



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

8068/H

ICTR-99-52-A
17 August 2006
(8068/H - 8065)

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. Adama Dieng

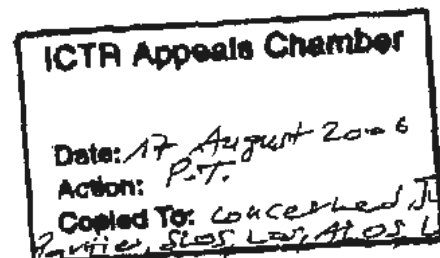
Decision of: 17 August 2006

Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE
(Appellants)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-99-52-A



JUDICIAL RECORDS/ARCHIVES

2006 AUG 21 A 10: 2

**DECISION ON JEAN-BOSCO BARAYAGWIZA'S URGENT MOTION
REQUESTING PRIVILEGED ACCESS TO THE APPELLANT WITHOUT
ATTENDANCE OF LEAD COUNSEL**

Counsel for Jean-Bosco Barayagwiza

Mr. Donald Herbert
Mr. Tanoo Mylvaganam

Counsel for Hassan Ngeze

Mr. Bharat B. Chadha

Counsel for Ferdinand Nahimana

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

Office of the Prosecutor

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

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: Tchidimba, Patrice	
SIGNATURE: [Signature]	DATE: 17.08.2006

8067/H

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 SEIZED of "The Appellant Jean Bosco-Barayagwiza's [*sic*] Extremely Urgent Motion Requesting Privileged Access to the Appellant without the Attendance of Lead Counsel" filed on 31 July 2006 ("Appellant" and "Motion", respectively);

NOTING that the Prosecution has filed no response to the Motion;

NOTING that the Appellant is currently detained in the United Nations Detention Facility in Arusha, Tanzania ("UNDF");

NOTING that the Appellant requests the Appeals Chamber to grant his Legal Assistant privileged access to him in the UNDF, in the absence of the Lead Counsel, for a period of three weeks from 19 August 2006;¹

FURTHER NOTING that the Appellant's Counsel submits that such privileged access is necessary in order to ensure that the reference books are prepared for the appeal, including a "collation of a number of legal articles, books and text references", "a task which need [not] be performed by Lead Counsel";²

NOTING that the Appellant's Counsel intends to visit his client in the UNDF for two weeks in August 2006, but submits that during this time, he will be working on the merits of the appeal, "particularly preparing for the oral hearing" and will not have sufficient time to work on reference books;³

ALSO NOTING that the Appellant maintains that similar requests have previously been denied by the Registry in the past, and that – in light of "the urgency of this situation" and the fact that "the President is currently in Norway" – "the only recourse available is to make a direct request to the Appeals Chamber itself";⁴

¹ Motion, para. 3.

² *Ibid.*, para. 4.

³ *Ibid.*, para. 5.

⁴ *Ibid.*, para. 6.

8066/H

NOTING that Rule 65 of the Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal ("Detention Rules")⁵ governs privileged communications between the Appellant and his Counsel and that, in the absence of Lead or Co-Counsel, legal assistants are generally allowed non-privileged visitations under Rule 61 of the Detention Rules;⁶

RECALLING that, as has been repeatedly reiterated in the present case,⁷ pursuant to Rule 3 of the Detention Rules, the Commanding Officer of the UNDF has primary responsibility for all aspects of the daily management of the Detention Unit, including communications and visitations, and that, pursuant to Rules 82 and 83 of the Detention Rules, when a detainee is not satisfied with the response of the Commanding Officer to a specific request in that regard, he or she has the right to make a written complaint to the Registrar who shall forward it to the President of the Tribunal;

RECALLING that the Appeals Chamber has the statutory duty to ensure the fairness of the proceedings on appeal⁸ and, thus, has jurisdiction to review decisions of the Tribunal's Registrar and President under the Detention Rules where they are closely related to issues involving the fairness of proceedings on appeal but that such review is ordinarily available only after a detainee has followed the requisite complaints procedure in the Detention Rules;⁹

NOTING that the Defence Counsel and Detention Management Section of the Tribunal have informed the pre-appeal Judge in the present case that, normally in appeal proceedings, the Defence teams are authorized to travel to Arusha on a limited number of occasions; however, the Registrar, mindful of the fact that the Appellant is not represented by the same Defence team as at trial, has

⁵ Adopted on 5 June 1998.

⁶ Visits to the UNDF under Rule 65 are subject to the same security controls as are imposed under Rule 61 of the Rules of Detention. However, communications between the Counsel and the detainee under the privileged regime of Rule 65 are conducted "in the sight but not within the hearing, either direct or indirect, of the staff of the Detention Unit". Besides, the general policy of the Registrar of the Tribunal has been that Defence legal assistants visiting the detainees under Rule 61, are not allowed *inter alia* to bring and use a portable computer and other equipment. (*Cf.* Status Conference, T. 7 April 2006, pp 10-12).

⁷ See, among the most recent decisions, Decision on Hassan Ngeze's Request for a Status Conference, 13 December 2005, p. 3; Decision on Hassan Ngeze's Request to Grant him Leave to Bring his Complaints to the Appeals Chamber, 12 December, p. 3; Decision on Hassan Ngeze's Motion for a Psychological Examination, 6 December 2005, p. 3; Decision on Hassan Ngeze's Motion to Set Aside President Møse's Decision and Request to Consummate his Marriage, 6 December 2005, pp 3-4.

⁸ Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase, 3 May 2005, paras 4 and 7; Decision on "Appellant Hassan Ngeze's Motion for Leave to Permit his Defence Counsel to Communicate with him during Afternoon Friday, Saturday, Sunday and Public Holidays", 25 April, p. 3. See also, *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR.73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003 ("*Milutinović et al.* Decision of 13 November 2003"), para. 19.

⁹ Decision on Hassan Ngeze's Motion to Set Aside President Møse's Decision and Request to Consummate his Marriage, 6 December 2005, p. 4; *Milutinović et al.* Decision of 13 November 2003, para. 20.

8065/H

already allowed frequent visits of the Appellant's Lead Counsel, Co-Counsel and Legal Assistant to the UNDF;¹⁰

NOTING that the briefing on the merits in the present case is complete;

NOTING that no oral hearing has been scheduled by the Appeals Chamber in the immediate future;

CONSIDERING that the Appellant has neither explained why his Legal Assistant needs to start working on the reference books from 19 August 2006 nor why his request would not be treated fairly or in a timely manner by the competent authorities of the Tribunal under the Detention Rules such that it must be considered now, as an urgent matter, by the Appeals Chamber contrary to established procedure;

CONSIDERING, consequently, that because the Appellant has not exhausted the procedure made available to him under the Detention Rules for consideration of his request, the Appeals Chamber will not consider the merits of that request;

FINDING, accordingly, that the Motion is frivolous and abusive in the sense of Article 73(F) of the Rules of Procedure and Evidence of the Tribunal;

CONSIDERING that if, after having followed the established procedure, the Appellant considers that his right to fair proceedings has been infringed with regard to his request presented in the Motion at issue here, he can, at that time, raise the matter with the Appeals Chamber;

FOR THE FOREGOING REASONS,

DISMISSES the Motion in its entirety;

DIRECTS the Registrar to withhold the payment of fees in relation to the Motion.

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



Fausto Pocar
Presiding Judge

Dated this 17th day of August 2006,
At The Hague, The Netherlands

[Seal of the Tribunal]

¹⁰ Status Conference, T. 7 April 2006, pp 10-12.