

UNITED NATIONS



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-97-34-A

Date: 21 January 2000

Original: French

IN THE APPEALS CHAMBER

Before: Judge Jorda, Presiding
Judge Lal Chand Vohrah
Judge Mohamed Shahabuddeen
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar: Mr. Agwu U. Okali

Decision of: 21 January 2000

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GRATIEN KABILIGI

v.

THE PROSECUTOR

DECISION REJECTING NOTICE OF APPEAL

Counsel for the Appellant:
Mr. Jean Yaovi Degli

The Office of the Prosecutor:
Mr. David Spencer
Mr. Frederic Ossogo
Ms. Holo Makwaia
Mr. Rashid S. Rashid
Mr. Matthias Marcussen

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: Felicité Talon Alimandjika
SIGNATURE: [Signature] DATE: 25.01.2000

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 ("the Appeals Chamber" and "the Tribunal" respectively), hereby issues its decision with respect to the "Notice of Appeal and Appellant's Brief Regarding an Objection Based on Lack of Jurisdiction (Rules 72(d), 107, 108 and 111 of the Rules of Procedure and Evidence)" ("the Notice of Appeal") filed on 16 August 1999 by the accused, Gratién Kabiligi ("the Accused" or "the Appellant"), and the Appellant's "*Mémoire Complémentaire d'Appel Relatif à une Exception d'Incompétence (Art 72 du Règlement de Procédure et de Preuve)*" filed on 5 November 1999 ("the Additional Brief"), seeking to appeal the "Decision on the Prosecutor's Motion to Amend the Indictment" issued in writing on 8 October 1999 ("the Decision").

2. The Appeals Chamber also now disposes of the "Prosecutor's Motion for Summary Rejection of the Defence's Notice of Appeal Relating to an Objection Based on Lack of Jurisdiction" filed on 3 September 1999 ("the Response"); the "Extremely Urgent Motion Seeking a Stay of Ruling (Rules 72, 73 and 107 of the Rules of Procedure and Evidence)" filed in French by the Accused on 2 November 1999 ("the Motion for Stay"), and the "*Mémoire du Procureur en Réponse a une Requête en Extrême Urgence et a une Demande de la Défense aux fins de Sursis a Statuer la Décision Orale du 12 août 1999 de la Chambre de Première Instance II*", filed by the Prosecutor on 12 November 1999 ("the Response to the Motion").

3. The Notice of Appeal is filed pursuant to Rule 72 (D) of the Rules of Procedure and Evidence of the Tribunal ("the Rules").

II. PROCEDURAL HISTORY

4. On 11 August 1999, Trial Chamber II heard argument on the “Prosecutor’s Request for Leave to File an Amended Indictment”, filed on 31 July 1998 (“the Request”). On 13 August 1999 the Trial Chamber delivered its oral decision, granting the Request. In its oral decision, the Trial Chamber explained that a written decision outlining its reasons would follow.

5. The Notice of Appeal was filed on 16 August 1999. On 3 September 1999 the Prosecutor filed the Response.

6. On 13 September, in view of Rules 72 (E) and 108 (B), as amended 1 July 1999, the Appeals Chamber issued a Scheduling Order (“the Scheduling Order”) allowing the Appellant 7 days from the delivery of the written judgement in both English and French, to file any further grounds of appeal.

7. The English Decision was issued on 8 October 1999. In response to this, and pursuant to the Scheduling Order, the Appellant filed an additional brief on 27 October 1999 (“the Additional Brief”) in which he raised two additional grounds of appeal.¹ The French Decision was issued on 3 November 1999. No further grounds of appeal have been filed.

8. On 2 November 1999 the Appellant filed a Motion applying for a stay of proceedings before the Trial Chamber pending the Appeals Chamber ruling in the current matter (“the Appellant’s Motion for Stay”).² On 12 November 1999 the Prosecutor responded, opposing the Appellants motion.³

III. SUBMISSIONS OF THE PARTIES

1. The Appellant

¹ *Mémoire complémentaire d'appel relatif à une exception d'incompétence (art 72 du règlement de procédure et de preuve*

² *Requête en extrême urgence aux fins de sursis à statuer (Art 72, 73 et 107 du Règlement de Procédure et de Preuve)*

9. The Notice of Appeal challenges the procedure by which the Trial Chamber reached its Decision. The Appellant requested the Trial Chamber to order disclosure to him of the supporting material contained in Annex B to the Prosecutor's Request. The Trial Chamber neither considered this material itself, nor ordered its disclosure to the Defence. The Appellant contends that the Trial Chamber acted contrary to the Statute of the Tribunal, *ultra vires* and in violation of the principle of *audi alteram partem* by granting the Request in this fashion. He goes on to qualify this action of the Trial Chamber as a miscarriage of justice giving rise to an objection based on lack of jurisdiction.

10. The Appellant requests the Appeals Chamber to quash the Decision, and to order disclosure of the material in preparation for a rehearing of the Request. He further requests that the hearing of a motion for joinder filed by the Prosecutor be stayed pending the outcome of the present Appeal.

11. In the Additional Brief, the Appellant adds two grounds of appeal, which can be considered together. He asserts that the Decision of the Trial Chamber was effectively a confirmation of an indictment. He goes on to argue firstly that this does not lie within the competence of the Trial Chamber, as indictments are confirmed by one judge pursuant to Rule 47, nor was the Trial Chamber seised of a Request to confirm an indictment. In this second respect the Trial Chamber is said to have decided *ultra petita* and so to have exceeded its jurisdiction. The Appeals Chamber notes that these arguments were not raised, at least not as "objections based on lack of jurisdiction", before the Trial Chamber.

2. The Respondent

12. The Prosecutor has filed the Response in which she contends that the Notice of Appeal is inadmissible as it is not directed to a dismissal of an objection based on lack of jurisdiction, but rather to the ruling of a Trial Chamber on a procedural matter. The Prosecutor thus requests the Appeals Chamber summarily to reject the appeal.

³ *Mémoire du Procureur en réponse à une requête en extrême urgence et à une demande de la défense aux fins de sursis à statuer de la décision orale du 12 août 1999 de la chambre de première instance II*

IV. APPLICABLE PROVISIONS

13. The provisions of the Statute and Rules of the Tribunal which are applicable to the decision of the Appeals Chamber are as follows:

A. THE STATUTE

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.

B. THE RULES

Rule 72

Preliminary Motions

- (A) Preliminary motions by either party shall be brought within sixty days following disclosure by the Prosecutor to the Defence of all the material envisaged by Rule 66 (A) (i), and in any case before the hearing on the merits.
- (B) Preliminary motions by the accused are:
 - i) objections based on lack of jurisdiction;
 - ii) objections based on defects in the form of the indictment;

- iii) applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Rule 82 (B);
 - iv) objections based on the denial of request for assignment of counsel.
- (C) The Trial Chamber shall dispose of preliminary motions in *limine litis*.
- (D) Decisions on preliminary motions are without interlocutory appeal, save in the case of objections based on lack of jurisdiction, where an appeal will lie as of right.
- (E) Notice of appeal envisaged in Sub-Rule (D) shall be filed within seven days from the impugned decision.
- (F) Failure to comply with the time limits prescribed in this Rule shall constitute a waiver of the rights. The Trial Chamber may, however, grant relief from the waiver upon showing good cause.

Rule 108

Notice of Appeal

- (A) Subject to Sub-Rule (B), a party seeking to appeal a judgement or sentence, not more than thirty days from the date on which the full judgement and sentence are delivered in both English and French, shall file with the Registrar and serve upon the other parties a written notice of appeal, setting forth the grounds.
- (B) In an appeal from a judgement dismissing an objection based on lack of jurisdiction or a decision rendered under Rule 77 or Rule 91, such delay shall be fixed at seven days from the date on which the full judgement or decision is delivered in both English and French.

Rule 117

Expedited Appeals Procedure

- (A) An appeal under Rule 108 (B) shall be heard expeditiously on the basis of the original record of the Trial Chamber and without the necessity of any-brief. In

such a case, the record on appeal shall be the record thus far in the original proceedings before the Trial Chamber.

- (B) All delays and other procedural requirements shall be fixed by an order of the President issued on an application by one of the parties, or proprio motu should no such application have been made within fifteen days after the filing of the notice of appeal.
- (C) Rules 109 to 114 shall not apply to such appeals.

V. DISCUSSION

14. The Appeals Chamber notes that, under Article 24 of the Statute of the Tribunal, it has power to hear appeals from persons convicted by the Trial Chambers or from the Prosecutor. Clearly the Appellant does not fall into either category.

15. However, even in cases when a person is not appealing from a conviction, the Appeals Chamber has jurisdiction to hear certain matters which are interlocutory in nature, pursuant to the Rules of the Tribunal. One such provision is Rule 72 (D), upon which the Appellant bases his appeal.

16. Rule 72 provides for preliminary motions to be brought by either party before the hearing on the merits. The four types of preliminary motion that an accused may bring are defined in Sub-Rule (B) of the Rule. One such motion is an objection based on lack of jurisdiction. Sub-Rule (D) of the Rule provides that decisions on preliminary motions are without interlocutory appeal, save in the case of a dismissal of an objection based on lack of jurisdiction, where an appeal lies as of right.

17. It follows that where an accused makes an objection based on lack of jurisdiction, as a preliminary motion before the Trial Chamber, and this motion is dismissed, the accused has a right of appeal. The impugned decision in the instant matter does not concern a preliminary motion brought by the Appellant before the Trial Chamber objecting to a lack of jurisdiction; it concerns the Decision of the Trial Chamber upon the Prosecutor's Request for Leave to Amend the Indictment. Further, the Appellant made no such motion objecting to jurisdiction during the hearing on the Prosecutor's Request.

18. The Appeals Chamber notes that the "objections to lack of jurisdiction" referred to in the Notice of Appeal and Additional Brief were not raised as such before the Trial Chamber. The Appeals Chamber makes no determination as to whether the Appellant's arguments relating thereto go to jurisdiction, in the sense of Rule 72. It is not necessary to determine this question because, since there was no dismissal of these arguments as objections based on lack of jurisdiction in the proceedings before the Trial Chamber, there can be no appeal under Rule 72(D).

19. There is also a request in the Notice of Appeal that the Appeals Chamber suspend the Trial Chamber hearing on the Prosecutor's Motion for Joinder. Again, the Appeals Chamber cannot act on this request as no preliminary motion on the matter has been made by the accused, with the consequence that there has been no dismissal of such a motion.

VI. DISPOSITION

THE APPEALS CHAMBER for the foregoing reasons:

REJECTS the “Notice of Appeal and Appellant’s Brief Regarding an Objection based on Lack of Jurisdiction (Rules 72D, 107, 108 and 111 of the Rules of Procedure and Evidence)”;

CONSIDERS it unnecessary to deal with the Appellant’s Motion for Stay.

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

(signed)

Claude Jorda
Presiding Judge

Dated this twenty-first day of January 2000
At The Hague
The Netherlands

[Seal of the Tribunal]

