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UNITED NATIONS
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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

ICTR-99-52-A
29-08-2006
(8142/A - 8139/A)

Office of the President
Cabinet du Président

Before: Judge Erik Møse, President

Original: English

Registrar: Mr Adama Dieng

Date: 29 August 2006

JEAN-BOSCO BARAYAGWIZA

v.

THE PROSECUTOR

Case No.: ICTR-99-52-A

JUDICIAL RECORDS/ARCHIVES
UNICTR
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2006 AUG 29 11: 11

REVIEW OF THE REGISTRAR'S DECISION DENYING REQUEST FOR
WITHDRAWAL OF CO-COUNSEL

The Defence:

Mr. Peter Herbert (Lead Counsel)

Ms. Tanoo Mylvaganam (Co-Counsel)

Ch

THE PRESIDENT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

BEING SEIZED of Jean-Bosco Barayagwiza's Urgent Motion for Review of the Registrar's Decision of 27 March 2006, dated 3 May 2006;

CONSIDERING the Registrar's response of 16 May 2006 and the Defence letter dated 18 August 2006;

HEREBY DECIDES THE REQUEST.

INTRODUCTION

1. On 3 December 2003, Jean-Bosco Barayagwiza ("the Appellant") was convicted of conspiracy to commit genocide, genocide, direct and public incitement to commit genocide and crimes against humanity (extermination and persecution). He was sentenced to thirty-five years of imprisonment. His appeal against his convictions and sentence is currently pending before the Appeals Chamber.

2. The Appellant is indigent and benefits from legal representation assigned by the Tribunal. On 16 February 2006, the Appellant's Lead Counsel, Mr. Peter Herbert, requested the Registrar to terminate the assignment of Ms. Tanoo Mylvaganam, who had been assigned as Co-Counsel to this case on 23 May 2005. The Registrar denied this request on 27 March 2006 as there were no exceptional circumstances as required by Article 19 of the Directive on the Assignment of Defence Counsel ("the Directive"). The Defence now requests the President's review of this decision.

SUBMISSIONS

3. The Appellant contends that a fundamental breakdown of trust and confidence exists between the Appellant and Co-Counsel, and in consequence, it is impracticable and beyond the remit of the Registrar to order the Appellant to cooperate with Co-Counsel in these circumstances. The Appellant acknowledges that Co-Counsel has since concluded her allotments of work on this appeal and that there is no further work for her to do at this juncture. He contends that Co-Counsel herself seeks to be freed from her professional obligation, given that her name is on record as representing the Appellant in circumstances where there is no reasonable prospect of her having any work to do.

4. In response, the Registrar submits that generally, the appointment or withdrawal of the assignment of Co-Counsel on the request of Lead Counsel is neither mandatory nor routine but instead, falls within the discretion of the Registrar. He further notes that Lead Counsel, in his request, praised the conduct and professionalism of his Co-Counsel and that there appears to be no fault that can be ascribed to her. Co-Counsel has already committed and been remunerated for 700 hours of work on this appeal, which is now at an advanced stage, with all briefing completed. Should Lead Counsel's request to withdraw the appointment of Co-Counsel be granted, and should this be followed by a request for the appointment of another Co-Counsel, this would entail a heavy fiscal burden on the Tribunal's Legal Aid Program. Further, a breakdown of trust and confidence between the Appellant and Co-Counsel, even if assumed to be proven, does not constitute exceptional circumstances as envisaged in Article 19(A)(ii) of the Directive.

8/1

DELIBERATIONS

5. Article 19 (A)(ii) of the Directive provides that the Registrar may, in exceptional circumstances, withdraw the assignment of Co-Counsel at the request of Lead Counsel. Where the Registrar has denied a request for withdrawal of assigned counsel, the person who made the request may seek the President's review of the Registrar's decision, pursuant to Article 19 (E) of the Directive. The scope of this review is to assess the fairness and reasonableness of the decision.

6. The Registrar, in denying the Appellant's request, reviewed the circumstances of the initial appointment of Co-Counsel, including the fact that she had undertaken to represent the Appellant to the finality of the case; the observations made by Lead Counsel on the qualities and work of Co-Counsel; and the apparent breakdown of trust between the Appellant and Co-Counsel. He then weighed these factors against the relative paucity of information presented from the Appellant concerning his inability to work with Co-Counsel, the extensive nature of the work done by Co-Counsel, the late stage of the proceedings at which the request for withdrawal was made, and the function of Co-Counsel in such proceedings.

7. A breakdown in communication between Counsel and an Accused does not automatically constitute "exceptional circumstances" within the meaning of Article 19 (A) of the Directive.¹ Both Lead Counsel and Co-Counsel acknowledge that most of the work has now been completed in the Appellant's appeal and that the role of Co-Counsel, following the expiry of her allocated hours, has reached a natural conclusion. It follows from Article 15 (E) of the Directive that Lead Counsel has primary responsibility for the defence, including the assignment of tasks within the Defence team. Lead Counsel's submissions that his attempts to solve the differences of opinion between the Accused and Co-Counsel have represented a distraction from his main task is noted but does not provide a sufficient basis for concluding that there are "exceptional circumstances" in the present case. Lead Counsel has not allocated work to Co-Counsel for a considerable time.

8. In his decision, the Registrar mentioned that the resources of the Legal Aid Programme are limited and that he had granted Co-Counsel 350 additional hours for the appeal stage in addition to the 350 hours which is normally the maximum provided for. He also took into account that the appeals proceedings will take place in the near future. Lead Counsel has subsequently explained that the remaining work on appeal will probably not exceed another 150 hours, and that there should be no need to adjourn the date for the final hearing which is likely to be in early 2007, provided that a new Co-Counsel could be appointed expeditiously. These additional explanations mean that the Registry was correct when considering budgetary restraints and the risk of delaying the proceedings. It is recalled that an accused has no absolute right to a Co-Counsel.²

¹ *Prosecutor v. Muvunyi*, President's Decision on the Application of Tharcisse Muvunyi's Application for Review of the Registrar's Decision Denying the Request for the Withdrawal of Lead Counsel, 12 September 2003, pp. 3-4; *Prosecutor v. Nchamihigo*, President's Decision on Simeon Nchamihigo's Appeal against the Registrar's Decision Denying the Request for the Withdrawal of Lead Counsel, 12 September 2003, p. 5. See, however, *Prosecutor v. Bizimungu*, President's Decision on Review, in Accordance with Article 19 (E) on the Directive on the Assignment of Defence Counsel, 20 September 2001, pp. 3-4 (refusal of Accused to communicate with Lead Counsel found to prevent fulfillment of obligations and to justify withdrawal).

² The Registrar has discretion to decide whether or not to appoint Co-Counsel, and there is no guarantee that a previous Co-Counsel will be replaced (*Prosecutor v. Blagojević*, Decision on Independent Counsel for Vidoje Blagojević's Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003, para. 79). The Registry 'is not necessarily bound by the wishes of an indigent accused' in determining assignments of Counsel

8139/A

9. As it has not been shown that the exercise of discretion by the Registrar was unfair, unreasonable, *mala fides* or based on extraneous factors, there is no basis to reverse his decision pursuant to Article 19 of the Directive.

FOR THESE REASONS, THE PRESIDENT

DENIES the Request.

Arusha, 29 August 2006.



Erik Møse
President

[Seal of the Tribunal]



but “has wide discretion, which he exercises in the interests of justice” (*Prosecutor v. Akayesu*, Judgement (AC), 1 June 2001, para. 62).