

SEPARATE OPINION

I fully support the decision rendered by the **Appeals Chamber** to **deny** the request of the convicted person **Aloys Ntabakuze**. Nevertheless, I find it necessary to share **my opinion** on the overall matter of a request for review filed by a **person convicted by an international court**.

To allow a convicted person legal aid except in exceptional circumstances¹ through the assistance of an **assigned counsel** lays open the international court to a **“deluge” of requests for review**. In fact, a **convicted person** serving his sentence could always think that he was poorly assisted or badly represented by his previous counsel and that, in those circumstances, the investigation should be redone with a new attorney who would seek out witnesses to establish the existence of new facts.

This seems to me **very dangerous** for the **legal certainty** of judgements rendered by an international court after lengthy proceedings lasting years in which the evidence leading to the conviction of an Accused was presented by the Prosecution and contested by the Defence. We must also add to this picture the evidence put forward by the Defence when it presented its case.

It should be recalled that the proceedings were conducted under the **control of the judges** who, if there had been any doubts or any questionable evidence, could have asked the parties to supplement their arguments or could have ordered the testimony of witnesses or the admission of new evidence pursuant to Rule 98 of the ICTR Rules of Procedure and Evidence.² Considering the professionalism of the judges of the Trial Chamber, it would be surprising if they had not asked themselves the question and concluded that there was no reason to supplement the inculpatory or exculpatory evidence.

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¹ *The Prosecutor v. Juvénal Kajelijeli*, ICTR-98-44A-R, “Decision on Request for Assignment of Counsel”, confidential, 12 November 2009.

² Rule 98 of the ICTR Rules of Procedure and Evidence states the following: “A Trial Chamber may *proprio motu* order either party to produce additional evidence. It may itself summon witnesses and order their attendance.”

In this case, it is quite astonishing to note that the convicted person **Aloys Ntabakuze** now recalls the presence of a unit from the Muvumba battalion which was deployed in April 1994 in the vicinity of the Nyanza hill.³ According to the convicted person, the presence of another unit in this zone would constitute a **new fact**. It is up to the Accused and his counsel to find out during the trial or on appeal which units located in the area were likely to have committed the crimes with which the Accused was charged. Similarly, even if this idea had not occurred to the Prosecution or the Defence, logically, it would have occurred to the judges.

Moreover, he maintains in his submission that the soldiers from the presidential guard were stationed close to the *Institut africain et mauricien de statistique et d'économie* ("IAMSEA").⁴ The fact that soldiers from the presidential guard could have been stationed near IAMSEA does not constitute in my eyes a new fact justifying a review.

The fact that the applicant is currently serving his sentence in **Benin** does not justify any aid for a potential review.

I believe that it would be extremely serious to embark on this path: why grant such a request to one convicted person and deny it to another? I think that on the matter of a review of proceedings which is based on new facts, the convicted person, or his attorney or any other volunteer or legal entity acting *pro bono*, must be able to present a file which is sufficient in itself to allow the judges to rule.

In this case, I note that in his request of 17 April 2014, the convicted person put together such a file, attaching several statements taken as part of an investigation that he had undertaken himself with the assistance of the Registry, which generously issued engagement letters, and that this file is sufficient in itself to allow the Residual mechanism for the International Criminal Tribunals to rule pursuant to Rule 147 of the Rules.

³ *The Prosecutor v. Aloys Ntabakuze*, MICT-14-77, "Ntabakuze *pro se* Motion for Assignment of Investigator and Counsel in Anticipation of His Request for Review pursuant to Article 24 MICT st.", confidential, 17 April 2014, p.8. para. 20.

⁴ *Ibid.* p. 11, para. 31.

The role of the Registry during this stage, initiated by the convicted person, raises a fundamental problem of its exact place within this half-common-law, half-civil-law procedure.

As we have noted, the Registry has also contributed its logistical assistance to the Office of the Prosecutor before and during the trial. The attached exhibits clearly establish that it also provided assistance to the Defence to an extent, since the Registry was faced with the problem of remunerating the investigator, which led to “back-peddalling” as seen in an email between the office of the Registry and the attorney of the convicted person.

There could be a **permanent conflict of interest** here, because how can one justify on the one hand complete assistance to the Prosecution before and during the trial, and then limited assistance to the convicted person after the trial? In order to avoid this type of conflict of interest, I believe that the Rules of Procedure and Evidence should have provided for a **specific procedure for review under the control of a judge** who would have ensured the “equality of arms” during this phase of gathering evidence in order to establish a “new fact”.

For lack of a specific procedure, I deem therefore that it is **primarily up to the convicted person** to initiate this procedure without the help of the Tribunal. On the other hand, he can benefit from the active assistance of his country, of the country in which he is serving his sentence as part of the legal aid system, of his attorney who received an overall remuneration for the defence of his client and his services at that stage would merely constitute his usual work, or of the various aid institutions or the NGOs that offer their assistance to a convicted person who claims to be innocent after his conviction and who wants a review of his trial.

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

/signed/

Judge Jean-Claude Antonetti

Done this nineteenth January 2015

The Hague (Netherlands)

/Seal of the Mechanism/

