

ICTR-98-44-AR72  
10 June 2004  
(574/H-570/H)

574/H  
RMM



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:** 10 June 2004

ICTR Appeals Chamber  
Date: 10 June 2004  
Action: PG  
Copied To: Concerned Judge

Joseph NZIRORERA

v.

THE PROSECUTOR

Case No. ICTR-98-44-AR72

Parties, Judicial  
Archives, LOs, LSS  
RMM

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**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**

**Counsel for the Prosecution**

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**Counsel for the Defence**

Mr. Peter Robinson

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: 10/06/04

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1. This Bench of three Judges of the Appeals Chamber is seised of the "Appeal of décision relative à la requête en exception préjudicielle de Nzirorera aux fins de rejet de l'acte d'accusation pour défaut de compétence: chapitre VII de la Charte des Nations Unies" filed by counsel for Joseph Nzirorera on 13 April 2004 ("Appeal"). The Appeal takes issue with Trial Chamber III's decision of 29 March 2004, which rejected Nzirorera's preliminary motion in which he contended that a trial on new charges added to the indictment in 2004 would exceed the power of the United Nations Security Council under Chapter VII of the Charter of the United Nations ("Impugned Decision").<sup>1</sup>

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 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 clarifies 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.<sup>2</sup>

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. In the Appeal, the Accused Joseph Nzirorera ("Appellant") contends that the Trial Chamber erred in dismissing his claim that the International Tribunal lacks jurisdiction to try new charges that, though arising out of events in Rwanda in 1994, are only added to the indictment in 2004. The Appellant argues that, while the United Nations Security Council had the power to create the International Tribunal in 1994 in response to a threat to international peace and security, the continued exercise of those powers in 2004 exceeds the authority granted to the Security Council by Chapter VII of the United Nations Charter given that there is "no current threat to peace" in Rwanda.<sup>3</sup> The principal thrust of the argument is that "[b]ecause the Security Council lacked the

<sup>1</sup> Décision relative à la requête en exception préjudicielle de Nzirorera aux fins de rejet de l'acte d'accusation pour défaut de compétence: chapitre VII de la Charte des Nations Unies, 29 March 2004.

<sup>2</sup> Rule 72(D) of the Rules; see also *Prosecutor v. Ojdanić*, No. IT-99-37-AR72.2, Decision, 27 February 2004, p. 2 (summarizing analogous rule in the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia).

<sup>3</sup> Appeal, para. 30.

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authority in 2004 to act upon the 1994 Rwanda events, it follows that the Tribunal lacked the jurisdiction to bring indictments in 2004 relating to those events."<sup>4</sup>

5. The Appellant argues that interlocutory appeals were taken on similar issues in the *Tadić* and *Ojdanić* cases in the International Criminal Tribunal for the former Yugoslavia ("ICTY").<sup>5</sup>

6. In its response, the Prosecution argues that the Appeal does not meet the requirements for an interlocutory appeal as of right under Rule 72(D) of the Rules because it challenges the authority of the United Nations Security Council to confer power on the International Tribunal, not the jurisdiction of the International Tribunal.<sup>6</sup> The Prosecution also argues that the *Tadić* jurisdiction decision was rendered before Rule 72(D) was imposed as a limitation on interlocutory appeals and that the appeal in the *Ojdanić* case raised challenges to the territorial jurisdiction of the ICTY, not to the very authority of the ICTY to try properly pleaded charges within that Tribunal's temporal, territorial, personal, and subject matter jurisdiction.<sup>7</sup>

7. The Appellant replies that his Appeal "comes squarely within Rule 72(D)(iv) in that he contends that he cannot be prosecuted for violations of Articles 2, 3, and 4 of the Statute because the Tribunal lacks jurisdiction to bring charges relating to these violations in 2004 when there is no longer a breach of peace or threat to peace in Rwanda."<sup>8</sup>

8. The Appeal may be said to raise a "jurisdictional" argument in the sense that it argues that the International Tribunal has no legitimate power to try the Appellant on charges added in 2004. However, Rule 72(D) of the Rules does not authorize an interlocutory appeal of every "jurisdictional" argument. Rule 72(D) is narrow in scope and permits interlocutory appeal as of right on a very limited set of challenges to an indictment.

9. The Appellant relies on Rule 72(D)(iv) of the Rules, which allows an interlocutory appeal as of right of a motion challenging an indictment "on the ground that [the indictment] does not relate to: ... (iv) any of the violations indicated in Articles 2, 3, 4 and 6 of the Statute."<sup>9</sup> The focus of the analysis, therefore, is whether the *indictment itself* relates to the violations indicated in the Statute. The question raised by the Appeal, namely whether the *Statute*, or rather the continued exercise of

<sup>4</sup> Appeal, para. 40.

<sup>5</sup> Appeal, para. 10 (citing *Prosecutor v. Tadić*, No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, and *Prosecutor v. Ojdanić*, No. IT-99-37-AR72.2, Decision, 27 February 2004).

<sup>6</sup> Prosecutor's Response to Joseph Nzirorera's Appeal of décision relative à la requête en exception préjudicielle de Nzirorera aux fins de rejet de l'acte d'accusation pour défaut de compétence: chapitre VII de la Charte des Nations Unies, 23 April 2004, para. 10.

<sup>7</sup> *Ibid.*, paras. 12-13.

<sup>8</sup> Reply Brief: Appeal of décision relative à la requête en exception préjudicielle de Nzirorera aux fins de rejet de l'acte d'accusation pour défaut de compétence: chapitre VII de la Charte des Nations Unies, 29 April 2004, para. 4.

<sup>9</sup> Rule 72(D) of the Rules (emphasis added).

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power conferred thereby, is somehow unlawful, does not fall within the narrow confines of Rule 72(D)(iv).

10. The Appellant argues that “[n]othing in the history of Rule 72 indicates that the Judges intended to exclude from preliminary motions such fundamental challenges to the Tribunal’s jurisdiction as that brought in this case.”<sup>10</sup> On the contrary, the strict language of Rule 72(D) suggests exactly that. The International Tribunal adopted the first version of Rule 72(D) on 21 February 2000,<sup>11</sup> at a time when interlocutory appeals purporting to challenge the jurisdiction of the Tribunal on grounds other than those listed in Rule 72(D) had arisen in both Tribunals, including in the *Tadić* case.<sup>12</sup> Had the Judges of the International Tribunal wished to permit a wider range of interlocutory appeals as of right challenging the jurisdiction of the International Tribunal, they would presumably not have opted for the restrictive language of Rule 72(D). Instead, the plenary concluded that interlocutory appeals as of right should be limited to situations where the indictment arguably reaches beyond the power that the Statute confers upon the Tribunal. Whether the Statute itself is subject to external restrictions, such as Chapter VII of the Charter of the United Nations, does not fall within this limitation on interlocutory appellate jurisdiction.

11. The *Ojdanić* decision cited by the Appellant does not assist him. In *Ojdanić*, the Bench of three Judges of the ICTY Appeals Chamber noted that the three grounds upon which interlocutory appeal as of right was allowed related to territorial jurisdiction and, although there was “some doubt” on the matter, that these grounds may be regarded as challenging territorial jurisdiction within Rule 72(D)(ii) of the Rules.<sup>13</sup> In this case, by contrast, the Appellant does not claim that the indictment charges crimes other than those listed in Articles 2, 3, 4, and 6 of the Statute. Rather, he asserts that those listed crimes can no longer be charged in light of Chapter VII of the United Nations and changed circumstances in Rwanda.

12. The Bench therefore concludes that the Appellant may not proceed with this interlocutory appeal as of right. 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.

13. For the foregoing reasons, the Bench **DISMISSES** the Appeal in its entirety.

<sup>10</sup> Reply Brief: Appeal of décision relative à la requête en exception préjudicielle de Nzirorera aux fins de rejet de l’acte d’accusation pour défaut de compétence: chapitre VII de la Charte des Nations Unies, 29 April 2004, para. 5.

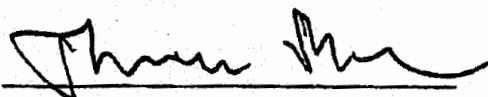
<sup>11</sup> See Rule 72(H) of the Rules of Procedure and Evidence of the International Tribunal (as amended 21 February 2000).

<sup>12</sup> See *Prosecutor v. Tadić*, No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995; *Barayagwiza v. Prosecutor*, No. ICTR-97-19-AR72, Decision, 3 November 1999.

<sup>13</sup> *Prosecutor v. Ojdanić*, No. IT-99-37-AR72.2, Decision, 27 February 2004, p. 3.  
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Done in French and English, the English text being authoritative.



Theodor Meron

Presiding Judge of the Appeals Chamber

Done this 10<sup>th</sup> day of June 2004,  
At The Hague,  
The Netherlands.

[Seal of the International Tribunal]

