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 1994 and 31 December 1994

Case No. ICTR-96-1-A

Date : 1700 bis

ENGLISH

Original: FRENCH

THE APPEALS CHAMBER

ICTR-96-4-A
22-06-2000
(1700 bis — 1691 bis)

2000 JUN 22 P 12:01
ICTR COURT REGISTRY RECEIVED

Sitting as Judges: Claude JORDA, Chairing
Lai Chand VOHRAH
Mohamed SHAHBUDDEEN
Rafael NIETO-NAVIA
Fausto POCAR

Assisted by: Mr. Agwu U. OKALI

Decision rendered 24 May 2000

THE PROSECUTOR

vs.

Jean- Paul AKAYESU

DECISION
(CONCERNING MOTIONS 2, 3, 4, 5, 6 AND 8 APPELLANT'S BRIEF RELATIVE TO THE FOLLOWING MOTIONS REFERRED TO BY THE ORDER DATED 30 NOVEMBER 1999)

Counsel for Jean- Paul Akayesu:
Mr. John Philpot
Mr. Andre Tremblay

Office of the Prosecutor:
Mr. Upawansa Yapa
Mr. Zhu Wen-qi
Mr. Norman Farrell
Mr. Karim Khan

AKA(A)00-11 (E)

Translation certified by the LCSS, ICTR

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 serious violations committed in the territory of neighbouring States between 1 January and 31 December 1994 (respectively the "Appeals Chamber" and the "Tribunal"

NOTING pending appeals filed by the appellant Jean-Paul Akayesu (the appellant) and the Prosecutor against the judgement rendered by Trial Chamber I on 1 and 2 September 1998, finding the appellant guilty on counts 1, 3, 4, 5, 7, 9, 11, 13, and 14 and not guilty of charges 2, 6, 8, 10, 12, and 15 of the indictment on the one hand and against the sentence handed down on 2 October 1998 on the other;

NOTING " The decision concerning the official assignment of Counsel" rendered by the Appeals Chamber on 27 July 1999, in which the latter directed the Registrar to officially assign Mr. Philpot as lead Counsel for the appellant and the subsequent decision of the Registrar, " Decision withdrawing the official assignment of Mr. Barletta Caldarera, as Counsel for Mr. Jean-Paul Akayesu ", on 10 August 1999;

NOTING the Order for the suspension of time limits for the filing of the appellant's briefs made on 21 October 1999 and whereas the said time limits are still suspended;

NOTING that the " Order bearing the calendar " made on 30 November 1999 ("Order ") and in which the latter prescribed that on account of the number of applications filed by the appellant since Mr. Philpot was officially assigned to him as lead counsel, the appellant should consolidate and file his motions "in a clear and concise manner in a brief not exceeding 15 pages ";

NOTING that the appellant has not consolidated his applications as was appropriate but made do with repeating them in a summary in his "Appellant's brief concerning the motions referred to in the calendar dated 30 November 1999 " filed on 10 December 1999 ("The appellant's brief ")

WHEREAS the appellant, for not having consolidated his motions as was prescribed by the "Order " and for having continued to file repetitive motions , unnecessarily shackles the normal conduct of his own case;

NOTING HOWEVER, that the Appeals Chamber, having already ruled on the two motions filed in the Appellant's brief , will now rule on the remaining applications;

INTENT UPON issuing an Order bearing a calendar for the future conduct of the instant matter;

NOTING the "response of the Prosecutor to Appellant's brief on the motions referred to by the Order dated 30 December 1999, in which Chamber decided inter alia that the Prosecutor could make other conclusions on issues relative to the material appended to the Appellant's brief after having received and analyzed them;

NOTING the "Supplement to the response of the Prosecutor to the Defence brief pursuant to the Order of the Appeals Chamber dated 30 December 1999 ", filed on 3 April 2000 ("Prosecutor's supplement");

WHEREAS the Appeals Chamber will now separately review each motion (Application) of the Appellant such as formulated in the Appellant's brief and in reference to the originally filed motion;

WHEREAS by so doing the Appeals Chamber subdivides the instant decision into various sections each of which will be devoted to a motion, thus grouping and reviewing those that relate to the same issues under the same section;

Section 1

NOTING the Appellant's motion for leave to file new evidentiary material in appeal (initially formulated in the: Motion on the violation of the right to a lawyer, on extending the time limits and the provisional motion for the admission of fresh evidence on appeal, pursuant to Rules 115 and 116 of the Rules of Procedure and Evidence ", filed on 25 October ("Motion of 25 October 1999 "). in which the Appellant seeks that:

A. Exhibits R-1 to R-76 tendered in support of the postulate of the right of the Appellant to a Defence Counsel of his own choosing be admitted as part of the record on appeal;

B. The Appellant be given leave to appear in person and to call upon Counsel Johan Scheers either to make an oral deposition or a statement under oath;

C. The Registry submit a copy of the Rules of Procedure and Evidence as well as the amendments made to them to date and the Directive relative to the official assignment of Defence Counsels;

D. The Prosecutor serve upon the appellant the letter concerning the recruitment of Mr. Karnavas as the Prosecutor's substitute, in which he stated that he would not defend a genocidaire and

E. The Registry confirm that witness DAAX had been imprisoned by the Rwandan authorities or accept that this fact has been demonstrated;

NOTING the Prosecutor's response to each of these motions, the supplement to the response of the Prosecutor and the Prosecutor's addendum;

NOTING that instant motion is relative to part 1 of the notice of Appeal filed by the Appellant on 2 October 1998 ("Appellant's notice of appeal ");

NOTING that so far as motion A is concerned, the Appellant stated that he was firstly seeking the admission of 63 exhibits as indicated in the motion of 25 October 1999, but that in the application he made in the Appellant's brief the number of said exhibits which according to him relate to part 1 of the Appellant's notice of appeal go up to 76;

NOTING FURTHER that the Prosecutor maintains that certain exhibits are already included in the record on appeal (exhibits R 3, 22, 26, 28, 36) and that he does not challenge the admission of exhibits R 12, 17, 20, 21, 34, 42, 43, 46 and 58;

NOTING that as for the remaining exhibits, the Prosecutor finds that they do not buttress the Defence's claims and have nothing to do with the issues on which the appeal is filed;

NOTING that as regards Motion B the Prosecutor claims that the Appellant did not tender any legal material sustaining the admission of the depositions of the two witnesses or their relevance to the grounds of the appeal;

NOTING that the Prosecutor does not object to Motion C;

NOTING that as regards Motion D, the Prosecutor appended a copy of the letter requested by the Appellant stating objection to the inclusion of said letter in the records on appeal for neither the fact that the letter was drafted nor its content do not in any way affect the right of the Appellant to Counsel of his own choosing;

NOTING that regarding application E, the Prosecutor states that it has no relationship with any grounds for appeal and should therefore be dismissed;

WHEREAS Rule 115 of the Rules of Procedure and Evidence (the Rules) is not applicable to the exhibits whose admission is sought, as the latter is relative to the denial of the right of the Appellant to be defended by Counsel of his own choosing and not his guilt or innocence

WHEREAS ALSO, in matters not provided for by Rule 115 of the Rules, the Appeals Chamber could only facilitate access to fresh evidentiary material on the basis of Rule 89 of the Rules, if such evidentiary material is needed for the appeal, if such material has a probative value and if the interest of justice dictates its admission;

WHEREAS the Appeals Chamber holds that exhibits R 3-36, 38-46, 48-63, in view of their relevance to the issues raised in the appeal as well as their potential probative value, their admission could, if warranted be accepted in the interest of justice;

WHEREAS exhibits R 1, 2, 37, 47, are not relevant to the issues raised in Appeal and do not satisfy the other applicable criteria of admission;

WHEREAS in the absence of evidence to the contrary, the Appellant has not also established that a deposition by an additional witness, that is the Appellant or Mr. Johann Scheers meets the applicable admission criteria;

WHEREAS the Rules and the Directive relative to the official assignment of Defence Counsel are public documents and that it is hence of no avail to issue an order to allow access to them by the Appellant;

WHEREAS HOWEVER the Appellant has not convincingly demonstrated the means by which he has sought to secure such public documents and in any event seizing the Appeals Chamber with a motion to that effect is not the way to obtain the said documents;

WHEREAS regarding witness DAAX the points raised in the application such as discussed in the Appellant's brief;

WHEREAS in the light of Section 3 hereinafter, the Appellant has shown that the evidentiary material for which he is seeking admission in the issue of witness DAAX could have some relationship with grounds he is using for an additional appeal, which would justify its admission in as far the above-mentioned admission criteria are complied with;

WHEREAS the Appeals Chamber could not rule on the merits of any of the issues raised in appeal by the Appellant;

ORDERS AS FOLLOWS:

(i) That exhibits R 3-36, 38-46, 48-63 be admitted and incorporated in the record on Appeal subject to decision by Chamber on the validity of the grounds for appeal, having heard the parties;

(ii) Exhibits R 1, 2,37, 47 be set aside from the record on appeal;

(iii) Mr. Karnavas' letter as appended to addendum of the Prosecutor be admitted and added to the record on appeal subject to the decision of the Chamber on the validity of the grounds for appeal, having heard the parties;

(iv) The Registry confirm on the basis of documentary evidence presently in its possession as to whether witness DAAX had been imprisoned by the Rwandan authorities. Grants leave to add the above-mentioned evidence and facts without prejudice to its prerogative to appreciate their value . The Appeals Chamber also declares that it shall not in any manner rule on the merits of the appeal; and

(v) DENIES the motion on all the other points.

SECTION 2

NOTING the applicant's request for leave to amend the notice of appeal with grounds for appeal connected with George Rutaganda's trial, the admission of certain transcripts of the trial of the latter and an affidavit by Tiphane Dickson as evidentiary material, the production of audio recordings of better quality of the hearing of 14 October 1997 in the matter of Georges Rutaganda (such as initially done in the "Motion for the expansion of time limits and the admission of fresh evidence on appeal under Rules 115 and 116 of the Rules of Procedure and Evidence ", filed on 22 September 1999);

1690 bis

NOTING the Prosecutor's response (as referred to in "the response of the Prosecutor to the motion of Appellant Jean-Paul Akayesu to extend the time limits for the filing of notices of appeal and the admission of fresh evidence on appeal under Rules 115 and 116 of the Rules of Procedure and Evidence", filed on 15 October 1999);

NOTING the Appellant's motion to modify his notice on appeal to include the following:

> The Tribunal rendered its judgement on the basis of out-of-court evidence, without the trial of the Appellant, in the absence of the accused and without his knowledge. The presumed change in the attitudes of the Prefets and the Bourgmestres following the meeting of 18 April 1994 and the presumed change in the attitude of the Appellant was at the core of the trial. Whereas in the trial of Georges Rutaganda on 14 October 1997, the Tribunal, proprio motu or officially made comments appreciating the evidence tendered in the trial of the Appellant during the testimony of expert Filip Reynjtens and put questions to the latter that were directly material to the trial of the Appellant. The expert testified on those issues. Furthermore, the trial Chamber allowed expert Filip Reynjtens to make negative and disparaging comments on the case-file of the Appellant without any objections whatsoever . That error alone is an error in law (miscarriage of justice) which invalidates the decision. This will be demonstrated at the hearing of this appeal.

NOTING that the Appellant in his notice on appeal had already made a submission as to whether the Trial Chamber based its judgement on evidence obtained during the separate trial in the matter of the Prosecutor Vs. Rutaganda,
a submission essentially repeated in the above-mentioned amendment;

WHEREAS nothing prevents the Appellant from submitting these grounds on appeal both in a public hearing (under Rule 114 of the Rules) if he must so do, and in the Appellant's brief (under Rule 111 of the Rules) and whereas the Appellant's motion to submit such grounds on appeal does not raise any new issues;

WHEREAS the grounds for the appeal will have to be established by the Appellant;

WHEREAS Rule 115 deals with issues pertaining to the guilt or innocence of the accused ;

WHEREAS HOWEVER Rule 115 does not preclude instant Chamber reviewing the evidentiary material concerning an allegation of prejudice and that by virtue of the powers vested in it, Chamber could appreciate the admissibility of evidence on the basis of the admissibility criteria described above;

NOTING FURTHER that the Appellant's application for an Order to amend the records of the hearing in the matter of the Prosecutor V Rutaganda, following the admission of the evidence tendered by Mrs. Tiphaine Dickson and the review by the Appeals Chamber (or by one of its judges)of the audio recordings of the proceedings of 14 October 1997 in the said matter and considering that the Appellant had argued that the audio recording in question was totally inaudible;

WHEREAS the records of the proceedings of any trial should be self sufficient in terms of facts

reflected in the transcripts in the two working languages of the Tribunal and that it is inadmissible to appeal against extraneous evidentiary material, to interpret the contents of transcripts when no omissions are noted;

WHEREAS the Appellant is not entitled to seek leave from instant Chamber to amend the records of the debate in the trial of the matter of the Prosecutor V Rutaganda, that instant Chamber is not the appropriate body to be seized of such a motion and that the appeal of which it is seized is not connected with the matter of the Prosecutor V Rutaganda;

WHEREAS the Prosecutor is not challenging the arguments of the Appellant according to which the Trial Chamber, in the trial of the matter of the Prosecutor vs. Akayesu and the Prosecutor vs. Rutaganda, was composed of the same judges;

THEREFORE ORDERS AS FOLLOWS:

(i) The Appellant is given leave to amend his notice of appeal to read as follows:

> The Tribunal rendered its judgement on the basis of out-of-court evidence, without the trial of the Appellant, in the absence of the accused and without his knowledge. The presumed change in the attitudes of the Prefets and the Bourgmestres following the meeting of 18 April 1994 and the presumed change in the attitude of the Appellant was at the core of the trial. Whereas in the trial of Georges Rutaganda on 14 October 1997, the Tribunal, proprio motu or officially made comments appreciating the evidence tendered in the trial of the Appellant during the testimony of expert Filip Reynjtens and put questions to the latter that were directly material to the trial of the Appellant. The expert testified on those issues. Furthermore, the trial Chamber allowed expert Filip Reynjtens to make negative and disparaging comments on the case-file of the Appellant without any objections whatsoever . That error alone is an error in law (miscarriage of justice) which invalidates the decision. This will be demonstrated at the hearing of this appeal.

The authorization thus granted does not in any manner mean that the Appeals Chamber holds the amendment as being the truth;

(ii) For the purpose of establishing the above-mentioned grounds for appeal, the Appellant could present the following parts of the records of the proceedings in the matter of the Prosecutor V Rutaganda : the covering page and pages 73, 74, 75, 112, 113, and 114 of the records of the hearing of 14 October 1997, subject to the decision of the Appeals Chamber on the validity of the grounds for appeal, having heard the parties; and

DENIES all the other applications of the Appellant, i.e:

(1) The one seeking leave for a statement under oath or an oral statement by Mrs. Tiphane Dickson;

(2) The one seeking an Order to modify the records of the hearing of 14 October 1997 in the matter of the Prosecutor vs. Rutaganda;

(3) The one seeking that the Appeals Chamber hear the audio recordings of the hearing of 14 October 1997 in the matter of the Prosecutor Vs, Rutaganda;

SECTION 3

NOTING the Appellant's application concerning witness DAAX, in which he sought additional evidence and leave to modify his notice of appeal to add new grounds for appeal (as initially formulated in the "motion for fresh evidence on appeal, extension and suspension of time limits and stay of proceedings", filed on 25 October 1999 and the Motion to amend notice of appeal concerning fresh evidence on appeal , extension and suspension of time limits and stay of proceedings (re: witness DAAX), filed on 10 November 1999).

NOTING that the motion which it is question of is about a witness cited by the Appellant who subsequently addressed an accusing letter to the Trial Chamber;

NOTING the response of the Prosecutor to this motion, according to which the grounds for appeal that the Appellant seeks to add are manifestly not admissible.

NOTING however the claim of the Appellant according to which his Counsel drafted the notice of appeal in September 1998, that is approximately one year before he was officially assigned to his defence in accordance with the Order on the official assignment of Counsel, issued by the Appeals Chamber on 27 July 1999, and according to which at the time, he was neither in possession of a complete file nor any precise information and that it was only following an interview with his client in September 1999 and after having reviewed the matter that he was brought about to invoke the grounds for appeal in question;

HAVING GRANTED, in its decision of 17 April 2000, that there were still problems about disclosure to the two parties, of complete records on appeal pursuant to Rule 110 of the Rules and having thus admitted that neither one nor the other party were as yet in possession of the complete records on appeal;

WHEREAS the exercise by the Appeals Chamber, of its prerogative to appreciate and authorize the modification of the grounds for appeal at this juncture of the proceedings gives rise to no substantial prejudice for the Prosecutor and that the interest of justice so dictates;

WHEREAS FURTHERMORE the Appellant will have to produce evidence about the allegation made in the grounds for appeal;

NOTING that regarding the additional evidentiary material for which the appellant is seeking admission, the records of the meeting held in camera in the Office of the Prosecutor, the request made by the Section responsible for the protection of victims and witnesses on 18 February 1998 and the confidential letter - exhibit R 1 could all be required from the Registrar and that the Appellant could require those exhibits for inclusion in the record on appeal;

ORDERS AS FOLLOWS:

1692 bis

The Appellant is given leave to modify his notice of appeal and to add the grounds adduced in pages 7 to 10 of the "motion to amend the notice of appeal against the motion for fresh evidence on appeal, the extension and suspension of time limits and the stay of proceedings" filed on 10 November 1999;

The leave thus granted does in no way mean that the Appeals Chamber holds the contents of such amendment as the truth and

DENIES the motion on all the other points.

SECTION 4

NOTING the Appellant's motion to amend his notice of appeal to add three grounds for appeal (initially referred to in the "motion to amend the notice of appeal and for the suspension of the time limits for appeal " filed on 10 November 1999) concerning the admissibility of evidence by hear-say, the refusal to grant leave to the Accused to ask subjective questions during the cross-examination and the unlawful disclosure of the statements of the defence witnesses, which he realized only after having analysed the Trial Chamber's case file;

NOTING the Prosecutor's response in which the latter recognised that good cause has been shown in the light of the difficulties of the two parties obtaining a complete record on appeal;

WHEREAS thus the Prosecutor has in fact admitted that to amend the grounds for appeal at that juncture of the proceedings will not be unduly prejudicial to her and that the interest of justice so dictates, among other things, on account of the difficulties suffered by the two parties in obtaining the complete record on appeal, which the Appeals Chamber has already recognised and that good cause had been subsequently shown;

THEREFORE ORDERS AS FOLLOWS:

Grants leave to the Appellant to amend his notice of appeal to include the three grounds for appeal such as adduced in paragraph 57 of the Appellant's brief. The leave thus granted does not in any manner mean that the Appeals Chamber holds the contents of the amendment as the truth;

SECTION 5

NOTING the Appellant's motion for the Prosecutor to disclose all evidentiary material in her possession and concerning him, including statements containing relevant evidence adduced by the Prosecutor , to furnish him with all the particulars of a witness designated as "FH" in order to enable the Appellants Counsel and an investigator to interview witness FH and to serve upon him copies of

all video recordings or all the written statements made by Jean Kambanda about the attitude of the bourgmestres (a request already made in the "Motion for disclosure of evidence and the extension of time limits for appeal pursuant to Rules 68, 73, 107, 115 and 116 of the Rules of Procedure and Evidence and Article 20 of the Statute of the Tribunal ", filed on 26 October 1999);

NOTING the response of the Prosecutor in which it was alleged that the motion was baseless and must be set aside, that regulatory provisions on the disclosure of material are only applicable at the level of Trial Chambers and that in fact the statement of witness FH in the matter of the Prosecutor vs. Ngirumpatse and Co. (ICTR-98-44-1) referred to by appellant had already been disclosed to the Defence on 16 September 1996 at the Trial Chamber ;

WHEREAS evidentiary material on appeal is limited to the record on appeal such as certified by the Registrar pursuant to Rule 109 of the Rules, subject the Appeal Chamber's admission of additional evidence under Rule 115 of the Rules, if it holds that the interest of justice so dictates or by virtue of the powers vested in it as mentioned above;

WHEREAS the Appellant has already received a copy of the statement of witness FH and that although the Appeals Chamber actually considers application for the submission of specific fresh evidence for as long as the latter is connected with grounds for appeal, it could not on the other hand grant a general application of unlimited scope for the admission of new evidentiary material that is not directly related to the grounds for appeal;

FOR ALL THESE REASONS DENIES the motion.

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

The Hague (Netherlands) 24 May 2000

(Signed)
Claude Jorda
President

SEAL OF THE TRIBUNAL

Translation certified by the LCSS, ICTR