



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

44/H

ICTR-99-52A-R

11 April 2008

{44/H - 40/H}

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: 11 April 2008

ICTR Appeals Chamber

Date: 11 April 2008

Action: P.T.

Copied To: Concerned Judges

Parties, Prosecution, Defence

Archived

Jean-Bosco BARAYAGWIZA

v.

THE PROSECUTOR

Case No. ICTR-99-52A-R

DECISION ON JEAN-BOSCO BARAYAGWIZA'S MOTION OF 6 MARCH 2008**The Applicant**

Mr. Jean-Bosco Barayagwiza, pro se

The Office of the Prosecutor

Mr. Hassan Bubacar Jallow

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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43/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 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively),

BEING SEIZED OF the "*Recours très urgent de Jean-Bosco Barayagwiza contre le refus du Greffier de répondre à la demande d'assistance juridique en vue de la révision et/ou réexamen de l'Arrêt du 28 novembre 2007*" filed by Jean-Bosco Barayagwiza ("Applicant") on 6 March 2008 ("Motion");¹

NOTING "The Registrar's Submissions Regarding the '*Recours très urgent de Jean-Bosco Barayagwiza contre le refus du Greffier de répondre à la demande d'assistance juridique en vue de la révision et/ou réexamen de l'Arrêt du 28 novembre 2007*'", filed on 14 March 2008 ("Registrar's Submissions");

NOTING the "*Éléments complémentaires pour « Recours très urgent de Jean-Bosco Barayagwiza contre le refus du Greffier de répondre à la demande d'assistance juridique en vue de la révision et/ou réexamen de l'Arrêt du 28 novembre 2007 »*", filed by the Applicant on 19 March 2008 ("Applicant's Additional Submissions");

NOTING the "*Réplique à la réponse du Greffier du 14 mars 2008 au « Recours très urgent de Jean-Bosco Barayagwiza contre le refus du Greffier de répondre à la demande d'assistance juridique en vue de la révision et/ou réexamen de l'Arrêt du 28 novembre 2007 »*", filed by the Applicant on 1 April 2008 ("Applicant's Reply to Registrar's Submissions");

NOTING that the Applicant requests that the Appeals Chamber order the Registrar to assign, pursuant to Rule 45 of the Rules of Procedure and Evidence ("Rules"), Mr. Donald Peter Herbert as Lead Counsel² to assist him in the preparation of a motion for review and/or reconsideration of the Judgement rendered by the Appeals Chamber on 28 November 2007 in *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A ("Appeal Judgement");³

NOTING that the Applicant submits that the Registrar has intentionally delayed responding to his requests for assignment of defense counsel as well as to related requests, and in this respect requests

¹ While the Motion was received by the United Nations Detention Facility on 28 February 2008 it was only filed on 6 March 2008. The Office of the Prosecutor has not responded to the Motion.

² Motion, para. 17; Applicant's Additional Submissions, paras 1, 4. While the Applicant has also requested the Registry to accept Mr. Donald Peter Herbert's proposal to assist the Applicant as *pro bono* Counsel (Motion, paras 2, 12 and Annexes 1, 7), it is apparent that he now requests that Mr. Donald Peter Herbert be assigned pursuant to Rule 45(C) of the Rules, under the legal aid scheme (Motion, paras 9-11, 16 and 17; Applicant's Additional Submissions, paras 3-4).

42/H

the Appeals Chamber to protect his right to have adequate facilities for the preparation of his defence;⁴

CONSIDERING that the Registrar acknowledges delays in responding to the Applicant's letters⁵ in relation to the request for review and/or reconsideration that the Applicant intends to file, and submits that action was taken "for the relevant Sections of the Registry to follow up on the various queries";⁶

CONSIDERING that the Registrar does not object to the continuous assistance of Mr. Donald Peter Herbert as *pro bono* counsel, but objects to his assignment under the legal aid scheme, pursuant to Rule 45 of the Rules, in the absence of judicial determination on the admissibility of the request for review and/or reconsideration;⁷

CONSIDERING that the Appeals Chamber has no power to reconsider a final judgement and that therefore the Applicant's request to be assigned counsel for the purpose of preparing a request for reconsideration is without merit;⁸

RECALLING that review of a final judgement is an exceptional remedy and that an indigent applicant is only entitled to assigned counsel, at the Tribunal's expense, if the Appeals Chamber authorizes the review or if it deems it necessary in order to ensure the fairness of the proceedings at the preliminary examination stage;⁹

³ Motion, para. 17.

⁴ Motion, paras 2-6, 13-14. The Applicant claims that all of his requests for legal assistance and access to material in order to prepare a motion for review sent between 3 December 2007 and 25 February 2008 to the Registrar remained without response as of the date of the filing of the Motion. In addition, he submits that the Registry's reluctance to respond to his requests for legal assistance goes back to 11 March 1997, when he filed his first request for legal assistance (Motion, paras 2-8, Annexes 1 to 6).

⁵ The Registrar explains that this delay has been caused by "administrative difficulties" and states that contrary to the Applicant's suggestion, it "should not be interpreted as showing any reluctance whatsoever to respond". Further, in his submissions the Registrar addresses "the various issues raised by [the Applicant] in his recent letters" (Registrar's Submissions, paras 3-4).

⁶ Registrar's Submissions, paras 2-3. See also Motion, paras 2-8, 13.

⁷ Registrar's Submissions, paras 5-8. The Registrar states that he is not required to designate Mr. Donald Peter Herbert as *pro bono* Counsel and that he is awaiting the filing by Mr. Herbert of his power of attorney for the record, in conformity with Rule 44(A) of the Rules (Registrar's Submissions, para. 7).

⁸ See *Prosecutor v. Žigic*, Case No. IT-98-30/1-A, Decision on Zoran Žigic's "Motion for Reconsideration of Appeals Chamber Judgment IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006, para. 9; *Elizér Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision On Request For Reconsideration Of The Decision On Request For Review, 27 September 2006, pp. 2-3; *Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-R, Decision on Hassan Ngeze's Motion of 25 February 2008, 3 March 2008, p. 2.

⁹ See *Georges Anderson Nderubwwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, 8 December 2006 ("Rutaganda Decision of 8 December 2006") para. 41; *Elizér Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Niyitegeka's Urgent Request for Legal Assistance, 20 June 2005, p. 4; *Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-R, Decision On Hassan Ngeze's Motion To Obtain Assistance From Counsel, 28 February 2008, p. 2.

41/H

CONSIDERING that the Motion fails to provide any information on the basis for a potential request for review;¹⁰

CONSIDERING further that in the absence of information as to the potential grounds for review, the Appeals Chamber cannot conclude that it would be necessary in order to ensure the fairness of the proceedings to authorize assignment of counsel to the Applicant under the Tribunal's legal aid scheme;

FINDING therefore, that the Applicant has not shown that he should receive the assistance of counsel at the expense of the Tribunal;

NOTING that in any event the Applicant may be assisted by counsel in connection with a request for review at his own expense, at the expense of a third party or on a *pro bono* basis, provided that counsel files a power of attorney with the Registrar and satisfies the requirements to appear before the Tribunal;

CONSIDERING that Mr. Herbert informed the President of the Tribunal on 29 November 2007 that he accepted to "continue to act on [the Applicant's] behalf on a 'pro bono' basis", but that he has failed to file his power of attorney pursuant to Rules 44(A) and 45bis of the Rules;¹¹

NOTING that in the Applicant's Reply to Registrar's Submissions, the Applicant reiterates his request for access to adequate facilities pending the effective assistance of counsel;¹²

CONSIDERING that it is incumbent on Mr. Herbert to take the required steps in order to be considered by the Registry as *pro bono* counsel for the Applicant;

FINDING therefore that, at this stage of the proceedings, the Appeals Chamber need not address the Applicant's request for access to adequate facilities pending the effective assistance of counsel.

FOR THE FOREGOING REASONS,

DISMISSES the Motion.

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

¹⁰ In this respect, the Appeals Chamber recalls that review of a final judgement is not meant to provide an additional opportunity for a party to remedy its failings at trial or on appeal. Review may only be granted when the moving party satisfies the following cumulative criteria: (i) there is a new fact; (ii) the new fact was not known to the moving party at the time of the original proceedings; (iii) the lack of discovery of that new fact was not the result of lack of due diligence by the moving party; and (iv) the new fact could have been a decisive factor in reaching the original decision. *Rudaganda* Decision of 8 December 2006, para. 8.

¹¹ Motion, Annex 7.

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40/H

Done this 11th day of April 2008,
At The Hague, The Netherlands.



Fausto Pocar
Presiding Judge



¹² Applicant's Reply to Registrar's Submissions, para. 16.