



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

279/H

EW

ICTR-00-61-A
19th August 2011
{279/H – 276/H

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Pre-Appeal Judge
Registrar: Mr. Adama Dieng
Decision of: 19 August 2011

JEAN-BAPTISTE GATETE

v.

THE PROSECUTOR

Case No. ICTR-00-61-A

**DECISION ON MOTION TO EXPUNGE DOCUMENTS FROM THE
APPEAL CASE FILE**

Counsel for Jean-Baptiste Gatete

Ms. Marie-Pierre Poulain

Office of the Prosecutor

Mr. Hassan Bubacar Jallow
Mr. James J. Arguin
Ms. Inneke Onsea
Ms. Priyadarshini Narayanan

<p>ICTR Appeals Chamber</p> <p>Date: <i>19th August 2011</i></p> <p>Action: <i>R. Fund</i></p> <p>Copied To: <i>Concerned Judges, Parties, JPU, LSS, LOs, <i>[Signature]</i></i></p>

<p>International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda</p> <p>CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS</p> <p>NAME / NOM: <i>ROSETTE MUZIGO-MORRISON</i></p> <p>SIGNATURE: <i>[Signature]</i> DATE: <i>19/08/11</i></p>

1. I, LIU DAQUN, Judge of 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 (“Tribunal”), and Pre-Appeal Judge in this case,¹ am seised of the “Defence Motion to Expunge Documents From the Appeal Case File” filed by Jean-Baptiste Gatete on 26 July 2011 (“Motion” and “Gatete”, respectively). On 28 July 2011, the Prosecution responded to the Motion.² Gatete did not reply.

2. Trial Chamber III of the Tribunal pronounced its judgement in this case on 29 March 2011 and filed the written version on 31 March 2011.³ On 3 May 2011, Gatete and the Prosecution filed their Notices of Appeal.⁴ On 18 July 2011, the Prosecution filed its Appeal Brief.⁵

3. In the Motion, Gatete requests to have documents stricken from the court file of the appeal in this case.⁶ He asserts that the Prosecution submitted three witness statements, a transcript, and a *Gacaca* court judgement (“Impugned Documents”) to the Registry for inclusion in the TRIM database on 18 July 2011.⁷ He submits that the Impugned Documents have been filed as part of the court file of the case before the Appeals Chamber.⁸ Gatete recalls the procedure for the disclosure of documents set out in the *Nahimana et al.* case but notes that, unlike in that case, the Prosecution did not request that the documents be filed as part of the appeal proceedings.⁹ He argues that the filing of the Impugned Documents in the court file violates the requirements of Rule 115 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) and is outside the scope of materials to be included in the appellate proceedings as defined by Rule 117*ter* of the Rules.¹⁰ As such, he argues that the inclusion of the Impugned Documents in the case file violates his right to fair appeal proceedings and equality of arms.¹¹ He further requests that the Registry be ordered to grant him an additional 15 hours of legal aid to compensate for the time taken in trying to resolve this issue.¹²

¹ Order Assigning a Pre-Appeal Judge, 11 May 2011.

² Prosecution’s Response to Defence Motion to Expunge Documents from the Appeal Case File, 28 July 2011 (“Response”).

³ *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-2000-61-T, Judgement and Sentence, 31 March 2011.

⁴ Prosecution’s Notice of Appeal, 3 May 2011; Notice of Appeal, 3 May 2011.

⁵ Prosecution’s Appellant’s Brief, 18 July 2011.

⁶ Motion, paras. 1, 15.

⁷ Motion, para. 2.

⁸ Motion, paras. 2, 9, 10.

⁹ Motion, paras. 7-9, referring to *Ferdinand Nahimana et al. v. The Prosecutor.*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motion Requesting that the Prosecution Disclosure of the Interview of Michel Bagaragaza be Expunged from the Record, 30 October 2006 (“*Nahimana et al.* Decision”), paras. 8, 12.

¹⁰ Motion, para. 12.

¹¹ Motion, paras. 10, 12.

¹² Motion, paras. 13, 15. See also Motion, paras. 11, 14.

4. The Prosecution opposes the Motion and requests that it be dismissed in its entirety.¹³ The Prosecution submits that, in conformity with its continuing disclosure obligations, it disclosed the Impugned Documents on a confidential basis to Gatete through an inter-office memorandum addressed to the Legal Officer and Officer in Charge of the Court Management Section within the Registry, without copying the Appeals Chamber.¹⁴ The Prosecution asserts that the Registry properly filed its *inter-partes* disclosure in Gatete's case file.¹⁵ Pointing to the *Nahimana et al.* Decision, the Prosecution contends that this practice has been endorsed by the Appeals Chamber.¹⁶ It argues that Gatete misunderstands the difference between the case file and the record on appeal.¹⁷ It submits that the fact that documents are part of the case file does not mean that they form part of the record on appeal as the only way to have documents added to the record on appeal is to have them admitted through the application of Rule 115 of the Rules.¹⁸ Finally, the Prosecution asserts that Gatete's request for additional legal aid should be dismissed as the Motion is frivolous because it raises an issue already adjudicated by the Appeals Chamber, as the Prosecution explained to Gatete prior to the filing of the Motion.¹⁹

5. The inclusion of the Impugned Documents in the case file does not subject them to the consideration of the Appeals Chamber in determining the appeal. The record on appeal, pursuant to Rule 109 of the Rules, consists only of the certified trial record and, as such, is different from the case file which contains all documents pertaining to the case. In determining an appeal, the Appeals Chamber only considers, as may be necessary, the content of materials in the record on appeal and any additional evidence admitted during appeal proceedings pursuant to Rule 115 of the Rules.

6. The Impugned Documents are not part of the record on appeal and have not been admitted as additional evidence on appeal. Therefore, the Appeals Chamber will not consider them in determining the appeal absent their formal admission as additional evidence pursuant to Rule 115 of the Rules. Accordingly, there is no need to strike the Impugned Documents from the court file of the appeal in this case.

7. In the *Nahimana et al.* Decision, the Appeals Chamber clarified that the appropriate procedure for disclosure of materials under Rule 68 of the Rules when a case is before the Appeals

¹³ Response, paras. 3, 11, 15.

¹⁴ Response, para. 4, referring to Confidential Disclosure in the case *The Prosecutor v. Jean-Baptiste Gatete* (Case No. ICTR-00-61-A), Registry pagination numbers 236/A-161/A. Although the Prosecution refers to Registry pagination numbers 236/A-261/A, this appears to be a typographical error. See also Response, para. 7.

¹⁵ Response, paras. 3, 5.

¹⁶ Response, para. 7.

¹⁷ Response, para. 6.

¹⁸ Response, para. 6. It further submits that Gatete's argument regarding Rules 117*ter* of the Rules is irrelevant. See Response, para. 9.

¹⁹ Response, paras. 3, 12-14.

Chamber is to serve the Defence with such material.²⁰ Accordingly, where the Prosecution files its disclosure with the Registry for purposes of keeping it in the Registry archives, the Prosecution shall do so without copying the Appeals Chamber.²¹

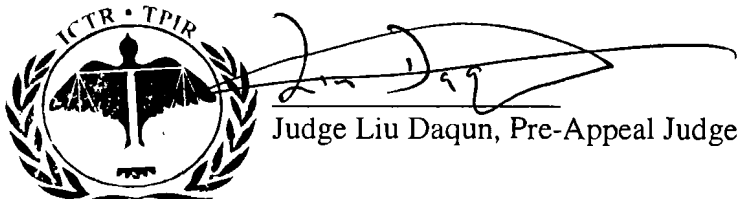
8. The Prosecution in this case followed the correct procedure. However, the Registry improperly distributed the Impugned Documents to the Appeals Chamber.²² Nonetheless, Gatete was not prejudiced by the erroneous distribution of the Impugned Documents to the Appeals Chamber since, as explained above, the Appeals Chamber will not consider them in determining the appeal.

9. Finally, with respect to Gatete's request for an additional 15 hours of legal aid for the preparation of the Motion, I recall that it is the Registrar who has the primary responsibility in the determination of matters relating to remuneration of counsel.²³ Accordingly, Gatete should direct his request to the Registrar.

10. For the foregoing reasons, I **INSTRUCT** the Registry not to communicate to the Appeals Chamber disclosure materials filed by the Prosecution pursuant Rule 68 of the Rules and **DENY** the Motion in all other respects.

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

Done this 19th day of August 2011,
At The Hague,
The Netherlands.



The seal of the Tribunal is circular, featuring a central figure with wings and a sword, surrounded by a laurel wreath. The text 'ICTR • TPIR' is inscribed at the top of the seal. To the right of the seal is a handwritten signature in black ink. Below the signature, the text 'Judge Liu Daqun, Pre-Appeal Judge' is printed.

[Seal of the Tribunal]

²⁰ *Nahimana et al.* Decision, para. 8.

²¹ *Nahimana et al.* Decision, para. 8.

²² See Confidential Disclosure in the case *The Prosecutor v. Jean-Baptiste Gatete* (Case No. ICTR-00-61-A), Registry pagination numbers 236/A-161/A.

²³ See Directive on the Assignment of Defence Counsel, as amended on 15 June 2007, Article 22(C). See also, e.g., *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-07-91-A, Decision on Request for Judicial Review of the Registrar's and President's Decisions Concerning Payment of Fees and Expenses, 13 April 2010, para. 12.