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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

Before Judges: Arlette Ramarason, presiding
Taghrid Hikmet
Joseph Masanche

Registrar: Adama Dieng

Date: 30 April 2010

THE PROSECUTOR
v.
ILDEPHONSE HATEGEKIMANA

Case No. ICTR-00-55B-T

JUDICIAL AUTHORITY
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**DECISION ON HATEGEKIMANA'S MOTION FOR WITHDRAWAL OF COUNSEL
AND ADJOURNMENT OF CLOSING ARGUMENTS**

Office of the Prosecutor:
William Egbe
Peter Tafah
Guilain Disengi Mugeyo

Defence Counsel:
A.R. Dovi
Ata-Quam-Dovi-Avouyi

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INTRODUCTION

1. In a Motion, dated 19 April 2010, the Accused Ildephonse Hategekimana requested the withdrawal of his Lead Counsel and an adjournment of Closing Arguments, scheduled for 26 April 2010, until a later date.

Procedural History

2. The Accused's trial before the present bench opened on 16 March 2009. The Prosecution case closed on 4 May 2009, and, on 6 October 2009, the Defence closed its case.

3. On 19 October 2009, the Chamber issued a Scheduling Order instructing the Parties to file their Closing Briefs by 15 January 2010 and to present their Closing Arguments on 25 February 2010.¹ On 13 January 2010, the Chamber granted a Defence request for an extension of time to file the Closing Briefs.² Accordingly, the Chamber ordered the Parties to file their Closing Briefs no later than 1 February 2010 and also postponed the Closing Arguments until 8 April 2010.³

4. The Prosecution and the Defence filed their Closing Briefs on 1 February 2010.⁴

5. On 16 March 2010, the Chamber issued another Order to postpone the Parties' Closing Arguments until 26 April, 2010 to afford sufficient time for translation into both French and English of the Closing Briefs.⁵

6. On 30 March 2010, the Accused wrote to Mr. Pascal Besnier, Chief of the Defence Counsel and Detention Management Section (DCDMS), to complain about a breakdown of the relationship with Lead Counsel assigned to his case, Robert Dovi.⁶ Attached to the correspondence to Mr. Besnier was a copy of an earlier letter from the Accused to Counsel Dovi, dated 22 March 2010, requesting his withdrawal as Lead Counsel. On 1 April 2010, Mr. Besnier met with the Accused at the United Nations Detention Facility (UNDF) to discuss the matter.

7. On 6 April 2010, the Accused wrote to the Registrar to request the withdrawal of his Lead Counsel.⁷ In this letter, the Accused stated his willingness to work with Co-Counsel in

¹ *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-T, Scheduling Order with Regard to Closing Briefs and Closing Arguments (TC), 19 October 2009.

² *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-T, Decision Regarding Motions for Extension of Time to File Closing Briefs and to Present Closing Arguments (TC), 13 January 2010.

³ *Hategekimana*, Decision Regarding Motions for Extension of Time to File Closing Briefs and to Present Closing Arguments, Orders I and II.

⁴ Prosecutor's Closing Brief, filed on 1 February 2010; *Mémoire Final de la Defense D'Ildephonse Hategekimana*, filed on 1 February 2010.

⁵ *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-T, Order Rescheduling Closing Arguments (TC), 16 March 2010.

⁶ *Rappel de ma correspondance datée du 22 mars 2010*, filed on 30 March 2010. attached as Annex B to 6 April 2010 letter to the Registry; Mr. Dovi responded to the Accused's allegations in a letter, dated 12 April 2010, filed with the Tribunal on 21 April 2010.

⁷ *Demande de Retrait de mon dossier de Maître A. Robert Dovi*, filed on 6 April 2010.

preparation for the Closing Argument in the case on 26 April 2010, as a provisional solution until the appointment of replacement Counsel.

8. In a letter, dated 15 April 2010, the Registrar denied the Accused's request for withdrawal of Lead Counsel. In this letter, the Registrar specified that, pursuant to Article 19 of the Directive on the Assignment of Defence Counsel, the Accused had not shown the existence of exceptional circumstances for the requested withdrawal, and had not established that the alleged communication problems were the fault of Counsel, or that such alleged problems had prejudiced his defence. Further, the Accused had been represented by Counsel at every evidentiary hearing, and at no time during any phase of pre-trial or trial proceedings did the Accused indicate any problem concerning his Lead Counsel's representation. The Registrar also noted that, since the evidentiary phase of the trial had closed, the withdrawal of Lead Counsel at this ultimate stage of Closing Arguments would delay the proceedings with no amelioration of the Accused's defence.

9. On 14 April 2010, the Accused, in a letter addressed to the Presiding Judge, requested an adjournment of Closing Arguments until a later date.⁸

10. On 19 April 2010, the Accused filed the present Motion.⁹

11. The Prosecution, in a Memorandum of 21 April 2010, opposed the Accused's written requests, addressed, respectively, to the Registrar on 6 April 2010 and to the Presiding Judge on 14 April 2010, for the withdrawal of Lead Counsel and an adjournment of Closing Arguments.¹⁰

SUBMISSIONS OF THE PARTIES

The Accused Hategekimana

12. In support of his Motion, Hategekimana states that Lead Counsel has failed to regularly communicate with him and has provided ineffective assistance in the preparation and conduct of his case, resulting in the Accused's loss of confidence in Dovi's representation of his interests.¹¹ Specifically, the Accused submits that the first strain in their attorney-client relationship can be traced back to Counsel's refusal to discuss the delay in replacing his Legal Assistant Koffi, in March or April 2009. Following this incident, the Accused maintains, his relationship with Lead

⁸ *Demande de report de l'Audience du 26 avril 2010*, 14 April 2010.

⁹ *Requête en Extrême Urgence de L'Accusé Ildephonse Hategekimana aux Fins de Reporter à une Date Ulérieure, lse Plaidoières Finales Dans son Procès Prévues à L'Audience du 26 Avril 2010*, filed on 19 April 2010.

¹⁰ Prosecutor's [R]esponse to [R]equest of [A]ccused Ildephonse Hategekimana for [W]ithdrawal of his case file from Lead Counsel Robert Dovi and for [A]djournment of the [D]ate [S]et for [C]losing [A]rguments (26 April 2010), filed on 21 April 2010. The Prosecution filed a Corrigendum on 22 April 2010 correcting typographical errors in their response.

¹¹ *Requête en Extrême Urgence de L'Accusé Ildephonse Hategekimana aux Fins de Reporter à une Date Ulérieure, les Plaidoières Finales Dans son Procès Prévues à L'Audience du 26 Avril 2010*, filed on 19 April 2010, paras. 24-28, 31, 33-37, 40; Letters of 22 and 30 March 2010 from Hategekimana to Counsel. Dovi, attached as Annexes A and B respectively to the Accused's Motion.

Counsel degenerated, resulting in difficult or strained communication and extremely short and finally no visits to consult with him at UNDF after 1 February 2010.¹²

13. The Accused makes four specific allegations of ineffective assistance of counsel: first, that Lead Counsel “refused” to represent him at the hearing of testimony of Prosecution Witness BYO by video conference in Kigali on 4 May 2009;¹³ second, that Lead Counsel delayed by one month the appointment of a new legal assistant to replace Assistant Koffi;¹⁴ third, that Lead Counsel did not actively participate in the preparation of either the Defence Motion for Acquittal or the Closing Brief;¹⁵ and fourth, that Lead Counsel failed to conduct sufficient investigations and file relevant exhibits for the Accused’s defence.¹⁶

The Prosecution

14. In its Response, the Prosecution argues that Hategekimana’s allegations “do not establish the absence of communication between the accused and his defence team,”¹⁷ given that the Accused attended all trial sessions and instructed the Defence team throughout the case. The Prosecution points out that the Accused failed to notify the Trial Chamber of these allegations of inadequate representation until after Closing Briefs were filed by both Parties. The Prosecution maintains that, “because the parties have gone past the stage of presentation of evidence, [r]emoval of Counsel from a case at this stage will be extraordinary and extreme indeed.”¹⁸

Lead Counsel Robert Dovi

15. Lead Counsel Dovi denies the Accused’s allegations in their entirety. In a letter to the Accused, dated 12 April 2010, Dovi recalls their last meeting on 2 April 2010 at UNDF, where the Defence team reviewed their work in preparation for the Closing Arguments in the case and discussed problems related to mail delivery. He also refers to a meeting held at UNDF on 2 February 2010, following the submission of the Closing Brief, where the Accused expressed his “entire satisfaction” with the Defence team’s work.¹⁹ Lead Counsel asserts that he has diligently represented the Accused in all phases of the proceedings, including the successful appeal,

¹² *Requête en Extrême Urgence de L'Accusé Ildephonse Hategekimana aux Fins de Reporter à une Date Ulérieure, les Plaidoiries Finales Dans son Procès Prévu à L'Audience du 26 Avril 2010*, filed on 19 April 2010, para. 26.

¹³ *Requête en Extrême Urgence de L'Accusé Ildephonse Hategekimana aux Fins de Reporter à une Date Ulérieure, les Plaidoiries Finales Dans son Procès Prévu à L'Audience du 26 Avril 2010*, filed on 19 April 2010, paras. 28-29; Letters of 22 and 30 March 2010 from Hategekimana to Counsel. Dovi, attached as Annexes A and B, respectively to the Accused’s Motion

¹⁴ *Requête en Extrême Urgence de L'Accusé Ildephonse Hategekimana aux Fins de Reporter à une Date Ulérieure, les Plaidoiries Finales Dans son Procès Prévu à L'Audience du 26 Avril 2010*, filed on 19 April 2010, paras. 25-27; Letters of 22 and 30 March 2010 from Hategekimana to Counsel. Dovi, attached as Annexes A and B respectively to the Accused’s Motion

¹⁵ Letters of 22 and 30 March 2010 from Hategekimana to Counsel. Dovi, attached as Annexes A and B respectively to the Accused’s Motion.

¹⁶ Letters of 22 and 30 March 2010 from Hategekimana to Counsel. Dovi, attached as Annexes A and B respectively to the Accused’s Motion.

¹⁷ Corrigendum to Prosecutor’s Response, filed on 22 April 2010, para. 3.

¹⁸ Prosecutor’s Response, filed on 21 April 2010, paras. 4-5.

¹⁹ Letter from Lead Counsel Dovi to the Accused, dated 12 April 2010, para. 6, p.1 (“votre entière satisfaction pour le travail fourni par l’équipe jusqu’au dépôt du mémoire final”),

pursuant to Rule 11 *bis*, since 2004.²⁰ Acknowledging his professional obligations both to the Accused and the Tribunal, Dovi confirms that he is prepared to conduct the Closing Argument on the Accused's behalf.²¹

DELIBERATIONS

16. The Chamber has carefully reviewed the information presented to determine whether good cause exists for a finding of exceptional circumstances for the removal of Lead Counsel, pursuant to Rule 45 (H), which provides:

Under *exceptional circumstances*, at the request of the suspect or accused or his counsel, the Chamber may instruct the Registrar to replace an assigned counsel, upon *good cause* being shown and after having been satisfied that the request is not designed to delay proceedings (emphasis added).²²

I. Exceptional Circumstances

Allegation of Lead Counsel's Failure to Communicate with the Accused

17. According to established jurisprudence, exceptional circumstances may exist upon a showing of compelling evidence of an obvious breakdown in communication between the Accused and his Counsel.²³

18. The Accused has asserted that the "absence of physical or telephone contact, quasi-non-existent communication, and the impossibility of any cooperation" with Lead Counsel constitute exceptional circumstances, which justify Counsel Dovi's withdrawal.²⁴ The Chamber does not agree.

19. Not until 14 April 2010, twelve days before Closing Arguments were scheduled to be heard, did the Chamber receive any written notification of a breakdown in communication between the Accused and his Lead Counsel. The Accused had not previously indicated to the Tribunal, during the five and a half years that he was represented by Counsel Dovi, from September 2004 through the pre-trial and evidentiary phases of the present case, of any difficulties in his communication and working relationship with Lead Counsel.

20. The Chamber notes the Registrar's Decision, issued on 15 April 2010, denying the Accused's request of 6 April 2010 for removal of Lead Counsel. The Registrar concluded that

²⁰ Letter from Lead Counsel Dovi to the Accused, dated 12 April 2010, paras. 4-5, p.1

²¹ Letter from Lead Counsel Dovi to the Accused, dated 12 April 2010, para. 7, p.2.

²² Rules of Evidence and Procedure, Rule 45 (H); *Prosecutor v. Nyiramasuhuko and Ntahobali*, Case No. ICTR-97-2, Decision on Ntahobali's Motion for Withdrawal of Counsel (TC), 22 June 2001, para. 12.

²³ Decision on Ntahobali's Motion for Withdrawal of Counsel (TC), 22 June 2001, paras. 12-14; *Prosecutor v. Bagosora*, Case No. ICTR 96-7-T, Decision on the Request of the Accused for Change of Assigned Counsel (TC), 26 June 1997.

²⁴ *Requête en Extrême Urgence de L'Accusé Ildephonse Hategekimana aux Fins de Reporter à une Date Ulérieure, les Plaidoières Finales Dans son Procès Prévues à L'Audience du 26 Avril 2010*, filed on 19 April 2010, para. 45.

the Accused had failed to establish facts to substantiate his allegations of a breakdown in communication, demonstrating exceptional circumstances for the removal of Counsel Dovi, pursuant to Article 19 of the Directive on the Assignment of Defence Counsel.²⁵

21. The Chamber finds that the Accused has failed to provide compelling evidence of a lack of meaningful communication between himself and Lead Counsel throughout the proceedings, pursuant to Rule 45 (H).

Allegations of Ineffective Assistance of Counsel

22. Article 20 of the ICTR Statute guarantees an accused person's right to representation by competent counsel.²⁶

23. The Accused has made four specific allegations of Lead Counsel's ineffective assistance, which the Chamber has carefully considered.

24. Concerning the first allegation that Lead Counsel "refused" to represent the Accused during the hearing of Prosecution Witness BYO's testimony by video conference:²⁷ the Chamber notes that Lead Counsel was present in Arusha to represent the Accused, and that he conducted a lengthy cross-examination of the witness. As the Appeals Chamber has stated, "[W]hen the accused is represented, the presence of his counsel or co-counsel at the hearing is essential."²⁸

25. As the Chamber previously ruled on this matter during the proceedings on 4 May 2009:

"Although there is no Defence counsel physically present in Kigali, there is Defence counsel in Arusha at this court defending the interests of the Accused. Under these circumstances, the rights of the Accused are safeguarded pursuant to Article 20 of the Statute, and the witness can be cross-examined by counsel in court in Arusha."²⁹

26. Concerning the Accused's second allegation that Lead Counsel delayed by approximately one month the replacement of Legal Assistant Koffi:³⁰ The Chamber finds that the allegation lacks evidentiary foundation. Furthermore, as ICTR Trial Chamber I has stated:

²⁵ Document Réf ICTR/RO/04/10/129.

²⁶ See ICTR Statute, Article 20 (4) (A); Directive on the Assignment of Defence Counsel, Article 2; *Prosecutor v. Akayesu*, Case No. 96-4-A, Appeal Judgment, 1 June 2001. para. 76.

²⁷ *Requête en Extrême Urgence de L'Accusé Ildephonse Hategekimana aux Fins de Reporter à une Date Ulérieure, les Plaidoires Finales Dans son Procès Prévues à L'Audience du 26 Avril 2010*, filed on 19 April 2010, paras. 28-29; Letters of 22 and 30 March 2010 from Hategekimana to Counsel. Dovi, attached as Annexes A and B, respectively to the Accused's Motion

²⁸ *Nahimana et al.*, Appeal Judgment, para. 139, emphasis added.

²⁹ T. 4 May 2009 pp. 3-4.

³⁰ *Requête en Extrême Urgence de L'Accusé Ildephonse Hategekimana aux Fins de Reporter à une Date Ulérieure, les Plaidoires Finales Dans son Procès Prévues à L'Audience du 26 Avril 2010*, filed on 19 April 2010, paras. 25-27; Letters of 22 and 30 March 2010 from Hategekimana to Counsel. Dovi, attached as Annexes A and B respectively to the Accused's Motion

“It is clear that the accused is not entitled as of right to have co-counsel, investigators and assistants appointed; nor can he assert the right of decision over the appointment or termination of their contracts. As stated above, these matters are for Lead Counsel.”³¹

27. Concerning the Accused’s third allegation that Lead Counsel did not participate in the preparation of either the Defence Motion for Acquittal or the Closing Brief:³² The Chamber finds no factual basis to support the charge.

28. Concerning the Accused’s fourth allegation that Lead Counsel failed to investigate and tender relevant exhibits:³³ The Chamber finds that Hategekimana

“has not shown how the failure to carry out such investigations constituted an act of gross professional negligence on the part of his Counsel and that such failure resulted in a miscarriage of justice.”³⁴

29. For the foregoing reasons, the Chamber considers that that the Accused has failed to provide substantiated evidence of Lead Counsel’s ineffective assistance of counsel..

30. The Chamber finds that Accused’s allegations do not demonstrate good cause for the Chamber to find exceptional circumstances for the withdrawal of Counsel Dovi. Accordingly, the Accused’s motion to withdraw and replace Lead Counsel is denied.

II. Undue Delay

31. The Chamber finds that undue delay would result, and that no improved defence would be afforded by the withdrawal of Lead Counsel and the appointment of replacement Counsel at this ultimate stage of the proceedings. Replacement Counsel, unfamiliar with the case and tasked with the presentation of a Closing Argument in relation to evidence given during the trial proceedings, would undoubtedly need significant time for preparation. The Chamber is satisfied that Counsel Dovi, who has represented the Accused since September 2004, has extensive knowledge of the case and should conduct the proceedings to finality, in conformity with his professional obligations to the Accused and the Tribunal.

32. Having denied the Accused’s Motion for withdrawal of Lead Counsel, the Chamber finds no basis to grant an adjournment of the Closing Arguments.

³¹ *Prosecutor v. Ngeze*, Case No. ICTR 97-27-1, Decision on the Accused’s Request for Withdrawal of His Counsel (TC), 9 March 2001.

³² Letters of 22 and 30 March 2010 from Hategekimana to Counsel. Dovi, attached as Annexes A and B respectively to the Accused’s Motion.

³³ Letters of 22 and 30 March 2010 from Hategekimana to Counsel. Dovi, attached as Annexes A and B respectively to the Accused’s Motion.

³⁴ *Nahimana et. al.*, Appeal Judgment, para. 164.

FOR THE ABOVE REASONS, THE CHAMBER:

DENIES the Accused's Motion for the withdrawal of Counsel and for an adjournment of the hearing of Closing Arguments scheduled for 26 April 2010;

ORDERS The Parties to commence Closing Arguments immediately.

Arusha, 30 April 2010



Arlette Ramaroson
Presiding Judge



Joseph Masanche
Judge