

ICTR-98-44-AR73.3

10 June 2004
(569/H - 562/H)

569/H
RMM



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:

**Judge Theodor Meron, Presiding Judge
Judge Mohamed Shahabuddeen
Judge Florence Mumba
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca**

Registrar:

Mr. Adama Dieng

Decision of:

10 June 2004

ICTR Appeals Chamber
Date: 10 June 2004
Action: PG
Copied To: Concerned Judges

Mathieu NGIRUMPATSE

v.

THE PROSECUTOR

Case No. ICTR-98-44-AR73.3

Parties, Judicial Archives
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**DECISION ON PROSECUTOR'S URGENT MOTION FOR
EXTENSION OF TIME LIMIT**

Counsel for the Prosecution

Mr. Don Webster
Mr. Gregory Lombardi

Counsel for the Defence

Mr. Charles Roach
Mr. Frédéric Weyl

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
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NAME / NOM: *ROSETTE MUZIERO-MORRISON*
SIGNATURE: *[Signature]* DATE: *10/06/04*

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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 ("Appeals Chamber" and "International Tribunal," respectively) is seised of the "Prosecutor's Urgent Motion to Extend the Time Limit to Respond to l'appel de la défense de M. Ngirumpatse contre la décision de la Chambre no. III en date du 13 février 2004 'relative à la requête du Procureur aux fins d'être autorisé à modifier l'acte d'accusation' and Solemn Declaration of Gregory Lombardi in Support," filed by the Prosecution on 7 May 2004 ("Motion"). The Appeals Chamber hereby decides the Motion on the basis of the written submissions of the parties.

Background

2. The Motion arises in the context of an appeal by the Accused Mathieu Ngirumpatse ("Appellant") against the decision of Trial Chamber III on 13 February 2004, which granted the Prosecution's request to amend the indictment in part and ordered the amended indictment to be filed on 18 February 2004 ("Impugned Decision").¹ The Appellant sought certification to appeal the Impugned Decision, which the Trial Chamber granted on 19 March 2004 ("Certification Decision").² The Appellant filed his appeal brief on 26 March 2004 ("Appeal").³ On 1 April 2004, the Presiding Judge of the Appeals Chamber issued an order assigning Judges to the Appeal ("Assignment Order").⁴

3. Under the practice of the International Tribunal and the relevant Practice Direction,⁵ the Prosecution's response to the Appeal was due on 8 April 2004, ten days after the filing of the Appeal. The Prosecution did not file its response within the prescribed time limit.

4. On 4 May 2004, the Appellant filed an additional brief pointing out the Prosecution's failure to file a response and inviting the Appeals Chamber to construe this failure as the Prosecution's acquiescence in the Appeal ("Additional Brief").⁶

¹ Decision on the Prosecutor's Motion for Leave to Amend the Indictment, 13 February 2004.

² Décision accordant à la défense la certification d'appel contre la décision du 13 février 2004 modifiant l'acte d'accusation et la décision orale du 23 février 2004 déclarant l'acte modifié conforme à la décision du 13 février 2004, dated 19 March 2004.

³ Appel de la défense de M. Mathieu Ngirumpatse contre la décision de la Chambre no. III en date du 13 février 2004 'relative à la requête du Procureur aux fins d'être autorisé à modifier l'acte d'accusation', 26 March 2004.

⁴ Order of the Presiding Judge to Assign Judges, 1 April 2004.

⁵ Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 16 September 2002; *Prosecutor v. Bizimungu et al.*, No. ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004, para. 9.

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5. On 6 May 2004, the Prosecution filed a short response to the Additional Brief, which explained that the Prosecution did not file a timely response to the Appeal because the trial attorneys in charge of the case had no knowledge that the Appeal had been filed until they received the Additional Brief.⁷ The Prosecution's filing also gave notice that it would seek an extension of time to file its response.

6. On 7 May 2004, the Prosecution filed the instant Motion, which seeks an unspecified extension of time for the filing of a response to the Appeal. The Appellant submitted a response opposing the Motion on 14 May 2004.⁸ The Prosecution did not file a reply.

7. On 28 May 2004, the Registrar made a submission ("Registry Submission") under Rule 33(B) of the Rules of Procedure and Evidence of the International Tribunal ("Rules").⁹

Discussion

8. Rule 116(A) affords the Appeals Chamber discretion to grant an extension of time limits upon a showing of good cause. A delay in the service of documents has been recognized as good cause to extend time limits.¹⁰ However, the determination of a request for an extension of time because of a delay in service or failure of service generally turns on the amount of evidence presented. Recently, in the case of *Prosecutor v. Kajelijeli*, the Appeals Chamber denied a motion for an extension of time because there was "no evidence that the Office of the Prosecutor did not receive the Decision of 17 December 2003."¹¹ Likewise, in *Prosecutor v. Krnojelac*, the Pre-Appeal Judge of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia noted that "the absence of evidence in support of the Defence claim that it received the Prosecution Appeal Brief four days after the filing date undermines the force of [the] argument."¹²

9. The Motion and the evidence submitted therewith disclose the following chain of events. Following the Certification Decision on 19 March, the Appeal was filed on 26 March 2004. That

⁶ Mémoire complémentaire au soutien de l'appel de la défense de M. Mathieu Ngirumpatse contre la décision de la Chambre no. III en date du 13 février 2004 'relative à la requête du Procureur aux fins d'être autorisé à modifier l'acte d'accusation', 4 May 2004.

⁷ Prosecutor's Response to "Mémoire complémentaire au soutien de l'appel de la défense de M. Mathieu Ngirumpatse contre la décision de la Chambre no. III en date du 13 février 2004 'relative à la requête du Procureur aux fins d'être autorisé à modifier l'acte d'accusation'", 6 May 2004.

⁸ Mémoire en réplique sur la "Prosecutor's Response to 'Mémoire complémentaire au soutien de l'appel de la défense de M. Mathieu Ngirumpatse contre la décision de la Chambre no. III en date du 13 février 2004 'relative à la requête du Procureur aux fins d'être autorisé à modifier l'acte d'accusation' ", 14 May 2004.

⁹ Submission of the Registrar Under Rule 33(B) of the Rules of Procedure and Evidence, 28 May 2004.

¹⁰ *Prosecutor v. Delalić et al.*, No. IT-96-21-A, Order on Emergency Motions by Hazim Delić and Zdravko Mucić for Extensions of Time to File Reply to the Prosecutor's Respondent Brief, 30 September 1999, p. 2.

¹¹ *Prosecutor v. Kajelijeli*, No. ICTR-98-44A-A, Decision on Prosecution Urgent Motion for Acceptance of Prosecution Notice of Appeal Out of Time, 23 January 2004, p. 3.

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same day, the Court Management Section of the Registry ("CMS") drew up a document entitled "Appeals - Proof of Service" ("Proof of Service"). This document appears to be a standard form prepared for this case and lists several persons beside the headings "To:", "From:", and "CC:". A box appears beside each name and, where applicable, an X is placed in the box. The Prosecutor submits that CMS, as a matter of regular practice, checks the box of the persons to whom service of the particular document is to be made, subsequently effects service and obtains a signature confirming receipt from each person whose name is checked.

10. The Proof of Service pertaining to the Appeal shows two intended recipients of the Appeal within the Office of the Prosecutor: "M. Warrett, Chief OTP [sic]" and "Don Webster Trial Attorney in charge of case."¹³ However, there is only one signature attesting to receipt next to the name of a Prosecution attorney, namely next to the name of "M. Warrett." This signature is presumably that of Ms. Melanie Werrett, Chief of Prosecutions, or of someone authorized to receive documents on her behalf. No signature appears next to the name of Mr. Don Webster, the trial attorney in charge of this case.

11. The Prosecution contends that neither Mr. Webster nor any other person actively involved in the case received a copy of the Appeal. Indeed, it appears that Ms. Werrett received the only copy ever delivered to the Office of the Prosecutor by CMS. The Prosecution argues that this represents a lapse in the normal practice of CMS for which the Prosecution should not be held responsible.

12. In response, the Appellant points out that there is no dispute that one attorney at the Office of the Prosecutor received the Appeal on 29 March 2004. The Appellant submits that the Prosecutor cannot expect service of documents on more than one attorney. Indeed, the Appellant points out that such a privilege is consistently denied to the Defence, even though the Appellant's defence team consists of two attorneys, one resident in Canada and one in France; documents filed in the case are only ever served on lead counsel in Canada, despite requests that documents also be served on co-counsel in France.

13. The Appellant also points out that the Prosecution was on notice that the Appeal would be filed on or before 26 April 2004. The Appellant had sought and obtained certification from the Trial Chamber to file the Appeal. The Defense claims that the Prosecution should have expected that the Appeal would be filed within seven days of the Certification Decision of 19 April, as required by Rule 73(C) of the Rules.

¹² *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Decision on Request for Extension of Time, 16 September 2002, pp. 2-3.

¹³ Motion, Exhibit B.

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14. The Appellant also argues that the Assignment Order of 1 April, which specifically noted that the Appeal was "filed by counsel for Mathieu Ngirumpatse on 26 March 2004," was served on Ms. Melanie Werrett and Mr. James Stewart, Chief of Prosecutions and Senior Appeals Counsel respectively, on 2 April 2004.¹⁴ The Appellant therefore contends that the Prosecution had reason to know that the Appeal had been filed no later than 2 April. The Appellant contends that disorganization within the internal structure of the Office of the Prosecutor cannot be considered grounds for an extension of time.

15. The Registry, in its separate submission, asserts that service on one member of the Office of the Prosecutor, and particularly the Chief of Prosecutions, is sufficient service on the Prosecutor. The Registry opposes the Prosecution's position, which it perceives to be "that the Trial Team has to be served mandatorily over and above the Prosecutor's Office."¹⁵ The Registry Submission does not explain why the Proof of Service contains an X next to the name of both Ms. Werrett and Mr. Webster.

16. Whether CMS normally distributes documents in this case to both Ms. Werrett and Mr. Webster is not of great importance. In this particular circumstance, it is clear that something went awry. Either CMS intended to deliver the Appeal to Mr. Webster – which would explain the X beside his name – but for reasons unexplained did not do so, or CMS meant to deliver the Appeal to Ms. Werrett only, but mistakenly indicated on the Proof of Service that it would also be delivered to Mr. Webster.

17. Whatever the nature of the error, however, it would have been easily remedied if the Prosecution attorneys responsible for the Appeal had inquired, either of CMS or of the Defence, as to the status of the Appeal which had been certified on 19 March and was due on 26 March. Moreover, the confusion with regard to the filing of the Appeal does not apply to the Assignment Order served on 2 April, which appears to have been properly served on Ms. Werrett and Mr. Stewart. If these recipients were not responsible for monitoring the Appeal, as the Prosecution contends, it would have been simple enough to transmit the Assignment Order to the attorneys who were. Those attorneys would then have realized that both the Appeal and the Assignment Order had been in their office as of 2 April and would have been able to make a timely motion for an extension of time. As it appears, however, the Prosecution took no action until the Appellant filed his Additional Brief, which was served on and signed for by Mr. Webster or someone acting on his behalf.

¹⁴ Additional Brief, Annex 3.

¹⁵ Registry Submission, p. 3.

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18. The Appeals Chamber concludes that the arguments put forward by the Prosecution do not demonstrate good cause for an extension of time limit. There is no question that the Appeal and the Assignment Order referencing the filing of the Appeal were served on the Office of the Prosecutor within a reasonable time of their filing. Moreover, it is plain that the Prosecution should have expected the filing of the Appeal following the granting of certification and could have easily discovered it by making a limited inquiry with CMS, the Defence, or within its own office.

19. Given the difficulties for the Appeals Chamber to decide an appeal based solely on one-sided briefing, the Appeals Chamber is of the opinion that the Prosecution's submissions would be beneficial in deciding the Appeal. In this respect, it is in the interests of justice to afford the Prosecution a brief period of time in which to file its submissions. These circumstances constitute good cause within the meaning of Rule 116(A) of the Rules.

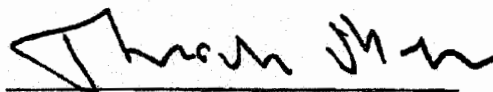
20. The Prosecution has not filed its response in the interim and moved for it to be accepted out of time, which would have been the preferable practice. Nor does the Prosecution's Motion specify the length of the extension of time it seeks. The result has been that the Prosecutor has had a significantly longer time to consider its response than is normally provided; even if the Prosecution attorneys in charge of the Appeal only became aware of it on 6 May 2004, the ten-day period for the filing of a response would have expired on Monday, 17 May 2004. Given that the Prosecution has had more than three weeks to consider the Appeal, the Prosecution is expected to file its response promptly.

Disposition

21. For the foregoing reasons, the Appeals Chamber finds that there is good cause to extend the time limit for the Prosecution to file a response. The Appeals Chamber therefore **GRANTS** the Motion and **ORDERS** the Prosecution to file its response on or before 14 June 2004.

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



Theodor Meron

Presiding Judge of the Appeals Chamber

Done this 10th day of June 2004,
At The Hague,
The Netherlands.

Judge Weinberg de Roca appends a dissenting opinion to this decision.

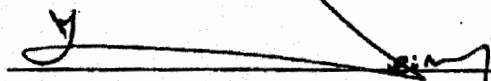
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DISSENTING OPINION OF JUDGE WEINBERG DE ROCA

1. For the reasons set out in paragraphs 1 to 18 and paragraph 20 (excluding the final sentence) of the Appeals Chamber's decision, I find that the Prosecution has failed to demonstrate good cause for an extension of time. Thus, I would dismiss the Prosecution's motion for an extension of time.



Judge Inés Mónica ~~Weinberg~~ de Roca

Done this 10th day of June 2004,
At The Hague,
The Netherlands.