



ICTR-99-52-A  
 03 May 2005  
 (2395/H - 2391/H)  
 Tribunal Pénal International pour le Rwanda  
 International Criminal Tribunal for Rwanda

93  
 2395/H  
 RMM

**IN THE APPEALS CHAMBER**

Before: Judge Theodor Meron, Presiding  
 Judge Mohamed Shahabuddeen  
 Judge Florence Ndepele Mwachande Mumba  
 Judge Fausto Pocar  
 Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Adama Dieng

Decision of: 3 May 2005

**ICTR Appeals Chamber**  
 Date: 03 May 2005  
 Action:  
 Copied To: Concerned Judges  
 Parties, Judicial Archives  
 LOs, LSS *RMM*

Ferdinand NAHIMANA  
 Jean-Bosco BARAYAGWIZA  
 Hassan NGEZE  
 (Appellants)

v.

**THE PROSECUTOR**  
 (Respondent)

Case No. ICTR-99-52-A

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**DECISION ON APPELLANT FERDINAND NAHIMANA'S MOTION FOR ASSISTANCE FROM THE REGISTRAR IN THE APPEALS PHASE**

**Counsel for the Appellant, Ferdinand Nahimana**      **Office of the Prosecutor**

Jean-Marie Biju-Duval

James Stewart  
 Neville Weston  
 Abdoulaye Seye

International Criminal Tribunal for Rwanda  
 Tribunal pénal international pour le Rwanda  
 CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME  
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 NAME / NOM: ROSETTE MORZED-MORRISON  
 SIGNATURE: *[Signature]* DATE: 03/05/05

**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 1994 and 31 December 1994 (“Appeals Chamber” and “Tribunal”, respectively);

**BEING SEISED OF** Appellant Ferdinand Nahimana’s “Requête aux fins de diverses mesures concernant l’assistance du Greffe à la Défense en phase d’appel”, filed 6 April 2005 (“Appellant” and “Motion”, respectively), in which the Appellant requests the Appeals Chamber to a) order the Registrar to fund further investigations on appeal;<sup>1</sup> b) order the Registrar to cover the expenses of additional travelling costs to Arusha;<sup>2</sup> c) authorize the Appellant’s legal assistants to meet him confidentially in the absence of Counsel;<sup>3</sup> and d) order the Registrar to provide a translation of a series of documents;<sup>4</sup>

**NOTING** that the Prosecution did not file a response;

**DECIDES AS FOLLOWS:**

a) Request for Funding of Investigations on Appeal

1. The Appellant submits that he is put in an impossible position because, in order to file a motion for the admission of additional evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence (“Rules”), he must provide the evidence sought to be admitted.<sup>5</sup> This evidence, he suggests, will only become available after investigations.<sup>6</sup> However, the Appellant notes that the Registrar will not fund investigations on appeal in the absence of an order of the Appeals Chamber.<sup>7</sup> The Appellant argues that the only way to resolve the contradiction is to recognize that the right to funding for investigations on appeal is recognized by the Rules and the case-law of this Tribunal.<sup>8</sup>

2. The Appeals Chamber disagrees. It recalls the jurisprudence of the Tribunal and that of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) to the effect that an appeal pursuant to Article 24 of the Statute of the Tribunal (or pursuant to Article 25 of the Statute of the

<sup>1</sup> Motion, paras 4-11 and p. 5.

<sup>2</sup> Motion, paras 12-20 and p. 5.

<sup>3</sup> Motion, paras 21-26 and p. 5.

<sup>4</sup> Motion, paras 27 & 30 and p. 5.

<sup>5</sup> Motion, para. 7.

<sup>6</sup> Motion, para. 8.

<sup>7</sup> Motion, para. 4.

<sup>8</sup> Motion, para. 9.

ICTY) is not a *de novo* trial,<sup>9</sup> and that the appeal is not an opportunity to remedy any “failures or oversights” by a party during the pre-trial and trial phases.<sup>10</sup> Investigations should be made during the pre-trial and trial stage. As to Rule 115, it provides for a corrective measure and its purpose is to deal “with the situation where a party is in possession of material that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial.”<sup>11</sup> Rule 115 does not imply that the Registrar must fund investigations at the appeal stage.

3. In an exceptional case, the Appeals Chamber may order the Registrar to fund investigations at the appeal stage, if the moving party shows, for example, that it is in possession of specific information that needs to be further investigated in order to avoid a miscarriage of justice (in other words, the investigation will not merely be a fishing expedition), and that this specific information was not available at trial and could not have been discovered at trial even through the exercise of due diligence. However, the Appellant has not established that his is an exceptional case. In particular, the Appellant is extremely vague as to the evidence he seeks to uncover and he does not show that he has specific information that needs to be further investigated in order to avoid a miscarriage of justice, or that this specific information was not available to him at trial or could not have been discovered through the exercise of due diligence.

b) Request for Funding of Costs for Additional Travel to Arusha

4. The Registrar has the primary responsibility for the administration of the legal aid scheme in general, and in particular for authorising travel expenses.<sup>12</sup> In the case at hand, the Appellant disagrees with the Registry’s policy of funding only three trips to Arusha at the appeal stage.<sup>13</sup> The Directive on the Assignment of Counsel provides a procedure for the settlement of disputes.<sup>14</sup> The Appellant should thus file a formal complaint with the Registrar, explaining why funding for

<sup>9</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, para. 177; *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement, 16 November 2001, para. 17; *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Reasons for the Judgement, 13 December 2002, para. 11; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases Nos. ICTR-96-10-A and ICTR 96-17-A, Judgement, 13 December 2004, para. 13. See also, e.g., *Prosecutor v. Tadić*, Case No. IT-94-1-A, Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, paras 41-42; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 40; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001, para. 22; *Prosecutor v. Mucić et al.*, Case No. IT-96-21-Abis, Judgement on Sentence Appeal, 8 April 2003, para. 11; *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004, para. 5; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, paras 13 and 21.

<sup>10</sup> *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, Judgement of 7 October 1997, para. 15.

<sup>11</sup> *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B), 8 May 2001, para. 5 (emphasis added).

<sup>12</sup> See in particular Articles 27 and 28 of the Directive on the Assignment of Counsel, adopted 9 January 1996, as modified.

<sup>13</sup> Motion, paras 12-20, referring to statements made by the representative of the Registry during last Status Conference (T. 9 March 2005, pp. 8-9).

<sup>14</sup> Article 30.

additional travel is necessary. Pursuant to Article 30 of Directive on the Assignment of Counsel, "the Registrar shall make a decision after consulting the President and, if necessary, the Advisory Panel, on an equitable basis." If, after having gone through this procedure, the Appellant still considers that his right to fair proceedings is infringed by restrictions on the travel of his legal team, he can raise the matter with the Appeals Chamber, which has the statutory duty to ensure the fairness of the proceedings on appeal.<sup>15</sup>

c) Privileged Communications between the Appellant and his Legal Assistants

5. The Appellant asserts that he is unable to have privileged communications with his legal assistants, except when these take place in the presence of his Counsel.<sup>16</sup> The Appellant requests that he be authorized to communicate confidentially with his legal assistants in the absence of his Counsel.<sup>17</sup>

6. Pursuant to Rule 3 of "The Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal" ("Rules on Detention"), the Commanding Officer of the United Nations Detention Unit has sole responsibility for all aspects of the daily management of the Detention Unit.<sup>18</sup> More specifically, Rule 65 of the Rules on Detention provides that "[e]ach detainee shall be entitled to communicate fully and without restraint with his Defence Counsel" and that these communications shall be privileged. If the Appellant disagrees with the interpretation of this rule given by the Commanding Officer, he may make a written complaint to the Registrar who shall forward it to the President.<sup>19</sup> In the present case, it does not appear that this procedure was followed.

7. If, after having gone through the prescribed procedure, the Appellant still considers that his right to fair proceedings is being infringed by the alleged restriction, he can raise the matter with the Appeals Chamber which, as already noted, has the statutory duty to ensure the fairness of the proceedings on appeal.

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<sup>15</sup> Cf. *Prosecutor v. Milutinović, Ojdanić & Sainović*, Case No IT-99-37-AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003, paras 19-20.

<sup>16</sup> Motion, para. 21.

<sup>17</sup> Motion, paras 22-26.

<sup>18</sup> Rule 3 of the Rules on Detention.

<sup>19</sup> Rule 83 of the Rules on Detention.

## d) Request for Translation of Various Documents

8. During the Status Conference held in this case on 9 March 2005, the Appellant requested the translation of four documents which he said were needed for the preparation of his appeal.<sup>20</sup> The Pre-Appeal Judge asked the representative of the Registry to inform her when the requested translation could be ready. On 11 March 2005, the Pre-Appeal Judge was informed that the translations of the first two documents would be ready at the latest by 6 April 2005, but that the translation of the Prosecutor's Closing Brief and Reply Brief at trial would only be available in draft form on 30 June 2005 and 30 July 2005, respectively. In his Motion, the Appellant requests that these translations be provided to him without delay. The Appeals Chamber is sympathetic to the concerns of the Appellant, but is at the same time conscious of the available resources of the Registry. In the circumstances, the Appeals Chamber can do no more than to order the Registrar to adhere to the commitments made on 11 March 2005.

9. As to the Appellant's Brief, the Appeals Chamber agrees that it should be translated into English.

**FOR THE FOREGOING REASONS**

**ORDERS** the Registrar to provide a draft translation of the Prosecutor's Closing Brief at trial no later than 30 June 2005, and a draft translation of the Prosecutor's Reply Brief at trial no later than 30 July 2005, with certified translations of said briefs to be provided to the Appellant as soon as possible thereafter;

**ORDERS** the Registrar to prepare an English translation of the Appellant's Brief;

**DISMISSES** the Motion in all other respects.

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

Dated this 3rd day of April 2005,  
At The Hague, The Netherlands



*Theodor Meron*  
Theodor Meron  
Presiding Judge

<sup>20</sup> T. 9 March 2005, pp. 9-11. The Appellant requested the translation of four documents: Exhibit C7, CD104k0151838 (1 standard page); Exhibit 1 D50D (3 standard pages); the Prosecutor's Closing Brief at trial (466 standard pages); the Prosecutor's Reply Brief at trial (239 standard pages).