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Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

122/H

*DF*

ICTR-05-82-A  
14<sup>th</sup> January 2011  
{122/H - 116/H}

IN THE APPEALS CHAMBER

**Before:** Judge Patrick Robinson  
Judge Mehmet Güney  
Judge Andréia Vaz  
Judge Theodor Meron  
Judge Carmel Agius

**Registrar:** Mr. Adama Dieng

**Decision of:** 14 January 2011

ICTR Appeals Chamber  
Date: 14<sup>th</sup> January 2011  
Action: R. Junit  
Copied To: Concerned Judges  
Parties, Judicial Archives,  
LOs, LSS  
*[Signature]*

**Dominique NTAWUKULILYAYO**

v.

**THE PROSECUTOR**

Case No. ICTR-05-82-A

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**DECISION ON DOMINIQUE NTAWUKULILYAYO'S MOTION  
FOR LEAVE TO AMEND HIS NOTICE OF APPEAL**

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**Counsel for Dominique Ntawukulilyayo**

Maroufa Diabira  
Dorothee Le Fraper du Hellen

**Office of the Prosecutor**

Hassan Bubacar Jallow  
James Arguin  
Alphonse Van  
Ousman Jammeh  
Priyadarshini Narayanan  
Deo Mbuto

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
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NAME / NOM: *KOFFI... KUMELID... A... AFANDE*  
SIGNATURE: *[Signature]* DATE: *14 Jan 2011*

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 “Tribunal”, respectively) is seized of “*Requête en amendement de l’Acte d’appel*” filed by Dominique Ntawukulilyayo (“Ntawukulilyayo”) on 7 December 2010 (“Motion”), in which he requests leave to amend his notice of appeal.<sup>1</sup>

#### A. Procedural Background

2. On 3 August 2010, Trial Chamber III of the Tribunal convicted Ntawukulilyayo of one count of genocide for aiding and abetting and ordering the killings of Tutsis at Kabuye hill on 23 April 1994, and sentenced him to 25 years of imprisonment.<sup>2</sup> The written Trial Judgement was filed in English on 6 August 2010 (“Trial Judgement”).

3. On 24 August 2010, the Pre-Appeal Judge denied Ntawukulilyayo’s request that the 30-day time limit for filing his notice of appeal commence from the service of the French translation of the Trial Judgement and that the 75-day time limit for filing his Appellant’s brief commence from the date of filing of his notice of appeal.<sup>3</sup> Ntawukulilyayo was nonetheless granted leave to file his Appellant’s brief within 45 days from the date on which the French translation of the Trial Judgement was served on him and his counsel.<sup>4</sup>

4. Ntawukulilyayo filed his Notice of Appeal on 6 September 2010.<sup>5</sup> The French translation of the Trial Judgement was served on him and his counsel on 3 December 2010.<sup>6</sup>

5. Ntawukulilyayo filed the present Motion on 7 December 2010, together with his Proposed Amended Notice of Appeal.<sup>7</sup> The Prosecution filed its response on 13 December 2010, to which Ntawukulilyayo replied on 16 December 2010.<sup>8</sup>

<sup>1</sup> Motion, para. 5, p. 4.

<sup>2</sup> *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Judgement and Sentence, dated 3 August 2010, filed 6 August 2010, paras. 457, 460, 461, 479.

<sup>3</sup> Decision on Dominique Ntawukulilyayo’s Motion for Extensions of Time for Filing Appeal Submissions, 24 August 2010 (“Decision of 24 August 2010”), paras. 3, 8, 10.

<sup>4</sup> Decision of 24 August 2010, para. 10.

<sup>5</sup> *Acte d’appel*, 6 September 2010 (“Notice of Appeal”).

<sup>6</sup> See Information to the Appeals Chamber as Directed in the Decision on Dominique Ntawukulilyayo’s Motion for Extensions of Time for Filing Appeal Submissions Dated 29 [sic] August 2010, 3 December 2010, para. 2.

<sup>7</sup> Motion, Annex “*Acte d’appel amendé*” (“Proposed Amended Notice of Appeal”).

<sup>8</sup> Prosecution Response to Ntawukulilyayo’s “*Requête en amendement de l’Acte d’appel*”, 13 December 2010 (“Response”); *Réplique de Ntawukulilyayo à la Réponse du Procureur à sa Requête en amendement de l’Acte d’appel*, 16 December 2010 (“Reply”).

## B. Submissions

6. Ntawukulilyayo seeks leave to replace his Notice of Appeal with the Proposed Amended Notice of Appeal in order to withdraw Grounds V and VII of his Notice of Appeal and add a new ground of appeal relating to the *actus reus* of aiding and abetting.<sup>9</sup> In support of his request, Ntawukulilyayo stresses that his Notice of Appeal was prepared and filed before he and his Lead Counsel could read the Trial Judgement in a language they understand.<sup>10</sup> He contends that, in these circumstances, his Defence team was not in a position to properly carry out its work.<sup>11</sup> He submits that the analysis of the French translation of the Trial Judgement allowed him and his team to identify an error of the Trial Chamber relating to the *actus reus* of aiding and abetting, which, if pleaded on appeal, would in his view invalidate his conviction for aiding and abetting.<sup>12</sup> Ntawukulilyayo also argues that denying the proposed addition would result in a miscarriage of justice.<sup>13</sup> He adds that neither the addition of the Proposed New Ground of Appeal, nor the withdrawal of Grounds V and VII would prejudice the Prosecution or delay the proceedings.<sup>14</sup>

7. The Prosecution does not oppose Ntawukulilyayo's request to withdraw Grounds V and VII,<sup>15</sup> but opposes the addition of the Proposed New Ground of Appeal on the ground that Ntawukulilyayo fails to demonstrate good cause.<sup>16</sup> It submits that Ntawukulilyayo fails to show why his asserted inability to understand the Trial Judgement in English should affect the preparation of his notice of appeal.<sup>17</sup> In this regard, it argues that the determination of potential grounds of appeal and the identification of potential errors of law fall primarily within the purview of Defence counsel, and that it is unlikely that Ntawukulilyayo's own reading of the French translation of the Trial Judgement would have generated the proposed amendment, which primarily concerns an issue of law.<sup>18</sup> The Prosecution also submits that the fact that Lead Counsel was himself unable to read the English version of the Trial Judgement does not constitute good cause.<sup>19</sup> It emphasises that Ntawukulilyayo's request for an extension of time to file his notice of appeal on grounds that his Lead Counsel required the French translation of the Trial Judgement was denied and that the Pre-Appeal Judge specifically noted that Ntawukulilyayo's Co-Counsel was able to

<sup>9</sup> Motion, para. 5, p. 4; Reply, p. 6. See Proposed Amended Notice of Appeal, Ground IV ("*Sur l'actus reus de l'aide et encouragement*"), para. 30 ("Proposed New Ground of Appeal").

<sup>10</sup> Motion, para. 9.

<sup>11</sup> Motion, para. 9.

<sup>12</sup> Motion, para. 10. See also Reply, para. 13.

<sup>13</sup> Motion, para. 10.

<sup>14</sup> Motion, paras. 10, 11. See also Reply, para. 14.

<sup>15</sup> Response, paras. 2, 10, 13. The Prosecution notes that Ground VII did not constitute a ground of appeal as such. See *ibid.*, para. 10.

<sup>16</sup> Response, paras. 2, 9, 13.

<sup>17</sup> Response, para. 4.

<sup>18</sup> Response, para. 4.

<sup>19</sup> Response, para. 5.



discuss any possible grounds of appeal with Ntawukulilyayo and his Lead Counsel.<sup>20</sup> The Prosecution further asserts that Ntawukulilyayo does not substantiate his claim that the proposed addition is necessary or that its exclusion would result in a miscarriage of justice.<sup>21</sup> It also contends that the asserted absence of prejudice to the Prosecution does not, on its own, constitute good cause, and that the addition of an entirely new ground of appeal would substantially broaden the scope of the appeal.<sup>22</sup>

8. In addition, the Prosecution identifies other variations between the initial Notice of Appeal and the Proposed Amended Notice of Appeal for which Ntawukulilyayo did not seek specific authorisation.<sup>23</sup> It submits that, should the Appeals Chamber grant Ntawukulilyayo's request to abandon Grounds V and VII, the Chamber should also consider the parts of the Notice of Appeal omitted in the Proposed Amended Notice of Appeal as being abandoned by Ntawukulilyayo.<sup>24</sup>

9. Ntawukulilyayo replies that his Lead Counsel's ability to take "primary responsibility for the Defence" was significantly impaired by the unavailability of the French translation of the Trial Judgement.<sup>25</sup> He also argues that, even if some members of the Defence team understand English, the working language of the team is French.<sup>26</sup> In response to the Prosecution's argument regarding his capacity to identify a legal error, Ntawukulilyayo contends that the Proposed New Ground of Appeal also contains allegations of errors of fact.<sup>27</sup> He further submits that the additional variations identified by the Prosecution are minor and do not affect the substance of the Notice of Appeal.<sup>28</sup>

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<sup>20</sup> Response, para. 5, referring to Decision of 24 August 2010, para. 7.

<sup>21</sup> Response, paras. 6, 8.

<sup>22</sup> Response, para. 7.

<sup>23</sup> Response, para. 11. The Prosecution points out that (i) paragraph 5 of the Notice of Appeal is missing in the Proposed Amended Notice of Appeal; (ii) the phrase "*ainsi que la mens rea de l'auteur allégué*" in paragraph 31 is missing in the Proposed Amended Notice of Appeal; and (iii) the title "*Sur les modes de responsabilité pénale retenus*" at page 11 of the Notice of Appeal was substituted with "*Sur l'actus reus de l'ordre*" in the Proposed Amended Notice of Appeal.

<sup>24</sup> Response, para. 12.

<sup>25</sup> Reply, para. 9, referring to Directive on the Assignment of Defence Counsel, dated 14 March 2008, Article 15(E).

<sup>26</sup> Reply, para. 9.

<sup>27</sup> Reply, para. 11.

<sup>28</sup> Reply, paras. 16, 17.

## C. Discussion

### 1. Applicable Standard

10. In accordance with Rule 108 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), the Appeals Chamber may, on good cause being shown by motion, authorise a variation of the grounds of appeal set out in the notice of appeal. Such a motion should be submitted as soon as possible after identifying the new alleged error of the Trial Chamber or after discovering any other basis for seeking to vary the notice of appeal.<sup>29</sup> Generally, the motion must explain precisely what amendments are being sought and show, with respect to each amendment, that the "good cause" requirement is satisfied.<sup>30</sup> The "good cause" requirement encompasses both good reason for including the proposed new or amended grounds of appeal and good reason as to why the proposed amendments were not included or correctly articulated in the original notice of appeal.<sup>31</sup>

### 2. Analysis

11. In the absence of objection from the Prosecution and given the nature of Grounds V and VII of the Notice of Appeal, the Appeals Chamber is satisfied that there is good cause for allowing their withdrawal.

12. Turning to the addition of the Proposed New Ground of Appeal, the Appeals Chamber recognises that working solely on the basis of the English language version of the Trial Judgement may have affected the work of Ntawukulilyayo's Defence team, given that the team's primary working language is French and the Lead Counsel's limited ability to understand English.<sup>32</sup> Contrary to the Prosecution's submission, the Pre-Appeal Judge expressly acknowledged the possibility of an amendment of the Notice of Appeal after the filing of the French version of the Trial Judgement if good cause were shown.<sup>33</sup> The Appeals Chamber notes that Ntawukulilyayo was provided with the Trial Judgement in a language he understands only after the filing of his Notice of Appeal. The Appeals Chamber therefore accepts Ntawukulilyayo's submission that the addition sought arises from the unavailability of the French version of the Trial Judgement at the time the

<sup>29</sup> See, e.g., *Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, Decision on Renzaho's Motion to Amend Notice of Appeal, 18 May 2010 ("Renzaho Decision"), para. 9; *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-A, Decision on Callixte Kalimanzira's Motion for Leave to Amend his Notice of Appeal, 5 March 2010 ("Kalimanzira Decision"), para. 7; *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Anatole Nsengiyumva's Motion for Leave to Amend his Notice of Appeal, dated 28 January 2010, filed 29 January 2010 ("*Bagosora et al.* Decision"), para. 10.

<sup>30</sup> See, e.g., *Renzaho Decision*, para. 9; *Kalimanzira Decision*, para. 7; *Bagosora et al. Decision*, para. 10. See also Practice Direction on Formal Requirements for Appeals from Judgement, dated 4 July 2005, paras. 2, 3.

<sup>31</sup> See, e.g., *Renzaho Decision*, para. 9; *Kalimanzira Decision*, para. 7; *Bagosora et al. Decision*, para. 10; *Prosecutor v. Milan Lukic and Sredoje Lukic*, Case No. IT-98-32/1-A, Decision on Milan Lukic's Motion to Amend his Notice of Appeal, 16 December 2009, para. 10.

<sup>32</sup> See Decision of 24 August 2010, para. 7.

Notice of Appeal was drafted. Furthermore, without expressing any views on the merits of Ntawukulilyayo's appeal, the Appeals Chamber considers that there is a good reason for including the Proposed New Ground of Appeal since, if successful, it may result in the quashing of Ntawukulilyayo's conviction for aiding and abetting genocide.

13. The Appeals Chamber also notes Ntawukulilyayo's diligence in requesting the proposed addition; his Motion was filed within a few days of the service of the French translation of the Trial Judgement, before the filing of his Appellant's brief. Allowing the requested variation at this stage of the proceedings would therefore not result in any undue delay in the appeal proceedings, as Ntawukulilyayo would be in a position to make any necessary amendments to his Appellant's brief prior to its filing. While the addition of the Proposed New Ground of Appeal would indeed broaden the scope of Ntawukulilyayo's appeal, the Prosecution would not suffer prejudice as it would have sufficient time to analyse the Proposed New Ground of Appeal before the filing of its submissions in response.

14. In these circumstances, the Appeals Chamber is satisfied that there is good cause for allowing the addition of the Proposed New Ground of Appeal.

15. As regards the remaining variations between the original Notice of Appeal and the Proposed Amended Notice of Appeal,<sup>34</sup> the Appeals Chamber reminds Ntawukulilyayo that all proposed changes should be indicated in a request for leave to amend the notice of appeal.<sup>35</sup> The Appeals Chamber, however, notes that these additional variations are minor and do not affect the substance of the Notice of Appeal. In the absence of objection from the Prosecution to the substance of such variations, and in light of their nature, the Appeals Chamber considers that it is in the interests of justice to allow these minor variations.

16. Accordingly, the Appeals Chamber grants leave to Ntawukulilyayo to vary his Notice of Appeal by replacing it with the Proposed Amended Notice of Appeal. For the sake of clarity of the record, Ntawukulilyayo should file his Proposed Amended Notice of Appeal as a single document entitled Amended Notice of Appeal.

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<sup>33</sup> See Decision of 24 August 2010, para. 7.

<sup>34</sup> The Appeals Chamber refers to the variations identified in the Prosecution's Response, as well as the deletion of the phrase "*AUTORISE la Défense, le cas échéant, à amender son acte d'appel après la transmission d'une version française du jugement*" at page 13 of the Notice of Appeal. See *supra* fn. 23; Proposed Amended Notice of Appeal, p. 13.

<sup>35</sup> See *Kalimanzira* Decision, para. 14; *Bagosora et al.* Decision, para. 30.


**D. Disposition**

17. For the foregoing reasons, the Appeals Chamber **GRANTS** the Motion, and **INSTRUCTS** Ntawukulilyayo to file the Amended Notice of Appeal no later than 18 January 2011.

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

Done this 14<sup>th</sup> day of January 2011,  
At The Hague,  
The Netherlands.



  
Judge Patrick Robinson  
Presiding

**[Seal of the Tribunal]**