

UNITED
NATIONSICTR
CRIMINAL REGISTRY
RECEIVED

JUN -8 A 8 52



International Criminal Tribunal for the
Prosecution of Persons Responsible
for Genocide and Other Serious
Violations of International
Humanitarian Law Committed in the
Territory of Rwanda and Rwandan
Citizens Responsible for Genocide
and Other Such Violations Committed
in the Territory of Neighbouring States
between 1 January and 31 December
1994

Case No: ICTR-98-37-A

Date: 8 June 1998

Original: English

IN THE APPEALS CHAMBER

Before: Judge Gabrielle Kirk McDonald (Presiding)
Judge Mohamed Shahabuddeen
Judge Lal Chand Vohrah
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar: Mr. Agwu U. Okali

Decision of: 8 June 1998

PROSECUTOR

v.

THÉONESTE BAGOSORA AND 28 OTHERS

**DECISION ON THE ADMISSIBILITY OF THE PROSECUTOR'S APPEAL
FROM THE DECISION OF A CONFIRMING JUDGE DISMISSING AN
INDICTMENT AGAINST THÉONESTE BAGOSORA AND 28 OTHERS**

The Prosecutor:
Louise Arbour
Bernard A. Muna

I. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 ("ICTR"), hereby issues its decision with respect to the Prosecutor's *ex parte* Notice of Appeal, filed on 6 April 1998¹ ("Notice of Appeal"), seeking to appeal from the Decision of Judge Tafazzal Hossain Khan², ("Decision"), dismissing an indictment against Théoneste Bagosora and 28 Others, filed on 31 March 1998 ("Indictment").

2. In her Notice of Appeal, the Prosecutor requests the Appeals Chamber to provide appropriate relief by quashing Judge Khan's Decision, declaring him competent to review the Indictment and remanding for a review of the Indictment on the merits.

3. This Appeals Chamber decision will also dispose of two additional motions filed by two individuals named in the Indictment. On 23 April 1998, Counsel for Anatole Nsengiyumva filed a motion seeking leave for the applicant to be joined as a party in the Appeal, or alternatively, leave to appear before the Appeals Chamber as *amicus curiae* and make submissions on, *inter alia*, whether an appeal lies from the Decision and whether the Appeals Chamber is competent to hear it, whether parties affected by such an appeal should be excluded from the proceedings, and whether such an appeal could be disposed of *ex parte*.³ Counsel for Théoneste Bagosora filed on 1 May 1998, a motion arguing that the present appeal was inadmissible and seeking leave

¹ Notice of Appeal (Article 24 and Rule 108), *The Prosecutor v. Théoneste Bagosora and 28 Others*, Case No. ICTR 98-37-I, 3 April 1998.

² Dismissal of Indictment, *The Prosecutor v. Théoneste Bagosora and 28 Others*, Case No. ICTR 98-37-I, 31 March 1998.

³ Motion by the Defence for Leave and/or Orders to be Enjoined in or be Invited as Amicus Curiae in an Appeal by the Prosecutor, *The Prosecutor v. Théoneste Bagosora and 28 Others* Case No. ICTR 98-37-I, 23 April 1998.

to be heard by the Appeals Chamber on the matter.⁴ In separate orders of 29 April and 26 May 1998, the Appeals Chamber stayed consideration of the motions pending determination of whether an appeal lies from the Decision.⁵

⁴ "Preliminary Motion regarding an appeal lodged by the Prosecutor against a decision of 30 March 1998 by Judge Tafazzal Hossein KHAN" [sic] *The Prosecutor v. Théoneste Bagosora and 28 Others*, Case No. ICTR 98-37-I, 1 May 1998.

⁵ Order on Motion by the Defence in the Matter of Prosecutor v. Anatole Nsengiyumva Seeking Orders for Joinder or Leave to Appear as Amicus Curiae in an Appeal *The Prosecutor v. Théoneste Bagosora and 28 Others*, Case No. ICTR 98-37-I, 29 April 1998; Order on Motion by the Defence in the Matter of Prosecutor v. Théoneste Bagosora *The Prosecutor v. Théoneste Bagosora and 28 Others* Case No. ICTR 98-37-I, 26 May 1998.

II. LEGAL AND FACTUAL BACKGROUND

1. Procedural History

4. On 6 March 1998, pursuant to Article 17 of the Statute of the ICTR ("Statute") and Rule 47 of the Rules of Procedure and Evidence of the ICTR ("Rules"), the Prosecutor submitted to Judge Khan for review the Indictment, charging the indictees with the commission of various offences within Articles 2, 3 and 4 of the Statute. Sixteen of those individuals were the subjects of indictments pending before the ICTR.

5. On 31 March 1998, Judge Khan ("Confirming Judge") issued his Decision. He found that before reviewing the merits of the Indictment, he had first to determine two issues of jurisdiction, namely whether the Prosecutor could submit the Indictment, and whether a confirming judge had jurisdiction to confirm it under Article 18 of the Statute and Rule 47 of the Rules. He divided the twenty-nine individuals charged into three groups: the "First Group" of eleven persons who had been previously indicted and had made initial appearances and entered pleas before Trial Chambers of the ICTR pursuant to Rule 62 of the Rules; the "Second Group" of five persons previously indicted who remained at liberty; and the "Third Group" of thirteen persons who had not been indicted and who were at liberty. The Appeals Chamber will use the same terms to refer to these different categories of indictees.

6. The Confirming Judge considered that the charges contained in the Indictment related to substantially the same facts and offences alleged in the Indictments already existing against the First and Second Groups ("First Group Indictments" and "Second Group Indictments"). Only one new crime, conspiracy to commit genocide, was added to those contained in the First and Second Group Indictments.⁶ He rejected, therefore, the Prosecutor's argument that the Indictment should be reviewed under Rule 47 and found that the proper course to follow would be for the Prosecutor to seek leave to amend the First and Second Group Indictments under Rule 50, or to withdraw them

⁶ Decision at p.10.

pursuant to Rule 51 and resubmit the Indictment for consideration, or to follow the procedure in Rule 72, governing the submission of preliminary motions. In his view, the use of the procedure provided by Rule 47 would be an unwarranted usurpation of the jurisdiction of the Trial Chambers seized of the First Group Indictments and would circumvent the express provisions of the Rules that guarantee the right of the Defence to be heard. He further held that the submission of the Indictment for confirmation was a wrongful attempt on the part of the Prosecutor to join the accused in the three Groups, seeking to impinge on the jurisdiction of the Trial Chambers and contravene the rights of the accused of the First Group to a fair and expeditious trial without undue delay.⁷ The Confirming Judge, therefore, declined jurisdiction over the First Group.

7. In respect of the Second Group, the Confirming Judge found that as the accused had been previously indicted but had not yet made initial appearances, jurisdiction lay with the Judges who had confirmed the Second Group Indictments ("Confirming Judges"). He, therefore, declined jurisdiction over the Second Group.

8. As to the Third Group, the Confirming Judge held that he was competent to review the Indictment but that consideration for the rights of the accused in the First Group militated against joining them with the Third Group in the Indictment. Noting the Prosecutor's unwillingness to sever the Indictment, he declined to review the substantive elements of the Indictment, also in relation to the Third Group.⁸

9. The Confirming Judge, therefore, dismissed the Indictment and, at the request of the Prosecutor, ordered its non-disclosure in the interests of protecting future prosecutorial investigations.

10. In her Notice of Appeal, the Prosecutor listed twenty grounds of appeal and reserved the right to enter such further grounds as the Appeals Chamber may permit.

⁷ Decision at pp. 10 and 11 "...the mandatory Rules for joinder of the accused...the only legal procedure...".

⁸ Decision at pp. 11-12.

11. The Prosecutor, citing the nature and the importance of the proceedings, sought an expedited, *ex parte* hearing on the matter and requested the Appeals Chamber to order the stay of any trial proceedings in relation to the First and Second Group Indictments.

12. In an *Ex Parte* Scheduling Order of 23 April 1998, the Appeals Chamber ordered the Prosecutor to submit within seven days a brief addressing the question of whether an appeal lies from the Decision. The Chamber further ordered that the matter would be resolved expeditiously thereafter without oral argument and denied the request to stay proceedings.⁹

13. The Prosecutor filed her appellate brief¹⁰ ("Appellant's Brief") on 30 April 1998. In the Appellant's Brief the Prosecutor asserts a number of grounds as justifying admission of the appeal and requests the Appeals Chamber to schedule a date for the submission of a brief on the merits and a date for oral arguments on the appeal.

⁹ *Ex Parte* Scheduling Order, *The Prosecutor v. Théoneste Bagosora and 28 Others*, Case No. ICTR 98-37-I, 23 April 1998.

¹⁰ Appellant's Brief by the Prosecutor in Support of the Admissibility of the Appeal of the Dismissal by Judge Khan of the Indictment against Bagosora and 28 Others of 31 March 1998 *The Prosecutor v. Théoneste Bagosora and 28 Others*, Case No. ICTR 98-37-I, 30 April 1998.

2. The Notice of Appeal

14. The Notice of Appeal is based on the Prosecutor's contention that the Indictment represents a critical component of a new Prosecutorial strategy. It is argued, therefore, that the dismissal of the Indictment by the Confirming Judge prejudices the ability of the Prosecutor to discharge her mandate under the Statute, which prejudice has a similar consequential impact on the ICTR.

15. In support of her submission that the Decision hinders her in the performance of her statutory functions, the Prosecutor lists twenty grounds of appeal and reserved the right to enter such further grounds as the Appeals Chamber may permit. The Appeals Chamber considers that many of these grounds overlap or are insufficiently distinguished to constitute separate foundations for an appeal from the Decision.

16. The Appeals Chamber will summarise the Prosecutor's grounds below.

17. The Prosecutor contends that the Confirming Judge made various errors of fact and of law by declining jurisdiction to consider the Indictment and by thereafter dismissing the Indictment. The Prosecutor considers as errors of law, *inter alia*, the findings that the Trial Chambers and Confirming Judges had jurisdiction over, respectively, the First and Second Groups,¹¹ the holding that the submission of the Indictment constituted an infringement of such jurisdiction¹² and that the Prosecutor should properly have proceeded under Rules 50, 51 or 72 of the Rules,¹³ the finding that an individual could be charged only once with the same offences arising from the same or substantially the same facts,¹⁴ and the holding that an accused in the First Group has a right to be heard on the amendment of an indictment.¹⁵

18. The Prosecutor submits that the Confirming Judge failed to consider sufficiently the grounds for the employment of the *ex parte* procedure under Rule 47

¹¹ *Ibid.*, at pp. 2-3, paras. 4, 7.

¹² *Ibid.*, paras. 5, 8.

¹³ *Ibid.*, paras. 3, 10, 11, 12.

¹⁴ *Ibid.*, paras. 12, 13.

¹⁵ *Ibid.*, at p. 4, para. 17.

and that he considered factors extraneous to his jurisdiction under Rule 47, thereby further erring in law.¹⁶

19. In addition, the Prosecutor submits that the Confirming Judge erred in law and in fact by, *inter alia*, holding that the Indictment contained only one substantial new charge¹⁷ and made errors of fact occasioning a miscarriage of justice by finding that the submission of the Indictment under Rule 47 and the form of the Indictment were intended to circumvent or deny the rights of the accused¹⁸.

¹⁶ *Ibid.*, at p.4, paras. 16, 20.

¹⁷ *Ibid.*, at p.3, para. 14.

¹⁸ *Ibid.*, at p.3, paras. 6 and 9

3. Applicable Provisions

20. The Notice of Appeal is filed pursuant to Article 24 of the Statute and Rule 108 of the Rules. Article 24 provides:

Article 24

Appellate Proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
 - a) an error on a question of law invalidating the decision; or
 - b) an error of fact which has occasioned a miscarriage of justice.
 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.
21. Rule 108 provides:

Rule 108

Notice of Appeal

(A) Subject to Sub-rule (B), a party seeking to appeal a judgement or sentence shall, not more than thirty days from the date on which the judgement or sentence was pronounced, file with the Registrar and serve upon the other parties a written notice of appeal, setting forth the grounds.

(B) Such delay shall be fixed at fifteen days in case of an appeal from a judgement dismissing an objection based on lack of jurisdiction or a decision rendered under Rule 77 or Rule 91.

22. Particular reference is made in the Appellant's Brief to Sub-rule 15(A), which provides:

Rule 15

Disqualification of Judges

(A) A Judge may not sit on a trial or appeal in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in any such circumstance withdraw from that case. Where the Judge withdraws from the Trial Chamber, the President shall assign another Trial Chamber Judge to sit in his place. Where a Judge withdraws from the Appeals Chamber, the Presiding Judge of that Chamber shall assign another Judge to sit in his place.

III. DISCUSSION

23. In the Appellant's Brief, the Prosecutor argues that an appeal from the Decision lies as of right, a contention that is essentially founded on two propositions. Based on a broad reading of Article 24 of the Statute, it is argued that an appeal is allowed in the instant case. It is further submitted that the Appeals Chamber has an inherent right to entertain the appeal.¹⁹ The Appeals Chamber will employ this framework in considering the arguments advanced by the Prosecutor in the Appellant's Brief.

1. A Liberal Interpretation of Article 24 of the Statute

24. In support of her first proposition, that Article 24 is sufficiently broad to encompass appeals such as the instant case, the Prosecutor submits that her mandate justifies a liberal reading of Article 24. It is then argued that such a reading would overcome the limitations on the right of appeal contained in the express terms of Article 24. These two elements will be addressed sequentially.

a. A broad reading of Article 24 is justified

25. The Prosecutor contends that the ICTR Statute must be interpreted liberally in light of its objects and purposes and in accordance with Article 31 of the *Vienna Convention on the Law of Treaties*,²⁰ such a construction being merited by the context in which the Statute was adopted and the objectives of the establishment of the ICTR.²¹ It is submitted that the "grave implications" of the Decision on the Prosecutor's ability to discharge her mandate under the Statute jeopardises the achievement of those

¹⁹ *Supra n.* 10 at para. 10.

²⁰ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *United Nations Treaty Series* 331.

²¹ *Supra n.* 10 at paras. 11-13.

objectives and is thus in contradiction to the purposes of the ICTR. It is argued that the Decision thereby constitutes a miscarriage of justice.²²

26. The Prosecutor argues, moreover, that Article 1 of the Statute itself supports a broad right of appeal. Article 1 states that the “the ICTR shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States” within the relevant timeframe.²³ The Prosecutor asserts that the term “prosecute” involves not only actions by the Office of the Prosecutor, but also encompasses the activities by the judicial organ of the ICTR, contending that the Appeals Chamber, as an organ of the ICTR, must enjoy “the full complement of jurisdiction conferred on the Tribunal as an institution”, except where there is clear expression in the Statute to the contrary.²⁴

27. The Appeals Chamber finds these arguments devoid of merit. The execution of the Prosecutor’s mandate is clearly not adversely affected by the Decision, as the Rules provide a variety of remedies to cure the effects of the dismissal of the Indictment. The Appeals Chamber considers that the dismissal of the Indictment is, therefore, not an obstacle to the achievement of the mandate of the ICTR and rejects the contention that it constitutes a miscarriage of justice.

28. The Appeals Chamber agrees with the Prosecutor on the applicability, *mutatis mutandis*, of the *Vienna Convention on the Law of Treaties* to the Statute. The relevant part of Article 31 reads as follows:

A treaty shall be interpreted in good faith in accordance with *the ordinary meaning* to be given to the terms of the treaty in their context and in the light of its object and purpose (emphasis added).²⁵

²² *Ibid.*, at paras. 39 - 43.

²³ *Ibid.*, at paras. 44 - 45.

²⁴ *Ibid.*, at paras. 44-50.

²⁵ *Supra n. 20*, Article 31 (1).

29. The Appeals Chamber considers that, in the instant case, it is not necessary to engage in an interpretation of the *object and purpose* of the Statute of the ICTR. In the instant case, the Appeals Chamber finds that it cannot abandon the *ordinary meaning of the terms* of those provisions. Rather, it may only interpret them in light of such an ordinary meaning.

30. With respect to the jurisdiction of the Appeals Chamber, it is axiomatic that the Statute delimits the jurisdiction of the organs of the ICTR. Article 15 of the Statute states that the Prosecutor "shall be responsible for...prosecution" within the terms of Article 1 of the Statute, while Articles 17 and 18 stipulate the procedure for initiating investigations and prosecutions. By the ordinary meaning of the terms in Article 1 of the Statute, therefore, it is the Prosecutor who is charged with responsibility for prosecuting persons charged with criminal offences. Moreover, it is clear from the Statute, *inter alia*, Articles 18 and 19 and 21 through 25, that the involvement of the Trial and Appeals Chambers in prosecutions is limited to an adjudicatory one. The parameters of this function are determined by reference to the aforementioned provisions of the Statute, which are intended to establish a means of balancing the mandate and the discretion of the Prosecutor with the need to ensure respect for the rights of the accused. Although an organ of the ICTR, the Prosecutor is considered to be a party. In relation to the Prosecutor, therefore, the judiciary fulfils a role analogous to the checks and balances necessary to maintain the separation of powers in most national systems. Accordingly, the competence of the Chambers and the Prosecutor form distinct and independent components of the ICTR's jurisdiction under Article 1, rather than encompassing the full ambit of the institution's mandate to prosecute.

31. In raising this question, the Prosecutor essentially contends that the jurisdiction of the Trial and Appeals Chambers of the ICTR may be construed as being defined by reference to the manner in which the Prosecutor elects to discharge her mandate. In addition to finding that it is without legal foundation, the Appeals Chamber is of the view that such a submission deserves further comment. The Appeals Chamber considers that the implication of such a contention can only be that it will have jurisdiction over a matter where such jurisdiction is considered by the Prosecutor to be

necessary to the execution of her statutory functions. The Appeals Chamber finds that such a perception of its competence is not only legally flawed, but places a construction on the relationship between the Chambers and the Prosecutor that offends against the most fundamental principles which guarantee the independence of both organs. Following the establishment of the ICTR by the Security Council of the United Nations, the Prosecutor enjoys sole discretion in the execution of her mandate. Similarly, it is the sole prerogative of the Trial and Appeals Chambers, by applying the Statute and the Rules, to determine the limits of their own competence.

32. The logical consequence of the interpretation advanced in the Appellant's Brief would be that where the Trial or Appeals Chambers refused to grant any relief requested by the Prosecutor, the Chambers would thereby be obstructing her mandate. Clearly such a proposition is untenable, both in law and in policy. It is axiomatic that justice must be done and must be seen to be done. Thus, a predicate of the effective discharge of the ICTR's mandate is an impartial dispensation of justice. The Prosecutor's construction of the competence of the Chambers, rather than fulfilling that objective, would imperil its very achievement.

33. The Prosecutor's arguments for a teleological interpretation of the Statute, therefore, do not support such a broad interpretation of Article 24. Nevertheless, in view of the Prosecutor's submissions concerning the critical nature of the Indictment, the Appeals Chamber considers it appropriate to review the contentions concerning that provision.

b. The present appeal implicitly falls within Article 24 of the Statute

34. In the view of the Prosecutor, the language of Article 24 provides the Prosecutor with a general right of appeal from decisions of Trial Chambers, such a right being unlimited and unqualified.²⁶ It is claimed that the general nature of the right

²⁶ *Supra* n.10 at paras. 16, 17.

derives from the non-exhaustive phrasing of Article 24,²⁷ which, it is asserted, is devoid of any language which would qualify the circumstances under which the Prosecutor may appeal decisions originating from the Trial Chamber.²⁸ Article 24, it is said, provides that the Appeals Chamber may hear appeals against decisions taken by the Trial Chambers from “persons convicted by the Trial Chambers” or from “the Prosecutor” *simpliciter*. However, this reading of Article 24, which would grant the Prosecutor an unfettered right of appeal, while that of the accused is limited, would violate the principle of equality of arms. Indeed, the principle of equality of arms requires that the parties enjoy corresponding rights of appeal.

35. Consistent with this principle, the Appeals Chamber finds that, in the instant case, where the matter affects the rights of the accused, the Prosecutor can have no greater power of appeal than accused persons.

36. While this finding is in itself sufficient to dispose of the Prosecutor’s Notice of Appeal, in the interests of justice, the Appeals Chamber will consider the Prosecutor’s remaining arguments.

37. Following the argument that Article 24 of the Statute grants an unlimited right of appeal, the Prosecutor construes the terms of that provision as implicitly allowing an appeal in the instant case. It is argued that a dismissal of an indictment under Rule 47 constitutes a final decision within the meaning of Article 24, as the Decision, by placing in peril the Prosecutor’s strategy for the achievement of her mandate, has an effect analogous to a decision finally disposing of a matter.²⁹ In the view of the Appeals Chamber, however, the Rules provide ample recourse for the Prosecutor. Accordingly, the Appeals Chamber finds the Prosecutor’s argument in this regard to be unfounded.

38. Further, the Prosecutor argues that a single judge is subject to the jurisdiction of the Appeals Chamber in the same manner as Trial Chambers, and that, therefore,

²⁷ *Ibid.*, at para. 21.

²⁸ *Ibid.*, at paras. 14 - 18.

²⁹ *Ibid.*, at para. 28.

decisions of a single judge may be appealed under Article 24.³⁰ The Prosecutor argues that under Articles 10 and 18 of the Statute, a single judge is an integral part of the Trial Chamber and that the Rules implicitly envisage appeals from decisions of a single judge, as they provide that Trial Chambers and single judges shall have concurrent jurisdiction in certain circumstances.³¹ While it is true that a single judge acting under Article 18 of the Statute and Rule 47 is always a member of a Trial Chamber, he is not acting as such during the review proceedings under these provisions. Rather, he is acting solely in his own capacity as a confirming judge.

39. The Prosecutor contends, moreover, that the ICTR and the International Criminal Tribunal for the former Yugoslavia ("ICTY") have expanded the scope of appellate jurisdiction beyond that expressly conferred by the Statute of either Tribunal. The Prosecutor cites Sub-rule 72(B)(ii) of the ICTY Rules which provides for appeals against decisions on preliminary motions other than those based on lack of jurisdiction³² and Sub-rule 73(B) which provides for appeals against decisions on motions other than preliminary motions.³³ Such Rules, however, do not appear in the ICTR Rules. It is obvious that the Appeals Chamber of the ICTR can apply only the Rules of the ICTR.

40. It is further argued in the Appellant's Brief that this is a general trend of adopting Rules concerning appellate jurisdiction which is consistent with developments in international law that assertedly grant a right of appeal against decisions which raise questions of jurisdiction or of admissibility.³⁴ The Prosecutor contends that the Decision, by declining jurisdiction, raises such a question and should, therefore, be appealable. All of the examples cited by the Prosecutor, however, allow an appeal by both parties. Indeed, the Appeals Chamber notes that even in the proposed provision of the Draft Statute for the International Criminal Court³⁵ relating to appeal from the confirmation or the denial of an indictment, the introductory paragraph stipulates that

³⁰ *Ibid.*, at paras 41, 42.

³¹ *Ibid.*, at paras. 24-26

³² *Ibid.*, at para. 33.

³³ *Ibid.*, para. 36.

³⁴ *Ibid.*, at para. 37.

“*either party* may appeal any of the following interlocutory decisions” (emphasis added). Moreover, the Prosecutor’s reliance on this particular example should be viewed in the overall context of that provision, which is merely a draft proposal.

41. Even if this was not sufficiently compelling to dispose of this leg of the Prosecutor’s argument, the Appeals Chamber would refer to its earlier findings that the ICTR Rules contain provisions to cure any perceived adverse effects of the Decision on the Prosecutor.

42. Notwithstanding its finding that no appeal lies in this matter, the Appeals Chamber considers that to interpret Article 24 of the Statute in a manner consistent with the submissions of the Prosecutor would broaden the scope of the right of the Prosecutor to appeal to a dimension that was not envisaged by the drafters of the Statute or the Rules. Accordingly, the Chamber rejects the Prosecutor’s proposition that the present appeal would lie under a broad construction of Article 24 of the Statute.

2. An Inherent Right of Appeal

43. The Prosecutor’s alternative argument, that the appeal may be entertained pursuant to an inherent right of appeal, is founded on two contentions.

a. What is not prohibited is permitted

44. The Prosecutor asserts that there are no provisions in the Statute or Rules which preclude an appeal against the Decision. In her view, Article 24 does not exclude appeals which fall outside of the express provisions of its text, as “nothing in the Statute or the Rules expressly excludes the jurisdiction of the Appeals Chamber to

³⁵ Proposed Article 73 bis, Draft Statute for the International Criminal Court, cited as A/AC.249/1998/CRP.14, 1 April 1998 (excerpts), Cited in *Ibid.*, at para. 37.

hear such an appeal.”³⁶ In support of this thesis, the Prosecutor asserts that there is established in the practice of international courts and tribunals a principle that “what is not specifically prevented by the rules may be applied by the Court”.³⁷ Thus, it is argued, where the ICTR Statute is silent with respect to a particular competence, such competence may, nevertheless, be exercised.

45. The Appeals Chamber regards as unhelpful the reliance by the Prosecutor upon this principle. Clearly, the ICTR may apply what is not specifically prohibited by the Rules only where this would be consistent with the objects and purposes of the Statute. Such is not a circumstance presented by the instant appeal.

b. The practice of courts in national jurisdictions

46. The Prosecutor submits that an inherent right of appeal may be founded on the practice of courts in national jurisdictions. It is argued that a survey of national law indicates the existence of a general principle of law that, in the absence of an express provision to the contrary, a right of appeal generally lies from the decisions of a lower court.³⁸ The Prosecutor cites provisions from the Codes of Criminal Procedure of the civil law jurisdictions of France, Senegal and Germany, where decisions of lower courts dismissing an indictment may always be appealed to a superior court,³⁹ and the remedies of *mandamus* and *certiorari* in the common law jurisdictions of the United States and the United Kingdom.⁴⁰

47. In the view of the Prosecutor, the Appeals Chamber may extrapolate an analogue of such rules to find jurisdiction in the instant appeal. The Prosecutor argues that general principles of law may be applied by international courts, citing, *inter alia*,

³⁶ *Ibid.*, at para. 42.

³⁷ *Ibid.*, at para. 32, citing Application of the Genocide Convention (Provisional Measures) Order of 13 September 1993, (1993) *I.C.J. Reports*, at p.396, and *Corfu Channel Case* (Preliminary Objection), (1948) *I.C.J. Reports*, at p.28.

³⁸ *Ibid.*, at para. 51.

³⁹ *Ibid.*, at paras. 53 - 57.

⁴⁰ *Ibid.*

Article 38 of the Statute of the International Court of Justice and the jurisprudence of the ICTY.⁴¹

48. The Appeals Chamber notes, however, that each of the rules cited by the Prosecutor is based on an explicit statutory provision in the national jurisdiction concerned. The Appeals Chamber, therefore, finds them inapplicable in the instant matter.

49. The *obiter dicta* of Judge Sidhwa in his Separate Opinion on the Defence Motion for Interlocutory Appeal on Jurisdiction in the *Tadić* case are instructive, but not dispositive, in respect of the Prosecutor's overall assertion of her inherent right of appeal. Judge Sidhwa stated:

"The law relating to appeals in most national jurisdictions is that no appeal lies unless conferred by statute. The right to appeal a decision is part of substantive law and can only be granted by the law-making body by specific enactment. Where the provision for an appeal or some form of review by a higher forum is not regulated by the statute under which an order is passed, there is usually some omnibus statute providing for appeals in such cases. The courts have no inherent powers to create appellate provisions or acquire jurisdiction where none is granted."⁴²

50. The Appeals Chamber finds that the contentions of the Prosecutor, which would allow her the sole right of appeal, do not establish that it is competent to assert an inherent power of jurisdiction for this Notice of Appeal.

51. In addition to its findings on the substantive arguments concerning Article 24 that are adduced by the Prosecutor, the Appeals Chamber finds that the other principal provision relied upon by the Prosecutor in submitting her Notice of Appeal, Rule 108, does not apply in the case at issue. Rule 108 prescribes only the time-limit for the filing of a Notice of Appeal; it does not create a right of appeal. Moreover, it addresses

⁴¹ *Ibid.*, at paras. 59-62.

⁴² Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-AR72, 2 October 1995, para. 6.

specific situations, namely where a party is seeking to appeal a “judgement or sentence” or “a judgement dismissing an objection based on lack of jurisdiction or a decision rendered under Rule 77 or Rule 91”. Rule 108 does not apply to a decision of a single judge acting under Rule 47.

52. In concluding her submissions in the Appellant Brief, the Prosecutor argues that the Appeals Chamber is the correct forum to hear the present appeal, referring to Article 24 of the Statute and Part Six (Rules 73 - 106) and Sub-rule 15(A) of the Rules. Considering its findings, the Appeals Chamber considers it unnecessary to address these contentions.

53. The Appeals Chamber, thus, rejects the Prosecutor’s application for leave to appeal the Decision.

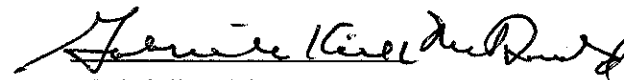
IV. DISPOSITION

THE APPEALS CHAMBER, for the foregoing reasons, unanimously:

REJECTS the Prosecutor's Notice of Appeal from Judge Khan's Decision dismissing the Indictment against Théoneste Bagosora and 28 others,

REJECTS the motions filed, respectively by the accused Anatole Nsengiyumva and the accused Théoneste Bagosora, there being no ground to further consider the said motions.

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



Gabrielle Kirk McDonald

Presiding Judge

Judge Shahabuddeen appends a Declaration to this Decision.

Dated this eighth day of June 1998,
At Arusha,
Tanzania



[Seal of the Tribunal]

UNITED
NATIONS

ICTR
CRIMINAL REGISTRY
RECEIVED

1998 JUN -8 A 8 52



International Criminal Tribunal for the
Prosecution of Persons Responsible
for Genocide and Other Serious
Violations of International
Humanitarian Law Committed in the
Territory of Rwanda and Rwandan
Citizens Responsible for Genocide
and Other Such Violations Committed
in the Territory of Neighbouring States
between 1 January and 31 December
1994

Case No: ICTR-98-37-A

Date: 8 June 1998

Original: English

IN THE APPEALS CHAMBER

Before: Judge Gabrielle Kirk McDonald (Presiding)
Judge Mohamed Shahabuddeen
Judge Lal Chand Vohrah
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar: Mr. Agwu U. Okali

Decision of: 8 June 1998

PROSECUTOR

v.

THÉONESTE BAGOSORA AND 28 OTHERS

**DECLARATION OF JUDGE MOHAMED SHAHABUDDEEN
ON THE ADMISSIBILITY OF THE PROSECUTOR'S APPEAL
FROM THE DECISION OF A CONFIRMING JUDGE DISMISSING AN
INDICTMENT AGAINST THÉONESTE BAGOSORA AND 28 OTHERS**

The Prosecutor:
Louise Arbour
Bernard A. Muna

My reason, which I think is sufficient, for agreeing with the decision to reject the Prosecutor's Notice of Appeal is that, as a matter of construction, Article 24 of the Statute does not, in my opinion, visualise an appeal being made when there is no case in existence between the Prosecutor and an accused. The Decision of the Reviewing Judge, which is sought to be appealed from, was not made in such a case; it was concerned with the prior question whether there should be such a case.

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



Judge Mohamed Shahabuddeen

Dated this eighth day of June 1998,
At Arusha,
Tanzania



[Seal of the Tribunal]