his Response, filed on 2 October 2006, the Appellant submits that the Prosecution's Motion "should be dismissed […] as being procedurally incorrect".[6]

3. With regard to the timeliness of the Appellant's Reply, the Appeals Chamber notes that this Reply should have been filed "within four days of the filing of the response" that is, no later than 28

[1] The Prosecutor's Response to the Appellant Jean-Bosco Barayagwiza's "Urgent Motion for Clarification and Guidance Following the Decision of the Appeals Chamber Date [*sic*] 16th June 2006 in *Prosecutor v. Karemera et al.*", 24 August 2006 ("Response"), paras 1, 14.
[2] The Appellant Jean-Bosco Barayagwiza's Reply to the Prosecution Response to the Appellant "Urgent Motion for Clarification and Guidance Following the Decision of the Appeals Chamber Dated 16 June 2006 in '*Prosecutor -v-Karemera et al.*'", 18 September 2006 ("Reply").
[3] Reply, preliminary para.
[4] Reply, preliminary para.
[5] The Prosecutor's Motion to Object to the Late Filing of "The Appellant Jean-Bosco Barayagwiza's Reply to the Prosecution Response to the Appellant's Urgent Motion for Clarification and Guidance Following the Decision of the Appeals Chamber Dated 16 June 2006 in '*Prosecutor-v-Karemera et al*'", 20 September 2006, ("Prosecution's Motion"), para. 3.
[6] The Appellant Jean-Bosco Barayagwiza's Response to the Prosecution Motion Calling for the Appellants Reply to the Prosecution Response Concerning the Karemera Decision to Be Expunged from the Record on Account of its Late Filing [sic], 2 October 2006 ("Appellant's Response"), para. 4.

August 2006.[7] Pursuant to Rule 116 of the Rules, the Appeals Chamber "may grant a motion to extend a time limit upon a showing of good cause". The Appeals Chamber recalls that Counsel, when accepting assignment as Lead Counsel in a case before the Tribunal, is under an obligation to give absolute priority to observe the time limits prescribed in the Rules.[8] In particular, the Appeals Chamber reiterates that the unavailability of Lead Counsel to perform his professional obligations due to his holiday schedule does not amount to good cause within the meaning of Rule 116 of the Rules.[9] Accordingly, the Appeals Chamber rejects the Appellant's request to accept the late Reply and will therefore not consider the submissions contained therein.

I. Procedural Background

4. Trial Chamber I rendered its Judgement in this case on 3 December 2003.[10] The Appellant filed a first notice of appeal on 22 April 2004,[11] which was amended on 27 April 2004.[12] His initial Appellant's brief was filed on 25 June 2004.[13] Pursuant to the decisions of 17 May 2005[14] and 6 September 2005,[15] the Appellant filed a revised Notice of Appeal and Appellant's Brief on 12 October 2005. The briefing with respect to the Appellant's appeal was completed on 12 December 2005.[16]

5. On 16 June 2006, the Appeals Chamber issued the Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice in the *Prosecutor v. Edouard Karemera et al.* case,[17] in

[7] Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal of 16 September 2002, para. 12.
[8] Decision on Clarification of Time Limits and on Appellant Barayagwiza's Extremely Urgent Motion for Extension of Time to File his Notice of Appeal and his Appellant's Brief, 6 September 2005 ("Decision of 6 September 2005"), p. 5; Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006, para. 26; *Mikaeli Muhimana v. The Prosecutor*, Case No. ICTR-95-IB-A, Decision on Appellant's Motion for Extension of Time to File a Brief in Reply and Postponement of a Status Conference, 21 June 2006, p. 3; *Emmanuel Ndindabahizi v. The Prosecutor*, Case No. ICTR-0l-71-A, Decision on « *Requête Urgente aux Fins de Prorogation de Délai pour le Dépôt du mémoire en Appel* », 5 April 2005, p. 3.
[9] *See* Decision of 6 September 2005, p. 5.
[10] *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("Trial Judgement").
[11] *« Notice d'Appel (conformément aux dispositions de l'article 24 du Statut et de l'article 108 du Règlement) »*, 22 April 2004.
[12] *« Acte d'appel modifié aux fins d'annulation du Jugement rendu le 03 décembre 2003 par la Chambre I dans l'affaire 'Le Procureur contre Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze, ICTR-99-52-T' »*, 27 April 2004.
[13] *« Mémoire d'Appel »,* 25 June 2004.
[14] Decision on "Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", 17 May 2005 ("Decision of 17 May 2005").
[15] *See* Decision of 6 September 2005.
[16] The Appellant Jean-Bosco Barayagwiza's Reply to the Consolidated Respondent's Brief, 12 December 2005 ("Reply Brief").
[17] *The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ("*Karemera* Decision"), with reference to The Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (Rule 73 (c)), 12 December 2005, Annex A ("Annex A"). Requests for reconsideration of the *Karemera* Decision by the three appellants in that case were recently rejected by the Appeals

which it directed the Trial Chamber in that case to take judicial notice, under Rule 94(A) of the Rules, of the following facts:

> (i) The following state of affairs existed in Rwanda between 6 April 1994 to 17 July 1994: There were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed or caused serious bodily or mental harm to person[s] perceived to be Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity;[18]
> (ii) Between 1 January 1994 and 17 July 1994 in Rwanda there was an armed conflict not of an international character;[19]
> (iii) Between 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group.[20]

II. Submissions of the Parties

6. The Appellant submits that the *Karemera* Decision would have serious consequences for his appeal if it would no longer be necessary for the Prosecution to prove any of the judicially noticed facts.[21] He therefore seeks clarification as to whether the *Karemera* Decision is applicable to his case, arguing that such application might cause a miscarriage of justice, by preventing him from challenging the assertion that genocide occurred and from challenging the "logical implication of this supposed fact – *i.e.* that a conspiracy did indeed exist to exterminate the Tutsi".[22] The Appellant disputes the existence of genocide in Rwanda in 1994, contending that the conflict was political and that the killings were indiscriminate and politically, rather than racially or ethnically, motivated.[23] In this regard, the Appellant seeks additional clarification as to whether the *Karemera* Decision, if applicable to his case, would prevent him from disputing that he was party to a plan to commit genocide through the means of the *Radio Television Libre des Mille Collines* ("RTLM") and the Coalition to Defend the Republic ("CDR").[24]

7. The Appellant further submits that the Appeals Chamber erred in holding in the *Karemera* Decision that there was no room for disagreement about the nature of the conflict in Rwanda in 1994.[25] He argues that judicial notice could not be taken of such disputed facts, but rather that the Tribunal would have to "hear evidence and argument from the parties and to make findings of fact

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Chamber. *See Karemera et al. v. The Prosecutor,* Case No. ICTR-98-44-AR73(C), Decision on Motions for Reconsideration, 1 December 2006 ("*Karemera* Decision of 1 December 2006").
[18] *Karemera* Decision, paras 26 and 57, referring to Annex A, para. 2.
[19] *Karemera* Decision, paras 26 and 57, referring to Annex A, para. 5.
[20] *Karemera* Decision, paras 33 and 57, referring to Annex A, para. 6.
[21] Motion, paras 5, 7.
[22] Motion, para. 12.
[23] Motion, para. 11.
[24] Motion, paras 14 and 28.
[25] Motion, paras 15-16.

accordingly".[26] Therefore, he claims that the *Karemera* Decision "must be reconsidered as a matter of urgency".[27]

8. Finally, should the Appeals Chamber find that the *Karemera* Decision is binding in his case, the Appellant seeks leave to vary the Notice of Appeal and to amend his Appeal Brief by adding "further grounds of appeal dealing specifically with the issues raised by the *Karemera* Decision".[28]

9. In its Response, the Prosecution requests the Appeals Chamber to dismiss the Motion in its entirety as misconceived and amounting to an abuse of the appeal process.[29] It submits that the clarification sought by the Appellant is not provided for in the Rules and that, in any event, such clarification is unnecessary in light of the Appeals Chamber's jurisprudence.[30] It argues further that, considering the Trial Chamber's specific findings on the occurrence of genocide in Rwanda, the judicial notice of this fact in the *Karemera* Decision is not relevant in the Appellant's case.[31] Moreover, the Prosecution submits that the Appellant has failed, in his Appeal Brief, to challenge the factual findings of the Trial Chamber that a genocide occurred in Rwanda[32] and that, in any event, these specific findings have no bearing on the Appellant's ability to dispute his conviction for conspiracy to commit genocide, as the actual occurrence of genocide is irrelevant to such a conviction.[33] Finally, the Prosecution concludes that the Appellant has failed to show that good cause exists to amend his Notice of Appeal or his Appeal Brief at such a late stage of the appeal proceeding.[34]

III. Analysis

10. In respect of the Appellant's submission that "the *Karemera* Decision must be reconsidered as a matter of urgency",[35] the Appeals Chamber recalls that a request for reconsideration of a decision in one case filed by an appellant who is not party to that case must fail for lack of standing to seek such reconsideration.[36] The Appeals Chamber will therefore not address the Appellant's arguments challenging the substance of the *Karemera* Decision.[37] The Appeals Chamber also

[26] Motion, para. 18.
[27] Motion, para. 26.
[28] Motion, para. 24.
[29] Response, paras 1, 14.
[30] Response, paras 1-2.
[31] Response, paras 1, 3-4.
[32] Response, paras 1, 5.
[33] Response, paras 1, 9-10.
[34] Response, para. 13.
[35] Motion, para. 26.
[36] *Aloys Ntabakuze v. The Prosecutor*, Case No. ICTR-98-41-AR73, Decision on Motion for Reconsideration, 4 October 2006, paras 14-15.
[37] *See*, in particular, Motion, paras 18-23.

declines to address whether the *Karemera* Decision is applicable to the Appellant's case since, for the reasons given below, his Motion fails in any event.

11. The Appellant argues that the *Karemera* Decision, if applicable to his case, would adversely affect his ability to challenge the existence of genocide,[38] which would impact upon his ability to dispute, on appeal, the finding that "he was party to a plan to commit genocide through the means of RTLM and the CDR".[39] The Appeals Chamber disagrees and stresses the need for a clear distinction between the issue of the existence of genocide in Rwanda in 1994, a fact judicially noticed by the Appeals Chamber in the *Karemera* Decision,[40] from the separate questions regarding the existence of a conspiracy to commit genocide between the three co-appellants in the present case, and the Appellant's participation in such a conspiracy. The Appeals Chamber finds that there is nothing in the Appellant's arguments to suggest that the judicially noticed facts in the *Karemera* Decision would prevent him either from challenging the existence of a conspiracy to commit genocide or from disputing his participation therein. The *Karemera* Decision is clear in that its direction to the Trial Chamber to take judicial notice of facts of common knowledge does not shift the ultimate burden of persuasion, which remains on the Prosecution,[41] with respect to the personal responsibility of each accused. It has been subsequently specified by the Appeals Chamber that with regard to the *Karemera* Decision, "taking of judicial notice of this fact does not imply the existence of a plan to commit genocide".[42] Therefore, the Appeals Chamber, noting that the Appellant indeed challenges the Trial Chamber's findings of conspiracy, both in his Notice of Appeal and in his Appeal Brief,[43] considers that he has failed to demonstrate how the *Karemera* Decision, if applicable to his case, could impact on his ability to dispute that "he was party to a plan to commit genocide".

12. Furthermore, the Appeals Chamber notes that in the present case the Trial Chamber made specific findings of fact with regard to the occurrence of genocide in Rwanda.[44] Should the Appellant therefore have wished to dispute in his appeal the Trial Chamber's finding that what occurred in Rwanda amounted to genocide, he could have done so in his Notice of Appeal and in his Appeal Brief, both of which were filed before the issuance of the *Karemera* Decision. The

[38] Motion, para. 12.
[39] Motion, paras 14 and 28.
[40] *Karemera* Decision, para. 35.
[41] *Karemera* Decision, paras 30 and 42; *see also Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, para. 192.
[42] *Karemera* Decision of 1 December 2006, para. 21.
[43] Notice of Appeal, Ground 30 and Appeal Brief paras 243-249.
[44] Trial Judgement, para. 121: "Following the shooting of the plane and the death of President Habyarimana on 6 April 1994, widespread and systematic killing of Tutsi civilians, *a genocide*, in Rwanda commenced" (emphasis added).

Appeals Chamber notes that contrary to the references given in his Motion,[45] the Appellant did not do so. In fact, in the invoked Ground 30 of his Notice of Appeal, developed in his Appeal Brief, the Appellant does not challenge the existence of genocide, but rather argues that the Trial Chamber erred in concluding from the evidence before it that a conspiracy to commit genocide existed and disputes *his* involvement therein. The Appeals Chamber, finding that the Appellant has failed to raise on appeal any argument challenging the occurrence of genocide, considers therefore that he has not shown how the judicially noticed facts in the *Karemera* Decision, if applicable to his case, could adversely affect his appeal. His request for clarification in this regard is therefore denied as unfounded.

13. Turning to the Appellant's request for variance of the Notice of Appeal and Appeal Brief, the Appeals Chamber considers that the Appellant, through his present Motion, in fact seeks to introduce a wholly new ground of appeal. Pursuant to Rule 108 of the Rules, the Appeals Chamber "may, on good cause being shown by motion, authorise a variation of the grounds of appeal" contained in the Notice of Appeal. The Appeals Chamber recalls its Decision of 17 August 2006, in which it outlined its jurisprudence concerning variation of grounds of appeal under Rule 108 of the Rules.[46] In particular, the Appeals Chamber recalls that the concept of "good cause" under this provision encompasses both good reason for including the new or amended grounds of appeal and good reason showing why these grounds were not included (or were not correctly phrased) in the original notice of appeal.[47] The Appeals Chamber held specifically that the "good cause requirement" must be interpreted restrictively at late stages of appeal proceedings when amendments would necessitate a substantial slowdown in the progress of the appeal.[48] To hold otherwise, would leave appellants free to change their appeal strategy and essentially restart the appeal process at will, interfering with the expeditious administration of justice and prejudicing the other parties to the case.[49]

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[45] Motion, fn. 3, referring to Ground 30 of his Notice of Appeal and his Appeal Brief, paras 243-249.
[46] Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief, 17 August 2006 ("Decision of 17 August 2006"), paras 9-14, referring, in particular, to *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief, 26 June 2006 ("*Blagojević* Decision of 26 June 2006"), para. 7; *See also, e.g.*, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Motions Related to the Pleadings in Dragan Jokić's Appeal, 24 November 2005 ("*Blagojević* Decision of 24 November 2005"), para. 10; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Defence Motion for Extension of Time in Which to File the Defence Notice of Appeal, 15 February 2005 ("*Blagojević* Decision on Defence Motion for Extension of Time"), pp. 2-3.
[47] Decision of 17 August 2006, para. 10; *See also, e.g.*, *Blagojević* Decision of 26 June 2006, para. 7; *Blagojević* Decision of 24 November 2005, paras 7-8; *Blagojević* Decision on Defence Motion for Extension of Time, pp. 2-3.
[48] Decision of 17 August 2006, para. 11, referring to *Blagojević* Decision of 26 June 2006, para. 8.
[49] *Id.*

14. In the present case, the Appellant claims that "[t]he issues raised by the *Karemera* Decision could not have been anticipated by the Defence when the Notice of Appeal and Appeal Brief were filed".[50] As noted above,[51] the judicially noticed facts within the *Karemera* Decision now challenged by the Appellant relate to the same issues specifically considered by the Trial Chamber and contained in its findings.[52] The Appellant has not demonstrated any justification for failing to challenge the Trial Chamber's findings on the existence of genocide in Rwanda in his Notice of Appeal. Moreover, the Appeals Chamber finds that the Appellant has not formulated any specific wording for the grounds he wishes to add in his Notice of Appeal,[53] but merely seeks to amend his Appeal Brief "by the addition of further grounds of appeal dealing specifically with the issues raised by the *Karemera* Decision".[54] Pursuant to Rule 108 of the Rules, read in conjunction with paragraphs 2 and 3 of the Practice Direction on Formal Requirements for Appeals from Judgement,[55] a request to amend a notice of appeal must, at least, explain precisely what amendments are sought and why, with respect to each such amendment, the "good cause" requirement of Rule 108 of the Rules is satisfied.[56] The generic submissions of the Appellant fall well short of satisfying this requirement. Therefore, the request for leave to vary the Notice of Appeal and to amend the Appeal Brief is denied as unfounded.

IV. Disposition

15. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion and **GRANTS** the Prosecution's Motion.

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

Dated this 8th day of December 2006
At The Hague, The Netherlands

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Fausto Pocar
Presiding Judge

[Seal of the Tribunal]

[50] Motion, para. 26.
[51] *See supra* para. 13.
[52] Trial Judgement, para.121.
[53] *Momir Nikolić v. The Prosecutor,* Case No. IT-02-60/1-A, Decision on Motion for Leave to Vary Notice of Appeal, 30 September 2004, p. 4.
[54] Motion, para. 24.
[55] Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005.
[56] *The Prosecutor v. Vidoje Blagojević & Dragan Jokić*, Case No. IT-02-60-A, Decision on Dragan Jokić's Request to Amend Notice of Appeal, 14 October 2005, pp 3-4.