



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

9352/H

*Q*

ICTR-98-42-A

05<sup>th</sup> July 2013

{9352/H - 9345/H}

IN THE APPEALS CHAMBER

**Before:** Judge Fausto Pocar, Presiding  
Judge Patrick Robinson  
Judge Liu Daqun  
Judge Carmel Agius  
Judge Bakhtiyar Tuzmukhamedov

**Registrar:** Mr. Bongani Majola

**Decision of:** 5 July 2013

ICTR Appeals Chamber

05 JUL 2013

Date: *Juan R.*

Action: *Chambers, Defence,*

Copied To: *DTP-ALAD & JPL*

**THE PROSECUTOR**

v.

**Pauline NYIRAMASUHUKO  
Arsène Shalom NTAHOBALI  
Sylvain NSABIMANA  
Alphonse NTEZIRYAYO  
Joseph KANYABASHI  
Élie NDAYAMBAJE**

*Case No. ICTR-98-42-A*

**DECISION ON PROSECUTION'S MOTION FOR SUMMARY  
DISMISSAL OR ALTERNATIVE REMEDIES**

Counsel for Pauline Nyiramasuhuko

Nicole Bergevin and Guy Poupart

Counsel for Arsène Shalom Ntahobali

Normand Marquis and Mylène Dimitri

Counsel for Sylvain Nsabimana

Josette Kadji and Pierre Tientcheu Weledji

Counsel for Alphonse Nteziryayo

Frédéric Titinga Pacéré and  
Gershom Otachi Bw'Omanwa

Counsel for Joseph Kanyabashi

Michel Marchand and Alexandra Marcil

Counsel for Élie Ndayambaje

Pierre Boulé and Claver Sindayigaya

Office of the Prosecutor

Hassan Bubacar Jallow

James Arguin

Deborah Wilkinson

Tajesh Adhietty

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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NAME / NOM: *ROSETTE MUZIGO-MORRISON*

SIGNATURE: *[Signature]* DATE: *5/7/13*

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 by the Prosecution on 8 May 2013 for summary dismissal of an allegation of error raised by Alphonse Nteziryayo (“Nteziryayo”) in his appeal or, in the alternative, for clarification of the record on appeal or admission of additional evidence.<sup>1</sup>

### A. Procedural Background

2. On 24 June 2011, Trial Chamber II of the Tribunal (“Trial Chamber”) convicted Nteziryayo of direct and public incitement to commit genocide.<sup>2</sup> The Trial Chamber sentenced him to 30 years of imprisonment.<sup>3</sup>

3. Nteziryayo filed his notice of appeal on 26 April 2012<sup>4</sup> and his appeal brief on 8 April 2013.<sup>5</sup> On 8 May 2013, the Appeals Chamber granted leave to Nteziryayo to partially amend his Notice of Appeal and struck out parts of his Appeal Brief.<sup>6</sup> Nteziryayo filed an amended notice of appeal and an amended appeal brief on 13 May 2013.<sup>7</sup> As part of his appeal, Nteziryayo submits that the Trial Chamber erred in failing to conclude that the delay between his arrest and his initial appearance violated his rights and caused him prejudice.<sup>8</sup> The Prosecution is due to file its response brief to Nteziryayo’s appeal no later than 21 August 2013.<sup>9</sup>

4. On 8 May 2013, the Prosecution filed the present Motion, in which it submits that Nteziryayo’s allegation of error regarding the delay between his arrest and his initial appearance should be summarily dismissed (“Request for Summary Dismissal”).<sup>10</sup> In the alternative, the

<sup>1</sup> Prosecution Motion for Summary Dismissal or, in the Alternative, for Clarification of the Record on Appeal and for Admission of Evidence under Rule 115, 8 May 2013 (“Motion”), with eight confidential annexes (“Annexes”).

<sup>2</sup> *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Judgement and Sentence, pronounced on 24 June 2011, issued in writing on 14 July 2011 (“Trial Judgement”), para. 6186. *See also ibid.*, para. 6234.

<sup>3</sup> Trial Judgement, para. 6271.

<sup>4</sup> Alphonse Nteziryayo’s Notice of Appeal, 26 April 2012 (“Notice of Appeal”).

<sup>5</sup> Confidential Appeal Brief on Behalf of Alphonse Nteziryayo, 8 April 2013 (confidential) (“Appeal Brief”).

<sup>6</sup> Decision on Nteziryayo’s Motion to Amend his Notice of Appeal and on Prosecution’s Motion to Strike Nteziryayo’s New Appeal Grounds, 8 May 2013, paras. 25, 26, 72, 74.

<sup>7</sup> Alphonse Nteziryayo’s Amended Notice of Appeal, 13 May 2013 (“Amended Notice of Appeal”); Revised Confidential Appeal Brief on Behalf of Alphonse Nteziryayo, 13 May 2013 (confidential; public redacted version filed on 14 June 2013) (“Amended Appeal Brief”). *See also* Confidential Corrected Revised Appeal Brief on Behalf of Alphonse Nteziryayo, 14 June 2013 filed as Public Redacted Appeal Brief on Behalf of Alphonse Nteziryayo and Corrigendum, 14 June 2013, Annex B.

<sup>8</sup> Amended Notice of Appeal, para. 66; Amended Appeal Brief, paras. 265-277.

<sup>9</sup> *See* Decision on Prosecution’s Motion for Extension of Time to File its Response Briefs, 22 April 2013, p. 3; AT. 10 May 2013 p. 12.

<sup>10</sup> Motion, paras. 2, 4-6, 16.

Prosecution requests the Appeals Chamber to: (i) instruct the Registry to certify that five documents pertaining to Ntezirayayo's arrest and detention in Burkina Faso and his transfer to the Tribunal's detention facility ("Documents") are part of the record on appeal or, if the Appeals Chamber finds that the Documents are not part of the record, admit them as additional evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules"); and (ii) instruct the Registry pursuant to Rule 33(B) of the Rules to provide clarifications on the dates of, and actions related to Ntezirayayo's arrest, transfer, appointment of counsel, and initial appearance.<sup>11</sup>

5. Ntezirayayo filed his response on 23 May 2013, in which he objects to the Request for Summary Dismissal but does not oppose the admission of the Documents as additional evidence and the request for clarification from the Registrar.<sup>12</sup> Ntezirayayo submits that, in any event, a clarification of the date of his arrest is necessary ("Request for Clarification of the Appeal Record").<sup>13</sup> Ntezirayayo also questions the Prosecution's designation of the Annexes attached to the Motion as confidential.<sup>14</sup> The Prosecution filed its reply on 30 May 2013.<sup>15</sup>

#### **B. Preliminary Issue: Status of the Annexes and the Response**

6. Ntezirayayo submits that he filed his Response confidentially for the purpose of preventing the public disclosure of a quotation extracted from Annex 8 to the Motion, which the Prosecution filed as confidential.<sup>16</sup> Ntezirayayo contends that there is no apparent justification for filing the Annexes confidentially and that, should the status of the Annexes change, he would encourage the public filing of his Response.<sup>17</sup>

7. The Prosecution responds that it filed the eight Annexes confidentially because they include names of Tribunal staff members and the practice has been to file such documents confidentially.<sup>18</sup> The Prosecution contends that it is not asserting confidentiality over the extract quoted in Ntezirayayo's Response and does not object to the Response being filed publicly.<sup>19</sup>

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<sup>11</sup> Motion, paras. 3, 7-15, 17.

<sup>12</sup> Ntezirayayo's Response to Prosecutor's Motion for Summary Dismissal or in the Alternative for Clarification of the Record on Appeal and Admission of Evidence under Rule 115, 23 May 2013 (confidential) ("Response"), paras. 3-17. See also *infra* paras. 6-9, fn. 20.

<sup>13</sup> Response, paras. 3-5, 9(e), 15, referring to Amended Appeal Brief, paras. 282-285.

<sup>14</sup> Response, paras. 18, 19.

<sup>15</sup> Prosecution Reply to Ntezirayayo's Response to the Motion for Summary Dismissal or Alternative Remedies, 30 May 2013 ("Reply").

<sup>16</sup> Response, para. 18.

<sup>17</sup> Response, para. 19.

<sup>18</sup> Reply, para. 13.

<sup>19</sup> Reply, para. 14.

8. On 19 June 2013, Nteziryayo filed a public version of his Response, explaining that a public filing is appropriate in light of the Prosecution's Reply and the Tribunal's preference for public filings.<sup>20</sup>

9. The Appeals Chamber recalls that all submissions filed before the Tribunal shall be public unless there are exceptional reasons for keeping them confidential.<sup>21</sup> The Appeals Chamber considers that there was no reason for Nteziryayo to file his Response confidentially. Consequently, the Appeals Chamber lifts the confidential status of the Response. Furthermore, the Appeals Chamber observes that what Nteziryayo purports to be a public re-filing of his Response is in fact an amended version of his original filing. A review of the so-called Public Re-Filing of the Response reveals that paragraphs 18 and 19 of the Response dealing with the status of the Response and the Annexes have been deleted rather than merely redacted. In these circumstances, the Appeals Chamber finds that the Public Re-Filing of the Response is not validly filed and will accordingly be disregarded.

10. The Appeals Chamber notes that the Annexes to the Motion consist of faxes, emails, letters, an internal memorandum, and a mission report, which are not publicly available and some of which were clearly not intended to be disclosed publicly. In these circumstances, the Appeals Chamber considers that it was appropriate for the Prosecution to file the Annexes confidentially.

### **C. Request for Summary Dismissal**

11. The Prosecution submits that the allegation of undue delay between Nteziryayo's arrest and his initial appearance developed under his ninth ground of appeal was neither litigated at trial nor addressed in the Trial Judgement or prior decisions.<sup>22</sup> The Prosecution contends that, by failing to raise the issue at trial, Nteziryayo has waived his right to adduce it on appeal and that this allegation of error should be summarily dismissed, since he also does not challenge any specific finding by the Trial Chamber in this respect.<sup>23</sup> The Prosecution argues that a summary dismissal at this stage of the proceedings will avoid unnecessary collection of evidence and procedures indispensable to

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<sup>20</sup> Public Refiling of: Nteziryayo's Response to Prosecutor's Motion for Summary Dismissal or in the Alternative for Clarification of the Record on Appeal and Admission of Evidence under Rule 115, 19 June 2013 ("Public Re-Filing of the Response"), paras. 1-3.

<sup>21</sup> See, e.g., *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-00-55A-R, Decision on Request for Variation of Protective Measures and Request for Review, 28 September 2012, para. 10; *Dominique Ntawukulilyayo v. The Prosecutor*, Case No. ICTR-05-82-A, Decision on Prosecution's Request for Public Filings, 15 April 2011, p. 1 and references cited therein.

<sup>22</sup> Motion, paras. 1, 4, 5.

<sup>23</sup> Motion, paras. 4, 5, 16; Reply, paras. 1-4, 12, 15.

determining the factual issues concerning Nteziryayo's arrest, transfer to the custody of the Tribunal, and initial appearance and will also be in the interests of expeditious proceedings.<sup>24</sup>

12. Nteziryayo responds that the Prosecution's request for summary dismissal should be rejected on the basis, *inter alia*, that: (i) the issue of undue delay is such a central feature of the right to a fair trial that "any assertion of waiver should be treated with extreme caution and scepticism";<sup>25</sup> (ii) his complaint on appeal is that the Trial Chamber failed in its duty to protect the right of the accused to be tried without undue delay, a complaint which "must always be within the purview of the Appeals Chamber";<sup>26</sup> (iii) he did reference paragraphs 139 and 144 to 152 of the Trial Judgement as the challenged findings;<sup>27</sup> (iv) the argument that summary dismissal is needed to avoid the collection of evidence necessary to determine the issue "seeks to elevate convenience and expedition over the need to do justice";<sup>28</sup> (v) the determination of the issue is necessary to decide other issues in his appeal;<sup>29</sup> and (vi) summary dismissal is inappropriate given the Prosecution's acknowledgement of the "anomalous" delay between his arrest and initial appearance and the evidence that he was indeed subject to undue delay.<sup>30</sup> Nteziryayo submits that summary dismissal of the impugned allegation of error would be a severe and unjust remedy.<sup>31</sup> In his view, "the timing of the [Prosecution's] request is a thinly disguised attempt to obfuscate with procedural arguments the merits of the central issue which is pivotal to the right to a fair trial."<sup>32</sup>

13. The Prosecution replies that Nteziryayo does not refute that he failed to raise at trial the issue of delay between his arrest and initial appearance and offers no explanation for his failure to do so.<sup>33</sup> It submits that the Tribunal's consistent jurisprudence regarding an appellant's obligation to present contentious issues at trial in order to preserve his appeal rights – and the resulting waiver when he does not – applies directly to Nteziryayo's appeal.<sup>34</sup> The Prosecution also argues that the paragraphs of the Trial Judgement cited by Nteziryayo are not relevant to the allegation of delay between his arrest and initial appearance.<sup>35</sup>

<sup>24</sup> Motion, paras. 2, 6; Reply, paras. 1, 7.

<sup>25</sup> Response, para. 9(a).

<sup>26</sup> Response, para. 9(a).

<sup>27</sup> Response, para. 9(f). Nteziryayo submits that the findings made in paragraphs 139 and 144 to 152 of the Trial Judgement apply *mutatis mutandis* to all the appellants. *See idem*.

<sup>28</sup> Response, para. 9(c). Nteziryayo also submits that the Prosecution's assertion that a determination of these issues would cause delay is speculative. *See ibid.*, para. 9(d).

<sup>29</sup> Response, para. 9(e).

<sup>30</sup> Response, para. 9(h), *referring to* Motion, Annex 8, para. 5.

<sup>31</sup> Response, para. 8. *See also ibid.*, para. 9(b).

<sup>32</sup> Response, para. 8. Nteziryayo asserts that the fact that the Motion comes after the filing of his Amended Appeal Brief where this ground was developed is also significant as it shows that "the Prosecution had time to reflect on the forcefulness of the argument[s]" presented in his Amended Appeal Brief. *See idem*. *See also ibid.*, paras. 6, 7.

<sup>33</sup> Reply, paras. 2, 3.

<sup>34</sup> Reply, paras. 3, 4.

<sup>35</sup> Reply, para. 12.

14. The Appeals Chamber notes that Nteziryayo does not challenge the Prosecution's assertion that he failed to raise the allegation of delay between his arrest and his initial appearance at trial. The Appeals Chamber also observes that the paragraphs of the Trial Judgement to which Nteziryayo refers as the relevant challenged findings do not relate to the right to initial appearance without delay specifically provided for under Rule 62 of the Rules but to the right to be tried without undue delay provided for under Article 20(4)(c) of the Statute of the Tribunal and the issue of joinder of trials under Rule 48 of the Rules.<sup>36</sup>

15. The Appeals Chamber recalls that "[t]he obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or Statute to relieve the situation. The party cannot remain silent on the matter only to return on appeal to seek a trial *de novo*".<sup>37</sup> It is settled jurisprudence that if a party raises no objection to a particular issue before the Trial Chamber, in the absence of special circumstances, the Appeals Chamber will find that the party has waived its right to adduce the issue as a valid ground of appeal.<sup>38</sup> This waiver principle has been applied to allegations of fair trial violations, including allegations of violation of the right to initial appearance without delay.<sup>39</sup>

16. The Appeals Chamber considers that none of the arguments raised by Nteziryayo constitute special circumstances that may convince the Appeals Chamber to exercise its discretion to entertain Nteziryayo's allegation of error despite his failure to raise the issue in the nearly 14 years that the trial proceedings lasted in his case. Accordingly, the Appeals Chamber finds that Nteziryayo has waived his right to raise this issue on appeal.

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<sup>36</sup> See Response, para. 9(f), referring to Trial Judgement, paras. 139, 144-152.

<sup>37</sup> *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement"), para. 55. See also *Alfred Musema v. The Prosecutor*, Case No. ICTR-96-13-A, Judgement, 16 November 2001 (the English translation of the French original was filed on 25 October 2002) ("*Musema* Appeal Judgement"), para. 341; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement"), para. 361; *Jean Kambanda v. The Prosecutor*, Case No. ICTR-97-23-A, Judgement, 19 October 2000 ("*Kambanda* Appeal Judgement"), para. 25.

<sup>38</sup> *Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor*, Case No. ICTR-98-41-A, Judgement, 14 December 2011 ("*Bagosora and Nsengiyumva* Appeal Judgement"), para. 31; *Musema* Appeal Judgement, paras. 127, 341; *Akayesu* Appeal Judgement, paras. 361, 370, 375, 376; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), paras. 640, 649, 650; *Kambanda* Appeal Judgement, paras. 25, 28; *Tadić* Appeal Judgement, para. 55. See also *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-A, Judgement, 19 May 2010, para. 244.

<sup>39</sup> See *Bagosora and Nsengiyumva* Appeal Judgement, para. 31 (right to initial appearance without delay); *Musema* Appeal Judgement, paras. 127 (right to effective cross-examination), 341 (right to have adequate time and facilities for the preparation of the defence); *Akayesu* Appeal Judgement, paras. 361, 370, 375, 376 (right to be informed promptly and in detail of the nature and cause of the charges); *Čelebići* Appeal Judgement, paras. 640, 649, 650 (alleged violation of fair trial right to the attention of judges to the proceedings); *Kambanda* Appeal Judgement, paras. 25, 28 (right to counsel of own choosing); *Tadić* Appeal Judgement, para. 55 (right to equality of arms).

17. Finally, the Appeals Chamber finds no merit in Nteziryayo's claim regarding the timing of the Motion<sup>40</sup> and considers that ruling on the Request for Summary Dismissal at this stage of the proceedings is in the interests of expeditious proceedings.<sup>41</sup>

18. For the foregoing reasons, the Appeals Chamber grants the Prosecution's Request for Summary Dismissal and summarily dismisses Nteziryayo's allegation of violation of his rights as a result of the delay between his arrest and his initial appearance raised in his appeal. Consequently, the Appeals Chambers finds that the Prosecution's requests for alternative remedies are moot.

#### **D. Request for Clarification of the Appeal Record**

19. Nteziryayo submits that a clarification of the date of his arrest is in any event necessary to determine the challenge in his appeal pertaining to "the overall delay in reaching a final conclusion" and should not be contingent upon whether summary dismissal is granted.<sup>42</sup>

20. The Prosecution responds that Nteziryayo's assertion that the date of his arrest requires investigation conflicts with his Counsel's acknowledgement in open court that he was arrested on 24 April 1998.<sup>43</sup> The Prosecution submits that Nteziryayo fails to explain: (i) how a full-scale investigation on the part of the Registry is necessary to determine a date he should know; and (ii) how it could be related to the issue of undue delay caused by the joinder.<sup>44</sup>

21. The Trial Judgement states that Nteziryayo was arrested in Burkina Faso on 24 April 1998.<sup>45</sup> In support of this statement, the Trial Chamber relied on the Fourth Annual Report of the Tribunal to the Security Council and on a declaration from Nteziryayo's Counsel during his opening statement.<sup>46</sup> The Appeals Chamber notes that Nteziryayo's Counsel seems also to have relied on this date in his closing arguments<sup>47</sup> and that, while stressing the absence of evidence in the appeal

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<sup>40</sup> See Response, paras. 6, 7. The Appeals Chamber considers that it was reasonable for the Prosecution to await the filing of Nteziryayo's appeal brief in order to have the benefit of his submissions on the impugned issue before moving the Appeals Chamber for summary dismissal.

<sup>41</sup> See Motion, paras. 2, 6.

<sup>42</sup> Response, paras. 3-5, 9(e), 15, referring to Amended Appeal Brief, paras. 282-285.

<sup>43</sup> Reply, para. 10, referring to *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Nteziryayo Opening Statement, T. 4 December 2006 ("Opening Statement") p. 7 and Trial Judgement, para. 6309.

<sup>44</sup> Reply, para. 10.

<sup>45</sup> Trial Judgement, paras. 49, 6309.

<sup>46</sup> Trial Judgement, paras. 49, 6309, referring to Fourth Annual Report 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, UN Doc. A/54/315 & S/1999/943, 7 September 1999, Annex, p. 2 and Opening Statement, p. 7.

<sup>47</sup> See *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Closing Arguments, T. 28 April 2009 pp. 30, 31.

record “which can be considered as conclusive proof of the date of arrest”,<sup>48</sup> Nteziriyayo also refers to 24 April 1998 as his date of arrest in his appeal submissions.<sup>49</sup>

22. The Appeals Chamber, however, observes that one of the documents annexed to the Prosecution’s Motion may raise questions as to the exact date of Nteziriyayo’s arrest in Burkina Faso.<sup>50</sup> The Appeals Chamber considers that it is of the utmost importance to ascertain the exact date of arrest of a convicted person, notably for the purposes of calculating the period of imprisonment. In the absence of clarity in the appeal record in this case as to the date of Nteziriyayo’s arrest, the Appeals Chamber considers it necessary to instruct the Registrar, pursuant to Rule 33(B) of the Rules, to make written representations to the Appeals Chamber as to Nteziriyayo’s date of arrest.

**E. Disposition**

23. For the foregoing reasons, the Appeals Chamber:

**DECLARES** the Public Re-Filing of the Response as not validly filed;

**GRANTS** the Request for Summary Dismissal;

**DISMISSES** the remainder of the Motion as moot;

**GRANTS** Nteziriyayo’s Request for Clarification of the Appeal Record;

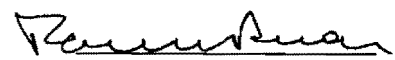
**INSTRUCTS** the Registrar to make written representations to the Appeals Chamber pursuant to Rule 33(B) of the Rules clarifying Nteziriyayo’s date of arrest no later than **5 August 2013**; and

**INSTRUCTS** the Registrar to lift the confidential status of the Response.

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

Done this fifth day of July 2013,  
at The Hague,  
The Netherlands.



  
Judge Fausto Pocar  
Presiding

<sup>48</sup> Amended Appeal Brief, fn. 335.

<sup>49</sup> Amended Notice of Appeal, para. 66; Amended Appeal Brief, para. 262, p. 91.

<sup>50</sup> See Motion, Annex 1, Facsimile transmission addressed to the Minister of Justice of the Republic of Burkina Faso by the Registrar of the Tribunal, dated 27 April 1998 (confidential), referring to a communication relating to the arrest of Nteziriyayo dated 22 April 1998.