ICTR-98-44-AR72.3
11 June 2004
(588/H-582/H)

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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

UNITED NATIONS
NATIONS UNIES

BEFORE A BENCH OF THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding Judge
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Adama Dieng

Decision of: 11 June 2004

ICTR Appeals Chamber
Date: 11 June 2004
Action: PG
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Joseph NZIRORERA

v.

THE PROSECUTOR

Case No. ICTR-98-44-AR72.3

DECISION ON VALIDITY OF APPEAL OF JOSEPH NZIRORERA REGARDING JOINT CRIMINAL ENTERPRISE PURSUANT TO RULE 72(E) OF THE RULES OF PROCEDURE AND EVIDENCE

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Mr. Peter Robinson

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: ROSETTE MUZIGO-MORRISON
SIGNATURE: DATE: 11 June 04

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1. This Bench of three Judges of the Appeals Chamber is seised of the "Appeal of Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Edouard Karemera, André Rwamakuba, and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise," filed by counsel for Joseph Nzirorera ("Appellant") on 17 May 2004 ("Appeal").

2. The Appeal purports to proceed as an interlocutory appeal as of right under Rule 72(B)(i) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), which states that preliminary motions are without interlocutory appeal, save "in the case of motions challenging jurisdiction, where an appeal by either party lies as of right." Rule 72(D) of the Rules expands on this provision by stating that, for purposes of Rule 72(B)(i) of the Rules, a "motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to" the personal, territorial or temporal jurisdiction of the International Tribunal, or to any of the violations enumerated in Articles 2, 3, 4, and 6 of the Statute.

3. This Bench must determine, pursuant to Rule 72(E) of the Rules, whether the Appeal is "capable of satisfying the requirements" of Rule 72(D) of the Rules; if it is not, the Appeal must be dismissed.

4. The Appellant raises two challenges, both of which were rejected by Trial Chamber in its decision of 11 May 2004 ("Impugned Decision").[1] First, the Appellant argues that the International Tribunal lacks "jurisdiction to apply the extended form of joint criminal enterprise liability to internal armed conflicts in general, and to [the Appellant] in this case, in violation of the principle of *nullum crimen sine lege*."[2] Second, the Appeal contends that the International Tribunal lacks jurisdiction to try the Appellant on a charge of "violence to life, health and physical and mental well-being of persons" because such an offence "is not part of customary international law."[3]

5. The Appellant contends that both grounds of appeal are challenges to the jurisdiction of the International Tribunal, in that both assert that count 7 of the indictment does not relate to any of the violations enumerated in the Statute, specifically Articles 4 and 6 thereof. First, the Appellant argues that the count 7 of the amended indictment does not relate to the violations included in Article 6 of the Statute because it charges serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II thereto ("serious violations of the Geneva Conventions") through participation in an "extended form" of joint criminal enterprise, a mode of liability the Appellant maintains cannot be charged in a purely internal conflict. Second, the Appellant argues

[1] Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Edouard Karemera, André Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, 11 May 2004.
[2] Appeal, para. 14(A).
[3] Appeal, para. 14(B).

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that the charge in count 7 of "violence to life, health and physical and mental well-being of persons" does not relate to the jurisdiction conferred by Article 4, because the customary international law in effect at the time of the alleged commission of the crimes charged did not provide a sufficiently specific definition of that crime.

6. This Bench is not seised with the merits of the issues raised in the Appeal. Rather, the task at present is to determine whether the Rules permit the Appellant to bring an interlocutory appeal as of right concerning these issues. This requires determining whether the two grounds of appeal truly satisfy the requirements of Rule 72(D)(iv) of the Rules.

The First Ground of Appeal

7. With regard to the first ground of appeal, the jurisdiction of the International Tribunal to try serious violations of the Geneva Conventions in an *internal* armed conflict through the mode of liability of the extended form of joint criminal enterprise, the Appellant relies on two decisions of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") that he maintains permitted interlocutory appeals as of right on similar issues. In the *Ojdanić* case, a Bench of that Chamber held that the Accused's submission that the ICTY did not have "jurisdiction under Article 7 of the [ICTY] Statute over persons who are alleged to be members of a joint criminal enterprise" was a challenge to jurisdiction permitting an interlocutory appeal, given that "if Ojdanić's submissions were correct, there would be no legal basis upon the facts pleaded in the Indictment in relation to an alleged joint criminal enterprise to hold him responsible pursuant to Article 7(1) on that basis."[4] That decision was confirmed in the Chamber's decision on the merits.[5] In *Hadžihasanović*, another Bench of the ICTY Appeals Chamber held that a challenge to the "jurisdiction of the Tribunal to hold a commander responsible as a superior for the acts of his subordinates in the course of an armed conflict which was not international in character" was a validly filed interlocutory appeal as of right.[6]

8. The Prosecution responds that the Appellant has misconstrued the indictment. The Prosecution contends that it is "not proceeding against [the Appellant] on a theory of Category 3 joint criminal enterprise" for count 7.[7] Rather, the Prosecution argues that the Appellant is

[4] *Prosecutor v. Milutinović et al.*, No. IT-99-37-AR72, Decision Pursuant to Rule 72(E) as to Validity of Appeal, 25 March 2003, pp. 2-3.
[5] *Prosecutor v. Milutinović et al.*, No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, paras. 5-6.
[6] *Prosecutor v. Hadžihasanović et al.*, No. IT-01-47-AR72, Decision Pursuant to Rule 72(E) as to Validity of Appeal, 21 February 2003, para. 12.
[7] Prosecutor's Reponse to Nzirorera's Appeal of Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Edouard Karemera, André Rwamakuba, and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, 28 May 2004 ("Prosecution Response"), para. 14.

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"charged with `commission' of Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II on a theory of Category 1 joint criminal enterprise."[8] The Prosecution therefore argues that the Appellant's argument is misplaced and, even if successful, would have no effect on the validity of any count in the indictment.

9. The Appellant replies[9] that the Prosecution's position is undermined by the indictment itself, which alleges in count 7 that all of the Accused "are held responsible for the killings of protected persons committed by their named and un-named co-perpetrators ... in so far as such killings were committed pursuant to a common plan, strategy or design, *or were the natural and foreseeable consequence of such joint criminal enterprise to destroy the Tutsi as a group.*"[10] The Appellant submits that, unless the Prosecution moves to amend the indictment to remove that language, it must be presumed that the Prosecution is reserving the right to assert that the Accused participated in a third category joint criminal enterprise.

10. The Appellant is correct that the language of count 7 is unmistakably the language of the extended form or "third category" of joint criminal enterprise, which involves "a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose."[11] The Prosecution's contrary position is inconsistent not only with this language, but with the Prosecution's own position before the Trial Chamber. The Trial Chamber summarized the Prosecution's position as follows: "[The Prosecution] argues that the extended form of joint criminal enterprise is recognized as a form of liability under customary international law for crimes committed in internal armed conflicts."[12]

11. Nevertheless, despite the language in the indictment and its position at trial, the Prosecution has represented to the Appeals Chamber that it does not assert a third category joint criminal enterprise as a mode of liability under count 7 of the indictment. The Bench takes the Prosecution at its word and finds that such a mode of liability is not an issue in this case. The Prosecution would be well advised to proffer a further amendment to the indictment removing the words "or

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[8] *Ibid.*
[9] Reply Brief: Appeal of Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Edouard Karemera, André Rwamakuba, and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, 31 May 2004, para. 5.
[10] Amended Indictment, 18 February 2004, para. 66 (emphasis added).
[11] *Prosecutor v. Vasiljević*, No. IT-98-32-A, Judgement, 25 February 2004, para. 99; see also *Prosecutor v. Brđanin*, No. IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004, para. 1 ("The third category of joint criminal enterprise liability refers to criminal liability of an accused for crimes which fall outside of an agreed upon criminal enterprise, but which crimes are nonetheless natural and foreseeable consequences of that agreed upon criminal enterprise.").
[12] Impugned Decision, para. 8.

were the natural and foreseeable consequence of such joint criminal enterprise to destroy the Tutsi as a group" from paragraph 66.

12. In light of the Prosecution's representation, the issue of jurisdiction to try a count of serious violations of article 3 common to the Geneva Conventions and Additional Protocol II thereto does not arise. Thus, even if successful, the first ground of appeal would not have any effect on the charges that the Prosecution now states it is raising against the Appellant. The first ground of appeal therefore does not meet the requirements of a jurisdictional challenge under Rule 72(D).

The Second Ground of Appeal

13. The second ground of appeal asserts that there is no jurisdiction to try the Appellant for the crime of "killing and causing violence to health and physical or mental well-being" in count 7.[13] The Appellant contends that, even though such a crime is listed in Article 4(a) of the Statute, which purports to confer jurisdiction to try persons for "violence to life, health and physical and mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment," the Tribunal lacks jurisdiction *ratione materiae* over such a crime because no sufficiently precise definition of this crime existed in customary international law at the time of the alleged commission of the crime. The Appellant rests his argument on the Judgement of the Trial Chamber in the case of *Vasiljević*, which stated that "[t]he fact that an offence is listed in the Statute, or comes within Article 3 of the Statute through common article 3 of the Geneva Conventions, does not therefore create new law, and the Tribunal only has jurisdiction over any listed crime if it was recognised as such by customary international law at the time the crime is alleged to have been committed."[14] This conclusion resulted in an acquittal in the *Vasiljević* case that was not appealed by the Prosecution, so the matter was not addressed by the ICTY Appeals Chamber in its Judgement on appeal.

14. The Prosecution does not make any submissions on the ability of the second ground of appeal to satisfy the requirements of Rule 72(D)(iv) of the Rules. Rather, the Prosecution defends the Trial Chamber's decision on the merits, stating that the Trial Chamber "properly concluded that it had jurisdiction to prosecute a person under Article 4 for `killing and causing violence to health and physical or mental well-being' as pleaded in the indictment."[15]

15. There is no question that the second ground of appeal is a "jurisdictional" argument that the Tribunal has no power to try count 7 of the amended indictment as pleaded. It is likewise clear that

[13] Impugned Decision, para. 49 (citing Amended Indictment, count 7).
[14] *Prosecutor v. Vasiljević*, No. IT-98-32-T, Judgment, 29 November 2002, para. 198.
[15] Prosecution Response, para. 24.

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the *Vasiljević* Trial Chamber Judgement considered that the existence of a sufficiently precise definition of a crime at customary international law bore on "[t]he scope of the Tribunal's jurisdiction *ratione materiae*."[16]

16. However, Rule 72(D) of the Rules does not authorize an interlocutory appeal as of right of every "jurisdictional" argument. Rule 72(D) is written very narrowly and permits an interlocutory appeal as of right only on a very limited set of challenges to an indictment. The relevant category in this case comprises challenges to an indictment "on the ground that it does not relate to: ... (iv) any of the violations *indicated in Articles 2, 3, 4 and 6 of the Statute*."[17]

17. Count 7 of the amended indictment clearly "relates to" the violations indicated in Article 4 of the Statute; the charge of "killing and causing violence to health and physical or mental well-being" is almost a verbatim reproduction of Article 4(a)'s grant of power to prosecute persons for "[v]iolence to life, health and physical or mental well-being of persons, in particular murder ...." The Appellant does not argue that the difference in wording affects the jurisdiction of the Tribunal.

18. The question raised by the Appellant, namely whether the Statute's grant of jurisdiction might be unlawful due to the state of customary international law at the time of the alleged commission of the crime, is separate from the question whether the crime "relates to" the crimes indicated in Article 4. Rather than arguing that the indictment falls outside the scope of the Statute's grant of jurisdiction, the Appellant seeks to invalidate the grant of jurisdiction itself.

19. Although the Appellant's second ground of appeal resembles the question decided in the *Vasiljević* trial judgement, the Appellant does not cite any authority suggesting that the question decided in the *Vasiljević* trial judgement would have been appropriate for an interlocutory appeal as of right under Rule 72(D)(iv) of the Rules. On the contrary, the Appellant's argument is indistinguishable from the position of the appellant in the *Stakić* case, who argued that "the criminal responsibility established by Article 7(3) of the Statute violates the principle *nullum crimen sine lege*, because the doctrine of command responsibility was not a norm of international customary law at the time of the alleged offence."[18] The Bench of three Judges of the ICTY Appeals Chamber concluded that this challenge to the very legality of Article 7(3) of the ICTY Statute did not "challenge the indictment on the ground that it does not relate to any of the matters set out in Rule

[16] *Prosecutor v. Vasiljević*, No. IT-98-32-T, Judgment, 29 November 2002, para. 197.
[17] Rule 72(D) of the Rules (emphasis added).
[18] *Prosecutor v. Stakić*, No. IT-97-24-AR72, Decision on Application for Leave to Appeal, 19 February 2002, p. 2.

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72(D)" of the ICTY Rules of Procedure and Evidence,[19] which is identical to Rule 72(D) of the Rules.

20. The Bench finds the approach of the Bench of the ICTY Appeals Chamber in *Stakić* to be persuasive. The Bench therefore concludes that the Appellant may not proceed with an interlocutory appeal as of right on his second ground of appeal.

21. The Bench notes that this decision does not preclude the Appellant from seeking certification of an appeal on this issue or from raising it in an appeal from judgement.

Disposition

22. The Bench of the Appeals Chamber unanimously **DISMISSES** the first ground of appeal. The Bench of the Appeals Chamber by majority, Judge Wolfgang Schomburg dissenting, **DISMISSES** the second ground of appeal.

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

Theodor Meron
Presiding Judge

Done this 11th day of June 2004,
At The Hague,
The Netherlands.

[Seal of the International Tribunal]

[19] *Ibid.*