



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

1459/H

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ICTR-99-52A-R  
22<sup>nd</sup> June 2009  
{1459/H – 1446/H}

**IN THE APPEALS CHAMBER**

**Before:** Judge Fausto Pocar, Presiding  
Judge Mehmet Güney  
Judge Liu Daqun  
Judge Andrésia Vaz  
Judge Theodor Meron

**Registrar:** Mr. Adama Dieng

**Decision of:** 22 June 2009

ICTR Appeals Chamber

Date: 22<sup>nd</sup> June 2009  
Action: R. J. M. C. 2  
Copied To: Conceded Judges,  
SLO, LOI, ALO, CMS, K. M. K.  
LSS, Parties. *J. J. M. C. 2*

**JEAN-BOSCO BARAYAGWIZA**

v.

**THE PROSECUTOR**

Case No. ICTR-99-52A-R

JUDICIAL  
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**DECISION ON JEAN-BOSCO BARAYAGWIZA'S MOTION FOR REVIEW  
AND/OR RECONSIDERATION OF THE APPEAL JUDGEMENT OF 28  
NOVEMBER 2007**

**The Applicant:**

Mr. Jean-Bosco Barayagwiza, *pro se*

**Office of the Prosecutor:**

Mr. Hassan Bubacar Jallow  
Mr. Alex Obote-Odora  
Ms. Christine Graham  
Ms. Linda Bianchi  
Ms. Béatrice Chapaux

**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

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NAME / NOM: *ADAMA DIENG* A: *AFANAS*  
SIGNATURE: *[Signature]* DATE: *22 June 2009*

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1. 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) is seized of a motion filed by Jean-Bosco Barayagwiza ("Applicant") on 10 December 2008<sup>1</sup> for review and/or reconsideration of the Appeal Judgement rendered on 28 November 2007 in the case of *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor*.<sup>2</sup>

## I. BACKGROUND

2. On 3 December 2003, Trial Chamber I ("Trial Chamber") convicted the Applicant of conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, and persecution and extermination as crimes against humanity,<sup>3</sup> and acquitted him of complicity in genocide, murder as a crime against humanity, and serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.<sup>4</sup> The Applicant was sentenced to thirty-five years' imprisonment.<sup>5</sup>

3. On 28 November 2007, the Appeals Chamber reversed the Applicant's convictions based on Article 6(1) of the Statute of the Tribunal ("Statute") for the crimes of direct and public incitement to commit genocide for his acts within the *Coalition pour la défense de la République* party ("CDR") and conspiracy to commit genocide, as well as his convictions based on Article 6(3) of the Statute with respect to his acts within *Radio télévision libre des mille collines S.A.* ("RTLM") and the CDR for the crimes of genocide, direct and public incitement to commit genocide, and extermination and persecution as crimes against humanity.<sup>6</sup> The Appeals Chamber affirmed the Applicant's convictions based on Article 6(1) of the Statute for genocide, under the mode of responsibility of instigation; extermination as a crime against humanity, under the mode of responsibility of ordering or instigating and planning; and persecution as a crime against humanity,

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*Mémoire du requérant en vue de la révision et/ou reconsidération de l'arrêt du 28 novembre 2007*, filed on 10 December 2008 ("Motion").

*Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("Appeal Judgement").

*The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Judgement, 3 December 2003 ("Trial Judgement and Sentence"), para. 1093.

*Ibid.*

<sup>3</sup> Trial Judgement, para. 1107.

<sup>6</sup> Appeal Judgement, para. 1096.

under the mode of responsibility of instigation.<sup>7</sup> As it reversed some of the Applicant's convictions, the Appeals Chamber also reduced his sentence to thirty-two years' imprisonment.<sup>8</sup>

4. Since the delivery of the Appeal Judgement on 28 November 2007, the Applicant has made several requests for assignment of counsel and access to documents to prepare a request for review and/or reconsideration.<sup>9</sup> On 11 April 2008, the Appeals Chamber filed a decision denying the Applicant's request for assignment of counsel at the Tribunal's expense to assist him in the preparation of a motion for review and/or reconsideration of the Appeal Judgement.<sup>10</sup> The Applicant's request to reconsider this decision was denied on 9 September 2008.<sup>11</sup>

5. On 2 October 2008 and 16 December 2008, the Appeals Chamber directed the Registrar to provide an exhaustive response to the Applicant's requests for documents.<sup>12</sup> The Registrar responded by delivering additional documents to the Applicant on 3 November 2008<sup>13</sup> and 16 December 2008.<sup>14</sup>

6. The Applicant filed his Motion on 10 December 2008, and moved for a scheduling order for the submissions related to the Motion on 11 December 2008.<sup>15</sup> On 6 January 2009, after the Registrar filed his submission, the Applicant requested an extension of time and authorization to file a supplement to the Motion.<sup>16</sup> On 28 January 2009, the Appeals Chamber dismissed the request for a scheduling order, partially granted the request for an extension of time, and instructed the

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, para. 1097.

<sup>9</sup> *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 examen de l'Arrêt du 28 novembre 2007*, filed on 6 March 2008; *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-99-52-A ("Barayagwiza"), *Requête aux fins de reconsidération de la décision du 11 avril 2008 et de protection des droits fondamentaux du requérant Jean-Bosco Barayagwiza*, filed on 2 May 2008; *Barayagwiza, Demande de clarifications en relation avec la Décision du 9 septembre 2008 à propos de la Requête de Jean-Bosco Barayagwiza du 2 mai 2008*, filed on 15 September 2008.

<sup>10</sup> *Barayagwiza*, Case No. ICTR-99-52-A-R, Decision on Jean-Bosco Barayagwiza's Motion of 6 March 2008, 11 April 2008 ("11 April 2008 Decision"), p. 4.

<sup>11</sup> *Barayagwiza*, Decision on Jean-Bosco Barayagwiza's Motion of 2 May 2008, 9 September 2008 ("9 September 2008 Decision"), p. 4.

<sup>12</sup> *Barayagwiza*, Decision on Barayagwiza's Motion of 15 September 2008, 2 October 2008 ("2 October 2008 Decision"); *Barayagwiza*, Order Regarding Communication of Documents, 16 December 2008. See also *Barayagwiza*, The Registrar's Submission in Regard to the Appeals Chamber's "Decision on Jean-Bosco Barayagwiza's Motion of 15 September 2008", filed confidentially on 3 November 2008 ("Registrar's Submission of 3 November 2008"). *Réponse au mémoire du Greffier du 3 novembre 2008 intitulé The Registrar's Submission in Regard to the Appeals Chamber's Decision on Jean-Bosco Barayagwiza's Motion of 15 September 2008*, filed on 10 November 2008.

<sup>13</sup> Registrar's Submission of 3 November 2008.

<sup>14</sup> *Barayagwiza*, Submission by the Registrar under Rule 33(B) of the Rules of Procedure and Evidence on the "Order Regarding Communication of Documents" dated 16 December 2008, 23 December 2008.

<sup>15</sup> *Barayagwiza, Requête pour une ordonnance définissant le calendrier et les délais de dépôt des écritures relativement à la demande de révision de l'arrêt du 28 novembre 2007*, filed on 11 December 2008.

<sup>16</sup> *Barayagwiza, Requête demandant la prolongation du délai de dépôt de la réponse au mémoire du Greffier intitulé «Submission by the Registrar under rule 33(B) of the Rules of Procedure and Evidence on the «Order Regarding Communication of Documents» dated 16 December 2008», et sollicitant l'autorisation de déposer un complément au mémoire en révision et/ou reconsidération déposé le 11 décembre 2008*, filed on 6 January 2009.

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Applicant to file his supplement within 20 days of the filing of the decision.<sup>17</sup> The Appeals Chamber also ordered that the time limit for the Prosecution's response start to run from the filing of the Applicant's supplement to the Motion.<sup>18</sup>

7. The Applicant filed a supplementary brief to the Motion on 13 February 2009.<sup>19</sup> The Applicant then filed a corrigendum to both the Motion and the Supplementary Brief on 17 February 2009, which addressed several grammatical and typographical errors in the Motion.<sup>20</sup> The Prosecution responded on 25 March 2009,<sup>21</sup> and the Applicant replied on 9 April 2009.<sup>22</sup>

## II. OVERVIEW OF SUBMISSIONS

8. As a preliminary issue, the Applicant contends that the Tribunal placed him in a position of inequality of arms *vis-à-vis* the Prosecution by denying his repeated requests for assignment of counsel and by denying him the facilities to gather documentation necessary for preparing his Motion.<sup>23</sup> He requests that the Appeals Chamber make findings on this specific aspect before it considers the merits of the Motion.<sup>24</sup>

9. The Applicant submits that he recently discovered new facts relating to his "trial *in absentia*" and the competence of his counsel, which are "capable of correcting the conspicuous injustice done to him had they been presented before the Trial Judges for adversarial argument".<sup>25</sup> The Applicant requests that the Appeals Chamber reconsider and/or review its findings in the Appeal Judgement that his "trial *in absentia*" was legal<sup>26</sup> and that he did not receive an unfair trial due to lack of effective and adequate representation.<sup>27</sup> The Applicant further seeks the review of an Appeals Chamber decision of 31 March 2000 concerning the legality of his arrest and detention and the related findings in the Appeal Judgement.<sup>28</sup> Finally, alleging disproportion between the convictions retained on appeal and the sentence, the Applicant seeks the reconsideration of his

<sup>17</sup> Barayagwiza, Decision on Jean-Bosco Barayagwiza's Motions of 11 December 2008 and 6 January 2009, 28 January 2009, p. 6.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Mémoire complémentaire au «Mémoire du requérant en vue de la révision et/ou reconsidération de l'arrêt du 28 novembre 2007»*, filed on 13 February 2009 ("Supplementary Brief").

<sup>20</sup> *Corrigendum au «Mémoire du requérant en vue de la révision et/ou reconsidération de l'arrêt du 28 novembre 2007» du 11 décembre 2008 et au «Mémoire complémentaire» date du 11 février 2009*, filed on 17 February 2009 ("Corrigendum").

<sup>21</sup> Prosecutor's Response to Barayagwiza's "Mémoire du requérant en vue de la révision et/ou reconsidération de l'arrêt du 28 Novembre 2007", 25 March 2009 ("Prosecutor's Response").

<sup>22</sup> *Mémoire en réplique à la réponse du procureur au mémoire du requérant en vue de la révision et/ou reconsidération de l'arrêt du 28 Novembre 2007*, filed on 9 April 2009 ("Reply").

<sup>23</sup> Motion, paras. 2-4, referring to 11 April 2008 Decision; 9 September 2008 Decision; 2 October 2008 Decision.

<sup>24</sup> *Ibid.* para. 4.

<sup>25</sup> *Ibid.* para. 1.

<sup>26</sup> *Ibid.* para. 217; see *ibid.* paras. 21-91.

<sup>27</sup> *Ibid.* para. 217; see *ibid.* paras. 92-217.

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sentence.<sup>29</sup> The Applicant bases his request on the Appeal Chamber's inherent discretionary power to reconsider its previous decisions<sup>30</sup> and its power of review pursuant to Article 25 of the Statute and Rule 120 of the Rules of Procedure and Evidence of the Tribunal ("Rules").<sup>31</sup> Finally, the Applicant requests that the submissions of the parties in relation to his Motion be heard orally.<sup>32</sup>

10. In his Supplementary Brief, the Applicant submits that additional evidence, which he received from the Registrar on 29 December 2008, further supports his argument that Counsel Caldarera and Pognon were "incompetent".<sup>33</sup>

11. The Prosecution responds that the Motion should be dismissed in its entirety.<sup>34</sup>

12. In his Reply, the Applicant argues that details of the documents, which he uses to support his contention that his "trial *in absentia*" was illegal, were not discoverable by him through the exercise of due diligence.<sup>35</sup> He further contends that details of these documents would have been decisive factors for the Appeals Chamber to consider regarding his "trial *in absentia*".<sup>36</sup> The Applicant also claims that new facts show that his counsel did not investigate factual allegations made by the Prosecution,<sup>37</sup> and that the interests of justice require that the Appeals Chamber take all of his alleged new facts into account.<sup>38</sup>

### III. DISCUSSION

#### A. Preliminary Issue: Allegation of Inequality of Arms in the Review and Reconsideration Proceedings

13. The Applicant argues that the Tribunal placed him "in a position of inequality of arms *vis-à-vis* the Prosecution" because it denied his request for assignment of counsel to assist him in preparing the Motion.<sup>39</sup> The Applicant contends that it was unjust for the Tribunal to force him to prepare the Motion without legal assistance while the Prosecution was endowed with "sufficient

<sup>28</sup> See *ibid.* paras. 218-225, referring to Barayagwiza, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000.

<sup>29</sup> *Ibid.* paras. 226, 227.

<sup>30</sup> *Ibid.* paras. 5-13.

<sup>31</sup> *Ibid.* paras. 14-20.

<sup>32</sup> *Ibid.* para. 228.

<sup>33</sup> Supplementary Brief, paras. 6-27.

<sup>34</sup> Prosecutor's Response, para. 4.

<sup>35</sup> Reply, para. 17.

<sup>36</sup> *Ibid.* para. 18.

<sup>37</sup> *Ibid.* paras. 31-37.

<sup>38</sup> *Ibid.* para. 46.

<sup>39</sup> Motion, paras. 2-4, referring to 11 April 2008 Decision; 9 September 2008 Decision; 2 October 2008 Decision; see also Reply, para. 5.

human and material resources".<sup>40</sup> The Applicant claims that he has "suffered unacceptable injustice due to the [Appeals Chamber's] refusal to assign him Counsel for the review proceedings",<sup>41</sup> and requests the Appeals Chamber to order the Registrar to assign him a "Defence team" to "help him finalize the Review proceedings initiated".<sup>42</sup>

14. The Appeals Chamber considers that the Applicant is in fact requesting the reconsideration of the 11 April 2008, 9 September 2008, and 2 October 2008 Decisions denying him the assignment of counsel for the preparation of a request for review. The Appeals Chamber recalls that it may reconsider a previous non-final decision pursuant to its inherent discretionary power if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice.<sup>43</sup>

15. The arguments set forth by the Applicant do not establish a clear error of reasoning in the 11 April 2008, 9 September 2008, and 2 October 2008 Decisions, nor that reconsideration is necessary to prevent an injustice. The Applicant merely submits that the Appeals Chamber placed him "in a position of inequality of arms *vis-à-vis* the Prosecutor" when it denied his requests for assignment of counsel, and that this forced him to research and prepare the Motion alone, without proper resources or expertise.<sup>44</sup> In doing so, the Applicant is simply repeating part of the argument that he set forth in his original motion for assignment of counsel,<sup>45</sup> which the Appeals Chamber has already denied three times.<sup>46</sup>

16. In addition, the Appeals Chamber recalls "that review is an exceptional remedy and that an applicant is only entitled to assigned counsel, at the Tribunal's expense, if the Appeals Chamber authorizes the review".<sup>47</sup> "Nonetheless, counsel may be assigned at the preliminary examination stage, normally for a very limited duration, if it is necessary to ensure the fairness of the proceedings".<sup>48</sup> The Appeals Chamber notes that the Applicant's submissions in support of his request for review are extensive and detailed, and that the Applicant does not express the need to file additional submissions prior to the examination of his Motion. The Appeals Chamber therefore

<sup>40</sup> Motion, para. 3.

<sup>41</sup> Reply, para. 5.

<sup>42</sup> *Ibid.* para. 49.

<sup>43</sup> 9 September 2008 Decision, p. 3; *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-A, Decision on Motion for Reconsideration of the Decision on Request to Admit Additional Evidence, 16 November 2007, p. 2; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.10, Decision on Ndirumutse's Motion for Reconsideration, 5 October 2007, p. 3.

<sup>44</sup> Motion, paras. 2-4.

<sup>45</sup> See 9 September 2008 Decision, p. 3.

<sup>46</sup> See 11 April 2008 Decision; 9 September 2008 Decision; and 2 October 2008 Decision.

<sup>47</sup> *Georges Anderson Nderubumwe 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 Review Decision"), para. 41. See also Decision on Niyitegeka's Urgent Request for Legal Assistance, 20 June 2005 ("Niyitegeka Decision of 20 June 2005"), p. 4.

<sup>48</sup> *Rutaganda Review Decision*, para. 41. See also *Niyitegeka Decision of 20 June 2005*, p. 4.

reiterates its findings that the assignment of counsel under the auspices of the Tribunal's legal aid system is not warranted in this case.

17. Accordingly, the Appeals Chamber denies the Applicant's request for reconsideration of the 11 April 2008, 9 September 2008, and 2 October 2008 Decisions.

#### **B. Request for Reconsideration of the Appeal Judgement**

18. The Applicant argues that he is entitled to a reconsideration of the Appeal Judgement because the Appeals Chamber has an inherent power to reconsider its decisions.<sup>49</sup> While he acknowledges that the Appeals Chamber has held that "there is no power to reconsider a final judgement",<sup>50</sup> the Applicant contends that a final judgement may still be reconsidered because a decision of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") Appeals Chamber states that the Tribunal may reconsider its decisions, which cannot be subject to review proceedings.<sup>51</sup> The Prosecution responds that the jurisprudence of the Appeals Chamber is such that reconsideration of a final judgement is not possible, and that there is no legal basis for the Appeals Chamber to depart from this established jurisprudence and in the interests of justice reconsider the issues raised by the Applicant.<sup>52</sup>

19. In the Reply, the Applicant reiterates his argument that a final judgement may be reconsidered and also argues that the Appeals Chamber should reconsider the Appeal Judgement because "in certain specific cases, the Appeals Chamber has power to reconsider its previous decision, in the interests of justice".<sup>53</sup>

20. The Appeals Chamber does not have an inherent power to reconsider final judgements.<sup>54</sup> As stated in the *Žigić* Decision, to which the Applicant refers:

To allow a person whose conviction has been confirmed on appeal the right to further contest the original findings against them on the basis of mere assertions of errors of fact or law is not in the interests of justice to the victims of the crimes or the convicted person, who are both entitled to certainty and finality of legal judgements.<sup>55</sup>

<sup>49</sup> Motion, paras. 5-13.

<sup>50</sup> *Ibid.* para. 9, quoting *Prosecutor v. Zoran Žigić a/k/a "Ziga"*, Case No. IT-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006 ("*Žigić* Decision"), para. 9 (emphasis added).

<sup>51</sup> *Ibid.*

<sup>52</sup> Prosecutor's Response, para. 21.

<sup>53</sup> Reply, paras. 7, 8.

<sup>54</sup> *Žigić* Decision, para. 9.

<sup>55</sup> *Ibid.*

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The Appeals Chamber has upheld and maintained that the mechanism of reconsideration is not applicable and cannot be used in respect of a final judgement.<sup>56</sup>

21. The jurisprudence cited by the Applicant in support of his contention that the Appeals Chamber may reconsider the Appeal Judgement refers exclusively to the Appeals Chamber's inherent power to reconsider *non-final* decisions, not final judgements.<sup>57</sup> As a consequence, the Appeals Chamber finds no merit in the Applicant's contention.

### C. Request for Review of the Appeal Judgement

#### 1. Standard of Review

22. The Appeals Chamber recalls that review proceedings are governed by Article 25 of the Statute and Rules 120 and 121 of the Rules. The Appeals Chamber emphasizes that review of a final judgement is an exceptional procedure and not an additional opportunity for a party to re-litigate arguments that failed at trial or on appeal.<sup>58</sup> In order for review to be granted, the moving party must show that: (1) there is a new fact; (2) the new fact was not known to the moving party at the time of the original proceedings; (3) the lack of discovery of that new fact was not the result of a lack of due diligence by the moving party; and (4) the new fact could have been a decisive factor in reaching the original decision.<sup>59</sup> In wholly exceptional circumstances, the Appeals Chamber may grant review even where the new fact was known to the moving party at the time of the original proceedings, or the lack of discovery of the fact was the result of a lack of due diligence by the moving party, if ignoring the new fact would result in a miscarriage of justice.<sup>60</sup>

23. The Appeals Chamber further recalls that the term "new fact" refers to new evidentiary information supporting a fact that was not in issue during the trial or appeal proceedings.<sup>61</sup> The requirement that the fact was not in issue during the proceedings means that "it must not have been among the factors that the deciding body could have taken into account in reaching its

<sup>56</sup> See, e.g., *Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-R, Decision on Hassan Ngeze's Motions and Requests Related to Reconsideration, 31 January 2008, p. 3; *Ferdinand Nahimana v. The Prosecutor*, Case No. ICTR-99-52B-R, Decision on Ferdinand Nahimana's "Notice of Application for Reconsideration of Appeal Decision Due to Factual Errors Apparent on the Record", 21 April 2008, p. 2.

<sup>57</sup> Motion, para. 9, citing *Žigic* Decision, para. 9.

<sup>58</sup> *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Fourth Request for Review (Public Redacted Version), 12 March 2009 ("*Niyitegeka* Fourth Review Decision"), para. 21; *Rutaganda* Review Decision, para. 8.

<sup>59</sup> *Niyitegeka* Fourth Review Decision, para. 21; *Rutaganda* Review Decision, para. 8; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Decision on Aloys Simba's Requests for Suspension of Appeal Proceedings and Review, 9 January 2007, para. 8. See also *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Decision on Prosecutor's Request for Review or Reconsideration, 23 November 2006 ("*Blaškić* Review Decision"), para. 7.

<sup>60</sup> *Niyitegeka* Fourth Review Decision, para. 21; *Rutaganda* Review Decision, para. 8; *Blaškić* Review Decision, para. 8.

<sup>61</sup> *Niyitegeka* Fourth Review Decision, para. 22; *Rutaganda* Review Decision, para. 9; *Blaškić* Review Decision, paras. 14, 15.



verdict.”<sup>62</sup> Essentially, the moving party must show that the Chamber did not know about the fact in reaching its decision.<sup>63</sup>

## 2. Alleged New Facts

24. In accordance with the standard applicable in review proceedings, the Appeals Chamber will not address the Applicant's allegations of errors in the Appeal Judgement unless they are related to alleged new facts. Accordingly, the following contentions of errors are dismissed without further consideration: (1) that the Applicant lacked effective and adequate representation between 23 October 2000 and 6 February 2001;<sup>64</sup> (2) that he suffered prejudice due to the continuation of his trial without any legal representation between 6 and 12 February 2001;<sup>65</sup> (3) that the Trial Chamber “knew the limits of Counsel's competence and skill to ensure adequate and effective defence”;<sup>66</sup> (4) that the repeated absences and lateness of his counsel during hearings should have been sanctioned;<sup>67</sup> (5) that his refusal to cooperate could not absolve his counsel from their duty to adequately defend him with due diligence;<sup>68</sup> (6) that his motions of 28 July 2000 and 26 September 2005 remain to be considered on their merits;<sup>69</sup> and (7) that his sentence is unjust, on the ground that it was not sufficiently reduced in view of the convictions that were set aside by the Appeals Chamber.<sup>70</sup> The Appeals Chamber will now turn to the Applicant's arguments which are supported by alleged new facts. The Applicant alleges that there are new facts supporting his contentions that: (1) the Trial chamber erred in trying him “in *absentia*”;<sup>71</sup> and (2) his trial was unfair due to the lack of effective and adequate representation.<sup>72</sup>

### (a) Alleged New Facts Related to the “Trial in *Absentia*”

25. The Applicant argues that he has discovered new facts concerning the alleged illegality of his “trial in *absentia*”, which his Defence Counsel failed to produce before the Trial Chamber.<sup>73</sup> According to the Applicant, those facts are contained in documents,<sup>74</sup> which concern opinions and

<sup>62</sup> *Ibid.*

<sup>63</sup> *Niyitigeka* Fourth Review Decision, para. 22; *Rutaganda* Review Decision, para. 9; *Blaškić* Review Decision, para. 14.

<sup>64</sup> Motion, paras. 92-100; Reply, para. 19; Appeal Judgement, paras. 123-125.

<sup>65</sup> Motion, paras. 101, 102; Reply, paras. 20, 21; Appeal Judgement, paras. 170-179.

<sup>66</sup> Motion, paras. 178-182; Appeal Judgement, paras. 136-138.

<sup>67</sup> Motion, paras. 183-191; Appeal Judgement, paras. 139-157.

<sup>68</sup> Motion, paras. 192-194; Appeal Judgement, para. 138.

<sup>69</sup> Motion, paras. 218-225; Reply, para. 47.

<sup>70</sup> Motion, paras. 226, 227; Reply, para. 48.

<sup>71</sup> Motion, paras. 1, 21-91.

<sup>72</sup> *Ibid.* paras. 1, 92-191.

<sup>73</sup> *Ibid.* para. 22.

<sup>74</sup> The documents that the Applicant refers to are: “(1) Report of the International Law Commission on the work of its forty-fifth session, 3 May-July 1993, Official Records of the General Assembly, Forty-eighth session, Supplement No. 10. (2) Proposals of States and Organizations for the Statute and Rules of Procedure and Evidence of the International Tribunal in relation to the Question of Trials in *absentia*. (3) Proposals of States and Organizations for the Rules of

proposals set forth by various entities and individuals during the preparatory work for the establishment of the International Criminal Court ("ICC").<sup>75</sup>

26. According to the Applicant, these documents demonstrate the extreme divergence of positions regarding the possibility of a trial in the absence of an accused, which led to the exclusion of trial *in absentia* from the Statute and Rules of the ICTY and the Tribunal, and the Statute of the ICC.<sup>76</sup> The Applicant further argues that the only permissible exception to the rule against trial *in absentia* is "where the accused has to be removed from court because of continued disruption of the trial."<sup>77</sup> The Applicant asserts that these are new facts, which establish that the Trial Chamber had no legal basis for trying him in his absence and, consequently, that the Appeals Chamber should have quashed the Trial Judgement.<sup>78</sup>

27. The Prosecution responds that the *travaux préparatoires* presented by the Applicant do not constitute new facts for the purpose of review because the Appeals Chamber already took them into account when determining whether the Trial Chamber correctly proceeded with a trial against the Applicant in his absence.<sup>79</sup> Additionally, the Prosecution contends that these alleged new facts were known, or must have been known to the Applicant through the exercise of due diligence. Finally, it submits that even if these facts could be characterized as "new", they could not have been decisive factors for the Appeals Chamber in reaching its original decision.<sup>80</sup>

28. The Appeals Chamber notes that, on appeal, the Applicant contended that neither the Statute nor the Rules permitted the Trial Chamber to try him *in absentia*.<sup>81</sup> In support of this argument, the Applicant invoked the *travaux préparatoires* of the Statute of the ICTY, and emphasized the fact that the Statute of the ICC does not provide for a trial *in absentia*.<sup>82</sup> Having considered these submissions, the Appeals Chamber stated that it could not "determine any error in the finding reached by the Trial Chamber in regard to the Appellant's refusal to attend trial".<sup>83</sup> Therefore, the documents the Applicant sets forth in the Motion regarding trial *in absentia* do not constitute "evidentiary information supporting a fact that was not in issue during the trial or appeal

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Procedure and Evidence of the International Tribunal in relation to the question of Trials in absentia. (4) Statement by the President of the Tribunal for the Former Yugoslavia. (5) Reports relating to *travaux préparatoires* of the Rome Treaty on the establishment of the ICC. the Statute of the ICC. (6) Statement by the ICTR Prosecutor, Abubakar Jallow, at the 5904<sup>th</sup> Session of the Security Council, held in New York on 4 June 2008". Motion, para. 23.

<sup>75</sup> *Ibid.* paras. 23, 24.

<sup>76</sup> *Ibid.* para. 25.

<sup>77</sup> *Ibid.* para. 72.

<sup>78</sup> *Ibid.* para. 79.

<sup>79</sup> Prosecutor's Response, para. 30.

<sup>80</sup> *Ibid.*

<sup>81</sup> Appeal Judgement, para. 94.

<sup>82</sup> *Ibid.*

<sup>83</sup> Appeal Judgement, paras. 99, 115, 116.

proceedings".<sup>84</sup> Accordingly, they are not new facts that would justify review of the Appeal Judgement by the Appeals Chamber.

(b) Alleged New Facts Related to the "Incompetence" of Counsel and Inadequate Representation

29. The Applicant further submits that new evidence<sup>85</sup> received from the Registrar confirms that he did not receive adequate and effective representation before the Trial Chamber because Counsel Caldarera and Pognon were "incompetent".<sup>86</sup> The Applicant contends that the new evidence proves that the counsel were "incompetent" because it shows that: (1) they did not conduct a field investigation in Rwanda;<sup>87</sup> (2) they did not attempt to retain Investigator Maniragena after his contract was terminated by the Tribunal;<sup>88</sup> (3) Counsel Pognon withdrew prematurely from the Applicant's defence;<sup>89</sup> and (4) they were not competent to adequately represent the Applicant and demonstrated a manifest lack of diligence.<sup>90</sup>

30. Based on jurisprudence from national jurisdictions, which he had not previously cited at trial or on appeal,<sup>91</sup> and a letter he recently received from the Registry,<sup>92</sup> the Applicant contends that Counsel Caldarera and Pognon were "incompetent" and demonstrated a manifest lack of diligence when they represented him at trial. The Applicant claims that the "incompetence" and lack of diligence of Counsel Caldarera and Pognon are demonstrated by the fact that they: (1) "were not familiar with the adversarial system at the time of their assignment";<sup>93</sup> (2) "did not conduct investigations required to prepare an adequate and effective defence before delving into the substance of the case";<sup>94</sup> and (3) "conducted inappropriate cross-examination".<sup>95</sup>

31. Based on work programs that he recently received from the Registry, the Applicant argues that Counsel Caldarera and Pognon never conducted a field investigation in Rwanda.<sup>96</sup> The

<sup>84</sup> *Niyitigeka* Decision, para. 14; *Rutaganda* Review Decision, para. 9; *Blaškić* Review Decision, paras. 14, 15 (internal quotations omitted).

<sup>85</sup> The new evidence, which the Applicant received from the Registrar, consists of various documents such as correspondence between Counsel Caldarera and Pognon and the Registry; time sheets, work programs, and other employment forms for Counsel Caldarera and Pognon; and other miscellaneous documents such as faxes, notes, and written requests. See Motion, para. 104; Supplementary Brief, para. 5. The Applicant received one batch of documents from the Registry in response to the 2 October 2008 Decision. See *Barayagwiza*, Registrar's Submission of 3 November 2008. The Applicant received a second batch of documents from the Registry on 29 December 2008. See Supplementary Brief, para. 5.

<sup>86</sup> Motion, paras. 104-117.

<sup>87</sup> *Ibid.* paras. 118-120.

<sup>88</sup> *Ibid.* paras. 121-129.

<sup>89</sup> *Ibid.* paras. 130-143.

<sup>90</sup> *Ibid.* paras. 143-191.

<sup>91</sup> *Ibid.* paras. 143-191.

<sup>92</sup> See, e.g., *Ibid.* para. 168, Fn. 241.

<sup>93</sup> *Ibid.* p. 53, paras. 150-156.

<sup>94</sup> *Ibid.* paras. 157-167.

<sup>95</sup> *Ibid.* p. 56, paras. 168-177.

<sup>96</sup> *Ibid.* paras. 118-120.

Applicant claims that during the period of 8 February 2001 to 1 October 2002, most of the activities of Counsel Caldarera and his legal assistant took place in Arusha, Tanzania, or at his law firm in Catane, Italy, and that Counsel Caldarera never went to any African country on a working mission.<sup>97</sup> The Applicant also contends that during the period of 5 March 2001 to 6 October 2002, the activities of Counsel Pognon and his legal assistant were carried out solely at his law firm in Benin and in Arusha, and that Counsel Pognon never went to any African country on a working mission.<sup>98</sup>

32. Based on recently received correspondence between Counsel Caldarera and the Registry, the Applicant argues that Counsel Caldarera committed gross professional misconduct by “not using all the means available to him to maintain the services of Investigator Théophile Maniragena”.<sup>99</sup> According to the Applicant, Counsel Caldarera never intervened to prevent the termination of Maniragena’s contract once the Registry informed him that they had suspended it.<sup>100</sup> The Applicant claims that the Registry finalized the termination of Maniragena’s contract once it realized that Counsel Caldarera had not objected to it.<sup>101</sup>

33. Based on recently received correspondence between Counsel Caldarera and Pognon and the Registry, the Applicant argues that Counsel Pognon withdrew prematurely from his case without demonstrating the required “exceptional circumstances” for his withdrawal.<sup>102</sup> The Applicant also states that Counsel Pognon withdrew simply “to renege on the undertaking he had made, with full knowledge of the facts”<sup>103</sup> so that he could “be assigned to the defence of Father Athanase Seromba”.<sup>104</sup>

34. The Applicant argues that the new evidence regarding Counsel Caldarera and Pognon demonstrates that he did not benefit from a truly adversarial trial or equality of arms during trial,<sup>105</sup> and that it was therefore impossible to adequately establish his guilt.<sup>106</sup> The Applicant also argues that gross injustice resulted from the “inadequate representation in a trial conducted in his absence”.<sup>107</sup>

<sup>97</sup> *Ibid.* para. 118.

<sup>98</sup> *Ibid.* p. 71.

<sup>99</sup> *Ibid.* paras. 121-125.

<sup>100</sup> *Ibid.* para. 122.

<sup>101</sup> *Ibid.* para. 123.

<sup>102</sup> *Ibid.* para. 136.

<sup>103</sup> *Ibid.* para. 138.

<sup>104</sup> *Ibid.* para. 139.

<sup>105</sup> *Ibid.* paras. 195-204.

<sup>106</sup> *Ibid.* paras. 205-214.

<sup>107</sup> *Ibid.* paras. 215-217.

35. The Prosecution responds that the competence of the Applicant's trial counsel was raised and comprehensively dealt with during the appeal proceeding and, therefore, that none of the arguments related to this issue concerns a new fact that would justify review of the Appeal Judgement.<sup>108</sup>

36. The Appeals Chamber recalls that, on appeal, the Applicant claimed that his trial counsel were "incompetent" and that he had lacked effective representation at trial. The Appeal Judgement addressed the following allegations made by the Applicant: (1) that Counsel Caldarera did not allow enough time to familiarize himself with the case;<sup>109</sup> (2) that his counsel were frequently late or absent from the proceedings;<sup>110</sup> (3) that there was a conflict of interest between the Applicant and his counsel;<sup>111</sup> (4) that the Applicant was not granted assistance from a Kinyarwanda speaker;<sup>112</sup> (5) that his counsel failed to investigate and to ask crucial questions, and relied improperly on information from third parties;<sup>113</sup> (6) that his counsel failed to recall Prosecution witnesses heard between 23 October 2000 and 6 February 2001;<sup>114</sup> (7) that his counsel failed to cross-examine certain witnesses;<sup>115</sup> and (8) that his counsel made a bad decision to call an expert witness.<sup>116</sup>

37. It is therefore clear that the alleged "incompetence" of Counsel Caldarera and Pognon was in issue during the appeal proceedings. Thus, the facts the Applicant sets forth in the Motion regarding the "incompetence" of Counsel Caldarera and Pognon do not constitute "evidentiary information supporting a fact that was not in issue during the trial or appeal proceedings".<sup>117</sup> Accordingly, they are not new facts that would justify a review of the Appeal Judgement by the Appeals Chamber.

38. Regarding the Applicant's claims that he was not offered a truly adversarial trial, and that inequality of arms and gross injustice resulted from "inadequate representation in a trial conducted in his absence",<sup>118</sup> the Appeals Chamber notes that these arguments are premised on the facts set forth by the Applicant concerning the alleged incompetence of Counsel Caldarera and Pognon and the alleged illegality of his "trial *in absentia*". Having already determined that the facts set forth by the Applicant concerning the alleged incompetence of Counsel Caldarera and Pognon and the

<sup>108</sup> Prosecutor's Response, para. 44.

<sup>109</sup> Appeal Judgement, paras. 136-138.

<sup>110</sup> *Ibid.* paras. 139-157.

<sup>111</sup> *Ibid.* paras. 158-160.

<sup>112</sup> *Ibid.* paras. 161-163.

<sup>113</sup> *Ibid.* para. 164.

<sup>114</sup> *Ibid.* para. 165.

<sup>115</sup> *Ibid.* paras. 166-168.

<sup>116</sup> *Ibid.* para. 169.

<sup>117</sup> *Niyitigeka* Fourth Review Decision, para. 14; *Rutaganda* Review Decision, para. 9; *Blaškić* Review Decision, paras. 14, 15.

<sup>118</sup> Motion, paras. 215-217.

legality of the Applicant's "trial *in absentia*" are not new facts, which merit a review of the Appeal Judgement, the Appeals Chamber declines to address the Applicant's arguments that he did not receive a truly adversarial trial and that he suffered from inequality of arms and gross injustice during trial.

### 3. Conclusion

39. The Appeals Chamber reiterates that review is an exceptional remedy. In the instant case, the Applicant has failed to demonstrate that such a remedy is warranted.

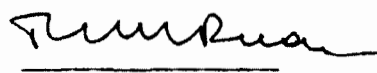
## IV. DISPOSITION

40. For the foregoing reasons, the Appeals Chamber:

**DENIES** the Motion in its entirety.

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

Done this 22<sup>nd</sup> day of June 2009,  
at The Hague,  
The Netherlands.

  
\_\_\_\_\_  
Judge Fausto Pocar  
Presiding

[Seal of the Tribunal]

