



**Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda**

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron

Registrar: Mr. Adama Dieng

Decision of: 27 January 2011

**Théoneste BAGOSORA
Aloys NTABAKUZE
Anatole NSENGIYUMVA
v.**

THE PROSECUTOR

Case No. ICTR-98-41-A

**DECISION ON ALOYS NTABAKUZE'S MOTION FOR STAY OF
PROCEEDINGS**

Counsel for Théoneste Bagosora

Raphaël Constant
Richard Perras

Counsel for Aloys Ntabakuze

Peter Erlinder
André Tremblay

Counsel for Anatole Nsengiyumva

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Hassan Bubacar Jallow
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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 “Tribunal”, respectively) is seised of a motion filed on 17 December 2010 by Aloys Ntabakuze (“Ntabakuze”) requesting the permanent stay of the appeal proceedings in his case,¹ as well as a motion filed by the Prosecution on 23 December 2010 to vary the word limit for its response to the Motion for Stay of Proceedings.²

A. Procedural Background

2. On 18 December 2008, Trial Chamber I (“Trial Chamber”) of the Tribunal rendered its judgement in the *Bagosora et al.* case.³ The Trial Chamber held Théoneste Bagosora, Anatole Nsengiyumva, and Ntabakuze guilty of genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and sentenced them to life imprisonment.⁴ They all lodged appeals against the Trial Judgement, challenging their convictions and sentence.⁵ The briefing in this case has now concluded and the appeal hearing is soon to be scheduled.

3. In his Motion for Stay of Proceedings, Ntabakuze requests a permanent stay of the proceedings related to his appeal, as well as the enlargement of “the word count attributable to the Motion”.⁶ The Prosecution responded on 23 December 2010 that Ntabakuze’s motion is manifestly without merit and should be dismissed.⁷ The same day, the Prosecution filed its Motion to Vary Word Limit, requesting that the Appeals Chamber authorise it to exceed the word limit permitted

¹ Exceptional Public Motion for a Permanent Stay, to Uphold the Rule of Law and Appearance of Justice, in Proceedings Before this Chamber, 17 December 2010 (“Motion for Stay of Proceedings”).

² Prosecutor’s Motion to Vary the Word Limit in: “Prosecutor’s Response to the ‘Exceptional Public Motion for Permanent Stay, to Uphold the Rule of Law and Appearance of Justice, in Proceedings Before this Chamber’”, 23 December 2010 (“Motion to Vary Word Limit”).

³ *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Judgement and Sentence, signed on 18 December 2008, filed on 9 February 2009 (“Trial Judgement”).

⁴ Trial Judgement, paras. 36, 38, 39, 2258, 2277-2279.

⁵ Notice of Appeal in the Interest of: Major Aloys Ntabakuze, 11 March 2009; Nsengiyumva’s Notice of Appeal, 13 March 2009; Notice of Appeal Appellant: Théoneste Bagosora, filed in French on 8 January 2010, English translation filed on 2 March 2010. *See also* Public Amended Notice of Appeal in the Interest of: Major Aloys Ntabakuze, 18 May 2009; Nsengiyumva’s Third Amended Notice of Appeal Pursuant to Appeals Chamber Decision of 28 January 2010, 1 February 2010.

⁶ Motion for Stay of Proceedings, p. 2887/A (Registry pagination).

⁷ Prosecutor’s Response to the “Exceptional Public Motion for Permanent Stay, to Uphold the Rule of Law and Appearance of Justice, in Proceedings Before this Chamber”, 23 December 2010 (“Response”), paras. 2, 29.

for a response and to accept the Response as filed.⁸ Ntabakuze replied on 18 January 2011.⁹ He did not respond to the Motion to Vary Word Limit.

B. Requests to Exceed the Word Limits

4. Paragraph C(3) of the Practice Direction on the Length of Briefs and Motions on Appeal of 8 December 2006 (“Practice Direction”) provides that “[m]otions, responses and replies thereto before the Appeals Chamber will not exceed 3,000 words.” Pursuant to paragraph C(5) of the Practice Direction, variations of word limits may be authorised if requested in advance and supported by an explanation of the exceptional circumstances that justify the oversized filing.

5. Ntabakuze requests the Appeals Chamber to enlarge the word count attributable to his motion in the interests of justice “to permit the Chamber to fully consider the extraordinary remedies requested herein”.¹⁰ The Appeals Chamber notes that Ntabakuze has failed to request authorisation in advance, and that many of his submissions are repetitive of previous submissions or irrelevant to the issues at stake.¹¹ Nevertheless, the Appeals Chamber finds that it would not serve the interests of judicial economy to deny the variation sought and reject the Motion for Stay of Proceedings as invalidly filed. The Appeals Chamber therefore grants Ntabakuze’s request to exceed the word limit and accepts the Motion for Stay of Proceedings as validly filed.

6. The Appeals Chamber also grants the Prosecution’s motion to exceed the word limit permitted for its response¹² and accepts the Response to the Motion for Stay of Proceedings as validly filed.

C. Motion for Stay of Proceedings

7. Ntabakuze requests a permanent stay of the proceedings related to his appeal as a result of “the intimidation of [his] Counsel, current and putative, by the Rwandan Government”.¹³ He contends that the intimidation arises out of (i) the “threatened arrest and prosecution” of

⁸ Motion to Vary Word Limit, para. 4.

⁹ Appellant’s Reply to Prosecutor’s Response to the Exceptional Public Motion for a Permanent Stay, to Uphold the Rule of Law and Appearance of Justice, in Proceedings Before this Chamber, 18 January 2011 (“Reply”). The Appeals Chamber notes that the Defence was not served with the Prosecution’s Response until 14 January 2011. *See* e-mail from Other Registry Services Unit, Appeals Chamber Support Section, dated 17 January 2011.

¹⁰ Motion for Stay of Proceedings, p. 2887/A (Registry pagination). The Appeals Chamber also notes that, in his Reply, Ntabakuze prays it to permit the filing of a reply of 2,805 words. *See* Reply, p. 2932/A (Registry pagination). Given the word limit authorised for a reply as provided in paragraph 3(C) of the Practice Direction, the Appeals Chamber considers Ntabakuze’s request to be moot.

¹¹ *See, e.g.*, Motion for Stay of Proceedings, paras. 1, 9-19, 57, 65.

¹² Motion to Vary Word Limit, para. 4.

¹³ Motion for Stay of Proceedings, para. 1.

Defence Counsel before this Tribunal and the “actual arrest and prosecution” of his Lead Counsel, Peter Erlinder; and (ii) “genuine threats to personal safety” facing Tribunal Defence Counsel, in particular his Lead Counsel.¹⁴ Ntabakuze submits that his representation by his Counsel has been intentionally impeded by the Rwandan Government and that his Counsel’s “representation of [his] interests is in conflict with [their] inevitable concern to avoid prosecution and for personal safety”.¹⁵ He argues that his Counsel are unable to fully discharge their professional duties in the absence of a remedy in these circumstances, and that he is consequently deprived of a fully effective representation, in violation of his right to a fair trial.¹⁶ In his view, “a permanent stay of proceedings is the most appropriate course of action open to the Chamber, to uphold the integrity of the Chamber and the ICTR, itself.”¹⁷

8. The Prosecution responds that Ntabakuze’s contentions are without merit and that his motion should be dismissed in its entirety.¹⁸ It submits, *inter alia*, that Ntabakuze is attempting to re-litigate issues that have already been conclusively determined,¹⁹ that his right to a fair trial will not be infringed,²⁰ and that there is no conflict of interest.²¹ In its view, a stay of the proceedings is not warranted in the circumstances of the case.²² The Prosecution also contends that, if Ntabakuze’s Counsel decline to represent him on appeal, alternative counsel can be appointed and, if necessary, an adjournment could be granted.²³

9. In his Reply, Ntabakuze submits that the Prosecution fails to address the public threats against his Counsel and the genuine fear resulting therefrom.²⁴ He asserts that he is not attempting to re-litigate the issue of functional immunity, but rather “is putting before the Chamber the undeniable fact that the umbrella of functional immunity provides no guarantee to effectively ensure that Counsel will not face arrest and prosecution”.²⁵

10. The Appeals Chamber recalls that, on 6 October 2010, it clarified that Defence Counsel before the Tribunal benefit from immunity from personal arrest or detention while performing their duties assigned by the Tribunal and also with respect to words spoken or written and acts done by

¹⁴ Motion for Stay of Proceedings, para. 1. *See also ibid.*, paras. 2-29, 46, 51, 52, 62; Reply, paras. 5-16.

¹⁵ Motion for Stay of Proceedings, para. 1(a). *See also ibid.*, paras. 41-60; Reply, paras. 8, 9.

¹⁶ Motion for Stay of Proceedings, paras. 1(b) and (c), 66. *See also ibid.*, paras. 30-40; Reply, para. 16.

¹⁷ Motion for Stay of Proceedings, para. 1(c). *See also ibid.*, para. 66, p. 2887/A (Registry pagination); Reply, para. 17.

¹⁸ Response, paras. 2, 3, 29.

¹⁹ Response, paras. 2, 4-8.

²⁰ Response, paras. 9-12, 29.

²¹ Response, paras. 13-18, 29.

²² Response, paras. 19-24, 29.

²³ Response, paras. 3, 24.

²⁴ Reply, para. 3.

²⁵ Reply, para. 15. *See also ibid.*, para. 17.

them in the course of the performance of such duties.²⁶ Accordingly, it requested Rwanda to desist from proceeding against Ntabakuze's Lead Counsel in relation to words spoken or written in the course of Lead Counsel's representation of Ntabakuze before the Tribunal.²⁷ Ntabakuze has not demonstrated in the Motion for Stay of Proceedings that the Rwandan judicial authorities failed to comply with the Appeals Chamber's Decision of 6 October 2010 or that Lead Counsel is at risk of arrest or prosecution in relation to Ntabakuze's defence. His assertion that "*no counsel* can advocate on behalf of Ntabakuze without risking criminal prosecution under the Rwandan criminal law"²⁸ is therefore devoid of merit.

11. The Appeals Chamber notes Ntabakuze's submission that his Lead Counsel cannot travel outside the United States for fear of arrest, which makes it impossible for Lead Counsel to appear before the Appeals Chamber and interferes with his ability to represent his client.²⁹ In this regard, the Appeals Chamber recalls that Defence Counsel benefit from immunity from personal arrest or detention while performing their duties assigned by the Tribunal, which includes the time spent on journeys in connection with their missions.³⁰ Ntabakuze's fear that his Lead Counsel may be arrested in the course of his journey to Tanzania for the appeal hearing in this case or that there may be interference with the representation of his interests is therefore ill-founded.

12. Furthermore, the Appeals Chamber is not persuaded that Ntabakuze has established that his Counsel face "genuine threats to [their] personal safety"³¹ related to their function as Tribunal Defence Counsel which would prevent them from representing him before the Tribunal. Similarly, the Appeals Chamber considers that Ntabakuze does not demonstrate that there is any present or potential conflict of interest that hinders or may hinder the discharge of his Counsel's professional duties. Such duties include conducting Ntabakuze's case to finality.³²

13. Based on the foregoing, the Appeals Chamber finds that Ntabakuze fails to demonstrate that the fairness of the proceedings is threatened in this case. In the circumstances before it, the Appeals Chamber considers that a stay of the proceedings is not warranted. On the contrary, the Appeals Chamber considers that a stay of the proceedings at this advanced stage of the appellate proceedings would be contrary to Ntabakuze's interests.

²⁶ Decision on Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, 6 October 2010 ("Decision of 6 October 2010"), para. 26.

²⁷ Decision of 6 October 2010, para. 31.

²⁸ Motion for Stay of Proceedings, para. 58 (emphasis in the original).

²⁹ See Motion for Stay of Proceedings, paras. 46, 54.

³⁰ Decision of 6 October 2010, paras. 22-26; Convention on the Privileges and Immunities of the United Nations, adopted by General Assembly Resolution A/RES/22(I)A, 13 February 1946, Article VI, Section 22.

³¹ Motion for Stay of Proceedings, para. 1.

³² See Rule 45(I) of the Rules of Procedure and Evidence of the Tribunal ("Rules").

14. Finally, the Appeals Chamber notes the following statement by Ntabakuze's Co-Counsel, André Tremblay, in his letter to Lead Counsel contained in the annex to the Motion for Stay of Proceedings:

I strongly recommend to you to activate the motion to stay proceedings in which we will give the proper and clear message on [*sic*] our intention to quit. That will be an appropriate way to respond to the [Appeals Chamber] decision on your limited immunity, and that will be a form of pressure to grant our two motions for disclosure for which I entertain no hope as to the positive outcome.³³

The Appeals Chamber finds that such a statement and conduct from Defence Counsel is wholly improper. Ntabakuze's Counsel are hereby warned to continue to strictly adhere to their professional obligations as Counsel assigned by the Tribunal.³⁴

D. Disposition

15. For the foregoing reasons, the Appeals Chamber

GRANTS Ntabakuze's request to exceed the word limit and, accordingly, **ACCEPTS** his Motion for Stay of Proceedings as validly filed;

GRANTS the Prosecution's Motion to Vary Word Limit and, accordingly, **ACCEPTS** its Response as validly filed;

DISMISSES the Motion for Stay of Proceedings in all other respects.

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

Done this 27th day of January 2011,
At The Hague,
The Netherlands.

Judge Patrick Robinson
Presiding Judge

FSeal of the Tribunal

³³ Motion for Stay of Proceedings, Annex C (E-mail from André Tremblay to Peter Erlinder, dated 4 November 2010).

³⁴ See Rule 46(A) of the Rules.