

PETER ROBINSON.com: Motion re Power of Ad Litem Judges
- ICTR

THE INTERNATIONAL CRIMINAL TRIBUNAL

FOR RWANDA

CASE No. ICTR-98-44-AR73.4

IN THE APPEALS CHAMBER

Before: The Appeals Chamber

Registrar: Mr. Adama Dieng

Date Filed: 13 April 2004

THE PROSECUTOR

v.

JOSEPH NZIRORERA

-
APPEAL OF DECISION RELATIVE AUX REQUETES

DE KAREMERA ET NZIRORERA AUX

FINS D'INVALIDATION DE L'ACTE D'ACCUSATION

POUR VICES DE PROCEDURE ET DE FORME

The Office of the Prosecutor:

Mr. Don Webster

Ms. Hole Makwaia

Ms. Dior Fall

Mr. Gregory Lombardi

Defence Counsel:

Mr. Peter Robinson

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera

Mr. Charles Roach and Mr. Frederick Weyl for Mathieu Ngirumpatse

Mr. David Hooper and Mr. Andreas O'Shea for Andre Rwamakuba

1. Joseph Nzirorera hereby appeals, pursuant to Rule 73(B), from the *Decision Relative Aux Requetes de Karemera et Nzirorera Aux Fins d'Invalidation de L'Acte D'Accusation Pour Vices de Procedure et de Forme* rendered on 29 March 2004.

Certification to appeal was granted by the Trial Chamber in an oral decision on 7 April 2004.

Procedural History

2. On 19 December 2003, the Appeals Chamber granted the prosecution's appeal from the Trial Chamber decision denying leave to file an amended indictment. Thereafter, on 13 February 2004, the Trial Chamber, consisting of Judge Andresia Vaz and *ad litem* judges Flavia Lattanzi and Florence Rita Arrey issued its *Decision Relative a la Requete du Procureur Aux Fins D'Etre Autorise a Modifier l'Acte d'Accusation*.

3. In that decision, after considering the proposed amended indictment of the Prosecutor as well as the supporting material, the Trial Chamber authorized the filing of an amended indictment with modifications. The amended indictment, modified in accordance with the Trial Chamber's instructions, was filed on 18 February 2004. It is upon this instrument that the accused are currently being tried.

4. In its decision, the Trial Chamber also determined that the amended indictment included new charges and that a further initial appearance was required. On 23 February 2004, the accused were afforded an initial appearance on the amended indictment and not guilty pleas were entered on their behalf. Pursuant to Rule 50(C), they were given thirty days to file preliminary motions.

5. On 24 March 2004, Mr. Nzirorera filed a *Preliminary Motion to Dismiss Amended Indictment as Void ab Initio*. He contended the amended indictment should be dismissed because it was reviewed by two *ad litem* judges expressly prohibited from reviewing an indictment in Article 12 *quarter* of the ICTR statute.

6. On 25 March 2004, the prosecution filed its response. It contended that the consideration of an amended indictment was not a "review" of an indictment and that therefore Article 12 *quarter* did not apply.

7. The prosecutor's response was not served on the defence until 29 March 2004. On that same day, without providing Mr. Nzirorera with an opportunity to reply, the Trial Chamber denied the motion in a written decision.

8. In its *Decision Relative Aux Requetes de Karemera et Nzirorera Aux Fins d'Invalidation de L'Acte D'Accusation Pour Vices de Procedure et de Forme*, the Trial Chamber held that the review required by Article 18 did not apply to amended

indictments and that the *ad litem* judges were not prohibited from reviewing an indictment once the trial process had commenced. The Trial Chamber went on to impose sanctions on Mr. Nzirorera's lead counsel pursuant to Rule 73(F) for making such a frivolous motion.

9. On 31 March 2004, Mr. Nzirorera made an oral request for certification to appeal this decision. Certification was granted in an oral decision of the Trial Chamber on 7 April 2004.

The Relevant Provisions

10. Article 12 *quarter* of the ICTR Statute provides as follows:

"1. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall:

- (a) Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal for Rwanda;
- (b) Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal for Rwanda;
- (c) Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal for Rwanda;
- (d) Enjoy the power to adjudicate in pre-trial proceedings in cases other than those they have been appointed to try

2. During the period in which they are appointed to serve in the

International Tribunal for Rwanda, ad litem judges shall not:

(a) Be eligible for election as, or to vote in the election of, the President of the International Tribunal for Rwanda or the Presiding Judge of a Trial Chamber pursuant to article 13 of the present Statute.

(b) Have power:

(i) To adopt rules of procedure and evidence pursuant to article 14 of the present Statute. They shall, however, be consulted before the adoption of those rules;

(ii) To review an indictment pursuant to article 18 of the present Statute;

(iii) To consult with the President of the International Tribunal of Rwanda in relation to the assignment of judges pursuant to article 13 of the present Statute or in relation to a pardon or commutation of sentence pursuant to Article 27 of the present Statute." (emphasis added)

11. Article 18 of the Statute provides:

"1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the

request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial."

12. Rule 50 of the ICTR Rules of Procedure and Evidence provides:

"(A) The Prosecutor may amend an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it, but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such an initial appearance, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47(G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

(C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges."

13. Rule 47 provides:

"(A) An indictment, submitted in accordance with the following

procedure, shall be reviewed by a Judge designated in accordance with Rule 28 for this purpose.

(B) The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material.

(C) The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.

(D) The Registrar shall forward the indictment and accompanying material to the designated Judge, who will inform the Prosecutor of the scheduled date for review of the indictment.

(E) The reviewing Judge shall examine each of the counts of the indictment, and any supporting material the Prosecutor may provide, to determine, applying the standard set forth in Article 18 of the Statute, whether a case exists against the suspect.

(F) The reviewing Judge may:

- (i) Request the Prosecutor to supply additional material in support of any or all counts, or to take any further measures which appear appropriate;
- (ii) Confirm each count;

(iii) Dismiss each count; or

(iv) Adjourn the review so as to give the Prosecutor the opportunity to modify the indictment.

(G) The indictment as confirmed by the Judge shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Tribunal. If the accused does not understand either of the official languages of the Tribunal, and if the language understood is known to the Registrar, a translation of the indictment in that language shall also be prepared, and a copy of the translation attached to each certified copy of the indictment.

(H) Upon confirmation of any or all counts in the indictment:

(i) The Judge may issue an arrest warrant, in accordance with Sub-Rule 55(A), and any orders as provided in Article 19 of the Statute; and

(ii) The suspect shall have the status of an accused.

(I) The dismissal of a count of the indictment shall not preclude the Prosecutor from subsequently bringing an amended indictment based on the acts underlying that count if supported by additional evidence."

Argument

14. The central issue in this appeal is whether the decision to authorize an amended indictment is a "review" of the indictment within the meaning of Article 18 of the

Statute. If the answer is in the affirmative, then the participation of the *ad litem* judges violated Article 12 *quater*.

15. The most direct jurisprudence on this issue is found in the separate opinion of Judge Pocar in *Prosecutor v Bizimungu*. Judge Pocar said:

"...before an amendment is allowed, the inquiry must be governed by Rule 47, applicable to all indictments submitted, and a prima facie case must be presented. The illogic of any contrary view aside, the following may be noted. First, Rule 50 is placed in the same section in which the provisions for the confirmation of indictments are located, and no derogation from the general rule can be inferred from the text. Second, it cannot be that an amended indictment satisfies fewer requirements than those that were necessary for the original indictment's confirmation. Such an approach would allow the conditions set out in the Statute and Rule 47 to be circumvented in a given case on any number of additional amendments. For these reasons, I believe that the Appeals Chamber should have stated, in this decision, that an amendment to an indictment should not be allowed if the conditions for confirming the indictment, articulated in Rule 47 of the Rules, are not satisfied."

16. Therefore, when a Trial Chamber decides an application for leave to amend an indictment containing new charges, it must "review" the indictment in the same way an initial indictment is reviewed. The distinction made by the Trial Chamber in the

impugned decision between review of an initial indictment and an amended indictment is simply not valid.

17. This position is supported by the point Judge Pocar raised concerning circumvention of the requirement of Article 18 that there be a judicial determination that a prima facie case against a suspect has been made out. Under the Trial Chamber's formulation that Article 18 does not apply to amended indictments, a Prosecutor can bring an initial indictment against one accused for a war crime, and then move to amend the indictment to add additional charges of genocide without any judicial review as to whether a prima facie case exists for such additional charges.

18. Similarly, an amended indictment can add new accused persons to an existing indictment and circumvent the judicial review of whether a prima facie case exists against the new accused in the amended indictment. In such a case, a person can be arrested and held without any judicial determination that a prima facie case exists against him.

19. This issue was addressed in the case of *Prosecutor v Kabiligi* by Judge Dolenc in a Separate and Concurring Opinion. Judge Dolenc said:

"If, however, a Trial Chamber seized of a case need not review the supporting material (for a motion to amend the indictment) in the case of new charges, this means that the Prosecutor has not proved a prima facie case. This, in turn, creates a loophole through which the Prosecutor can circumvent the confirmation process. The Prosecutor could move to amend an indictment, including adding

new charges, for which she knows she cannot establish a prima facie case.

"With such a loophole, the Prosecutor could charge in an indictment only one count and later file a motion to amend with an unlimited number of charges that are not supported by supporting material establishing a prima facie case. This type of filing would seem to be contrary to the principle to a fair trial, violating particularly the spirit and purpose of the provisions of Article 18(1) of the Statute and of Rule 47(E) that only a confirmed charge should be grounds for trial."

20. Judge Dolenc went on to hold that, in his opinion, to allow an amendment of the indictment by taking the Prosecutor's allegations as fact would conflict with the basic requirement of Article 18(1) and would lead to a result which is manifestly unreasonable.

21. Therefore the opinions of Judges Pocar and Dolenc support Mr. Nzirorera's position that an amended indictment is subject to the requirements of Article 18 and that a review of an amended indictment cannot be undertaken by ad litem judges.

22. Mr. Nzirorera finds further support for his argument in the Decision of Judge Hunt in *Prosecutor v Milosevic*. Judge Hunt held that the amended indictment, like an initial indictment, must also be confirmed. He expressly applied Article 18's requirement of a prima facie case to the amended indictment proposed against Slobodan Milosevic and others and noted that:

"As leave to amend an indictment by *adding* matters or charges

would not ordinarily be granted unless there was *prima facie* evidence available to support those additional matters or charges, the tests for determining the application for leave to amend in this case and for confirming the amended indictment are therefore the same."

23. This is in accord with the uniform practice that has been applied at the ICTY.

24. In contrast, the ICTR Trial Chambers have routinely refused to apply Article 18 to amended indictments. This was criticized by Judge Dolenc in his Separate Opinion in *Kabiligi*, where he said:

"ICTY Rule 50(A) requires that the amended indictment be reviewed using the same standard of proof as the confirmation of the first indictment. ICTR Rule 50 has not followed that provision and without good reason. It seems to me, therefore, that ICTR Rule 50 is contrary to said provision of the Statute."

25. The Appeals Chamber should take this opportunity to clarify whether the requirements of Article 18 apply to amended indictments submitted pursuant to Rule 50. Mr. Nzirorera believes that both a textual and logical interpretation of the Statutes and the Rules support the position expressed by Judges Pocar, Dolenc, and Hunt.

26. It should be noted that the Trial Chamber in Mr. Nzirorera's case did review the supporting material and rejected portions of the proposed amended indictment. Therefore an even stronger case exists that the ad litem judges participated in "reviewing" the indictment pursuant to Article 18, despite their later protestations

that they only ruled on a motion for leave to amend not covered by the requirements of Article 18.

27. Calling a duck a peacock doesn't make it so. It is still a duck. Likewise, the Trial Chamber cannot avoid the requirements of Article 18 by calling its "review" of the proposed amended indictment something else.

28. Nothing in the text of Article 18 restricts its applicability to "review" of indictments pre-trial, as the Trial Chamber has held. If the Security Council wished to allow ad litem judges to review amended indictments presented during a trial in which they were participating, it could have exempted such situations from the prohibition imposed in Article 12 *quater* (2)(B)(ii).

29. Similarly, nothing in the text of Article 18 restricts its applicability to "review" of only initial indictments which cause the arrest of suspects. As pointed out by Judge Dolenc, an amended indictment can also add new suspects. Thus, the interpretation that Article 18 does not apply to amended indictments would not prevent ad litem judges from causing arrest warrants to be issued ancillary to such amended indictments. Therefore, the prosecutor's argument that in enacting Article 12 *quater*, the Security Council intended only that ad litem judges not cause the initial arrest of suspects, is not supported by the text of either Article 12 *quater* or Article 18.

Conclusion

30. The Trial Chamber erred in concluding that the approval of the amended indictment was not a "review" of the indictment pursuant to Article 18. Since it was indeed such a review, the ad litem judges were explicitly prohibited from participating by Article 12 *quater*. Their participation in the review and approval of

the amended indictment requires that the decision to confirm the amended indictment be vacated and the amended indictment be dismissed.

31. Should the Appeals Chamber determine that the participation of the ad litem judges in the process of approving the amended indictment did not violate Article 12 *quater*, the Appeals Chamber should nevertheless reverse the imposition of sanctions against counsel imposed pursuant to Rule 73(F). As seen from the above arguments, the motion filed by Mr. Nzirorera's counsel is anything but frivolous.

32. This sanction was imposed without even allowing the defence an opportunity to reply to the prosecutor's arguments. It is the fifth time that the Trial Chamber has imposed sanctions pursuant to Rule 73(F) upon counsel for Mr. Nzirorera. The imposition of these sanctions is creating serious jeopardy to Mr. Nzirorera's right to a fair trial and to have adequate resources for his defence. Mr. Nzirorera would be grateful to the Appeals Chamber if it would reverse the imposition of the sanctions imposed in the impugned decision and discourage the Trial Chamber from such behavior.

Respectfully submitted,

PETER ROBINSON

Lead Counsel for Joseph Nzirorera