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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

TRIAL CHAMBER

Case N° ICTR-98-44-T

ENGLISH
Original: FRENCH

Before: Judge Andrésia Vaz, presiding
Judge Flavia Lattanzi
Judge Rita Arrey

Registrar: Adama Dieng

Date filed: 29 March 2004

THE PROSECUTOR
v.
Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
André RWAMAKUBA

DECISION ON NZIRORERA'S PRELIMINARY MOTION TO DISMISS THE INDICTMENT FOR LACK OF JURISDICTION: CHAPTER VII OF THE UNITED NATIONS CHARTER

Rule 73 of the Rules of Procedure and Evidence

Counsel for the Defence:

Peter Robinson

Counsel for the Co-Accused:
Dior Diagne and Félix
Charles Roach and Frédérik Weyl
David Hooper and Andreas O'Shea

Office of the Prosecutor:

Don Webster
Holo Makwaia
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Bongani Dyani
Gregory Lombardi
Sunkarie Ballah-Conte
Ayodeji Fadugba
Tamara Cummings-John

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber III (the "Chamber"), composed of Judge Andrésia Vaz, presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey;

SEIZED of a motion by the Defence for Nzirorera entitled "Preliminary Motion to dismiss for Lack of Jurisdiction: Chapter VII – Powers", filed on 17 March 2004;

CONSIDERING the Prosecutor's Response filed on 22 March 2004;

CONSIDERING the Defence Reply filed on 24 March 2004;

DECIDING based solely on the briefs of the parties, pursuant to the provisions of Rule 73(A) of the Rules of Procedure and Evidence, hereinafter the "Rules"

NOW CONSIDERS THE MOTION.

Submissions of the Parties

The Defence

1. The Defence for Nzirorera, pursuant to Rules 72(A)(i) and 72(D)(iv) of the Rules, moved for the dismissal of the Amended Indictment of 18 February 2004, on the grounds that the Tribunal lacked jurisdiction in 2004 to bring new charges relating to the events that took place in Rwanda in 1994. The Defence made the following submissions:

(i) The source of the Tribunal's jurisdiction is in the powers vested in the Security Council by virtue of Chapter VII of the United Nations Charter. The powers are applicable only to situations constituting a threat to peace, breach of the peace, or acts of aggression and they are limited to those measures necessary to maintain and restore international peace and security.

(ii) Since it cannot be said that such a situation existed in Rwanda in 2004, the Tribunal has no jurisdiction to bring the new charges contained in the Amended Indictment and those charges should be dismissed.

(iii) The Tribunal was validly created by the Security Council in 1994 under Chapter VII of the United Nations Charter (Articles 39 and 41). That was confirmed in the *Tadić*[1] and *Kanyabashi*[2] cases.

(iv) However, the powers conferred on the Security Council under Chapter VII are not unlimited. The Chamber should review the continued exercise of

[1] *Prosecutor v. Tadić*, Case No. 94-1-A, Decision on the Defence Appeal on the Preliminary Motion for lack of jurisdiction, 2 October 1995.
[2] *The Prosecutor v. Kanyabashi*,Case No. ICTR-96-15-PT, Decision on the Defence Motion on Jurisdiction, 15 June 1997.

the Security Council's powers in 2004 over the crimes committed in Rwanda in 1994, and determine whether it is reasonable to conclude that a threat to peace currently exists and whether the exercise of criminal jurisdiction over such crimes is reasonable as a necessary measure to maintain or restore international peace and security.

(v) By the creation of an international Tribunal, the Security Council deprived Rwanda of the opportunity to prosecute the accused persons and violated its sovereignty. The Trial Chamber should therefore determine whether the continuity of the jurisdiction of the Tribunal is reasonable, considering the right of self-determination under Article 1(2) of the United Nations Charter.

(vi) The jurisdiction of the Tribunal to prosecute persons responsible for crimes committed in Rwanda in 1994 is no longer necessary, since in this country there is no threat to peace.

The Prosecutor

2. The Prosecutor requests that the Motion be dismissed. In support of his request, he advances the following arguments:

(i) Since the Defence is challenging the authority of the Security Council and not the jurisdiction of the Tribunal pursuant to Rules 72(A)(i) and 72(B)(i) of the Rules, its Motion should be dismissed;

(ii) It is not for the Chamber but for the Security Council to determine whether in 2004, there is a threat to peace, breach of the peace, or act of aggression.

(iii) The Security Council concluded, on the basis of relevant information, that in 1994, the situation in Rwanda constituted a threat to international peace and security, and created the Tribunal.

(iv) The Appeals Chamber in the *Tadić* case interpreted the powers conferred on the Security Council by Article 39, Chapter VII of the United Nations Charter. The Appeal Judges had correctly held that the powers could be subjected to a judicial review.

(v) However, the Appeals Chamber never stated that a Trial Chamber was empowered to determine whether there is a threat to the peace, breach of the peace, or an act of aggression.

(vi) Moreover, such a review power can only be exercised after such a determination has been made. Consequently, Nzirorera's Motion can only be considered after the Security Council has made a new determination.

(vii) Should the Chamber find that it could make such a review, it should find that the cessation of the atrocities does not necessarily imply that peace had been restored, since peace and security imply that justice has been done.

The Defence

3. The Defence, in its reply, underscores that:

(i) The Preliminary Motion is admissible insofar as the jurisdiction of the Tribunal is dependent on the authority of the Security Council. Moreover, in the *Tadić* case, the Motion, challenging the authority of the Security Council was held to be properly filed under Rule 72.

(ii) The Motion emphasized that the Tribunal has jurisdiction only in situations constituting a threat to the peace, breach of the peace or acts of aggression and that in the present situation, the Indictment does not validly relate to the crimes set forth in the Statute insofar as the Tribunal is without jurisdiction to prosecute the accused for such crimes.

(iii) In the event that the Chamber determines that the Motion does not come within the ambit of Rule 72(D), it is requested that it nevertheless be considered pursuant to Rules 72(A) and 73.

(iv) The Chamber is not being requested to determine whether there is still a threat to the peace, but to determine whether, given that there is no present threat to the peace, it is proper for the Security Council, through the Tribunal, to continue to usurp the Rwandan judicial functions.

Discussion

4. The Chamber notes that the Defence, in its Motion, challenges the jurisdiction of the Tribunal pursuant to Rules 72(A)(i) and 72(D)(iv) of the Rules and in its reply, requests alternatively that the Chamber should consider the motion pursuant to Rules 72(A) and 73 of the Rules, in the event that the Trial Chamber determines that the motion does not come within the ambit of Rule 72(D). The Defence's main contention is that the jurisdiction of the Tribunal over the events that occurred in Rwanda in 1994 no longer permits the Chamber to grant leave for the amendment of the Indictment in 2004, inasmuch as the situation which existed at the time has changed. The Chamber finds that the Defence motion, which seeks to establish that the Tribunal lacks jurisdiction, does not satisfy the criteria set out in Rule 72(D)(iv) of the Rules and, consequently, cannot be considered as a preliminary motion within in the meaning of Rule 72 of the Rules. Accordingly, the Chamber will consider the motion pursuant to Rule 73 of the Rules.

Jurisdiction of the Chamber to grant leave for the amendment of the Indictment

5. The Chamber finds, as submitted by the Defence, that the source of the Tribunal's jurisdiction is in the powers vested in the Security Council by virtue of Chapter VII of the

Charter of the United Nations, which, after noting that there was a situation in Rwanda that constituted a threat to the peace, adopted measures that it deemed necessary for the restoration and maintenance of peace.

6. The Chamber points out in this connection that the Council, having received the request of the Government of Rwanda decided to establish the Tribunal by adopting Resolution 955 of 8 November 1944. In so doing, it gave the Tribunal personal, subject-matter and temporal jurisdictions, pursuant to Articles 1 to 5 of the Statute. The Chamber therefore considers that it has jurisdiction to grant leave to the Prosecutor to amend an indictment in the course of the proceedings and, in the exercise of its jurisdiction, it is limited only by the respect for the rights of the Accused.

7. The Chamber further points out that the organ which determined the existence of threats to the peace has exclusive power to decide, still pursuant to Chapter VII, if and when the measures taken in 1994 – without stating when such measures would no longer be in force, insofar as their outcome is unpredictable – will have attained the set goals, namely to restore peace and ensure the stability necessary for the maintenance of such peace, in accordance with Chapter VII of the Charter.

8. It follows from the foregoing that the jurisdiction of the Tribunal to prosecute suspects of crimes committed during the relevant period (1994), should be exercised throughout the period that the Security Council will deem necessary. Moreover, the Security Council reaffirmed such necessity on 26 March 2004 in its Resolution 1534.[3]

Limits to the powers of the Security Council

9. The Chamber considers that the powers of the Security Council are not unlimited, as the Appeals Chamber of the Tribunal for the former Yugoslavia rightly emphasized in the *Tadić* case cited by the Defence, insofar as the Chamber is bound, in accordance with Article 24 of the Charter, to respect the aims and principles set out in the Charter. However, that does not imply that these limits should be subjected to judicial review by the Tribunal, since the Chambers are empowered to prosecute only persons presumed responsible for genocide and other serious violations of international humanitarian law.

10. Moreover, international case law and legal opinion acknowledge that the powers of the Security Council are not subjected by the Charter to judicial review by an independent international judicial authority;[4] States and legal writers have even deplored such review. Consequently, it cannot be argued that the Security Council's powers could be subjected to judicial review by a subsidiary organ of the Security Council that it created to exercise a jurisdiction clearly defined in terms of personal, subject-matter and temporal jurisdictions.

[3] Resolution 1534 (2004) para.2.
[4] International Court of Justice. « Legal inferences for the States with the continued presence of South Africa in Nambia ». Advisory opinion of 21 June 1971.

Violation of the sovereignty of the Rwandan State

11. The Chamber considers that ratification by Rwanda of the United Nations Charter implies total and complete acceptance of Chapter VII of the Charter and, therefore, also of the jurisdiction of the Tribunal to prosecute, even in 2004, individuals presumed responsible for committing crimes in 1994, punishment of which continues to be considered by the Security Council as a necessary measure for the restoration and maintenance of peace in Rwanda. When a State voluntarily acknowledges such jurisdiction, it cannot reasonably be argued that there has been a violation of the sovereignty of that State through the exercise of the said jurisdiction.

Rights of State and of the Rwandan people

12. The Defence argues that each State has the right to try its own nationals and that such right is part of the inalienable right of a people to self-determination.

13. The Chamber, in the light of the practice that obtains in States, the jurisprudence of international and national courts and prevailing legal opinion, considers that international law does not recognize an exclusive right of a State to try its own nationals as deriving from the right of a people to self-determination or as a right as such. Moreover, some States include in their penal legislations the principle that crimes governed by international law in particular, be referred to an international court, and that as regards international humanitarian law, the Geneva Conventions of 1949 require States to include such a principle in their legislations for some of their violations.

14. The Chamber further holds that States have the right and, sometimes, the duty to try any person presumed responsible for crimes falling under international law, notwithstanding the choice-of-law rule. The existence of such a duty is particularly true for an International Criminal Tribunal established with this aim in view.

15. The Chamber also emphasizes that the Rules take into account the rights of States, since the possibility for a Trial Chamber to decline jurisdiction in a given case and refer it to any State that is willing to prosecute the accused in its own courts is provided for in Rule 11 *bis*. However, such referral is not automatic and is not made solely to the court of a State of which the accused is a national. Such court does not have primacy over the other courts.

16. In conclusion, the Chamber underscores that it is in the exercise of its absolute jurisdiction that the Chamber granted the Prosecutor leave to amend the Indictment in February 2004 with respect to crimes committed in the territory of Rwanda and to Rwandan citizens responsible for such crimes committed in the territory of neighbouring States in 1994. In the Chamber's view, that decision does not violate any norm of international law; rather, it reflects a duty that the Chamber cannot shy away from.

17. Consequently, the Chamber finds that the Defence Motion is frivolous within the meaning of Rule 73(F) of the Rules and, accordingly, is of the opinion that payment to the Defence of fees associated with this motion and costs thereof should be denied.

FOR THE FOREGOING REASONS

THE TRIBUNAL

1. **DISMISSES** the Defence Motion;

2. **ORDERS** the Registrar not to pay the fees and costs associated with the Motion, pursuant to Rule 73(F) of the Rules.

Arusha, 29 March 2004

[Signed]	[Signed]	[Signed]
Andrésia Vaz Presiding Judge	Flavia Lattanzi Judge	Florence Rita Arrey Judge

[Seal of the Tribunal]

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