



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

5124/H  
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ICIR-99-52-A  
04 October 2005  
(5124/H-5720/H)

IN THE APPEALS CHAMBER

**Before:** Judge Theodor Meron, Presiding Judge  
Judge Mohamed Shahabuddeen  
Judge Florence Ndepele Mwachande Mumba  
Judge Fausto Pocar  
Judge Andréia Vaz

**Registrar:** Mr. Adama Dieng

**Decision of:** 4 October 2005

Ferdinand NAHIMANA  
Jean-Bosco BARAYAGWIZA  
Hassan NGEZE  
(Appellants)

v.

THE PROSECUTOR  
(Respondent)

Case No. ICTR-99-52-A

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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
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NAME / NOM: KOFFI KUMECOR A. A. FANDE  
SIGNATURE: *[Handwritten signature]*  
DATE: 05/10/2005

**DECISION ON JEAN-BOSCO BARAYAGWIZA'S EXTREMELY URGENT MOTION FOR LEAVE TO APPOINT AN INVESTIGATOR**

Counsel for Jean-Bosco Barayagwiza

Mr. Donald Herbert  
Mr. Tanoo Mylvaganam

Office of the Prosecutor

Mr. James Stewart  
Mr. Neville Weston  
Mr. Abdoulaye Seye

Counsel for Ferdinand Nahimana

Mr. Jean-Marie Biju-Duval  
Ms. Diana Ellis

Counsel for Hassan Ngeze

Mr. Bharat B. Chadha  
Mr. Behram Shroff

ICTR Appeals Chamber  
Date: 04 October 2005  
Action: R. Tuma  
Copied To: See Prof of Service  
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**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** the “Appellant Jean-Bosco Barayagwiza’s Extremely Urgent Motion for Leave to Appoint an Investigator”, filed confidentially on 12 August 2005 (“Motion to Appoint an Investigator”),<sup>1</sup> in which Jean-Bosco Barayagwiza (“Appellant”) requests the Appeals Chamber to order the Registrar to appoint an investigator to investigate allegations and evidence presented at trial along with the credibility of certain Prosecution witnesses, in order to present additional evidence to the Appeals Chamber pursuant to Rule 115 of the Rules of Procedure and Evidence (“Rules”);<sup>2</sup>

**NOTING** the “Prosecutor’s Response to ‘Appellant Jean-Bosco Barayagwiza’s Extremely Urgent Motion for Leave to Appoint an Investigator’”, filed on 22 August 2005 (“Response”), in which the Prosecution opposes the Motion to Appoint an Investigator;

**NOTING** the “Appellant’s Preliminary Response to Prosecution Reply to Appellant’s Request to Appoint Investigator”, filed on 29 August 2005 (“Reply”);<sup>3</sup>

**NOTING ALSO** that in the Reply the Appellant requests five days to submit a further document consisting of a “full reply” to the Response;<sup>4</sup>

**BEING SEISED ALSO OF** a motion in which the Prosecution requests the Appeals Chamber to consider the Reply as definitive and to reject the Appellant’s request for an extension of time to file a further reply;<sup>5</sup>

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<sup>1</sup> The Appeals Chamber reminds the Appellant that pursuant to paragraph 3 of the Practice Direction on the Length of Briefs and Motions on Appeal, issued on 16 September 2002 as amended (“Practice Direction”), motions are limited to 10 pages or 3,000 words. See also *Prosecutor v. Ferdinand Nahimana et al.*, ICTR-99-52-A, “Decision on Clarification of Time Limits and on Appellant Barayagwiza’s Extremely Urgent Motion for Extension of Time to File his Notice of Appeal and his Appellant’s Brief”, 6 September 2005 (“Decision on Extension of Time”), p. 3, footnote 5. The Appeals Chamber notes that the Motion to Appoint an Investigator exceeds the limit by 20 pages and that no exceptional circumstances were shown in advance to the Appeals Chamber justifying a request for enlargement as stipulated by paragraph 5 of the Practice Direction. The Appeals Chamber will consider the Motion in its full length in this instance but may not do so in the future if the Appellant does not conform with the Practice Direction.

<sup>2</sup> Motion to Appoint an Investigator, paras. 1, 36, 37.

<sup>3</sup> The Appeals Chamber notes that pursuant to paragraph 12 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, issued on 16 September 2002 as amended (« Practice

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**CONSIDERING** that, if the Appellant wished to seek an extension of time to file a “full” reply, he should have first filed a motion to that effect before the deadline for filing a reply rather than file, out of time, a “preliminary reply” requesting more time to file a “full reply”;<sup>6</sup>

**CONSIDERING** that it is in the interest of justice to avoid any further delay to the proceedings in this case;

**CONSIDERING** that the Appellant has not shown good cause for an extension of time to file a “full reply”;

**CONSIDERING ALSO** that the Reply already addresses the arguments of the Prosecution in its Response;

**FINDING**, therefore, that the Appellant need not be given a further five days to file a further Reply;

**NOTING** that in support of his Motion to Appoint an Investigator, the Appellant alleges a “combination of wholly exceptional circumstances”<sup>7</sup>, which, he contends, justify the Appeals Chamber ordering the Registrar to appoint an investigator;<sup>8</sup>

**RECALLING** the jurisprudence of the Tribunal that an appeal pursuant to Article 24 of the Statute of the Tribunal 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>

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Direction on Appeal Proceedings »), the Appellant’s Reply was filed out of time. Nevertheless, the Appeals Chamber will recognize the Reply as validly filed under paragraph 16 of the Practice Direction on Appeal Proceedings.

<sup>4</sup> Reply, para. 1.

<sup>5</sup> “Prosecutor’s Urgent Motion for an Order that the ‘Appellant’s Preliminary Response to Prosecution Reply [*sic*] to Appellant’s Request to Appoint an Investigator’ and the ‘Appellant’s Preliminary Response to Prosecution Reply [*sic*] to Appellant’s Request for Further Time to Lodge Appeal Brief dated 16<sup>th</sup> August 2005’ Be Deemed as the Actual Replies of the Appellant And For Rejection of the Requests for an Extension of Time to File Additional Replies”, filed on 2 September 2005 (“Motion for Denial of Extension of Time to Submit the Reply”), para. 3.

<sup>6</sup> Decision on Extension of Time, p. 4.

<sup>7</sup> He puts forward specially the late appointment of a Counsel and the disengagement of the Appellant from his trial. He also cites the incompetence of his Counsel throughout the trial and the Trial Chamber’s failure to direct the Counsel to mount an effective Defence, both of which deprived the Appellant of his “right to be effectively represented by a competent counsel”. See Motion, paras. 2, 5-7, 12-34.

<sup>8</sup> *Ibid.*, para. 39.

<sup>9</sup> *Prosecutor v. Akayesu*, ICTR-96-4-A, Judgement, 1 June 2001, para. 177; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, ICTR-96-10-A and ICTR 96-17-A, Judgement, 13 December 2004, para. 13. See also, e.g., Article 25 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Prosecutor v. Tadić*, 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 (“*Tadić* Rule 115 Decision”); *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, 17 December 2004, paras. 13, 21.

<sup>10</sup> *Prosecutor v. Dražen Erdemović*, IT-96-22-A, Judgement, 7 October 1997, para. 15.

**CONSIDERING** that Rule 115 of the Rules provides for a corrective measure and that 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>

**CONSIDERING** that when applying Rule 115 of the Rules, “[t]he applicant’s duty to act with reasonable diligence includes making appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber”,<sup>12</sup>

**CONSIDERING** that investigations should be made during the pre-trial and trial stages, and that the Registrar will generally not fund investigations at the appeal stage,<sup>13</sup>

**CONSIDERING**, however, that “in an exceptional case, the Appeals Chamber may order the Registrar to fund investigations at the appeal stage, if the moving party could show, 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 at the appeal stage is not 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”,<sup>14</sup>

**FINDING** that Appellant has not established that his is an exceptional case justifying ordering the Registrar to appoint an investigator at the appeal stage in that 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, particularly in view of the Appellant’s refusal to take part in the proceedings and to cooperate with appointed Counsel;

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<sup>11</sup> *Prosecutor v. Ferdinand Nahimana et al.*, ICTR-99-52-A, Decision on Appellant Hassan Ngeze’s Motion for the Approval of the Investigation at the Appeal Stage, 3 May 2005 (“Decision on Ngeze’s Motion for Investigation”), p. 3; *Prosecutor v. Ferdinand Nahimana et al.*, ICTR-99-52-A, Decision on Appellant Ferdinand Nahimana’s Motion for Assistance from the Registrar in the Appeals Phase, 3 May 2005 (“Decision on Nahimana’s Motion for Assistance”), para. 2; *Prosecutor v. Zoran Kupreškić et al.*, 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> *Prosecutor v. Galić*, IT-98-29-A, Decision on the First and Third Rule 115 Defence Motions to Present Additional Evidence Before the Appeals Chamber, 30 June 2005, para. 13; *Tadić* Rule 115 Decision, para. 47; *Prosecutor v. Momir Nikolić*, IT-02-60/1-A, Decision on Motion to Admit Additional Evidence, 9 December 2004, para. 21.

<sup>13</sup> T. 9 March 2005 p. 9.

<sup>14</sup> Decision on Ngeze’s Motion for Investigation, pp. 3, 4; Decision on Nahimana’s Motion for Assistance, para. 3.

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**NOTING** that, in the Reply, the Appellant submits "that the Chamber is entitled to take into account Article 91"<sup>15</sup> of the Rules but that the Appellant does not explain the manner in which this Rule could justify the relief sought;

**CONSIDERING** that in any event, the mere reference to Rule 91 of the Rules does not justify ordering the Registrar to appoint an investigator at the appeal stage;

**HEREBY**

**GRANTS** the Motion for Denial of Extension of Time to Submit the Reply;

**DISMISSES** the Motion to Appoint an Investigator.

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

Done this 4<sup>th</sup> day of October 2005,  
At The Hague,  
The Netherlands.



Judge Theodor Meron  
Presiding Judge

[Seal of the Tribunal]

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<sup>15</sup> Reply, para. 3. The Appeals Chamber notes that the Appellant does not mention Rule 91 of the Rules in his Motion.