

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-96-15-A

Date: 21 January 2000

Original: French

IN THE APPEALS CHAMBER

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

Registrar: Mr. Agwu U. Okali

Decision of: 21 January 2000

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JOSEPH KANYABASHI

v.

THE PROSECUTOR

DECISION REJECTING NOTICE OF APPEAL

Counsel for the Appellant:

Mr. Michel Marchand
Mr. Michel Boyer

The Office of the Prosecutor:

Mr. Japhet D. Mono
Mr. Ibukunolu A. Babajide
Mrs. Céline Tonye
Mr. Robert Petit
Ms. Nadira Bayat
Mr. Matthias Marcussen

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: *Felicite T. Ndayishimiye*
SIGNATURE: *Felicite T. Ndayishimiye* DATE: *25 JAN 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 “Appeal Relating to an Objection Based on Lack of Jurisdiction (Rules 72, 108 (B) and 117 of the Rules of Procedure and Evidence)” filed on 18 August 1999 (“the Notice of Appeal”), by the accused, Joseph Kanyabashi (“the Accused” or “the Appellant”), seeking to appeal the oral decision of 12 August 1999 by Trial Chamber II granting the “Prosecutor’s Request for Leave to File an Amended Indictment” against the Accused, which decision was issued in writing on 13 September 1999 (“the Decision”).

2. The following are also addressed: 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 7 September 1999 (“the Response”); the “Application to the President of the Appeals Chamber under Rule 117(B) of the Rules of Procedure and Evidence” filed by the Accused on 2 September 1999 (“the Application”); the Appeal filed by the Accused on 20 October 1999¹, and the Accused’s extremely urgent request for leave to amend his notice of appeal, filed on 23 November 1999.²

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

¹ “Appel relatif à une exception d’incompétence (Art. 72, 108(B) et 117 du Règlement de procédure et de preuve)”

² “Requête en extrême urgence afin d’être autorisé à amender l’avis d’appel déposé le 20 octobre 1999”

II. PROCEDURAL HISTORY

4. The Accused was arrested on 28 June 1995. The indictment against him was confirmed on 15 July 1996, and he made his initial appearance before the Tribunal to plead on that indictment on 29 November 1996. On 18 August 1998 the Prosecutor filed the "Prosecutor's Request for Leave to File an Amended Indictment" against the Accused ("the Request"). The Appellant objected to the jurisdiction of Trial Chamber I to hear the Request, which objection was dismissed by the Trial Chamber. The Accused then lodged an appeal against this dismissal with the Appeals Chamber.

5. In its decision of 3 June 1999³, the Appeals Chamber remitted the Prosecutor's Request to Trial Chamber II ("the Trial Chamber") for reconsideration. The re-hearing of the Request took place on 10 August 1999. During the hearing, the Prosecutor made an oral application to the Trial Chamber for an order that the Defence return all materials in Annex B to the original Request and refrain from referring to the same, of which more below. On 12 August 1999, the Trial Chamber II delivered an oral decision granting the Request and the oral application. In its oral decision, the Trial Chamber explained that a written Decision outlining its reasons would follow. Later that day, the Accused made his initial appearance to plead on the amended indictment.

6. The Notice of Appeal was filed on 18 August 1999. On 2 September 1999 the Accused filed his Application for (a) leave to file a brief in support of the Notice of Appeal; (b) leave for the Prosecutor to file a brief in response if she so wished, and (c) certain documents to be included in the Appeal Record. On 7 September 1999 the Prosecutor filed her Motion for summary dismissal of the Notice of Appeal.

7. On 13 September 1999 the written Decision was issued by the Trial Chamber. On that same day, the Appeals Chamber issued a 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, in view of Rules 72 (E) and 108 (B) as amended 1 July 1999. The French Decision was issued on 14 October 1999. On 20 October, the Appellant filed a further Notice of Appeal, expanding on the grounds already submitted ("the Expanded Notice of Appeal").

8. On 23 November 1999 the Appellant filed a request for leave to amend his Expanded Notice of Appeal in light of the Appeals Chamber decision of 3 November 1999 in another case: *Jean-Bosco Barayagwiza v The Prosecutor*.⁴

III. THE APPEAL

1. The Decision

9. The Decision granted the Prosecutor's Request and ordered the indictment to be amended and filed with the Registry. The Decision also made two orders with respect to the application which had been made by the Prosecutor in the course of the hearing. This application concerned material which had originally been filed by the Prosecutor in support of the amendments to the indictment as "Annex B". The Accused, who had received "Annex B" in the earlier interlocutory proceedings before the Appeals Chamber, was ordered to return all materials derived from "Annex B" to the Registry. He was further prohibited from making use of or reference to the contents of "Annex B" prior to its disclosure to him pursuant to Rule 66 of the Rules.

10. The Appellant was thus prohibited from referring to the material in the course of the hearing on the Request. The Trial Chamber itself also did not consider "Annex B" in its deliberation on the Prosecutor's Request. As it stated in its Decision, it satisfied itself that the Prosecutor had shown sufficient grounds in fact and in law to justify the amendments to the indictment against the Accused on consideration of:

the Prosecutor's submissions, request and supporting brief, [and] the response and submissions of the Defence.⁵

2. The Appellant

³ Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I.

⁴ Case No. ICTR-97-19-AR72

⁵ Decision, ¶21.

11. The Notice of Appeal challenges the procedure by which the Trial Chamber reached its Decision, and in particular its treatment of "Annex B". Five grounds of appeal are listed (reproduced in the Expanded Notice of Appeal), which can be considered under two heads.

12. In the first place, the Appellant claims that the Trial Chamber erred in failing to consider the material contained in "Annex B". He claims that in failing to consider any evidentiary material in support of the amendments, and so granting the Request "on the basis of mere allegations"⁶, the Trial Chamber presumed that the assertions of the Prosecutor were true. The Appellant argues that this violated his right to be presumed innocent, his right to equality, and his right to a fair hearing as enshrined in Articles 19 and 20 of the Statute of the Tribunal. He further claims that this absence of evidence in support of the decision renders the decision irrational. He therefore characterises the granting of the Request as an act in excess of the Trial Chamber's jurisdiction.

13. Secondly, the Appellant challenges the failure of the Trial Chamber to allow him to make representations on the basis of "Annex B" in the course of the hearing on the Request. He claims that this decision violated the principle of *audi alteram partem*, and thus was a decision which the Chamber had no jurisdiction to take.

14. The Appellant requests the Appeals Chamber to set aside the Decision of the Trial Chamber and to declare the initial appearance held on the amended indictment void. He asks the Appeals Chamber to order disclosure of "Annex B" to him, and to order a rehearing on the Request in which the Trial Chamber would consider the evidence in support of the amendments and the Appellant would present his arguments on the same.

15. In his Application, filed on 2 September 1999, the Appellant requests leave to file a brief in support of the Notice of Appeal pursuant to Rule 117(B) of the Rules. This request was presumably overtaken by the Scheduling Order of 13 September and the subsequent Expanded Notice of Appeal. He further requests that certain documents be included in the Record on Appeal.

16. On 23 November 1999 the Appellant requested leave to amend his Expanded Notice of Appeal in light of the Appeals Chamber decision in *Jean-Bosco Barayagwiza v The*

Prosecutor. The Appellant draws attention to a number of documents he submitted in the course of proceedings on the Prosecutor's Request seeking a stay of proceedings against him. He seeks now to have the Appeals Chamber consider these arguments as part of the instant appeal.

3. The Respondent

17. The Prosecutor replies that the Notice of Appeal is inadmissible as it is not directed at a dismissal of an objection based on lack of jurisdiction, but rather at the ruling of a Trial Chamber on a procedural matter. She adds that it is clear the Appellant is not challenging the jurisdiction of the Trial Chamber from the fact that he seeks a rehearing of the Request before the same Trial Chamber.

18. In the alternative, the Prosecutor submits that the Notice of Appeal is filed out of time. She claims that there is an obligation on the Defence to raise objections based on lack of jurisdiction at the earliest possible opportunity; as the original refusal to disclose Annex B to the Defence came in the ruling of Trial Chamber I on 30 September 1998 the Appellant has not complied with this obligation.

19. The Prosecutor thus requests the Appeals Chamber to reject the appeal summarily. Should the Appeal be deemed admissible, she requests that the Appeals Chamber schedule dates for the filing of briefs. The Prosecutor does not respond to the Appellant's request that certain documents be included in the Record on Appeal.

⁶ Notice of Appeal, ¶16.
Case No. ICTR-96-15-A

IV. APPLICABLE PROVISIONS

20. 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 a 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 of 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

21. 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.

22. 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.

23. 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 paragraph (B) of the Rule. One such motion is an objection based on lack of jurisdiction. Paragraph (D) of the Rule provides that preliminary motions are without interlocutory appeal, save in the case of a dismissal of an objection based on lack of jurisdiction. In these cases, an appeal lies as of right.

24. 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.

25. In the instant case the Accused did not file an objection based on lack of jurisdiction as a preliminary motion before the Trial Chamber. The impugned decision is the Decision of the Trial Chamber upon the Prosecutor's Request for Leave to Amend the Indictment. However, the Appeals Chamber notes that Counsel for the Accused clearly did contest the jurisdiction of the Trial Chamber on certain limited grounds in his oral submissions before that Chamber.⁷ In particular he claimed that the Trial Chamber had no jurisdiction to order the return of the documents contained in "Annex B", nor to order that the defence refrain from referring to them, as requested by the Prosecutor.⁸

⁷ see transcript of the hearing of 10 August 1999 before Trial Chamber II ("Transcript"), pp. 30-31, 44, 45 English version; pp.28, 43, 44 French version.

⁸ Transcript, p. 44-45 English version; p.43-44 French version.

26. The Appeals Chamber notes that motions may be made orally as well as in writing. However, even if the Appeals Chamber were able to characterise the submissions of the Accused on the Prosecutor's Request as an oral motion, it could not constitute a Preliminary Motion within the meaning of Rule 72. Preliminary Motions under Rule 72 "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". It is clear that the filing of Preliminary Motions comes *after* the initial appearance and the disclosure of material in support of the indictment. From the point of view of the Accused, Rule 72 provides him with the opportunity to challenge the Tribunal's jurisdiction or the form of the indictment, to apply for severance of crimes or separation of trials, and to object to a refusal to assign him counsel, once he is in possession of the material forming the basis of the charges against him.

27. In the instant case, the Accused purported to challenge the jurisdiction of the Trial Chamber in relation to an indictment upon which he had yet to plead. The Accused raised his oral objections before the Trial Chamber two days before his initial appearance on the amended indictment on 12 August 1999. While the Accused is of course free to raise his objections at this point, such objections cannot constitute a Preliminary Motion under Rule 72. A Preliminary Motion seeking to challenge jurisdiction should be brought after the disclosure of material in support of the indictment pursuant to Rule 66(A)(i).

28. The Appeals Chamber notes that the Appellant has made two initial appearances before the Tribunal. His first initial appearance took place on 29 November 1996 when he entered his plea to the original indictment against him. The Appellant was therefore able to file Preliminary Motions in relation to this indictment and the material in its support after its disclosure to him. The objections subject of the instant Notice of Appeal, however, relate to the second amended indictment. Should the Appellant wish to challenge jurisdiction under Rule 72(B)(i) in relation to this, he must do so in the period specified in Rule 72(A).

29. The Decision subject of the Notice of Appeal cannot constitute a dismissal of an objection based on lack of jurisdiction under Rule 72(D). There is therefore no right of interlocutory appeal against the Decision. The Appeals Chamber does not find it necessary to consider the other arguments put forward by the Prosecutor in her Response.

30. In view of the foregoing, it is unnecessary to consider the Appellant's request for leave to amend his Expanded Notice of Appeal. Any objections should be brought as a preliminary motion before the Trial Chamber in order that they may be properly argued there. With regard to the request in the Application that certain documents be included in the Record on Appeal, the Appeals Chamber notes that it has had the full Trial Record at its disposal in consideration of the Notice of Appeal, as specified in Rule 117(A) of the Rules.

VI. DISPOSITION

THE APPEALS CHAMBER for the foregoing reasons:

REJECTS the Defence's "Appeal Relating to an Objection Based on Lack of Jurisdiction (Rules 72, 108 (B) and 117 of the Rules of Procedure and Evidence)".

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 Appeals Chamber]

