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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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In the Appeals Chamber

Case No. ICTR-98-37-I

Date filed with the Registrar: 30 April 1998

THE PROSECUTOR

AGAINST

THEONESTE BAGOSORA AND 28 OTHERS

APPELLANT BRIEF BY THE PROSECUTION
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

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JUDGE KHAN OF THE INDICTMENT AGAINST BAGOSORA AND 28 OTHERS OF 31
MARCH 1998

Contents

I. INTRODUCTION	2
II. PRINCIPLES OF INTERPRETATION	3
III. ARTICLE 24	5
1. Admissibility of the appeal follows from the language of Article 24	
2. Article 24 is not limited to decision on guilt or sentencing decision	
3. Grounds of appeal under Article 24	
IV. PRINCIPLES ENSHRINED IN THE STATUTE AND THE RULES	9
1. No provision on the Statute or the Rules prevent the appeal	
2. Seriousness of the decisions	
3. Mandate and structure of the Tribunal implies a broad basis for appeal	
V. GENERAL PRINCIPLES OF LAW	15
1. General Principles of law is a source of law recognised by the Tribunal	
2. National laws	
a) France	
b) Senegal	
c) England	
d) United States	
e) Germany	
VI. APPEALS CHAMBER IS THE RIGHT ORGAN	18
VII. SUBMISSIONS	19

I. Introduction

1. On 6 March 1998 the Prosecutor filed with the Registrar an indictment against Théoneste Bagosora and 28 others, ICTR-98-37-I 1998 (hereinafter the "Indictment").
2. Honourable Judge Tafazzal Hossain Khan, acting as confirming Judge pursuant to Rule 28 of the Rules of Procedure and Evidence, adopted 5 July 1997 as latest amended on 6 June 1997, ICTR/3.rev.2 (hereinafter the "Rules"), conducted ex parte proceedings under Rule 47 of the Rules.
3. In his decision of 31 March 1998 (hereinafter the "Decision"), Honourable Judge Tafazzal Hossain Khan declined jurisdiction and dismissed the Indictment.
4. The Prosecutor filed on 6 April 1998 a Notice of Appeal (hereinafter the "Notice") pursuant to Rule 108 of the Rules setting forth her grounds of appeal. The Notice of Appeal submits that in his Decision, Honourable Judge Tafazzal Hossain Khan, erred on points of both law and fact. The Notice of Appeal has set out 21 grounds, among these are the following important legal ones:

The reviewing Judge erred in law by declining to exercise the jurisdiction conferred upon him by Article 18 of the Statute of the Tribunal and Rule 47 of the Rules.

The reviewing Judge erred in law by dismissing the indictment under Article 18 of the Statute of the Tribunal and Rule 47, after having declined jurisdiction.

The reviewing Judge erred in law by finding that the Prosecutor did not have the legal competence to present the new indictment in its current form, pursuant to Rules 47, 48, and 49 of the Rules, for the purposes of review and confirmation.

The reviewing Judge erred in law by finding that the trial of an accused begins upon his or her initial appearance and plea, pursuant to Rule 62.

- 5. By a scheduling order dated 23rd April 1998, the Appeals Chambers required the Prosecutor to submit a written brief addressing the question of whether an appeal lies from the decision within seven days from the date of the order.
- 6. The present brief is filed in pursuant to the said order.
- 7. Accordingly, the submissions in this brief are limited to addressing the question as to whether the decision contested can be appealed and if so which is the proper jurisdiction to hear such an appeal.
- 8. It is the contention of the Prosecutor that in dismissing the indictment, the learned reviewing Judge raised the question of jurisdiction by declining to exercise it under Article 18 of the Statute and 47 of the Rules, and contradicted this position by dismissing the indictment under the very rules.
- 9. It is also the contention of the Prosecutor that by holding that the Prosecutor did not have legal competence to submit the new indictment in its current form pursuant to rule 47, 48 and 49 the learned reviewing Judge has in fact limited the powers of the Prosecutor as contained in Art. 1 of the Statute.
- 10. The Prosecutor contends that the right of Appeal is Statutory in nature and Article 24 of the Statute of the ICTR, confers on the Prosecutor an unrestricted right of appeal. Further, the Prosecutor contends that the rights to appeal such decisions is also recognized under general principles of law.

II. Principles of Interpretation

- 11. The provisions of the Statute of the International Tribunal for Rwanda annexed to Security Council Resolution 955 of 8 November 1994 (hereinafter the "Statute") must be interpreted liberally, as a function of its context and in the light of its object and purpose. In this regard, the majority judgement of Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v*

Tadic (Prosecutor's Motion for Protective Measures for Victims and Witnesses) (1995), held as follows:

Although the Statute of the International Tribunal is a *sui generis* legal instrument and not a treaty, in interpreting its provisions and the drafters' conception of the applicability of the jurisprudence of other courts, the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties appear relevant. Article 31 of the Vienna Convention states that 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. (Vienna Convention on the Law of Treaties, UN Doc. A/CONF. 39/27.) The object and purpose of the International Tribunal is evident in the Security Council resolutions establishing the International Tribunal and has been described as threefold: to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace. (Prosecutor v Tadic Prosecutor's Motion for Protective Measures for Victims and Witnesses) (1995) (Doc No IT-94-I-T of 10 August 1995) para 18 (Trial Chamber II).

12. The foregoing is merely a restatement of an established principle of international law to the effect that the terms of international documents must be given their ordinary meanings unless to do so 'results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained.'
- Legal Status of Eastern Greenland Case (PCIJ) (1933) A/B No 53, p 49
 - Art 31 of the Vienna Convention on the Law of Treaties (1969)
 - Prosecutor v Tadic Prosecutor's Motion for Protective Measures for Victims and Witnesses) (1995) (Doc No IT-94-I-T of 10 August 1995) para 18 (Trial Chamber II)
 - See also Oppenheim's International Law 9th edn vol I parts 2—4 (Essex: Longman, 1992) p 1272.
13. It must be remembered at all times that the Statute is not an ordinary piece of criminal legislation. It is an international

statute meant to vindicate international humanitarian law by seeing to it that justice is done, that further commission of international crimes is deterred, and that peace is restored and maintained, in Rwanda in particular and in the world at large. It must then be seen as a remedial statute. As such, it must be given a liberal interpretation, in order to achieve its lofty objects and purposes which are amply set out in the preamble to the Statute, and reiterated in the passage of the Tadic decision just cited above.

III. Article 24

Admissibility of the appeal follows from the scope and language of Article 24

- 14. Article 24 of the Statute has as its heading "Appellate Proceedings" and is therefore relevant to the present matter which the Prosecutor seeks to appeal. It provides that:
 - "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."
- 15. The Prosecutor submits, that Article 24 of the Statute provides sufficient legal basis for the Appeals Chamber to entertain the appeal.
- 16. According to Article 24 the following persons have a right of appeal under art 24: (1) 'persons convicted by the Trial Chambers', or (2) 'the Prosecutor' simpliciter. This reading is clearly supported by the French version of the text, which uses the words "*soit par les personnes condamnées ... soit par le Procureur ...*"
- 17. Further, Article 24 is completely devoid of any language that qualifies or limits the circumstances under which the Prosecutor may appeal decisions originating from the Trial

Chamber on the prescribed grounds. Had the framers of the Statute wished to do so, it would have been quite simple for the drafters of the article to have added the term 'acquittal' or a similar notion around the term 'the Prosecutor', in order to put the Prosecutor's right of appeal exactly at a syntactic par with the right of appeal of 'persons convicted'.

18. This interpretation of Article 24 is quite consonant with the spirit, object and purpose of the instruments, which regulate the activities of the Tribunal in its various organs. There are many *ex parte* instances in which the Prosecutor is contemplated as the sole party appearing before a judge or a Trial Chamber. Such instances include the following:

- (1) Indictment reviews under Article 18 of the Statute and Rule 47 of the Rules;
- (2) Prosecutor's application to the Trial Chamber to request the co-operation and judicial assistance of State under Article 28 of the Statute;
- (3) Prosecutor's application for deferral under Rules 9 and 10 of the Rules;
- (4) Prosecutor's application for transfer and provisional detention of suspects under Rules 40 and 40bis of the Rules;
- (5) Prosecutor's application under Rule 54 for any of the orders therein indicated, for purposes of investigation;
- (6) Prosecutor's application for warrant of arrest under Rule 55, etc.

Article 24 is not limited to decisions on guilt or sentencing decisions by a Trial Chamber only

19. Two questions arises in relation to the applicability of Article 24 of the Statute in the present case. First, Article 24 could be read as implying that only decision on the guilt and decisions on sentencing can be appealed. Second, Article 24 could be read as allowing appeals of decisions by a Trial Chamber only.
20. The Prosecutor submits, however, that such readings are incorrect, given that article 24 is not in any event exhaustive.

21. The Prosecutor submits that it is clearly evidenced by Rule 72(D) that decisions other than decisions on guilt and decisions on sentencing can be appealed. Rule 72(D) grants a right to appeal of a decision on preliminary motions, which are neither decisions on guilt, nor decisions on sentencing. Article 24 thus has a broader scope than only providing a right of appeal of decisions on guilt and sentencing, or, alternatively, there is an inherent legal basis for appeals in the statute, which is broader than Article 24.
22. The fact that both Trial Chambers have held that "neither Rule 47 nor Rules 72 and 73 of the Rules permit appeals against a decision rendered by a single Judge to confirm an indictment"; and that "only in special circumstances can a preliminary motion raising objections against the form of the confirmation of an indictment be appealed as an indirect means to obtain a review by a Trial Chamber of a confirming decision"; has no bearing on this case, as Honourable Judge Tafazzal Hossain Khan declined jurisdiction to review the Indictment, and on this ground dismissed the indictment.
 - Prosecutor v. Ferdinand Nahimana, ICTR-96-11-T, 24 November 1997, Decision on preliminary motion filed by the Defence based on defects in the form of the indictment, para. 6.
 - Prosecutor v. André Ntagerura, ICTR-96-10-I, 28 November 1997, Decision on the preliminary motion by the Defence based on defects in the form of the indictment, para. 29.
23. Article 10 sets out the organisational set up of the judicial branch as consisting of "The Chambers, comprising two Trial Chambers and an Appeals Chamber." Furthermore, the Statute confers in a single Judge the power to review and confirm indictments recognizing that a single Judge can render a decision of the Tribunal.
24. The Prosecutor submits, that the better view is to consider a confirming Judge as an integral part of the Trial Chamber. This is also how Article 18 views the confirming Judge. The Judge is there, referred to as a "judge of the Trial Chamber". If then he is an integral part of the Trial Chamber, it will follow that in his unitary capacity he will be as subject to the review jurisdiction of the Court of Appeal as is the Trial Chamber to which he belongs.

25. It is the contention of the Prosecutor that the decisions of a single Judge are subject to the same review by an appellate jurisdiction as those of a trial chamber. In certain cases the Statute or Rules gives concurrent jurisdiction to 'a judge or Trial Chamber' such as;
- (a) non-disclosure orders under Rule 53(c);
 - (b) order under Rule 54 for any of the legal facilities therein indicated, for purposes of investigation or the preparation or conduct of trial; and
 - (c) order for transfer of a detained witness under Rule 90bis(b).
26. It is hard to imagine that the drafters of the Statute would intend that an order of a Trial Chamber in any such instance may be appealed, but that of a single judge in exactly the same circumstances may not be.

Grounds of appeal under Article 24

27. Under Article 24, appeals may be based upon either errors of law invalidating a decision, or errors of fact resulting in a miscarriage of justice.
28. There is 'miscarriage of justice' involved in the decision now under appeal, given that the Prosecutor has a mandate under the Statute to bring to justice those responsible for the most serious crimes known to law and humanity—namely, genocide, crimes against humanity, and war crimes. In other words, a perverse decision on a matter of law or fact, resulting in the dismissal of an indictment under our Statute, would represent a miscarriage of justice, and should be subject to appellate review, in that it may result in the Tribunal not fulfilling its mandate, timely or efficiently.
29. In conclusion, the Prosecutor submits, that there is sufficient legal basis in Article 24 of the Statute to entertain the present appeal.

IV. Principles enshrined in the Statute and the Rules

No provision on the Statute or the Rules prevent the appeal

30. The Appeals Chamber, in *Delalic et al* recognized that Rule 72 has broadened the right to appeal from the very limited right to appeal provided for in the Statute.”(IT-96-21-AR72.4), (Decision on Application for Leave to Appeal (Separate Trials) by Hazim Delic, 22 November 1996, para. 21).
31. Article 24, however, does not exclude other types of appeal, as evidenced by Rule 72(D) of the Rules, which provides a right for appeal in respect of decisions on preliminary motions based on lack of jurisdiction.
32. Further, there are no provision in the Statute or in Rules preventing the Prosecutor from appealing decision declining jurisdiction to act under Rule 47. In this connection, the Prosecutor notes, that it has been established as a principle in the practice and procedure of international courts and tribunals that ‘what is not specifically prevented by the rules may be applied by the Court.’
- *Application of the Genocide Convention (Provisional Measures) Order of 13 September 1993* (1993) ICJ Reports 1993, p 325 at 396
 - *Corfu Channel Case (Preliminary Objection)* (1948) ICJ Reports 1947-1948, p 15 at p 28.
33. The Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (ICTY Rules) have gradually expanded the possibility of appeal. First by providing a possibility of appeal, of decisions on other types of preliminary motions, than preliminary motions based on lack of jurisdiction in Rule 72(B)(ii) of the ICTY Rules.
34. The practice under Rule 72(B)(ii) has adopted a cumulative three-fold test for the admissibility of appeals of decisions on preliminary motions. It is required that the motion is question is a preliminary motion, in that the application must relate to on of the issues covered by the former Rule 73 (A)(ii), (iii), (iv) or (v); the application must

not be frivolous, vexatious, manifestly ill-founded, an abuse of the process or the court or so vague and imprecise as to be unsusceptible of any serious consideration, and the application must show serious cause.

- *Delalic et al* (IT-96-21-AR72.1), Decision on Application for Leave to Appeal (Separate Trials), 14 October 1996, para. xxx.
- Bench of the Appeals Chamber, *Blaskic* (IT-95-14-AR72), Decision on Application for Leave to Appeal (Protection of victims and witnesses), 14 October 1996, para. xxx.
- Bench of the Appeals Chamber, *Delalic et al* (IT-96-21-AR72.2), Decision on Application for Leave to Appeal (Provisional Release), 15 October 1996, para. xxx.
- Bench of the Appeals Chamber, *Delalic et al* (IT-96-21-AR72.4), Decision on Application for Leave to Appeal (Separate Trials) by Hazim Delic, 22 November 1996, para. xxx.

35. "Serious cause", in the practice of the Bench of the Appeals Chamber, means a showing of a grave error in the decision which would substantially prejudice the accused or the prosecution or is detrimental to the interests of justice or raises issues which are not only of general importance but are also directly relevant to the future development of trial proceedings, in that the decision by the Appeals Chamber would seriously impact upon further proceedings before the Trial Chamber.

- Bench of the Appeals Chamber, *Delalic et al* (IT-96-21-AR72.1), Decision on Application for Leave to Appeal (Separate Trials), 14 October 1996, para. xxx.
- Bench of the Appeals Chamber, *Delalic et al* (IT-96-21-AR72.1), Decision on Application for Leave to Appeal (Separate Trials), 14 October 1996, para. 18: "It should be added that such leave may be granted whether the application is made by the Defence or by the Prosecutor. Indeed, although Rule 73 only addresses preliminary motions by accused, it follows from the principle of equality of arms based on the fundamental concept of fair trial, that on any of the matters listed in rule 73(A) also the Prosecutor is entitled to appeal against a decision by a Trial Chamber rendered upon submission by the accused of a preliminary motion pursuant to Rule 73. The Prosecutor is entitled to appeal against such a decision either as of right (Rule 73A(i)), or by requesting leave to appeal from a Bench of Three Judges (on matters covered by Rule 73(A)(ii), (iii), (iv), (v)).

- Bench of the Appeals Chamber, *Delalic et al* (IT-96-21-AR72.4), Decision on Application for Leave to Appeal (Separate Trials) by Hazim Delic, 22 November 1996, para. 21: "... Rule 72 thus enhanced and strengthened the judicial rights of the accused (and, consequently, those of the Prosecutor, on account of the principle of "equality of arms"). ..."

36. At the latest Plenary Session of ICTY Rules 72 and 73 were revised, and a new Rule 73 was adopted which provides for appeal of decisions on motions other than preliminary motions. Under this rule leave may be granted if the decision impugned would cause such prejudice to the case of the party seeking leave as could not be cured by the final disposal of the trial including post-judgement appeal or if the issue in the proposed appeal is of general importance to proceedings before the Tribunal or in international law generally.

- IT/32/rev. 12, 12 November 1998:
"Rule 73
Other Motions
(A) After a case is assigned to a Trial Chamber, either party may at any time move before the Chamber by way of motion, not being a preliminary motion, for appropriate ruling or relief. Such motion may be written or oral, at the discretion of the Trial Chamber.
(B) Decisions on such motions are without interlocutory appeal save with the leave of a bench of three Judges of the Appeals Chamber which may grant such leave
(i) if the decision impugned would cause such prejudice to the case of the party seeking leave as could not be cured by the final disposal of the trial including post-judgement appeal;
(ii) if the issue in the proposed appeal is of general importance to proceedings before the Tribunal or in international law generally.
(C) Applications for leave to appeal shall be filed within seven days of the filing of the impugned decision."

37. This development is consonant with the latest development in international law. At the latest meeting of the Preparatory Committee on the Establishment of an International Criminal Court in New York from 16 March to 3 April 1998 it was agreed to include in the Draft Statute for an International Criminal Court a new provision granting a right of appeal over decisions with respect to jurisdiction

or admissibility, and the draft has further suggestions for appeal with respect to orders that confirms or denies indictments. It is also suggested that either party should be able to seek leave to appeal if a majority of the judges of the Trial Chamber under different conditions find it desirable.

- Draft Statute for the International Criminal Court, A/AC.249/1998/CRP.14, 1 April 1998 (excepts):
 - “Article 73 bis
 - Appeal against interlocutory decisions
 - 1. Either party may appeal any of the following interlocutory decisions in accordance with the Rules of Procedure and Evidence:
 - (a) A decision with respect to jurisdiction or admissibility;
 - (b) ...
 - [(c) An order that confirms or denies, wholly or in part, the indictment]
 - [(d) ...]
 - [(e) When the majority of members of a Trial Chamber shall be of the opinion that the order involves a controlling issue as to which there is substantial ground for difference of opinion and that immediate appeal from the order may materially advance the ultimate conclusion of the trial and a majority of the judges of the Appeals Chamber, at their discretion, agree to hear the appeal.]

38. This reflects a clear principle of international law, as applied by international courts and tribunals, that an error of jurisdiction arises not only when a tribunal positively arrogates unto itself a jurisdiction it does not have, but also when it fails to apply the prescribed principles of law or fails to exercise jurisdiction which it has—as has the confirming judge in this case. In *The Betsey Case* (1797) Commissioner Gore put the point as follows:

“To refrain from acting, when our duty calls us to act, is as wrong as to act where we have no authority. We owe it to the respective governments to refuse a decision in cases not submitted to us—we are under equal obligation to decide on those cases that are within the submission.”

Seriousness of the Decision

39. The decision under appeal stops the Prosecution from presenting an indictment that reflects the true state of the evidence against the accused and the true extent of their individual criminal responsibility in the events that occurred in Rwanda in 1994. The Decision thus severely impairs the ability of the Prosecutor to discharge her responsibility under the Statute and Rules, and endangers the capacity of the Tribunal itself to carry out the mandate conferred upon it, which is to bring to justice persons who are responsible for serious violations of international humanitarian law in Rwanda in 1994, and to contribute to national reconciliation and to the restoration and maintenance of peace in Rwanda.
40. The indictment contains evidence which has given rise to a substantially new charge of conspiracy, as well as evidence on how genocide in Rwanda was planned and prepared and executed. Evidence of extensive sexual crimes in Rwanda has also been unearthed requiring the formulation of new charges on rape and other crimes.
41. The dismissal of an indictment is similar in several respects to an acquittal. It acts as a bar to proceedings and puts to an end the courts consideration of a case. This would undermine the effort not only of the Tribunal, but also Rwanda, to bring about national reconciliation and to establish and maintain the peace. Should this happen, the Prosecutor, and the Tribunal, would have failed in accomplishing the mandate conferred upon it by the Security Council under resolution UNSC 955 (1994)
42. The dismissal of the Indictment is a final decision or judgement, for the purpose of Article 24 of the Statute and Rule 108 of the Rules. A fair and liberal interpretation of the provisions of Article 24 supports the conclusion that the Appeals Chamber has jurisdiction to entertain the Prosecutor's appeal. The language of Article 24(1) expressly allows for such an appeal, and nothing in the Statute or the Rules expressly excludes the jurisdiction of the Appeals Chamber to hear such an appeal.
43. A decision of a Judge to dismiss an indictment under Rule 47 of the Rules must be amenable to appellate review, if the Appeals Chamber

is to exercise the plenary appellate supervisory powers conferred upon it by Article 24 of the Statute, as a function of the object and purpose of the Statute and the mandate it entrusts to the Tribunal.

Mandate and structure of the Tribunal implies a broad basis for appeal

- 44. Further, the Prosecutor submits that the mandate and structure of the Tribunal implies a broad basis for appeal.
- 45. The Tribunal is a unique international institution with both a judicial organ and a prosecutorial organ. The common fountain-head of the jurisdiction of all of the Tribunal's organs will be found in art 1 of the Statute. It provides as follows:

The International Tribunal for Rwanda 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 between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute. (Emphases added)

- 46. In its judicial organ, the 'International Tribunal for Rwanda' is one Tribunal, which happens to have been divided into two levels of chambers—the Trial Chambers and the Appeals Chamber—in a hierarchical order.

- Arts 10 and 11 of the Statute of the ICTR

- 47. As one tribunal, all the Chambers of the Tribunal must be taken as enjoying wholly, but within their various spheres of judicial hierarchy, the full complement of jurisdiction conferred on the Tribunal as an institution. This jurisdiction is to 'prosecute persons' coming within its temporal and territorial purview.
- 48. Prosecution is a legal notion with quite a composite meaning. It has been defined to mean:

A criminal action; a proceeding instituted and carried on by due *course* of law, before a competent tribunal, for

the purpose of determining the guilt or innocence of a person charged with crime. ... The continuous *following up*, through *instrumentalities* created by law, of a person accused of a public offence with a steady and fixed purpose of reaching a judicial determination of the guilt or innocence of the accused. Black's Law Dictionary 6th edn (1990). [Emphases added.]

49. Central to the Tribunal's task of prosecution is the role of the Prosecutor and her staff who, as the prosecutorial organ of the Tribunal, are the prime movers of prosecution. They drive the engine of prosecution to the judicial organ (the Chambers) who will then ensure that the prosecution processes meet the requirement of fairness within the spirit of the Statute.

- Art 15, 17 and 18 of the Statute of the ICTR

50. When the Prosecutor moves the prosecution into the territory of the judicial organ, every action taken there in the 'course' and 'following up' of the process is as much within the jurisdiction of the Appeals Chamber as it is within that of the Trial Chambers. There must be no exclusion of the Appeals Chamber, in its appellate realms, from partaking in any aspect of this jurisdiction, except where there is clear expression in the Statute to that effect.

V. General Principles of Law

51. In determining the question of appealability, it would be pertinent to examine the general principles as contained in most domestic laws for inspiration. A review of national laws would support the view that a right of appeal generally lies from decisions of a lower court to a higher court unless there are express provision of law expressly stipulating that in such a right does not lie against a particular decision.

52. Most national jurisdictions provide a remedy by way of Appeal or by extraordinary orders such as Mandamus, Certiorari or prohibition to enable parties to a case to correct errors of jurisdiction, or miscarriage of justice, or denial of justice that may be committed by a lower court.

National Laws

53. In the National Laws determination of the question of jurisdiction arising out of the dismissal of an indictment, it may be useful to briefly turn to practice as is carried in States. In France and other civil law countries, a decision not to indict rendered by a “Juge d’instruction” (examining magistrate) can be appealed to the “Chambre d’accusation” which is a Chamber of the Court of Appeal.

“Le Procureur de la République a le droit d’interjeter un appel devant la Chambre d’accusation de toute ordonnance du juge d’instruction”.

Article 185 para 1 of the Code de Procédure pénal of France

Compare with: Article 71 and 179 of Code de procédure pénal of Senegal

54. Under the German Code of Criminal Procedure, indictments have to be submitted to court for confirmation and an appeal lies as of right of the prosecution if the court rejects to open the proceedings (Section 210 of the Code of Criminal Procedure).

55. Certain common law jurisdictions have provision that enable the prosecution to seek recourse where a jurisdiction has refused to indict (Mandamus or Certiorari). In English law where appeal is not available, the high court has powers to review decisions on indictments by a magistrate. In the United States, a right of appeal lies where a district court renders a decision dismissing an indictment – United States Federal Rules on Criminal procedure (See Federal Criminal Code and Rules, West Publishing Company (1996 edition) 3731.

56. In matters concerning an indictment in common law countries, the Attorney General usually has wide powers to file an indictment in a superior court even where the examining Magistrate may consider that a prima facie case does not exist, while in civil law countries an order of an examining magistrate finding that a prima-facie case does not exist where the Prosecutor is seeking an indictment is always appealable.

57. It is therefore submitted that generally speaking there is always a right of recourse in domestic jurisdictions to enable a party to seek recourse to a higher court to review a decision made by a lower court unless legal provision exists expressly denying such a right in particular cases.
58. It is further submitted that neither the Statutes nor Rules of the International Criminal Tribunal for Rwanda contain any express provision denying the right of the prosecution to seek recourse to a higher Court in this particular case. As there is no clear exclusion, the right of appeal must lie.
59. The Prosecutor submits that International Law especially International Criminal Law usually draws its inspiration from national legislation. This relevance of national legislation on the international level is recognized by Article 38 of the Statute of the International Court of Justice which inter alia needs :

“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (e) The general principles of law recognized by civilized nations.

60. One of the main spheres in which general principles have been a source of international law is the administration of international justice.

- Waldock, General Course on Public International Law, 106 Hague Recueil 54 (1962-II), reprinted in D.J. Harris, Cases and Materials on International Law, 4th edition, Sweet and Maxwell, 1991, page, 48 et seq.

61. General principles of law have also been recognized in international criminal law. In the Hostages case the Tribunal commented on this source:

“It applies ... to fundamental principles of justice which have been accepted and adopted by civilised nations generally. In determining whether such a rule of justice is entitled to be declared a principle of International Law, an examination of the municipal laws of states in the family of nations will reveal the answer. If it is

found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of International Law would seem to be fully justified.” (Quoted from VIII LRWC 49. See also commentary XV LRWC 6–7).

62. The International Criminal Tribunal for the former Yugoslavia has also relied on this source of law in its jurisprudence, and all Judges of the Appeals Chamber recognised in the Erdemovic Case before the International Criminal Tribunal for the former Yugoslavia (IT-96-22-A) the use of general principles of law in international criminal law, even if there was some discrepancies as to what extent such principles existed in the case at hand.

- see as example Prosecutor v. Erdemovic, Sentencing Judgement, IT-96-22-T, 29 November 1996, para. 31).
- Compare Prosecutor v. Drazen Erdemovic, IT-96-22-A, 7 October 1997, Joint separate opinion of Judge McDonald and Judge Vorhrah, para. 56 et seq, Separate opinion of Judge Li, para. 3, Separate opinion of Judge Cassese, para. 1 et seq, and Separate opinion of Judge Stephen, para. 25)

VI. The Appeals Chamber is the right organ to hear the appeal

63. Article 24 of the Statute as well as relevant provisions of the Rules refer to the Appeals Chamber as the reviewing organ of the Tribunal, and the Prosecutor submits, that it is the Appeals Chamber that should hear the appeal.
64. Further, there are no provisions in the Statute or the Rules providing for the Trial Chambers acting as a reviewing jurisdiction. On the contrary, Article 24 talks of the “Appeals Chamber”.
65. In addition, Part Six of the Rules provide for the procedure to be followed in appellate proceedings, and it is clear from these provisions that they are to apply to the Appeals Chamber, which in the submission of the Prosecutor indicates, that appeals are to be heard by the Appeals Chamber.

- 80
66. Finally, the Prosecutor submits, that there is an inherent divisions of tasks in the Statute and the Rules, as evidenced by the names of the two judicial organs of the Tribunal: "Trial Chamber" and "Appeals Chamber."
67. Even if it is upheld that a Trial Chamber can sit as appellate chamber over the decision on a confirming judge to discuss an indictment the question of conflict of interest arises. This is supported by the provisions of Rule 15(A) of the Rules of Evidence and Procedure which provides :

"Article 15(1). A judge may not sit on a trial or an appeal in any case which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in such circumstances withdraw from that case . Where the judgewithdraws from the Trial Chamber, the President shall assign another Trial Chamber Judge to sit in his place ..."

68. The above provision therefore provides for the disqualification of judges that compose either a trial or appeal chamber in the event of a conflict or the mere likelihood of one existing.

VII. Submissions

69. The Prosecutor submits on the basis of the above, that the appeal lies from the decision of Honourable Judge Tafazzal Hossain Khan of 31 March 1998 declining jurisdiction and dismissing the indictment against Bagosora and 28 others, and that the Appeals Chamber can entertain the appeal on the basis of the following:

- 1) Article 24 of the Statute;
- 2) Principles enshrined in the Statute and the Rules; and
- 3) General principles of law;

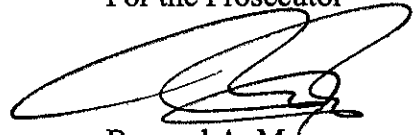
70. The Prosecutor submits, that the Appeals Chamber is the competent jurisdiction to entertain the appeal. Taken to its logical conclusion, the inability of the Appeals Chamber to review decisions by confirming judges on jurisdictional issues could result in the

intolerable position that no trial could commence and that decisions leading to such a state of affairs would, in effect, be unimpeachable. Moreover, such decisions will be made without the prospect of appellate review. This possibility necessitate an Appeals Chamber (as recognised in the Statute) and one that has jurisdiction over such matters as covered in the notice of Appeal.

71. For all the reasons given above the Prosecutor respectfully request the Appeals Chamber

- 1) to admit the Prosecutor's appeal of the Decision;
- 2) to schedule a date for hearing for submission of the Prosecutor's brief on the substance of the appeal, and
- 3) to schedule a date for hearing of the appeal.

For the Prosecutor



Bernard A. Muna
Deputy-Prosecutor