SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

TRIAL CHAMBER II

Before: Hon. Justice Richard Lussick, Presiding
Hon. Justice Teresa Doherty
Hon. Justice Julia Sebutinde

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 25 April 2006

THE PROSECUTOR

Against

ALEX TAMBA BRIMA
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU

Case No. SCSL – 2004 – 16 – T

PUBLIC

PROSECUTION RESPONSE TO 'JOINT DEFENCE REQUEST FOR LEAVE TO APPEAL FROM DEFENCE MOTIONS FOR JUDGEMENT OF ACQUITTAL PURSUANT TO RULE 98 OF 31 MARCH 2006'

Office of the Prosecutor
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I. INTRODUCTION

1. The Prosecution files this response to the "Joint Defence Request for Leave to Appeal from Defence Motions for Judgment of Acquittal Pursuant to Rule 98 of 31 March 2006", filed on the joint behalf of all three Accused on 3 April 2006 (the "**Defence Motion**")[1]. The Defence for all three Accused (the "**Defence**") seek to appeal against the Trial Chamber's Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, of 31 March 2006 (the "**Rule 98 Decision**")[2].
2. The Defence Motion is based primarily on Rule 73(B) of the Rules of Procedure and Evidence ("**Rules**"). The Defence Motion bases itself in the alternative on Rule 108. For the reasons given below, the Prosecution agrees with the Defence's primary position that the applicable provision is Rule 73(B), and not Rule 108.
3. For the further reasons given below, the Prosecution submits that the Defence Motion should be rejected, on the ground that the requirements of Rule 73(B) for leave to appeal ("exceptional circumstances" and "irreparable prejudice") have not been established.

II. THE APPLICABILITY OF RULE 73(B)

4. The Defence's primary submission is that appeals against decisions under Rule 98 are governed by Rule 73(B). The Prosecution submits that this is correct.
5. The Defence Motion refers to one decision of the International Criminal Tribunal for the Former Yugoslavia ("**ICTY**"),[3] in which a Trial Chamber held that an appeal against a decision under Rule 98 *bis* of the ICTY Rules (which corresponds with Rule 98 of the Special Court's Rules) should be brought under Rule 108, and not under Rule 73(B). However, that was a single decision at the Trial Chamber level. In other ICTY cases, appeals against decisions under Rule 98 *bis* have been dealt with under Rule 73(B).[4] In the ICTY, the issue has now been settled by a decision of the Appeals Chamber in the *Krajišnik* case.[5] In that case, the Appeals Chamber held that motions to the Trial Chamber to acquit an accused at the

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[1] *Prosecutor v. Brima, Kamara, Kanu*, SCSL-2004-16-T-471.
[2] *Prosecutor v. Brima, Kamara, Kanu*, SCSL-2004-16-T-469, 31 March 2006.
[3] *Prosecutor v. Blagojević and Jokić*, 'Decision on Request for Certification of Interlocutory Appeal of the Trial Chamber's Judgment on Motions for Acquittal Pursuant to Rule 98 bis', Case No. IT-02-60-T, Trial Chamber, 23 April 2004.
[4] *Ibid.*, para. 14, citing precedents in footnote 11. See also *Prosecutor v. Hadzihasanović and Kubura*, 'Decision on the Request for Certification to Appeal the Decision Rendered Pursuant to Rule 98 bis of the Rules', Case No. IT-01-47-T, Trial Chamber, 26 October 2004.
[5] *Prosecutor v. Krajišnik*, 'Decision on Appeal of Rule 98 bis Decision', Case No. IT-00-39-AR98*bis*.1, Appeals Chamber, 4 October 2005.

end of the Prosecution case are motions falling within the purview of Rule 73.[6] This position was not altered by the fact that, following an amendment to Rule 98 *bis* of the ICTY Rules in 2004, this provision of the ICTY Rules no longer contains the word "motion".[7] The Appeals Chamber held that the amendment in 2004 "was not intended to impinge upon the already established practice of the Tribunal that appeals against judgments denying acquittal require certification of a Trial Chamber [under Rule 73(B) of the ICTY Rules]",[8] and that the Appeals Chamber will not entertain appeals by accused of decisions under Rule 98 *bis* unless certification has been granted by a Trial Chamber under Rule 73(B).[9]

6. Reference may also be made to the practice at the International Criminal Tribunal for Rwanda ("**ICTR**"). The Prosecution is not aware of any case in which a decision under Rule 98 *bis* of the Rules of the ICTR (which corresponds with Rule 98 of the Special Court's Rules) has ever been the subject of an appeal to the Appeals Chamber.[10] In at least one case before the ICTR, an attempt by the Defence to appeal against a Rule 98 *bis* decision was dealt with by the Trial Chamber under Rule 73(B).[11] Although the Trial Chamber expressed some doubt as to the applicability of Rule 73(B), it noted that both the Prosecution and the Defence considered Rule 73(B) to be the applicable rule, and dealt with the matter on that basis.[12] Furthermore, the Trial Chamber in that decision never suggested that Rule 108 would be the appropriate rule.[13]

7. This practice at the ICTY and ICTR is consistent with general principles. It has been held that Rule 108 prescribes only the time limit for the filing of a notice of appeal, and does not itself create any right of appeal.[14] Furthermore, it has been held that Rule 108 applies only to appeals from final judgments of a Trial Chamber, and that no right of interlocutory appeal can

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[6] *Ibid.*, para. 2.
[7] *Ibid.*, paras. 3 and 5.
[8] *Ibid.*, para. 5.
[9] *Ibid.*, para. 6.
[10] It is important to note that until 27 May 2003, Rule 73(B) of the Rules of the ICTR provided that "Decisions rendered on such [interlocutory] motions are without interlocutory appeal". Following an amendment to Rule 73(B) of the ICTR Rules on 27 May 2003, decisions on motions became subject of interlocutory appeals where certification is granted by the Trial Chamber upon the relevant conditions being satisfied.
[11] *Prosecutor v. Bizimungu et al.*, 'Decision on Justin Mugenzi's Application for Certification to Appeal the Trial Chamber's Decision on Defence Motions Pursuant to Rule 98 bis', Case No. ICTR-99-50-T, Trial Chamber, 20 March 2006.
[12] *Ibid.*, para. 6.
[13] *Ibid.*
[14] *Prosecutor v. Bagosora and 28 Others*, 'Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Théoneste Bagosora and 28 Others', Case No. ICTR 98-37-A, Appeals Chamber, 8 June 1998, para. 51.

be founded on Rule 108.[15] A decision of a Trial Chamber to reject a Defence motion under Rule 98 is certainly not a final judgment of the Trial Chamber—on the contrary, it is a decision to the effect that the trial proceedings will continue. It cannot be characterized as anything other than an interlocutory decision of the Trial Chamber on an interlocutory motion.

8. For the same reasons, under the Rules of the Special Court, an appeal against a decision of a Trial Chamber under Rule 98 is an interlocutory appeal that is subject to Rule 73(B). As the Defence Motion notes, in another case before the Special Court, a Prosecution application for leave to appeal against a Rule 98 decision of the Trial Chamber was dealt with by the Trial Chamber under Rule 73(B).[16]

9. It follows that the Defence cannot appeal against the Rule 98 decision without the Trial Chamber granting leave under Rule 73(B). Under the terms of that provision, for such leave to be granted, the Defence must establish the existence of (1) exceptional circumstances, and (2) irreparable prejudice. Both of these requirements must be satisfied conjunctively,[17] and the Defence Motion appears to acknowledge this.[18]

III. "EXCEPTIONAL CIRCUMSTANCES" HAVE NOT BEEN ESTABLISHED

10. The Rules do not provide a definition for the meaning of "exceptional circumstances" and as this Trial Chamber rightly stated "the notion is one that does not lend itself to a fixed meaning."[19] However, this Trial Chamber held that exceptional circumstances may exist :

> depending upon the particular facts and circumstances, where, for instance the question to which leave to appeal is sought is one of general principle to be decided for the first time, or is a question of public international law upon which further argument or decision at the appellate level would be conducive

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[15] *Prosecutor v. Nikolić,* 'Decision on Notice of Appeal', Case No. IT-94-2-AR72, Appeals Chamber, 9 January 2003; *Prosecutor v. Simić et al.,* 'Decision and Scheduling Order', Case No. IT-95-9-AR72, Appeals Chamber, 18 May 1999.

[16] Defence Motion, para. 11, referring to *Prosecutor v. Norman et al.,* 'Decision on Prosecution Application for Leave to Appeal Proprio Motu Findings in Decision on Motions for Judgment of Acquittal Pursuant to Rule 98', Case No. SCSL-04-14-T-545, Trial Chamber, 24 January 2006.

[17] See, for instance, *Prosecutor v. Brima et al.,* 'Decision on Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality', Case No. SCSL-04-16-PT-414, Trial Chamber, 12 October 2005, p. 1; *Prosecutor v. Norman et al.,* 'Majority Decision on Request for Leave to Appeal Decision on Prosecution Motion for a Ruling on Admissibility of Evidence', Case No. SCSL-04-14-T-515, Trial Chamber, 9 December 2005, para. 5; *Prosecutor v. Sesay et al.,* 'Decision on Defence Applications for Leave to Appeal Ruling of the 3 of February, 2005 on the Exclusion of Statements of Witness TF1-141', Case No. Case No. SCSL-2004-15-T-357, Trial Chamber, 28 April 2005, para. 27.

[18] Defence Motion, para. 17.

[19] *Prosecutor v. Sesay, Kallon, Gbao*, "Decision on Defence Applications for Leave to Appeal Rulings of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141", SCSL-04-15-T-357, 28 April 2005, para. 25.

> to the interests of justice, or where the cause of justice might be interfered with, or is one that raises serious fundamental issues of fundamental legal importance to the Special Court for Sierra Leone, in particular, or international criminal law, in general, or some novel substantial aspect if international criminal law for which no guidance can be derived from national criminal law systems.[20]

11. With respect to the second limb of the test under Rule 73(B), as stated by His Honour Judge Boutet, "irreparable prejudice refers to the inability to cure any prejudice suffered."[21]

12. Although apparently acknowledging that the two requirements of Rule 73(B) must be satisfied conjunctively, the Defence Motion devotes only two paragraphs to the requirement of "exceptional circumstances" (paragraphs 18 and 19), and both of these paragraphs in effect simply cross-refer to the submissions in the Defence Motion dealing with "irreparable prejudice". In particular, paragraph 18 of the Defence Motion argues that its submissions on "irreparable prejudice" are of such a nature as to "qualify for" being "exceptional circumstances". However, the Defence Motion does not explain how the submissions on "irreparable prejudice" satisfy the legal definition of "exceptional circumstances".

13. The Prosecution therefore submits that the Defence Motion fails to establish the existence of "exceptional circumstances". The Prosecution further responds to the Defence arguments concerning "exceptional circumstances" in the paragraphs below dealing with "irreparable prejudice".

IV. "IRREPARABLE PREJUDICE" HAS NOT BEEN ESTABLISHED

(i) First Defence Argument

14. Paragraphs 21-25 of the Defence Motion argue that the Trial Chamber "failed to apply a proper standard for a Rule 98 Decision", in that it did not provide the proper remedy in respect of the Defence Rule 98 Motions.[22]

15. This argument is based on a particular aspect of the Rule 98 Decision. In the Rule 98 Decision, the Trial Chamber took the view that it was not empowered by Rule 98 to break an individual indictment down to its particulars supplied in the Indictment and to enter a judgment of acquittal in respect of any particular which has not been proved. However, the

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[20] *Id.* para. 26.

[21] *Prosecutor v. Norman et al.*, "Dissenting Opinion of Judge Pierre Boutet On Decision On the Prosecution's Application For Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa", SCSL-04-14-T-172, at para. 19, RP 8900.

[22] Defence Motion, para. 21.

Trial Chamber added that the Defence will not be expected to call evidence concerning locations about which no evidence has been given.[23]

16. The Defence Motion argues that the approach of the Trial Chamber is "contradictory". The Prosecution submits that it is not. Under the approach taken in the Rule 98 Decision, the Trial Chamber considered that, in determining whether the Rule 98 standard had been met or not, it was required to look at each count *as a whole*. Under such an approach, there is no logical contradiction in finding that the count *as a whole* satisfies the Rule 98 standard, and that therefore the count *as a whole* survives the Rule 98 procedure, even if no evidence had been given of certain specific locations in the particulars of that count. This approach is consistent with the plain wording of Rule 98 that prescribes that: *"[i]f, after the close of the case of the Prosecution there is no evidence of supporting a conviction on one or more counts in the indictment, the Trial Chamber shall enter a judgment of acquittal on those counts."* [emphasis added]

17. At the Rule 98 stage, the Trial Chamber is only required to consider whether there is some Prosecution evidence that could sustain a conviction on each of the counts in the Indictment. Provided that there is evidence which could sustain a conviction for a particular *count*, the trial on that count as a whole can proceed, even if the evidence in relation to one or more paragraphs of the Indictment or one or more modes of liability might not necessarily rise to the standard of Rule 98.[24]

18. In any event, this Defence argument amounts to saying no more than that the Trial Chamber made an error of law in its Rule 98 Decision. The fact that a Trial Chamber may have committed an error of law in an interlocutory decision does not of itself amount to "exceptional circumstances" for the purposes of Rule 73(B),[25] nor of itself can it amount to

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[23] Rule 98 Decision, para. 22.

[24] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, "Decision on Motions for Judgment of Acquittal," 2 February 2005, paras. 8-9. However, it is noted that Trial Chambers of the ICTY have indicated that they *may* enter judgments of acquittal in relation to specific incidents or modes of liability where the evidence on that particular incident or mode of liability does not reach the Rule 98 standard: see, for instance, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, "Judgement on Motions for Acquittal Pursuant to Rule 98bis," 5 April 2004, para. 16.

[25] *Prosecutor v. Sesay et al.*, 'Decision on Application for Leave to Appeal the Ruling (2 May 2005) on Sesay Motion Seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor', Case No. SCSL-2004-15-T-401, Trial Chamber, 15 June 2005, para. 20.

irreparable prejudice, since otherwise any interlocutory appeal alleging an error of law would satisfy the requirements of Rule 73(B).[26]

19. The Defence Motion also argues that the approach taken in the Rule 98 Decision is inconsistent with the approach taken by Trial Chamber I of the Special Court in the Rule 98 Decision in the CDF case. While divergent views on an issue of law taken by two different Trial Chambers is a factor which may be taken into account in determining whether or not there are "exceptional circumstances", this factor of itself is not necessarily determinative.[27] In this instance, Defence Motion does not establish how the different approaches of the two Trial Chambers do amount to exceptional circumstances. Furthermore, even if the existence of exceptional circumstances were established on this basis, the Defence Motion has not established the existence of "irreparable prejudice". The Rule 98 Decision makes it clear that the Defence will not be expected to call evidence concerning locations about which no evidence has been given. The Defence Motion does not explain how, in practice, the failure of the Trial Chamber to take the formal step of entering judgments of acquittal under Rule 98 in respect of those locations causes any actual prejudice to the Defence. The Trial Chamber's failure to do so does not alter the fact that the Defence is not expected to call evidence about those locations.

(ii) Second Defence Argument

20. Paragraphs 26-27 of the Defence Motion deal with the Trial Chamber's rejection of the Defence argument that "locations without supporting evidence referring to exactly the same village name should be struck from the Indictment".[28]

21. Paragraph 26 of the Defence Motion refers to the Trial Chamber's observation, at para. 24, that this Defence argument was raised as a new issue in the Kanu Reply. The Defence Motion seeks to argue that this observation by the Trial Chamber was erroneous. It is not clear whether the Defence Motion is seeking to argue that this alleged error in itself

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[26] *Prosecutor v. Norman et al.*, 'Majority Decision on Request for Leave to Appeal Decision on Prosecution Motion for a Ruling on Admissibility of Evidence', Case No. SCSL-04-14-T-515, Trial Chamber, 9 December 2005, para. 9 (noting that "errors of law are conceptually outside the statutory scope and contemplation of Rule 73(B) as the basis for the exercise by a Trial Chamber of its exceptional authority to grant leave for an interlocutory appeal").

[27] Compare *Prosecutor v. Norman et al.*, 'Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on Presentation of Witness Testimony on Moyamba Crime Base', Case No. SCSL-04-14-T-404, Trial Chamber, 23 May 2005 (noting that "the fact of judicial dissent amongst the Judges of the Trial Chamber ... does not of itself constitute an exceptional circumstance, although the nature and significance of the matters sought to be appealed, in conjunction with the fact of dissent, might be considered as factors relevant to this determination").

[28] This is dealt with in paras. 23-25 of the Rule 98 Decision.

constitutes "exceptional circumstances" and/or "irreparable prejudice" for the purposes of Rule 73. If so, the Prosecution submits that this is not the case, since, as paragraph 27 of the Defence Motion concedes, the Trial Chamber did go on to consider the substance of this Defence argument.

22. Paragraph 27 of the Defence Motion suggests that the Trial Chamber should, at the Rule 98 stage, have determined whether or not differently spelled names refer to the same location, the burden of proof being on the Prosecution. The Prosecution submits that this is not so, for two reasons. First, as noted above, the Trial Chamber took the view that it was not empowered by Rule 98 to break an individual indictment down to its particulars supplied in the Indictment and to enter a judgment of acquittal in respect of any particular which has not been proved. Under the approach that it took, the Trial Chamber was therefore simply not concerned at the Rule 98 stage with the sufficiency of evidence in relation to individual specific locations. Secondly, the question whether or not differently spelled names refer to the same location is a question of fact, to be determined by the Trial Chamber in its final judgment at the end of the trial, based on all of the evidence. On any view of Rule 98, the only question that could arise at this stage is whether there is sufficient evidence on the basis of which a reasonable Trial Chamber *could* convict. It is evident from a reading of paragraph 25 of the Rule 98 Decision that the Trial Chamber made no finding that differently spelled names did refer to the same location; this paragraph cannot be understood as going any further than suggesting that differently spelled names *could* refer to the same location. The Defence cannot expect the Trial Chamber to go further than this at the Rule 98 stage, and the failure of the Trial Chamber to do so cannot constitute "exceptional circumstances" or "irreparable prejudice".

(iii) Third Defence Argument

23. Paragraph 29 of the Defence Motion complains that in paragraphs 240-243 of the Rule 98 Decision, the Trial Chamber adopted a different definition of the legal elements of "pillage" to that previously adopted by Trial Chamber I in the CDF case. However, as argued in paragraph 16 above, the fact that different views are taken by the two Trial Chambers does not of itself necessarily constitute an "exceptional circumstance" for the purposes of Rule 73(B), and it is still necessary for the Defence to establish the existence of "irreparable prejudice". The Defence Motion claims that it would be "seriously hampered" if it has to conduct the Defence case without knowing whether or not "private or personal use" is an

element of the crime of pillage. The Prosecution submits that the Defence has not established how this is so. If the Defence takes the position that "private or personal use" *is* an element of the crime of pillage, then, regardless of the view of the Trial Chamber, the Defence will have to conduct its case on that basis, and present to the Trial Chamber all necessary evidence and legal arguments in support of that position. If the Trial Chamber disagrees with the Defence position in its final judgment, the Defence may seek to raise the matter on appeal. However, the presentation of the Defence case before the Trial Chamber will be unaffected by the view on the issue taken by the Trial Chamber in the Rule 98 Decision.

24. Paragraphs 30 and 31 of the Defence Motion relate to the treatment in paragraphs 262-268 of the Rule 98 Decision of the question whether acts of destruction of civilian property by burning fall within the definition of "pillage". The Trial Chamber discussed some aspects of this question, but ultimately decided to defer its decision on the question to the end of trial, since there was in any event sufficient other evidence capable of supporting a conviction on Count 14.[29] The Defence Motion argues that the failure of the Trial Chamber to decide this question in the Rule 98 Motion has irreparably prejudiced the Defence.

25. The Prosecution submits that this is not the case. The time for the Trial Chamber to take final decisions on both issues of law and issues of fact is in the final trial judgment. A Rule 98 Decision is not intended to be a final judgment of the Trial Chamber on issues of law. For purposes of determining whether there is evidence capable of supporting a conviction on a count at the Rule 98 stage, the Trial Chamber is inevitably required to consider the evidence in the light of the legal definition of the crimes in question. However, that does not mean that the Trial Chamber has to make definitive findings of law at the Rule 98 stage. If there are uncertainties as to the applicable law, at the Rule 98 stage the Trial Chamber should determine whether there is evidence on which a Trial Chamber *could* convict on *any* reasonable view of the law. Disputed issues of law fall to be fully argued in the final arguments of the parties at the end of trial, and fall to be decided in the final trial judgment of the Trial Chamber. The Prosecution submits that the failure of the Trial Chamber to take a

[29] Rule 98 Decision, para. 268.

definitive view of the law at the Rule 98 stage is appropriate; it is certainly not an "exceptional circumstance" causing "irreparable prejudice".[30]

(iv) Fourth Defence Argument

26. Paragraph 32 of the Defence Motion relates to the treatment in paragraphs 323-326 of the Rule 98 Decision of the issue of joint criminal enterprise liability. The Trial Chamber found that the evidence, if believed, is capable of establishing all three categories of joint criminal enterprise for all three accused, but that the Trial Chamber would not at that stage make a final determination as to the precise liability of each Accused.[31] The Defence Motion suggests that the Defence is irreparably prejudiced since the Defence is "left unclear to which form of liability it has to defend itself". The Prosecution submits that this Defence argument is incomprehensible.

27. The Trial Chamber found, at paragraphs 321 to 323 of the Rule 98 Decision, that the Indictment pleads all three forms of joint criminal enterprise liability. It is clear that the Defence for all three Accused must defend against all three forms of joint criminal enterprise liability. Consistently with Rule 98, the Trial Chamber has determined that there is evidence on which a Trial Chamber *could* convict all of the Accused on all three forms of liability. The question of which, if any, form of liability *will* form the basis of any conviction is a matter for the final trial judgment.

CONCLUSION

28. For the reasons given above, the Defence Motion should be rejected.

Filed in Freetown this 25th day of April 2006.
For the Prosecution,

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Chief of Prosecutions

Karim Agha
Senior Trial Attorney

[30] Compare also *Prosecutor v. Delalić et al. (Čelebići case)*, Judgment, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001, paras. 573-579 ("***Čelebići Appeal Judgment***"), in which the Appeals Chamber rejected an argument that the Trial Chamber had violated the rights of the Accused by refusing to define the legal elements of the defence of diminished responsibility during the course of the trial. In that case, the Accused had sought the Trial Chamber's ruling on this issue of law on 9 June 1998 (see *ibid., at footnote 954), which was well after the Trial Chamber's decision on the motions for judgment of acquittal, which was given on 18 March 1998 (as to which, see Prosecutor v. Delalić et al. (Čelebići case)*, Judgment, Case No. IT-96-21-T, Trial Chamber, 16 November 1998, paras. 81-82). The *Čelebići Appeal Judgment* thus makes clear that legal elements of crimes and defences do not have to be decided by the Trial Chamber by the Rule 98 stage, or at any stage prior to the final trial judgment.

[31] Rule 98 Decision, para. 326.

INDEX OF AUTHORITIES

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1. *Prosecutor v. Norman et al.*, 'Decision on Prosecution Application for Leave to Appeal Proprio Motu Findings in Decision on Motions for Judgment of Acquittal Pursuant to Rule 98', Case No. SCSL-04-14-T-545, Trial Chamber, 24 January 2006.
2. *Prosecutor v. Brima et al.*, 'Decision on Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality', Case No. SCSL-04-16-PT-414, Trial Chamber, 12 October 2005.
3. *Prosecutor v. Norman et al.*, 'Majority Decision on Request for Leave to Appeal Decision on Prosecution Motion for a Ruling on Admissibility of Evidence', Case No. SCSL-04-14-T-515, Trial Chamber, 9 December 2005.
4. *Prosecutor v. Norman et al.*, 'Dissenting Opinion of Judge Pierre Boutet On Decision On the Prosecution's Application For Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa', SCSL-04-14-T-172, 5 August 2004.
5. *Prosecutor v. Sesay et al.*, 'Decision on Defence Applications for Leave to Appeal Ruling of the 3 of February, 2005 on the Exclusion of Statements of Witness TF1-141', Case No. Case No. SCSL-2004-15-T-357, Trial Chamber, 28 April 2005.
6. *Prosecutor v. Sesay et al.*, 'Decision on Application for Leave to Appeal the Ruling (2 May 2005) on Sesay Motion Seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor', Case No. SCSL-2004-15-T-401, Trial Chamber, 15 June 2005.
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8. *Prosecutor v. Blagojević and Jokić*, 'Decision on Request for Certification of Interlocutory Appeal of the Trial Chamber's Judgment on Motions for Acquittal Pursuant to Rule 98 bis', Case No. IT-02-60-T, Trial Chamber, 23 April 2004.
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9. *Prosecutor v. Hadzihasanović and Kubura*, 'Decision on the Request for Certification to Appeal the Decision Rendered Pursuant to Rule 98 bis of the Rules', Case No. IT-01-47-T, Trial Chamber, 26 October 2004.
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10. *Prosecutor v. Krajišnik*, 'Decision on Appeal of Rule 98 bis Decision', Case No. IT-00-39-AR98bis.1, Appeals Chamber, 4 October 2005.
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11. *Prosecutor v. Bizimungu et al.*, 'Decision on Justin Mugenzi's Application for Certification to Appeal the Trial Chamber's Decision on Defence Motions Pursuant to Rule 98 bis', Case No. ICTR-99-50-T, Trial Chamber, 20 March 2006.

12. *Prosecutor v. Bagosora and 28 Others*, 'Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Théoneste Bagosora and 28 Others', Case No. ICTR 98-37-A, Appeals Chamber, 8 June 1998.

13. *Prosecutor v. Bagosora et al.*, "Decision on Motions for Judgment of Acquittal," Case No. ICTR-98-41-T, Trial Chamber, 2 February 2005.
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15. *Prosecutor v. Nikolić,* 'Decision on Notice of Appeal', Case No. IT-94-2-AR72, Appeals Chamber, 9 January 2003.
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17. *Prosecutor v. Delalić et al. (Čelebići case),* Judgment, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001.
http://www.un.org/icty/celebici/appeal/judgement/index.htm
This authority exceeds 30 pages. The relevant section is attached.

18. *Prosecutor v. Delalić et al. (Čelebići case),* Judgment, Case No. IT-96-21-T, Trial Chamber, 16 November 1998.
http://www.un.org/icty/celebici/trialc2/judgement/index.htm
This authority exceeds 30 pages. The relevant section is attached.

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UNITED NATIONS

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

Case No: ICTR-98-37-A

Date: 8 June 1998

Original: English

IN THE APPEALS CHAMBER

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

Registrar: **Mr. Agwu U. Okali**

Decision of: **8 June 1998**

PROSECUTOR

v.

THÉONESTE BAGOSORA AND 28 OTHERS

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

The Prosecutor:
Louise Arbour
Bernard A. Muna

I. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 ("ICTR"), hereby issues its decision with respect to the Prosecutor's *ex parte* Notice of Appeal, filed on 6 April 1998[1] ("Notice of Appeal"), seeking to appeal from the Decision of Judge Tafazzal Hossain Khan[2], ("Decision"), dismissing an indictment against Théoneste Bagosora and 28 Others, filed on 31 March 1998 ("Indictment").

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

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

[1] Notice of Appeal (Article 24 and Rule 108), *The Prosecutor v. Théoneste Bagosora and 28 Others*, Case No. ICTR 98-37-I, 3 April 1998.
[2] Dismissal of Indictment, *The Prosecutor v. Théoneste Bagosora and 28 Others*, Case No. ICTR 98-37-I, 31 March 1998.
[3] Motion by the Defence for Leave and/or Orders to be Enjoined in or be Invited as Amicus Curiae in an Appeal by the Prosecutor, *The Prosecutor v. Théoneste Bagosora and 28 Others* Case No. ICTR 98-37-I, 23 April 1998.

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

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

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

II. LEGAL AND FACTUAL BACKGROUND

1. Procedural History

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

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

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

[6] Decision at p.10.

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

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

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

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

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

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[7] Decision at pp. 10 and 11 "...the mandatory Rules for joinder of the accused...the only legal procedure...".
[8] Decision at pp. 11-12.

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

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

13. The Prosecutor filed her appellate brief[10] ("Appellant's Brief") on 30 April 1998. In the Appellant's Brief the Prosecutor asserts a number of grounds as justifying admission of the appeal and requests the Appeals Chamber to schedule a date for the submission of a brief on the merits and a date for oral arguments on the appeal.

[9] *Ex Parte* Scheduling Order, *The Prosecutor v. Théoneste Bagosora and 28 Others,* Case No. ICTR 98-37-I, 23 April 1998.
[10] Appellant's Brief by the Prosecutor in Support of the Admissibility of the Appeal of the Dismissal by Judge Khan of the Indictment against Bagosora and 28 Others of 31 March 1998 *The Prosecutor v. Théoneste Bagosora and 28 Others,* Case No. ICTR 98-37-I, 30 April 1998.

2. The Notice of Appeal

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

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

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

17. The Prosecutor contends that the Confirming Judge made various errors of fact and of law by declining jurisdiction to consider the Indictment and by thereafter dismissing the Indictment. The Prosecutor considers as errors of law, *inter alia*, the findings that the Trial Chambers and Confirming Judges had jurisdiction over, respectively, the First and Second Groups,[11] the holding that the submission of the Indictment constituted an infringement of such jurisdiction[12] and that the Prosecutor should properly have proceeded under Rules 50, 51 or 72 of the Rules,[13] the finding that an individual could be charged only once with the same offences arising from the same or substantially the same facts,[14] and the holding that an accused in the First Group has a right to be heard on the amendment of an indictment.[15]

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

[11] *Ibid.*, at pp. 2-3, paras. 4, 7.
[12] *Ibid.*, paras. 5, 8.
[13] *Ibid.*, paras. 3, 10, 11,12.
[14] *Ibid.*, paras. 12,13.
[15] *Ibid.*, at p.4, para. 17.

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

19. In addition, the Prosecutor submits that the Confirming Judge erred in law and in fact by, *inter alia,* holding that the Indictment contained only one substantial new charge[17] and made errors of fact occasioning a miscarriage of justice by finding that the submission of the Indictment under Rule 47 and the form of the Indictment were intended to circumvent or deny the rights of the accused[18].

[16] *Ibid.*, at p.4, paras. 16, 20.
[17] *Ibid.*, at p.3, para. 14.
[18] *Ibid.*, at p.3, paras. 6 and 9

3. Applicable Provisions

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

Article 24

Appellate Proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
   a) an error on a question of law invalidating the decision; or
   b) an error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

21. Rule 108 provides:

Rule 108

Notice of Appeal

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

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

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

Rule 15

Disqualification of Judges

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

III. DISCUSSION

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

1. A Liberal Interpretation of Article 24 of the Statute

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

a. A broad reading of Article 24 is justified

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

[19] *Supra n.* 10 at para. 10.
[20] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *United Nations Treaty Series* 331.
[21] *Supra n.* 10 at paras. 11-13.

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

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

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

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

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

[22] *Ibid.*, at paras. 39 - 43.
[23] *Ibid.*, at paras. 44 - 45.
[24] *Ibid.*, at paras. 44-50.
[25] *Supra n. 20,* Article 31 (1).

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

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

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

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

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

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

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

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

[26] *Supra n.10* at paras. 16, 17.

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

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

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

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

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

[27] *Ibid.*, at para. 21.
[28] *Ibid.*, at paras. 14 - 18.
[29] *Ibid.*, at para. 28.

decisions of a single judge may be appealed under Article 24.[30] The Prosecutor argues that under Articles 10 and 18 of the Statute, a single judge is an integral part of the Trial Chamber and that the Rules implicitly envisage appeals from decisions of a single judge, as they provide that Trial Chambers and single judges shall have concurrent jurisdiction in certain circumstances.[31] While it is true that a single judge acting under Article 18 of the Statute and Rule 47 is always a member of a Trial Chamber, he is not acting as such during the review proceedings under these provisions. Rather, he is acting solely in his own capacity as a confirming judge.

39. The Prosecutor contends, moreover, that the ICTR and the International Criminal Tribunal for the former Yugoslavia ("ICTY") have expanded the scope of appellate jurisdiction beyond that expressly conferred by the Statute of either Tribunal. The Prosecutor cites Sub-rule 72(B)(ii) of the ICTY Rules which provides for appeals against decisions on preliminary motions other than those based on lack of jurisdiction[32] and Sub-rule 73(B) which provides for appeals against decisions on motions other than preliminary motions.[33] Such Rules, however, do not appear in the ICTR Rules. It is obvious that the Appeals Chamber of the ICTR can apply only the Rules of the ICTR.

40. It is further argued in the Appellant's Brief that this is a general trend of adopting Rules concerning appellate jurisdiction which is consistent with developments in international law that assertedly grant a right of appeal against decisions which raise questions of jurisdiction or of admissibility.[34] The Prosecutor contends that the Decision, by declining jurisdiction, raises such a question and should, therefore, be appealable. All of the examples cited by the Prosecutor, however, allow an appeal by both parties. Indeed, the Appeals Chamber notes that even in the proposed provision of the Draft Statute for the International Criminal Court[35] relating to appeal from the confirmation or the denial of an indictment, the introductory paragraph stipulates that

[30] *Ibid.*, at paras 41, 42.
[31] *Ibid.*, at paras. 24-26
[32] *Ibid.*, at para. 33.
[33] *Ibid.*, para. 36.
[34] *Ibid.*, at para. 37.

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

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

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

2. An Inherent Right of Appeal

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

a. What is not prohibited is permitted

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

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

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

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

b. The practice of courts in national jurisdictions

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

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

[36] *Ibid.*, at para. 42.
[37] *Ibid.*, at para. 32, citing Application of the Genocide Convention (Provisional Measures) Order of 13 September 1993, (1993) *I.C.J. Reports*, at p.396, and *Corfu Channel Case* (Preliminary Objection), (1948) *I.C.J. Reports*, at p.28.
[38] *Ibid.*, at para. 51.
[39] *Ibid.*, at paras. 53 - 57.
[40] *Ibid.*

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

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

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

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

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

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

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[41] *Ibid.*, at paras. 59-62.
[42] Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-AR72, 2 October 1995, para. 6.

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

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

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

IV. DISPOSITION

THE APPEALS CHAMBER, for the foregoing reasons, unanimously:

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

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

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

Gabrielle Kirk McDonald
Presiding Judge

Judge Shahabuddeen appends a Declaration to this Decision.

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

[Seal of the Tribunal]

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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-98-37-A

Date: 8 June 1998

Original: English

IN THE APPEALS CHAMBER

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

Registrar: **Mr. Agwu U. Okali**

Decision of: **8 June 1998**

PROSECUTOR

v.

THÉONESTE BAGOSORA AND 28 OTHERS

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

The Prosecutor:
Louise Arbour
Bernard A. Muna

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International Criminal Tribunal for Rwanda
Tribunal pénal International pour le Rwanda

UNITED NATIONS
NATIONS UNIES

ICTR-99-50-T
20-03-2006
(22865 - 22861)

OR: ENG

TRIAL CHAMBER II

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 20 March 2006

THE PROSECUTOR
v.
CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

DECISION ON JUSTIN MUGENZI'S APPLICATION FOR CERTIFICATION TO APPEAL THE TRIAL CHAMBER'S DECISION ON DEFENCE MOTIONS PURSUANT TO RULE *98BIS*

Rule 73(B) of the Rules of Procedure and Evidence

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Mr. Ben Gumpert and Mr. Jonathan Kirk for **Justin Mugenzi**
Mr. Pierre Gaudreau and Mr. Michel Croteau for **Jérôme-Clément Bicamumpaka**
Mr. Tom Moran and Ms. Marie-Pierre Poulain for **Prosper Mugiraneza**

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("Tribunal"),

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of "Justin Mugenzi's Application for Certification of Interlocutory Appeal in Accordance with Rule 73(B)", filed on 9 December 2005 (the "Motion");

CONSIDERING the "Prosecutor's Response to Mr Justin Mugenzi's Motion for Certification of Interlocutory Appeal in Accordance with Rule 73B", filed on 15 December 2005 (the "Response");

RECALLING the "Decision on Defence Motions Pursuant to Rule 98 *bis*", filed on 22 November 2005;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Rules 73 (B) and 98 *bis*;

NOW DECIDES the matter solely on the basis of the briefs of the parties pursuant to Rule 73(A).

SUBMISSIONS OF THE PARTIES

The Defence Motion

1. The Defence prays for certification to appeal the Trial Chamber's Decision on Defence Motions Pursuant to Rule 98 *bis* ("the Decision"). The Defence's application for certification is limited to the Chamber's findings and decision in respect of Count 9 of the Indictment which charges the Accused with Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II.[1] The Defence had argued that the Prosecution had failed to adduce evidence on a necessary element of the offence alleged in Count 9, namely that the armed conflict must be of a non-international character. According to the Defence, the Chamber accepted both that this was a necessary element to prove, and that the Chamber would not take judicial notice of this fact which must be borne out through evidence.

2. The Defence submits that the Chamber's Decision on Count 9 is flawed. It points to the Chamber's conclusion that:

> The Conflict was between Government forces and the Rwandan Patriotic Front ("the RPF"), which consisted of Rwandan refugees, seeking to exercise their right of return.

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[1] Article 4 of the Statute [in relevant part] provides:

"The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

[...]

The Defence contends that the Chamber failed to properly consider its Rule 98 *bis* submissions in respect of this point. It points to a lack of footnotes referring to the evidence in support of the Chamber's conclusion. Furthermore, the terms "Rwandan refugees", and "right of return" remain undefined by the Chamber. According to the Defence, the Chamber does not demonstrate in the Decision that it dealt with the Defence's submissions on the insufficiency of evidence on the nature of the conflict, nor their contention that the "principal Prosecution expert witness" Dr. Alison Des Forges herself expressed doubt as to whether the war was international or non-international in character. Thus, the Chamber did not take into account all the matters that it should have done when reaching its decision, which is therefore flawed with respect to Count 9.

3. The Defence submits that the Chamber should allow an interlocutory appeal on this issue, since it has demonstrated that all of the criteria under Rule 73(B) have been met. In particular, the Defence submits that a determination of this issue by the Appeals Chamber:

   i) Would significantly affect the fair and expeditious conduct of the proceedings;

   ii) Would shorten the length and expense of the trial, as the Defence currently intends to call an expert witness to testify on the character of the armed conflict;

   iii) Would significantly affect the outcome of the trial. A successful appeal would see Count 9 resolved in favour of the Defendant and therefore not require him to answer to a charge for which there is insufficient evidence; and

   iv) May materially advance the proceedings given that an appellate determination at this stage would negate the need for any defence evidence or submissions in respect of this count.

The Prosecution Response

4. The Prosecution submits that the Defence has not shown that the Trial Chamber erred in the exercise of its discretion in finding in the Decision that the Prosecution had adduced evidence "to avert an acquittal beyond the balance of probabilities (the appropriate burden of proof for the purposes of Rule 98 *bis*)" against the Accused in respect of Count 9 of the Indictment.[2]

5. The Prosecution further submits that, in deciding whether to grant certification or not, the Trial Chamber exercises a discretionary power. The Defence fails to meet the criteria set down in Rule 73 (B), as the certification sought will not affect the fair and expeditious conduct of the proceedings, and may not affect the outcome of the trial. Therefore the application should fail.

[2] Response, para. 8.

DELIBERATIONS

6. The Chamber has reservations as to whether a Rule 98 *bis* "Judgement of Acquittal" is the proper subject of an interlocutory appeal under Rule 73 (B), which deals with interlocutory appeals from "decisions". Although the Appeals Chamber has in the past entertained an interlocutory appeal under Rule 73 (B) from a Rule 98 *bis* decision without comment,[3] in that case the correct Rule under which to appeal was not in issue. There is precedent at Trial Chamber level for denying such requests made under Rule 73 (B).[4] Nonetheless, the Parties in this case implicitly agree that a "Judgement of Acquittal" pursuant to Rule 98 *bis* is a "decision" which can be the subject of an interlocutory appeal.[5] Given that there is little authority on the matter, and that it was not specifically argued in this case, the Trial Chamber is prepared to consider the merits of the application.

7. Rule 73 (B) reads as follows:

> Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

8. The Chamber will consider the submissions relating to the first condition for certification and decide if the "decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" (the "first limb"). If the first limb is met, the Chamber will then consider whether "an immediate resolution by the Appeals Chamber may materially advance the proceedings" (the "second limb"). This is the procedure that the Trial Chamber has followed in previous decisions in this case.[6]

9. The issue the Defence wishes to appeal is the part of the Decision denying the Defence Motion for Acquittal under Rule 98 *bis* on Count 9 of the Indictment. Conceivably, a successful appeal on this issue may significantly affect the *fair and expeditious conduct of the proceedings*, since it could result in the acquittal of the Accused on Count 9 of the Indictment, which in turn would obviate the need for the Accused to present evidence on this charge. Thus, the application meets the requirements of the first limb.

10. Having regard to the stage the trial has reached and the uncertainty as to when the Appeals Chamber would determine the interlocutory appeal, the Trial Chamber is not

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[3] *Prosecutor v. Enver Hadzihasanović and Amir Kubura*, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98 *bis* Motions for Acquittal (AC), 11 March 2005.

[4] *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Decision on Request for Certification of Interlocutory Appeal of the Trial Chamber's Judgement on Motions for Acquittal Pursuant to Rule 98 *bis*, (TC), 23 April 2004.

[5] Motion, para.13; Response, para. 2.

[6] *Bizimungu et. al.*, Decision on Casimir Bizimungu's Motion for Certification to Appeal from the Trial Chamber's Decision of 3 September 2004 Concerning Rule 73 *bis* of the Rules and for Other Appropriate Relief, 9 March 2005; Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005.

convinced that an immediate resolution by the Appeals Chamber may materially advance the proceedings. The second limb is therefore not met.

11. While the language used in the Rule 98 *bis* Decision suggests that the Chamber has made a final determination about the non-international nature of the conflict, this is not what was intended. It would be recalled that the Chamber, throughout its Rule 98 *bis* Decision, referred to the test under Rule 98 *bis*, which involves a determination, by the Trial Chamber, that there is sufficient evidence upon the basis of which a reasonable trier of fact could find that the Prosecution has met its evidentiary threshold with respect to the particular element of the offence in question. The Chamber observes that the issue is still open and the Defence is at liberty to present evidence on the matter. The parties may then address the issue in their final submissions and the Chamber will make a final determination of the issue when it delivers its final Judgment.

FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Defence Motion for certification to appeal.

Arusha, 20 March 2006

Khalida Rachid Khan	~~Lee~~ Gacuiga Muthoga	Emile Francis Short
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

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(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

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	☐ Chief, CMS J.-P. Fomété	☐ Deputy Chief, CMS M. Diop	☐ Chief, JPU, CMS K. K. A. Afande	☐ Appeals Chamber / The Hague R. Burriss
From:	☒ Chamber II **Will Romans** (names)	☐ Defence (names)	☐ Prosecutor's Office (names)	☐ Other: (names)
Case Name:	The Prosecutor vs. **Casimir Bizimungu et al.**		**Case Number:** ICTR-99-50-T	
Dates:	Transmitted: **20 March 2006**		Document's date: **20 March 2006**	
No. of Pages:	**5**	**Original Language:** ☒ English	☐ French	☐ Kinyarwanda
Title of Document:	**Decision on Justin Mugenzi's Application for Certification to Appeal the Trial Chamber's Decision on Defence Motions Pursuant to Rule 98 bis**			

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☐ Disclosure	☐ Order	☐ Appeal Book	☐ Accused particulars
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☐ Normal		☐ Other deadlines:

IN THE APPEALS CHAMBER

Before:
Judge David Hunt, Presiding
Judge Fouad Riad
Judge Rafael Nieto-Navia
Judge Mohamed Bennouna
Judge Fausto Pocar

Registrar:
Mr Hans Holthuis

Judgement of: 20 February 2001

PROSECUTOR

V.

Zejnil DELALIC,
Zdravko MUCIC (aka "PAVO"),
Hazim DELIC and Esad LANDŽO (aka "ZENGA")

("*CELEBICI* Case")

JUDGEMENT

Counsel for the Accused:

Mr John Ackerman and Ms Edina Rešidovic for Zejnil Delalic
Mr Tomislav Kuzmanovic and Mr Howard Morrison for Zdravko Mucic
Mr Salih Karabdic and Mr Tom Moran for Hazim Delic
Ms Cynthia Sinatra and Mr Peter Murphy for Esad Landžo

The Office of the Prosecutor:

Mr Upawansa Yapa
Mr William Fenrick
Mr Christopher Staker
Mr Norman Farrell
Ms Sonja Boelaert-Suominen
Mr Roeland Bos

572. C. The Trial Chamber's Refusal to Define Diminished Mental Responsibility

573. Landzo filed two grounds of appeal directed to the issue of diminished mental responsibility. The first was in these terms:[953]

> The Trial Chamber Erred in Law, Violated the Rules of Natural Justice, and the Principle of Certainty in Criminal Law, and Denied Appellant a Fair Trial, When It Refused to Define the Special Defence of Diminished Mental Responsibility Which the Appellant Specifically Raised.

574. During the trial, Landzo moved before the Trial Chamber for rulings as to the definition of this "special defence", where the onus lay and the burden (or standard) of proof involved.[954] He argued that "diminished capacity"[955] was a "prolific defence relied upon in many jurisdictions", and that it was "best known as having been derived from the Homicide Act of 1957 from England".[956] Then, having referred to a number of decisions in England concerning the Homicide Act, Landzo submitted that the English definition of diminished responsibility, its burden of proof and its standard of proof should be adopted by the Trial Chamber when considering the evidence proffered by him.[957] In his summary, he submitted:

> The special defence of diminished capacity as envisioned by the framers of the Statute and Rules of this Tribunal should be as follows: where a person kills or is a party to a killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omission in doing or being a party to the killing.[958]

575. The Trial Chamber, noting that the "special defence" was, by reason of Rule 67(A)(ii), "a plea offered by the Defence", ruled (in accordance with Landzo's submission) that a defendant offering such a plea carried the burden of proving it on the balance of probabilities,[959] but it reserved its decision as to the appropriate definition of that defence.[960]

576. This refusal by the Trial Chamber is said by Landzo to have violated the principles of certainty in the criminal law,[961] and of *nullum crimen sine lege*,[962] or *ex post facto* law (as it was described by counsel for Landzo).[963] These objections are misconceived. The law to be applied must be that which existed at the time the acts upon which the charges are based took place. However, the subsequent identification or interpretation of that law by the Tribunal, whenever that takes place, does not alter the law so as to offend either of those principles .[964]

577. Landzo also submitted that the refusal by the Trial Chamber to define the " special defence" in advance of evidence being given in relation to it denied him a fair trial.[965] It is, however, no part of a Trial Chamber's obligation to define such issues *in advance*. Its obligation is to rule upon issues at the appropriate time, after all of the relevant material has been placed before it and after hearing the arguments put forward by the parties. It may well be considered to be appropriate or convenient in the particular case to give a ruling of this type upon an assumed or agreed basis , but whether it is appropriate or convenient to do so in any case is a matter for the Trial Chamber in that case to determine in the exercise of its discretion. There is no basis for suggesting that the exercise of the Trial Chamber's discretion in the present case miscarried in its refusal to give in

advance a definition of the "special defence".

578. Nor has any prejudice been demonstrated, as a result of that refusal, to show that Landzo's trial was unfair. First, the Trial Chamber substantially adopted the submission made by him as to the definition of the "special defence". After quoting Section 2(1) of the Homicide Act of 1957 of England and Wales the Trial Chamber said:

> Thus, the accused must be suffering from an abnormality of mind which has substantially impaired his mental responsibility for his acts or omissions. The abnormality of mind must have arisen from a condition of arrested or retarded development of the mind, or inherent causes induced by disease or injury.

And, later (after referring to an English authority):[966]

> It is, however, an essential requirement of the defence of diminished responsibility that the accused's abnormality of mind should substantially impair his ability to control his actions.[967]

Secondly, Landzo was not denied the opportunity of producing any evidence or making any submissions in relation to the "special defence". His counsel told the Appeals Chamber that, in effect, she had produced everything she had.[968] Thirdly, as will be seen when Ground 8 is considered, the "special defence" failed not through lack of evidence but because the Trial Chamber did not accept as true Landzo's evidence as to the facts upon which the psychiatric opinions were expressed .

579. This ground of appeal 7 is rejected.

IN THE TRIAL CHAMBER

Before:
Judge Adolphus G. Karibi-Whyte, Presiding
Judge Elizabeth Odio Benito
Judge Saad Saood Jan

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 16 November 1998

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

JUDGEMENT

The Office of the Prosecutor:
Mr. Grant Niemann
Ms. Teresa McHenry

Counsel for the Accused:
Ms. Edina Residovic, Mr. Eugene O'Sullivan, for Zejnil Delalic
Ms. Nihada Buturovic, Mr. Howard Morrison, for Zdravko Mucic
Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic
Ms. Cynthia McMurrey, Ms. Nancy Boler, for Esad Landzo

11. Motion for Judgement of Acquittal

81. At the conclusion of the case for the Prosecution, on 16 February 1998, the Defence indicated that it would move to dismiss the case against each of the accused. The Defence for Zejnil Delalic, Hazim Delic and Esad Landzo filed a joint Defendant's Motion for Judgement of Acquittal or in the alternative Motion to Dismiss the Indictment at the Close of the Prosecutor's Case on 20 February 1998 (hereafter "Motion to Dismiss")[155]. The Defence for Zdravko Mucic filed a separate motion for judgement of acquittal, or, in the alternative, dismissal, or provisional release[156]. Thereafter, the Prosecution filed a comprehensive response, setting forth its arguments as to why the motion should be denied.[157]

82. In its Decision on these motions, the Trial Chamber observed that the submission of a motion for judgement of acquittal constituted an effective closing of the Defence case, thereby entitling the Trial Chamber to determine the guilt or innocence of the accused, whereas a request for dismissal of the Indictment, if unsuccessful, would permit the accused to continue with their respective cases. In response to questions posed during oral argument, each of the Defence counsel submitted that they did not seek to close their respective cases at this time and that the motions should therefore be understood as requests for dismissal of all counts of the Indictment. Thereafter, the Trial Chamber held that, as a matter of law, the Prosecution had presented sufficient evidence relating to each element of the offences charged to allow a reasonable tribunal to convict, were such evidence to be accepted. Accordingly, the Trial Chamber dismissed the Motion to Dismiss and the motion submitted by Mr. Mucic, in so far as it constituted a request for dismissal of the Indictment. The Trial Chamber also dismissed Zdravko Mucic's motion in so far as it constituted a request for provisional release, finding that the issue was not appropriately raised.[158]