



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

3284/H

of

ICTR-98-41-A
15th March 2011
{3284/H – 3278/H}

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: 15 March 2011

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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ICTR Appeals Chamber
Date: 15th March 2011
Action: R. Jumez
Copied To: Concerned Judges

Théoneste BAGOSORA
Aloys NTABAKUZE
Anatole NSENGIYUMVA

v.

THE PROSECUTOR
*Parties Judicial Archives,
LOs, LSS [Signature]*
Case No. ICTR-98-41-A

**DECISION ON ALOYS NTABAKUZE'S MOTIONS FOR
VIDEO-CONFERENCE PARTICIPATION OF LEAD COUNSEL IN THE
APPEAL HEARING AND FOR THE WITHDRAWAL OF
REGISTRAR'S PUBLIC DECISION**

Counsel for Théoneste Bagosora

Raphaël Constant
Richard Perras

Counsel for Aloys Ntabakuze

Peter Erlinder
André Tremblay

Counsel for Anatole Nsengiyumva

Kennedy Ogetto
Gershom Otachi Bw'Omanwa

Office of the Prosecutor

Hassan Bubacar Jallow
James J. Arguin
George W. Mugwanya
Inneke Onsea
Renifa Madenga
Abubacarr Tambadou
Evelyn Kamau
William Mubiru
Aisha Kagabo
Ndeye Marie Ka

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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 requesting the participation of Lead Counsel for Aloys Ntabakuze ("Lead Counsel" and "Ntabakuze", respectively) in the appeal hearing by video-conference¹ and of a motion requesting that a public decision from the Registrar be withdrawn,² filed by Ntabakuze on 23 February 2011 and 1 March 2011, respectively.

A. Background

2. On 28 May 2010, Lead Counsel was arrested in Kigali by Rwandan authorities on allegations of "genocide denial".³ On 6 October 2010, the Appeals Chamber 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 them in the course of the performance of such duties.⁴ Accordingly, it requested the Republic of Rwanda to desist from proceeding against Lead Counsel in relation to words spoken or written in the course of his representation of Ntabakuze before the Tribunal.⁵

3. On 27 January 2011, the Appeals Chamber dismissed a motion whereby Ntabakuze requested the permanent stay of the appeal proceedings in his case on the basis of alleged intimidation of his Lead Counsel by the Rwandan Government.⁶ In a subsequent order, the Appeals Chamber directed that the appeal hearing in this case shall take place on 30 March, 31 March, and 1 April 2011 at the seat of the Tribunal in Arusha, Tanzania.⁷

4. On 24 February 2011, the Registrar denied a request by Lead Counsel for the withdrawal from the case of his Co-Counsel, Mr. André Tremblay ("Co-Counsel").⁸

¹ Motion for Video-Link Participation [*sic*] of Lead Counsel at the Appeals Hearing, 23 February 2011 ("Motion").

² Motion for an Order Requiring the Registrar to Withdraw the Improper, and Apparently Intentional, Public Dissemination of His Decision in Response to an *Ex-Parte* and Confidential Request Regarding the Composition of a Defense Team, 1 March 2011 ("Ancillary Motion"), public with confidential *ex parte* annexes.

³ See 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. 2.

⁴ Decision of 6 October 2010, para. 26.

⁵ Decision of 6 October 2010, para. 31.

⁶ Decision on Aloys Ntabakuze's Motion for Stay of Proceedings, 27 January 2011 ("Decision of 27 January 2011"), para. 15. See also 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").

⁷ Scheduling Order, 27 January 2011, p. 2.

⁸ Registrar's Decision on the Motion for Withdrawal of André G. Tremblay, Co-Counsel for Aloys Ntabakuze, 24 February 2011 ("Registrar's Decision"), para. 8.

5. On 7 March 2011, the Prosecution responded that the Motion should be dismissed in its entirety.⁹ On 7 March 2011, Ntabakuze filed an addendum to his Motion, in which he presents submissions concerning the issue of withdrawal of Co-Counsel from the case.¹⁰ Ntabakuze replied to the Prosecution's Response to the Motion on 11 March 2011.¹¹

6. On 11 March 2011, the Prosecution responded that the Ancillary Motion should be dismissed in its entirety.¹²

B. Preliminary Considerations: Addendum to the Motion

7. The Appeals Chamber notes that the Addendum to the Motion was filed by Ntabakuze on 7 March 2011, 12 days after the filing of his Motion. While the Addendum to the Motion discusses issues pertaining to the Registrar's Decision of 24 February 2011, the Appeals Chamber considers that Ntabakuze and his Counsel did not exercise due diligence in filing this addendum. In so doing, Ntabakuze deprived the Prosecution of the opportunity to consider the additional submissions contained in the Addendum to the Motion before responding to the Motion.

8. Furthermore, the Appeals Chamber observes that the Addendum to the Motion "concerns the substantive decision of the Registrar, which, it is submitted, is wrong in law."¹³ The Appeals Chamber recalls that the President of the Tribunal, not the Appeals Chamber, is the competent authority to review a Registrar's decision denying the withdrawal of counsel.¹⁴ In the circumstances, the Appeals Chamber therefore declines to consider the Addendum to the Motion.

⁹ Prosecutor's Response to Aloys Ntabakuze's "Motion for Video-Link Participation of Lead Counsel at the Appeals Hearing", 7 March 2011 ("Prosecution's Response to the Motion"), paras. 2, 6. The Appeals Chamber also notes that, on 4 March 2011, Théoneste Bagosora, one of Ntabakuze's co-appellants, indicated that he would object to any postponement of the appeal hearing and that he had no representations to make on all other aspects of Ntabakuze's Motion. See Appellant Bagosora's [sic] Response to the Appellant [sic] Ntabakuze's Motion Entitled "Motion for Video-Link Participation of Lead Counsel at the Appeal Hearing", 4 March 2011, paras. 4, 5.

¹⁰ Addendum – Motion for Video-Link Participation [sic] of Lead Counsel at the Appeals Hearing, 7 March 2011 ("Addendum to the Motion"), public with confidential *ex-parte* annexes.

¹¹ Appellant's Reply to Prosecution's Response to Ntabakuze's Motion for Video-Link Participation [sic] of Lead Counsel at the Appeals Hearing, 11 March 2011 ("Reply Relating to the Motion").

¹² Prosecutor's Response to Aloys Ntabakuze's "Motion for an Order Requiring the Registrar to Withdraw the Improper, and Apparently Intentional, Public Dissemination of His Decision in Response to an Ex-Parte and Confidential Request Regarding the Composition of a Defence Team", 11 March 2011 ("Prosecution's Response to the Ancillary Motion"), paras. 2, 7.

¹³ Addendum to the Motion, para. 6.

¹⁴ See Directive on the Assignment of Defence Counsel, 14 March 2008 ("Directive on the Assignment of Defence Counsel"), Article 19(E). The Appeals Chamber notes that Ntabakuze has filed a request for review of the Registrar's Decision with the President. See Confidential & Ex Parte with Confidential Ex Parte Annexes A Through I, Annex L, and Public Annexes J & K – Request for Review, Pursuant to Article 19(E) of the Directive on Assignment of Counsel, of the Public Administrative Decision of the Registrar to the Ex Parte Confidential Request of Lead Counsel for Appellant Ntabakuze for the Withdrawal of Co-Counsel, 11 March 2011, confidential and *ex parte*.

C. Motion

9. Ntabakuze seeks to have his Lead Counsel participate in the appeal hearing by video-conference.¹⁵ He submits that Lead Counsel considers it unsafe to travel outside the United States and relies, in part, on his submissions made in the Motion for Stay of Proceedings to assert that this fear is well-founded.¹⁶ He contends that Lead Counsel has received further threats since his Motion for Stay of Proceedings.¹⁷ According to Ntabakuze, his Lead Counsel's limited scope of immunity is insufficient to ensure his safety should he travel to Tanzania for the appeal hearing.¹⁸ Ntabakuze argues that a video-conference would avoid a conflict of interest¹⁹ between his interest, as a client, and his Lead Counsel's personal interest in his own safety.²⁰ Ntabakuze asserts that he has consented to his Lead Counsel's request to continue representing him "strictly under the parameters" of participating in the appeal hearing by video-conference.²¹

10. Ntabakuze notes that his Co-Counsel will be unable to travel to the appeal hearing²² and emphasises that he does not wish to have his case adjourned.²³ He asserts that allowing Lead Counsel to participate in the appeal hearing via video-conference would be the most expeditious resolution and would allow him to be represented by counsel of his own choosing with the most experience with the facts and issues in this case.²⁴ Ntabakuze further requests that his two Legal Assistants be exceptionally granted the right of audience to participate as counsel in the appeal hearing in order to assist Lead Counsel's appearance by video-conference.²⁵

11. The Prosecution responds that Ntabakuze's contentions are without merit and do not warrant the relief requested.²⁶ It submits that Ntabakuze is impermissibly arguing *de novo* issues concerning his Lead Counsel's incapacity to travel and making representations that were raised in his previous motions and were conclusively determined by the Appeals Chamber.²⁷ It also argues that Ntabakuze's contentions regarding Co-Counsel's inability to appear at the appeal hearing have been rendered moot by the Registrar's Decision denying the withdrawal of Co-Counsel from the case and

¹⁵ Motion, paras. 6, 12, 13, p. 3063/A (Registry pagination). Ntabakuze further requests that the Appeals Chamber grant any other relief as is necessary, including, for example, adjournment, severance, or stay of proceedings until arrangements can be made to protect his right to counsel. See Motion, p. 3063/A (Registry pagination).

¹⁶ Motion, paras. 6, 8, 17. See also Reply Relating to the Motion, para. 5. Ntabakuze also submits that the Motion follows the request for withdrawal of his Co-Counsel. See Motion, para. 6.

¹⁷ Motion, para. 9, Annex 1. See also Reply Relating to the Motion, para. 6.

¹⁸ Motion, paras. 11, 13.

¹⁹ Motion, para. 12.

²⁰ Motion, para. 11, referring to Illinois Rules of Professional Conduct, Article VIII, Rule 1.7(b).

²¹ Motion, para. 12.

²² Motion, para. 5. See also Reply Relating to the Motion, para. 7, Annex C.

²³ Motion, para. 14. See also Reply Relating to the Motion, para. 3.

²⁴ Motion, para. 15.

²⁵ Motion, para. 16.

²⁶ Prosecution's Response to the Motion, paras. 2, 6.

²⁷ Prosecution's Response to the Motion, paras. 2, 3.

that, in any event, if Co-Counsel were unable to represent Ntabakuze on medical grounds, Lead Counsel could present oral arguments on behalf of Ntabakuze.²⁸ The Prosecution adds that, given that Lead Counsel has no justification why he cannot appear in person at the appeal hearing, the additional relief sought of having the Legal Assistants appear in court as advocates becomes moot.²⁹

12. The Appeals Chamber recalls its findings in its Decision of 27 January 2011 that Defence Counsel benefit from immunity from personal arrest or detention while performing their duties assigned by the Tribunal, including during journeys in connection with their missions.³⁰ Therefore, it found that 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 was ill-founded.³¹ Additionally, the Appeals Chamber was not persuaded that Ntabakuze had established that his Counsel would face genuine threats to their personal safety related to their function as Tribunal Defence Counsel which would prevent them from representing him before the Tribunal.³² Similarly, the Appeals Chamber considered that Ntabakuze did not demonstrate that there was any present or potential conflict of interest that hindered or may hinder the discharge of his Counsel's professional duties, including the duty to conduct Ntabakuze's case to finality.³³

13. The Appeals Chamber notes that Ntabakuze relies on a press article in support of the alleged new threats made to Lead Counsel.³⁴ However, this article only refers to protests Lead Counsel faced in the United States when promoting a book.³⁵ Similarly, Ntabakuze attaches an affidavit to his Reply Relating to the Motion in which Lead Counsel expresses his fears but provides no new information.³⁶ Consequently, the Appeals Chamber considers that Ntabakuze has not presented any new information which demonstrates that his Lead Counsel could not safely travel to Tanzania for the appeal hearing.

14. Based on the foregoing, the Appeals Chamber finds that Ntabakuze has failed to demonstrate that the grant of a video-conference is warranted in this case and that the request for Lead Counsel's appearance by way of video-conference should therefore be denied. Ntabakuze's

²⁸ Prosecution's Response to the Motion, paras. 4, 5.

²⁹ Prosecution's Response to the Motion, para. 5.

³⁰ Decision of 27 January 2011, para. 11. *See also* 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 Decision of 27 January 2011, para. 11.

³² Decision of 27 January 2011, para. 12.

³³ Decision of 27 January 2011, para. 12. *See also* Rule 45(I) of the Rules of Procedure and Evidence of the Tribunal ("Rules").

³⁴ *See* Motion, Annex 1.

³⁵ Motion, Annex 1.

³⁶ Reply Relating to the Motion, Annex B.

request for his Legal Assistants to be granted the right of audience is accordingly moot and rejected as such.

15. The Appeals Chamber reminds Counsel of their obligation to represent their client and to comply with the orders of the Tribunal. In this respect, it recalls that failure by Counsel to appear before the Tribunal may be a ground for the imposition of sanctions³⁷ or may constitute contempt of the Tribunal.³⁸

16. Nonetheless, and in an abundance of caution, the Appeals Chamber will direct the Registrar to make any such arrangements as may be necessary to ensure the respect of Ntabakuze's Counsel's functional immunity during his travel and stay in Arusha, Tanzania, in connection with the appeal hearing.

D. Ancillary Motion

17. In the Ancillary Motion, Ntabakuze requests that the Registrar's Decision, filed publicly, be ordered to be withdrawn on the ground that the request for withdrawal of Co-Counsel was filed *ex parte* and confidentially.³⁹ He further requests that "the waiver of the presence of Co-Counsel for medical reasons, or the replacement of Co-Counsel for medical and/or *deontological* reasons, be taken up as ancillary to the Motion".⁴⁰ The Prosecution responds that the Ancillary Motion should be dismissed in its entirety.⁴¹

18. The Appeals Chamber declines to consider the Ancillary Motion. The issue of the withdrawal of Co-Counsel was decided by the Registrar, and, as held above, the Appeals Chamber is not the competent authority to review the Registrar's Decision.⁴² Likewise, the Appeals Chamber considers that it is generally not within its province to determine issues pertaining to the public or confidential status of decisions which it has no jurisdiction to review.

³⁷ See Rules 45ter(B) and 46 of the Rules.

³⁸ See Rule 77(A)(iii) of the Rules. The Appeals Chamber nonetheless recalls that "[i]f Counsel is not available, co-counsel shall assume responsibility of carrying on the proceedings." See Directive on the Assignment of Defence Counsel, Article 20(E)(i). The Appeals Chamber notes in this regard that: (i) the Registrar denied Ntabakuze's request for the withdrawal of Co-Counsel; but that (ii) Ntabakuze has filed a request for review of the Registrar's Decision with the President. Considering the situation of Co-Counsel at the time of deliberating on the Motion, the Appeals Chamber has disregarded the issue of the availability of Co-Counsel in disposing of the Motion.

³⁹ Ancillary Motion, paras. 5, 9. Ntabakuze argues that "the Registrar committed a grave violation of his obligation to respect confidentiality and *ex [p]arte* communications with respect to the composition of a Defence team that cannot be undone [... and] has, as a practical matter, eliminated any meaningful operation of the right guaranteed under Article 19 [of the Directive on the Assignment of Defence Counsel]". See Ancillary Motion, para. 6.

⁴⁰ Ancillary Motion, para. 9 (emphasis in original).

⁴¹ Prosecution's Response to the Ancillary Motion, paras. 2, 7.

⁴² See *supra*, para. 8.

E. Disposition

19. For the foregoing reasons, the Appeals Chamber,

DENIES the Motion in its entirety;

DISMISSES the Ancillary Motion in its entirety; and

DIRECTS the Registrar to make any such arrangements as may be necessary to ensure that the functional immunity of Ntabakuze's Counsel is respected during his travel and stay in Arusha, Tanzania, in connection with the appeal hearing.

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

Done this fifteenth day of March 2011,
at The Hague,
The Netherlands.



[Seal of the Tribunal]

Judge Patrick Robinson
Presiding