



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

ICTR-00-61-A
25th October 2011
{314/H – 308/H}

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Decision of: 25 October 2011

JEAN-BAPTISTE GATETE

v.

THE PROSECUTOR

Case No. ICTR-00-61-A

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DECISION ON MOTION TO AMEND NOTICE OF APPEAL

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

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda	
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS	
NAME / NOM:	CONSTANT K. HOMETOWU
SIGNATURE:	DATE: 25-10-2011

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 seised of the “Defence Urgent Motion to Amend the Notice of Appeal” filed by Jean-Baptiste Gatete on 7 October 2011 (“Motion” and “Gatete”, respectively). On 13 October 2011, the Prosecution responded to the Motion.¹ Gatete filed his reply on 17 October 2011.²

A. Introduction

2. Trial Chamber III of the Tribunal pronounced its judgement in this case on 29 March 2011 and filed the written Trial Judgement on 31 March 2011.³ On 3 May 2011, Gatete and the Prosecution filed their respective notices of appeal.⁴ On 18 July 2011, the Prosecution filed its appeal brief.⁵ The French translation of the Trial Judgement was filed on 16 September 2011 and, accordingly, the deadline for the filing of Gatete’s appeal brief is 26 October 2011.⁶

3. In the Motion, Gatete requests leave to amend his Notice of Appeal.⁷ In particular, Gatete seeks to divide Ground 4 of his appeal into two sub-grounds, including one new sub-ground relating to “cumulative modes of liability that are redundant and/or incompatible with the commission through a joint criminal enterprise” (“New Sub-Ground of Appeal”).⁸ Gatete requests leave to modify the heading of Ground 4, paragraphs 28 through 31 and the relief sought accordingly, as set out in the Proposed Amended Notice of Appeal.⁹ He also seeks to withdraw paragraphs 9 (intimidation of witnesses), 10 (refusal of an extension of time for the Defence investigation), 19, in part, (exclusion of Witness BVS’s *pro-justicia* statement), 37, and 38, in part, (incidental requests

¹ Prosecution’s Response to Defence Motion to Amend the Notice of Appeal, 13 October 2011 (“Response”).

² Reply to the Prosecution Response to the Defence Urgent Motion to Amend the Notice of Appeal, 17 October 2011 (“Reply”).

³ *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Judgement and Sentence, 31 March 2011 (“Trial Judgement”), Annex A, para. 26. See also T. 29 March 2011.

⁴ Notice of Appeal, 3 May 2011 (“Notice of Appeal”); Prosecution’s Notice of Appeal, 3 May 2011.

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

⁶ See Decision on Extension of Time Limits, 26 May 2011 (“Decision on Extension of Time Limits”), para. 10, ordering Gatete “to file his Appeal Brief no later than forty (40) days from the date of the filing of the French translation of the Trial Judgement”. The Appeals Chamber notes that Gatete was provided with the French translation of the Trial Judgement on 19 September 2011. See Motion, para. 3.

⁷ Motion, paras. 4, 17. The proposed Amended Notice of Appeal is annexed to the Motion (“Proposed Amended Notice of Appeal”).

⁸ Motion, para. 4. See also Motion, paras. 11, 12.

⁹ Motion, paras. 4, 12, fn. 10.

under Rules 108 and 110 of the Rules of Procedure and Evidence of the Tribunal ("Rules") which have become moot).¹⁰

4. Gatete submits that his Notice of Appeal was drafted on the basis of the English language version of the Trial Judgement, a language he does not understand, and that accordingly he was unable to read, understand, or analyse the Trial Judgement.¹¹ Gatete submits that the Appeals Chamber has recognised as a good cause for the variation of grounds of appeal the unavailability of the trial judgement in a language that the appellant understands.¹² Gatete asserts that he has been able to provide proper input into his appeal now that he has had the opportunity to review the Trial Judgement in a language he understands.¹³ He submits that, since this request was made in a timely manner with a clear and concise purpose, it will not prejudice the Prosecution or delay the proceedings and will bring the Notice of Appeal into conformity with his appeal brief.¹⁴ Gatete adds that not allowing the addition of the New Sub-Ground of Appeal would result in a miscarriage of justice.¹⁵

5. The Prosecution responds that it does not oppose Gatete's request to withdraw paragraphs 9, 10, 19, in part, 37, and 38, in part.¹⁶ However, it opposes the addition of the New Sub-Ground of Appeal.¹⁷ In this regard, it submits that: (i) the New Sub-Ground of Appeal raises a purely legal error and that the identification of legal errors falls primarily to the Defence Counsel;¹⁸ (ii) given that Gatete's Counsel speaks English, it is unpersuasive that the alleged legal error could not have been discovered until Gatete, a layperson, was able to read the French translation of the Trial Judgement;¹⁹ (iii) since the unavailability of the French translation of the Trial Judgement was the only reason advanced for the delay in seeking the amendment, no good reason has been shown for the delay;²⁰ and (iv) Gatete's claim that a miscarriage of justice may occur if the amendment is not allowed is not substantiated.²¹ Additionally, the Prosecution argues that the Proposed Amended Notice of Appeal contains several additional variations from the Notice of Appeal which Gatete

¹⁰ Motion, paras. 4, 14-16. Gatete further requests to modify the heading of Ground 2 to reflect the deletion of paragraphs 9 and 10. *See* Motion, para. 14.

¹¹ Motion, para. 10. *See also* Reply, para. 8.

¹² Motion, para. 8. *See also* Reply, para. 8.

¹³ Motion, para. 11.

¹⁴ Motion, paras. 13-16. *See also* Reply, paras. 9, 11.

¹⁵ Motion, para. 13.

¹⁶ Response, para. 1.

¹⁷ Response, para. 1.

¹⁸ Response, para. 5.

¹⁹ Response, paras. 2, 5, 6.

²⁰ Response, paras. 7, 8.

²¹ Response, para. 9.

failed to request in his Motion.²² Accordingly, the Prosecution requests the Appeals Chamber to dismiss the Motion as currently formulated.²³

6. Gatete replies that, contrary to the Prosecution's argument, the New Sub-Ground of Appeal involves both legal and factual issues.²⁴ He asserts that the New Sub-Ground of Appeal would not unduly expand the scope of the appeal as it relates to general claims that already existed in the Notice of Appeal.²⁵ Gatete also submits that, if successful, the New Sub-Ground of Appeal may result in the quashing of his conviction for committing through a joint criminal enterprise, planning, and aiding and abetting genocide and extermination as a crime against humanity.²⁶

7. Gatete explains that the minor variations noted by the Prosecution in relation to paragraphs 12, 22, 23, and 24 of the Notice of Appeal were clerical errors and that he is not seeking to amend those paragraphs.²⁷ Finally, Gatete asserts that the two variations in Ground 4 were covered by his request to amend paragraphs 28 through 31 of the Notice of Appeal.²⁸

B. Discussion

8. In accordance with Rule 108 of the 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.²⁹ Generally, the motion must explain precisely what amendments are being sought and show that the "good cause" requirement is satisfied with respect to each amendment.³⁰ The "good cause" requirement encompasses both good reason for including the proposed new or amended grounds of appeal, and

²² Response, paras. 10, 11.

²³ Response, para. 12.

²⁴ Reply, para. 7.

²⁵ Reply, para. 10.

²⁶ Reply, para. 10.

²⁷ Reply, para. 14.

²⁸ Reply, para. 15.

²⁹ See, e.g., *Dominique Ntawukulilyayo v. The Prosecutor*, Case No. ICTR-05-82-A, Decision on Dominique Ntawukulilyayo's Motion for Leave to Amend his Notice of Appeal, 14 January 2011 ("*Ntawukulilyayo* Decision"), para. 10; *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, 29 January 2010 ("*Bagosora et al.* Decision"), para. 10.

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

good reason as to why the proposed amendments were not included or correctly articulated in the original notice of appeal.³¹

9. In its previous determinations as to which proposed variations to a notice of appeal may be authorised within the scope of the good cause requirement, the Appeals Chamber has considered the following factors to be of relevance: (i) the proposed variation is minor but clarifies the notice of appeal without affecting its content; (ii) the opposing party has not opposed the variation or would not be prejudiced by it; (iii) the variation would bring the notice of appeal into conformity with the appeal brief; (iv) the variation does not unduly delay the appeal proceedings; or (v) the variation could be of substantial importance to the success of the appeal such as to lead to a miscarriage of justice if it is excluded.³²

10. In this case, given the nature of paragraphs 9, 10, 19, in part, 37, and 38, in part, of the Notice of Appeal, the absence of prejudice to the Prosecution arising from their withdrawal, and the fact that the Prosecution does not object,³³ the Appeals Chamber is satisfied that there is good cause for allowing their withdrawal.

11. Turning to the proposed New Sub-Ground of Appeal, the Appeals Chamber recalls that the new alleged error is a legal error and that Counsel is principally responsible for the assessment of potential legal errors in the Trial Judgement.³⁴ Furthermore, Gatete's Counsel is able to work in English and was therefore able to discuss the Notice of Appeal and the draft of the appeal brief with Gatete prior to the filing of the French translation of the Trial Judgement.³⁵ Gatete fails to show how his own reading and understanding of the Trial Judgement was central to the identification of the alleged error of law. In the circumstances, the Appeals Chamber is not satisfied that there is good cause for allowing the addition of the proposed New Sub-Ground of Appeal on the basis of the unavailability of the French translation of the Trial Judgement.

12. Nonetheless, recalling that the interests of justice require that an appellant not be held responsible for the failures of his counsel,³⁶ and considering, without expressing any views on the

³¹ See, e.g., *Ntawukulilyayo* Decision, para. 10; *Renzaho* Decision, para. 9; *Kalimanzira* Decision, para. 7; *Bagosora et al.* Decision, para. 10.

³² See, e.g., *Kalimanzira* Decision, para. 8; *Bagosora et al.* Decision, para. 11.

³³ See Response, para. 1.

³⁴ See, e.g., *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on the Prosecution's Motion Seeking Clarification and an Order Regarding the Time-Limit for the Defence to File Potential Motions to Vary Grounds of Appeal, 22 September 2010, pp. 2, 3; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Nebojša Pavković's Second Motion to Amend His Notice of Appeal, 22 September 2009, para. 15; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Dragoljub Ojdanić's Motion to Amend Ground 7 of His Notice of Appeal, 2 September 2009, para. 15.

³⁵ See Decision on Extension of Time Limits, para. 7.

³⁶ *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Sreten Lukić's Re-Filed Second Motion for Leave to Vary his Notice of Appeal and Appeal Brief, 9 September 2011, para. 7.

merits of Gatete's appeal, that the issue could be of substantial importance to the success of the appeal, the Appeals Chamber grants the request to add the New Sub-Ground of Appeal. In so doing, the Appeals Chamber notes that it grants the amendment at an early stage of the appellate proceedings; consequently, there is no prejudice to the Prosecution.

13. Turning to the alleged additional variations between the Notice of Appeal and the Proposed Amended Notice of Appeal, the Appeals Chamber dismisses the Prosecution's argument that Gatete included changes to Ground 4, Sub-Ground B, in the Proposed Amended Notice of Appeal without requesting them in his Motion. Gatete specifically requested leave to modify the heading of Ground 4, paragraphs 28 through 31 (which comprise Sub-Ground B in the Proposed Amended Notice of Appeal) and the relief sought, as set out in the Proposed Amended Notice of Appeal.³⁷ The Appeals Chamber considers that nothing indicates that these changes go beyond amending Ground 4, Sub-Ground B to reflect that it has been divided into two.³⁸

14. As regards the remaining variations between the Notice of Appeal and the Proposed Amended Notice of Appeal,³⁹ the Appeals Chamber notes that Gatete is not seeking to amend these paragraphs.

15. Accordingly, the Appeals Chamber grants Gatete leave to vary his Notice of Appeal by replacing it with the Proposed Amended Notice of Appeal, without the amendments in paragraphs 12, 22, 23, and 24. For the sake of clarity of the record, Gatete should file an Amended Notice of Appeal, without the amendments in paragraphs 12, 22, 23, and 24, as a single document entitled Amended Notice of Appeal.

³⁷ Motion, paras. 4, 12, fn. 10.

³⁸ The Prosecution refers to the addition of an error of fact to Ground 4, Sub-Ground B (*see* Response, para. 10); however, the Appeals Chamber is unable to identify any such addition.

³⁹ The Appeals Chamber refers to the variations identified in the Response, para. 10, relating to Proposed Amended Notice of Appeal, paras. 10 (Notice of Appeal, para. 12), 20 (Notice of Appeal, para. 22), 21 (Notice of Appeal, para. 23), 22 (Notice of Appeal, para. 24). In each instance, Gatete has simply made the paragraph references narrower and more specific.

C. Disposition

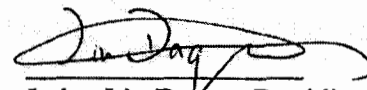
16. For the foregoing reasons, the Appeals Chamber

GRANTS the Motion; and

INSTRUCTS Gatete to file the Amended Notice of Appeal as a separate document, without amendment to paragraphs 12, 22, 23, and 24, no later than 26 October 2011.

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

Done this 25th day of October 2011,
At The Hague,
The Netherlands.


Judge Liu Daqun, Presiding

[Seal of the Tribunal]

