

ICTR-98-44-AR72.4
23 July 2004
(705/h-700/h)

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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

BEFORE A BENCH OF THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding Judge
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Adama Dieng

Decision of: 23 July 2004

ICTR Appeals Chamber
Date: 23 July 2004
Action: DG
Copied To: Concerned Parties, Judicial Arc
WDs, LSS P. [Signature]

André RWAMAKUBA

v.

THE PROSECUTOR

Case No. ICTR-98-44-AR72.4

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**DECISION ON VALIDITY OF APPEAL OF ANDRÉ RWAMAKUBA
AGAINST DECISION REGARDING APPLICATION OF JOINT CRIMINAL
ENTERPRISE TO THE CRIME OF GENOCIDE PURSUANT TO RULE
72(E) OF THE RULES OF PROCEDURE AND EVIDENCE**

Counsel for the Prosecution

Mr. Don Webster
Ms. Dior Fall
Ms. Holo Makwaia
Mr. Gregory Lombardi

Counsel for the Defence

Mr. David Hooper
Mr. Andreas O'Shea

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
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NAME / NOM: ROSETTE MUZIED - MORRISON
SIGNATURE: [Signature] DATE: 23/07/04

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1. This Bench of three Judges of the Appeals Chamber is seized of the "Appeal on Behalf of Dr. André Rwamakuba Against Decision on Preliminary Motion Re Application of Joint Criminal Enterprise to the Crime of Genocide," filed by counsel for André Rwamakuba ("Appeal" and "Appellant" respectively). The Appeal takes issue with Trial Chamber III's decision of 11 May 2004 ("Impugned Decision"),¹ which dismissed a preliminary motion filed by the Appellant on 24 March 2004.² In that motion, the Appellant argued that the International Tribunal lacks subject-matter jurisdiction to try the accused on a charge of genocide through the mode of liability of joint criminal enterprise.

2. The Appeal purports to proceed as of right under Rule 72(B)(i) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), which provides that preliminary motions are without interlocutory appeal, except "in the case of motions challenging jurisdiction, where an appeal by either party lies as of right." Rule 72(D) further provides:

For purposes of paragraphs (A)(i) and (B)(i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:

- (i) any of the persons indicated in Articles 1, 5, 6 and 8 of the Statute;
- (ii) the territories indicated in Articles 1, 7 and 8 of the Statute;
- (iii) the period indicated in Articles 1, 7, and 8 of the Statute; or
- (iv) any of the violations indicated 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 paragraph (D)." If the Appeal fails to satisfy the requirements of Rule 72(D) of the Rules, it must be dismissed.

4. The Appellant submits that his motion in the Trial Chamber and the instant Appeal raise a challenge to the jurisdiction of the International Tribunal in that the Appellant argues that the International Tribunal "does not possess subject-matter jurisdiction and or jurisdiction *ratione personae* for a crime of joint criminal enterprise to commit genocide."³ This challenge rests on the Appellant's contention that "there is insufficient state practice and *opinio juris* to support the application of joint criminal enterprise to the crime of genocide."⁴

¹ Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Édouard Karemera, André Rwamakuba and Mathieu Ndirumpatsé Challenging Jurisdiction in Relation to Joint Criminal Enterprise – Article 6 (1) of the Statute, Rule 72 of the Rules of Procedure and Evidence, 11 May 2004.

² Preliminary Motion on Behalf of Dr. André Rwamakuba – Re Lack of Jurisdiction: The Applicability of the Doctrine of Joint Criminal Enterprise to the Crime of Genocide, 24 March 2004.

³ Appeal, para. 2.

⁴ Appeal, para. 2.

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5. In its response, the Prosecution first contends that the Appeal was filed too late. The Prosecution next contends that the Appellant's argument is not one subject to interlocutory appeal as of right because it is not capable of satisfying the requirements of Rule 72(D) of the Rules.⁵ The Prosecution likens this Appeal to two other interlocutory appeals dismissed recently (together, the "Nzirorera Decisions").⁶

6. In his reply, the Appellant contends that the Appeal was timely filed and that it challenges jurisdiction within the meaning of Rule 72(D)(iv) or, in the alternative, within the meaning of Rule 72(D)(i). The Appellant further submits that this case is distinguishable from the Nzirorera Decisions mentioned by the Prosecutor.⁷

Timeliness

7. The Impugned Decision was filed on 11 May 2004. Rule 72(C) states that interlocutory appeals purporting to proceed as of right must be filed "within fifteen days ... of filing of the impugned decision." The Appellant relies on Rule 7 *ter* (A) of the Rules, which states in relevant part that "where the time prescribed by or under the Rules for the doing of any act shall run as from the occurrence of an event, that time shall run from the date on which notice of the occurrence of the event has been received in the normal course of transmission by counsel for the accused." The Appellant contends that his counsel did not receive notice of the filing of the Impugned Decision until 16 May 2004⁸ and that the Appeal was therefore only due on 31 May 2004.⁹

8. The Prosecution argues that, even if the Appeal was due on 31 May, it was filed one day late on 1 June.¹⁰ The Appellant replies that the Appeal was faxed to the Appeals Chamber in The Hague on 31 May 2004 and that the signed original was left with security at the seat of the Appeals Chamber in The Hague pursuant to a prior arrangement with an officer of the Registry.¹¹ The Appellant adds that the Appeal was not processed that same day because 31 May was a public holiday in The Hague. The Appellant therefore argues that the Appeal should be deemed as filed

⁵ Prosecutor's Response to Appeal on Behalf of Dr. André Rwamakuba Against decision on Preliminary Motion Re: Application of Joint Criminal Enterprise to the Crime of Genocide, 14 June 2004 ("Response").

⁶ *Nzirorera v. Prosecutor*, No. ICTR-98-44-AR72, 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; *Nzirorera v. Prosecutor*, No. ICTR-98-44-AR72, Decision Pursuant to Rule 72(E) of the Rules of Procedure and Evidence on Validity of Appeal of Joseph Nzirorera Regarding Chapter VII of the Charter of the United Nations, 10 June 2004.

⁷ Reply to Prosecutor's Response to Appeal on Behalf of Dr André Rwamakuba against Decision on Preliminary Motion Re: Application of Joint Criminal Enterprise to the Crime of Genocide, 18 June 2004 ("Reply").

⁸ Appeal, para. 1.

⁹ Reply, para. 1.

¹⁰ Response, para. 9.

¹¹ Reply, para. 3.

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on 31 May.¹² The Appellant also submits in the alternative that the time limit was extended to 1 June 2004 by operation of Rule 7 *ter* (B).¹³ Finally, the Appellant submits that if the Appeal was in fact filed out of time, the violation was minimal and the Appeals Chamber should view the above facts as constituting good cause for an extension of time.¹⁴

9. The Appellant has not supported his assertion that the Impugned Decision was only served on his counsel on 16 May 2004 with any evidence or documentation. The Prosecution does not dispute the claim of service on that date, however. Moreover, the proof of service in the Registry file indicates that the Impugned Decision was served on Ms. Benga, assistant to counsel for the Appellant, on 18 May 2004. In the circumstances of this case, the Bench considers it appropriate to treat the Appeal as having been due no earlier than 31 May 2004.

10. Although the Appellant could have filed the Appeal on 31 May 2004 with the Registry in Arusha, which was open for business on that day, the Bench is satisfied that the Appellant made appropriate arrangements to submit the Appeal for filing to Registry personnel in The Hague on 31 May 2004. Therefore, in the particular circumstances of this case, the Bench is satisfied that the Appeal should be treated as having been timely filed.

Validity of Appeal Under Rule 72(D)

11. The Appeals Chamber is of the view that the Appellant's challenge differs materially from those involved in the Nzirorera Decisions. Rather than arguing that the Statute's grant of jurisdiction is itself invalid, as was contended in the appeals dismissed by the Nzirorera Decisions, the Appellant here argues that the grant of jurisdiction in Article 6(1) of the Statute is to be interpreted in a limited fashion, namely that it excludes jurisdiction to try a charge of genocide on a theory of commission of joint criminal enterprise because, in the Appellant's submission, no such theory was known to customary international law in 1994. The dispute in this case concerns the correct interpretation of Article 6 of the Statute and whether the indictment as pleaded falls within it.

12. The Appellant's argument is indistinguishable from the argument of the appellants in two interlocutory appeals before the International Criminal Tribunal for the former Yugoslavia ("ICTY"). These appeals were allowed to proceed as of right under Rule 72(E) of the Rules of Procedure and Evidence of that Tribunal. In the first case, the Appellant contended that the ICTY

¹² Reply, para. 3.

¹³ Reply, para. 4.

¹⁴ Reply, paras. 5-6.

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Statute did not grant jurisdiction to hold a commander responsible as a superior for the acts of subordinates in the course of a non-international armed conflict.¹⁵ In the second appeal, the appellant contended, *inter alia*, that Article 7(1) of the ICTY Statute did not grant jurisdiction to try an accused on a theory of joint criminal enterprise liability.¹⁶

13. The Bench concludes that, similar to those ICTY cases, this Appeal challenges the indictment on the ground that it does not relate to any of the violations indicated in Article 6 of the Statute. The Appeal thus satisfies the requirements of Rule 72(D)(iv) of the Rules and may therefore proceed as of right. In light of this conclusion, it is not necessary to consider the Appellant's alternative argument that the Appeal also satisfies the requirements of Rule 72(D)(i) of the Rules.

Disposition

14. For the foregoing reasons, the Bench **DECLARES** that the Appeal was timely filed and validly filed for purposes of Rule 72(E) of the Rules. The Bench **ORDERS** that the parties may file further written briefs as follows:

1. The Appellant may file a supplementary brief within 10 days of this decision;
2. The Prosecution may file a response within seven days of the filing of the supplementary brief or, if no such brief is filed, may file a brief addressing the merits of the Appeal within 14 days of this decision;
3. The Appellant may reply to any response or brief filed by the Prosecution within four days of the filing of such response or brief.

¹⁵ *Prosecutor v. Hadžihasanović et al.*, No. IT-01-47-AR72, Decision Pursuant to Rule 72(E) as to Validity of Appeal, 21 February 2003.

¹⁶ *Prosecutor v. Milutinović et al.*, No. IT-99-37-AR72, Decision Pursuant to Rule 72(E) as to Validity of Appeal, 25 March 2003; Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003.

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



Theodor Meron
Presiding Judge

Done this 23rd day of July 2004,
At The Hague,
The Netherlands.

[Seal of the International Tribunal]

