8618/H

UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-99-52-A
23 November 2006
(8618/H – 8609)
P.T.

IN THE APPEALS CHAMBER

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

Registrar: Mr. Adama Dieng

Decision of: 23 November 2006

ICTR Appeals Chamber
Date: 23 November 2006
Action: P.T.
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Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE
(Appellants)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-99-52-A

DECISION ON APPELLANT JEAN-BOSCO BARAYAGWIZA'S MOTION CONTESTING THE DECISION OF THE PRESIDENT REFUSING TO REVIEW AND REVERSE THE DECISION OF THE REGISTRAR RELATING TO THE WITHDRAWAL OF CO-COUNSEL

Counsel for Jean-Bosco Barayagwiza
Mr. D. Peter Herbert
Ms. Tanoo Mylvaganam

Counsel for Ferdinand Nahimana
Mr. Jean-Marie Biju-Duval
Ms. Diana Ellis

Counsel for Hassan Ngeze
Mr. Bharat B. Chadha
Mr. Behram N. Shroff

Office of the Prosecutor
Mr. James Stewart
Mr. Neville Weston
Mr. Abdoulaye Seye
Ms. Linda Bianchi
Mr. Alfred Orono Orono

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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 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of "The Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President of 24th August 2006 Refusing to Review and Reverse the Decision of the Registrar Dated 27th March 2006 Relating to the Withdrawal of Co-Counsel" filed by Lead Counsel for Jean-Bosco Barayagwiza ("Lead Counsel" and "Appellant", respectively) on 22 September 2006 ("Motion"), requesting the Appeals Chamber to reverse the Decision of the President of the Tribunal,[1] order the Registrar to withdraw Co-Counsel, Ms. Tanoo Mylvaganam, from the present case, and appoint a new Co-Counsel.[2]

2. The Prosecution responded to the Motion on 22 September 2006.[3] The Appellant replied on 26 September 2006.[4]

I. Procedural Background

3. Trial Chamber I rendered its Judgement in this case on 3 December 2003.[5] The Appellant filed his notice of appeal on 22 April 2004,[6] which was amended on 27 April 2004.[7] His Appellant's brief was filed on 25 June 2004.[8] Pursuant to the Decisions of 17 May 2005[9] and 6 September 2005,[10] the Appellant filed a revised Notice of Appeal and a revised Appellant's Brief on 12 October 2005 ("Notice of Appeal" and "Appellant's Brief", respectively). The filings of

[1] Review of the Registrar's Decision Denying Request for Withdrawal of Co-Counsel, 29 August 2006 ("President's Decision").
[2] Motion, para. 1, p. 9 (i), (iii).
[3] The Prosecutor's Response to "The Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President of 24th August 2006 Refusing to Review and Reverse the Decision of the Registrar Dated 27th March 2006 Relating to the Withdrawal of Co-Counsel", 22 September 2006 ("Response").
[4] The Appellant Jean-Bosco Barayagwiza's Reply to The Prosecutor's Response to The Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President of 24th August 2006 Refusing to Review and Reverse the Decision of the Registrar Dated 27th March 2006 Relating to the Withdrawal of Co-Counsel, 26 September 2006 ("Reply").
[5] *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("Trial Judgement").
[6] *Notice d'Appel (conformément aux dispositions de l'article 24 du Statut et de l'article 108 du Règlement)*, 22 April 2004.
[7] *Acte d'appel modifié aux fins d'annulation du Jugement rendu le 03 décembre 2003 par la Chambre I dans l'affaire « Le Procureur contre Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze, ICTR-99-52-T »*, 27 April 2004.
[8] *Mémoire d'Appel*, 25 June 2004.
[9] Decision on "Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", 17 May 2005 ("Decision of 17 May 2005").
[10] 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.

written briefs on appeal with respect to the Appellant's appeal were completed on 12 December 2005.[11]

4. The Appeals Chamber recalls that, following a request for withdrawal of counsel,[12] the appellate proceedings in relation to the Appellant were stayed from 19 May 2004[13] through 26 January 2005,[14] pending the assignment of a new counsel. The current Lead Counsel was assigned to the Appellant by the Registrar on 30 November 2004, and on 19 January 2005, the Appeals Chamber dismissed the Appellant's challenge to this assignment.[15] The Appellant's request for reconsideration of the Decision of 19 January 2005 was dismissed by the Appeals Chamber on 4 February 2005.[16] On 23 May 2005, following Lead Counsel's request, Ms. Tanoo Mylvaganam was assigned as Co-Counsel.[17]

5. On 17 February 2006, the Appellant's Lead Counsel requested the Registrar to terminate the assignment of Ms. Mylvaganam.[18] Following a request from the Registrar,[19] Ms. Mylvaganam communicated her position on the matter confirming the existence of a difference in legal reasoning and strategy and thus not opposing her withdrawal.[20] On 27 March 2006, the Registrar dismissed the Request for Withdrawal on the grounds that Lead Counsel had neither demonstrated the existence of exceptional circumstances nor submitted any specific allegations, referring simply to differences in views that resulted in the breach of trust between the Appellant and his Co-Counsel.[21]

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[11] The Appellant Jean-Bosco Barayagwiza's Reply to the Consolidated Respondent's Brief, 12 December 2005 ("Reply Brief").
[12] The Very Urgent Motion to Appeal Refusal of Request for Legal Assistance, 8 April 2004.
[13] Decision on Jean-Bosco Barayagwiza's Motion Appealing Refusal of Request for Legal Assistance, 19 May 2004.
[14] Order Lifting the Stay of Proceedings in Relation to Jean-Bosco Barayagwiza, 26 January 2005. In particular, the Appellant was initially ordered to file "any amended or new Notice of Appeal no later than 21 February 2005 (*i.e.*, thirty days from the Decision of 19 January 2005)" and "any amended or new Appellant's Brief no later than 9 May 2005 (*i.e.*, seventy-five days after the time limit for filing the Notice of Appeal)."
[15] Decision on Jean-Bosco Barayagwiza's Motion Concerning the Registrar's Decision to Appoint Counsel, 19 January 2005 ("*Barayagwiza* Decision").
[16] Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005.
[17] Letter from the Registrar to Ms. Mylvaganam, Dated 23 May 2005. Ref: ICTR/JUD-11-5-2-1593.
[18] *Confidential* Letter from Mr. Peter Herbert to the Registry, "Re: Termination of mandate of Co-Counsel Ms Mylvaganam re Appeal of Jean Bosco Barayagwiza (ICTR-99-52-A)", 16 February 2006 ("Request for Withdrawal").
[19] Urgent and Confidential Facsimile Transmission from Aminata L.R. N'gum, Deputy Chief and OIC, 17 February 2006.
[20] *Confidential* Letter from Ms. Tanoo Mylvaganam to the Registrar "Re: Termination of my Mandate as Requested by Lead-Counsel re Appeal of Jean Bosco Barayagwiza (ICTR-99-52-A)", 22 February 2006.
[21] Decision of the Registrar Denying the Request of the Lead Counsel Mr. Peter Herbert to Terminate the Assignment of Co-Counsel Ms. Tanoo Mylvaganam Representing the Appellant Mr. Jean-Bosco Barayagwiza, 27 March 2006 ("Registrar's Decision"), p. 2.

6. On 4 May 2006, the Appellant requested the President to review the Registrar's decision.[22] On 17 May 2006, the Registrar filed related submissions pursuant to Rule 33(B) of the Tribunal's Rules of Procedure and Evidence ("Rules").[23] On 29 August 2006, the President dismissed the Motion for Review on the ground that the Appellant had not shown that the exercise of discretion by the Registrar was unfair or unreasonable.[24]

II. Discussion

A. Submissions of the Parties

7. The Appellant requests the Appeals Chamber to reverse both the Registrar's Decision and the President's Decision, and to order the Registrar to remove the current Co-Counsel from the case and to appoint a new co-counsel in accordance with the wishes of the Appellant and the agreement of Lead Counsel and Co-Counsel.[25] First, he alleges irreconcilable differences in approach in legal strategy between himself and his Co-Counsel, and contends that the Registrar's order to his Counsel to ensure resolution of the conflict is "unrealistic" and "impossible".[26] Second, to counter the Registrar's argument relating to the paucity of information concerning the breakdown of trust with Co-Counsel, the Appellant argues that he should not be expected to provide more details in this respect because (a) this is privileged information and (b) the proof of this breakdown "can be presumed from the joint expert view of both lead and co-counsel."[27] He submits that the breakdown of trust is both a subjective and an objective matter to assess, and that the consensus on this matter within the Defence team should exclude all "speculation" from the Registrar and the President.[28] Third, the Appellant contends that it is contrary to both common sense and Article 19 of the Directive on the Assignment of Defence Counsel[29] to maintain Ms. Mylvaganam as Co-Counsel in

[22] The Appellant Jean-Bosco Barayagwiza's Urgent Motion for the President of the ICTR to Review the Decision of the Registrar Relating to the Continuing Involvement of Co-Counsel, filed confidentially on 4 May 2006 ("Motion for Review").

[23] [Confidential] Registrar's Submission under Rule 33(B) in Respect of the Appellant Jean-Bosco Barayagwiza's Urgent Motion for the President of the ICTR to Review the Decision of the Registrar Relating to the Continuing Involvement of Co-Counsel, 17 May 2005 ("Registrar's Submissions"). The Registrar submitted *inter alia* that « a difference of opinion that leads to a breakdown of trust and confidence between the Appellant and Co-Counsel at the late stage of Appellate proceedings that has been reached in this case d[id] not constitute exceptional circumstances" (para. 6) and thus did not justify the withdrawal of the Co-Counsel. The Registrar also referred to such factors as quality and importance of the Co-Counsel's work, costs implied by the nomination of a new Co-Counsel, the Registrar's discretionary powers, etc. (paras 5, 7, 9-12).

[24] President's Decision, para. 9.

[25] Motion, paras 1-2, 14, p. 9.

[26] *Ibid.*, paras 4, 8. At paragraph 17, the Appellant submits that even if there was some doubt concerning an eventual reconciliation at the time of the Registrar's Decision, the passage of time clearly demonstrates that such reconciliation is not possible anymore.

[27] *Ibid.*, para. 5.

[28] *Ibid.*, para. 14.

[29] Document prepared by the Registrar and approved by the Tribunal on 9 January 1996 as amended 6 June 1997, 8 June 1998, 1 July 1999, 27 May 2003 and 15 May 2004 ("Directive").

his case because she is not receiving his instructions, does not carry his trust and confidence, and has not been allowed to play any part in the conduct of the defence since January 2006.[30] Fourth, he asserts that any reliance on budgetary constraints should be dismissed, "as being contrary to the principle of ensuring a fair appeal and providing for adequate representation of the Appellant."[31] Fifth, the Appellant argues that the President's reference to the risk of delaying the proceedings is flawed, maintaining that the withdrawal will have no impact if a new Co-Counsel is appointed without further delay.[32] Finally, the Appellant maintains that the President's Decision and the Registrar's Decision are contrary to the jurisprudence of both this Tribunal and that of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), including previous decisions of the Registrar allowing the withdrawal of counsel in cases of a breakdown of trust.[33]

8. In its Response, the Prosecution submits "that no change in the Appellant's legal representation for the appeal should be permitted to be used as a reason to cause any delay to the scheduling of the oral hearing in this case."[34] In his Reply, the Appellant reiterates that the withdrawal of Co-Counsel will not cause any delay in the appellate proceedings and that "the appointment of a new co-counsel would enable the timetable to be adhered to far more easily."[35]

B. Discussion

9. The Appeals Chamber has inherent power to review decisions of the Tribunal's President concerning withdrawal of counsel where such decisions are closely related to issues involving the fairness of proceedings on appeal and if the procedure provided by Article 19 of the Directive has been followed.[36] However, such review is neither a rehearing, nor an appeal, nor is it in any way similar to the review which a Chamber may undertake of its own judgement in accordance with Rule 119 of the Rules.[37] The Appeals Chamber recalls that judicial review of an administrative

[30] Motion, paras 6, 17-18.
[31] *Ibid.*, p. 9 (ii). *See also* paras 6 and 20, referring to the President's Decision, para. 8.
[32] *Ibid.*, para. 22, p. 9 (iv).
[33] *Ibid.*, paras 9-16, 19.
[34] Response, para. 2. The Prosecution recognizes that normally, it does not address this matter since it lies in the discretion of the Registry, the President of the Tribunal, and ultimately, the Appeals Chamber (para. 2.).
[35] Reply, para. 1.
[36] 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 2005, p. 3; *Prosecutor v. Vidoje Blagojević*, Case No. IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team, 7 November 2003 ("*Blagojević* Appeal Decision"), para. 7. *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"), para. 19; *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Request of Withdrawal of Defence Counsel), 2 February 2000, p. 2.
[37] *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003 ("*Kvočka* Decision"), para. 13. *See also The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on the Defence Motions for the Reinstatement of Jean

decision in relation to legal aid under the Directive is primarily concerned with the regularity of the procedure by which the Registrar and/or the President reached the impugned decision.[38] The decision will be quashed if the Registrar or the President:

> (a) failed to comply with the legal requirements of the Directive, or
>
> (b) failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision, or
>
> (c) took into account irrelevant material or failed to take into account relevant material, or
>
> (d) reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the "unreasonableness" test).[39]

The Appeals Chamber also specified that "[t]hese issues may in the particular case involve, at least in part, a consideration of the sufficiency of the material before the Registrar [or President], but (in the absence of established unreasonableness) there can be no interference with the margin of appreciation of the facts or merits of that case to which the maker of such an administrative decision is entitled".[40] Finally, in the review, the party contesting the administrative decision bears the onus of persuasion and must show that (a) an error of the nature described has occurred, and (b) that such error has significantly affected the impugned decision to his detriment.[41]

10. It has been repeatedly emphasized that the right to legal assistance financed by the Tribunal does not confer the right to counsel of one's choosing.[42] When deciding on the assignment of counsel, some weight is accorded to the accused's preference, but such preference may be overridden if it is in the interests of justice to do so.[43] The Appeals Chamber further recalls that an

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Yaovi Degli as Lead Counsel for Gratien Kabiligi, 19 January 2005 ("*Bagosora* Decision of 19 January 2005"), para. 37; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision [of the President] Affirming the Registrar's Denial of Assigned Counsel's Application to Withdraw, 7 February 2005, para. 4; *The Prosecutor v. Vesselin Šljivančanin*, Case No. IT-95-13/1-PT, Decision [of the President] on Assignment of Defence Counsel, 20 August 2003, para. 22 ("*Šljivančanin* Decision").

[38] *Kvočka* Decision, para. 13. *See also Bagosora* Decision of 19 January 2005, para. 37; *Šljivančanin* Decision, para. 22.

[39] *Id.*

[40] *Kvočka* Decision, para. 13.

[41] *Kvočka* Decision, para. 14; *Prosecutor v. Vidoje Blagojević & Dragan Jokić*, Case No. IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević's Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003 ("*Blagojević* Trial Decision"), para. 116.

[42] *Blagojević* Appeal Decision, para. 22 and footnote 54; *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-AR73.1, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić, 6 October 2004, para. 8; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement"), para. 61; *Jean Kambanda v. The Prosecutor*, Case No. ICTR 97-23-A, Judgement, 19 October 2000, para. 33. *See also The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Maitre Paul Skolnik's Application for Reconsideration of the Chamber's Decision to Instruct the Registrar to Assign him as Lead Counsel for Gratien Kabiligi, 24 March 2005 ("*Bagosora* Decision of 24 March 2005"), para. 21; *Bagosora* Decision of 19 January 2005, para. 45; *The Prosecutor v. Tharcisse Muvunyi et al.*, Case No. ICTR-2000-55-I, Decision on the Accused's Request to Instruct the Registrar to Replace Assigned Lead Counsel, *Article 20(4)(d) of the Statute and Rules 45 and 73 of the Rules of Procedure and Evidence*, 18 November 2003, para. 6.

[43] *Barayagwiza* Decision, p. 3; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.1, Decision on Appeal by Bruno Stojjić Against Trial Chamber Decision on Request for Appointment of Counsel, 24 November 2004, para. 19; *Blagojević* Appeal Decision, para. 22; *Akayesu* Appeal Judgement, para. 62. *See also Bagosora* Decision of 24 March 2005, para. 21; *Blagojević* Trial Decision, paras 86, 117; *Prosecutor v. Duško Knežević*, Case No. IT-95-4-PT, Decision

indigent accused does not have a right to a co-counsel, but, where appropriate and at the request of the lead counsel, the Registrar *may* appoint a co-counsel to assist the assigned lead counsel.[44] Accordingly, where co-counsel has been appointed and subsequently withdrawn, there is no guarantee that the co-counsel will be replaced.[45] Finally, the Appellant's personal preferences are irrelevant to assignment or withdrawal of co-counsel.[46]

11. Under Article 19(A)(ii) of the Directive the Registrar may, in exceptional circumstances and at the request of lead counsel, withdraw the assignment of co-counsel.[47] The burden of proof of existence of such circumstances squarely lies on lead counsel.[48] The Appeals Chamber emphasizes that each case must be considered on its own and that what constitutes exceptional circumstances justifying a request for withdrawal may vary from one case to another. In addition, exceptional circumstances justifying withdrawal of a co-counsel might be substantially different from those applicable to withdrawal of a lead counsel.

12. The Appeals Chamber considers that the alleged conflict between the Appellant and his Co-Counsel on issues of legal strategy does not constitute an exceptional circumstance justifying a withdrawal of Co-Counsel. The Appeals Chamber notes that, in most decisions holding that a breakdown of trust between the accused and his legal representatives constituted an exceptional circumstance justifying the withdrawal of assignment, the breach of trust was attributable to one or more of the following circumstances: alleged incompetence or lack of knowledge of the Rwandan context and history; a lack of initiative in the defence of the accused; an exceptional workload incompatible with other professional commitments; a breach of professional responsibilities, including the obligation to communicate with the client; and misconduct or manifest negligence.[49]

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on Accused's Request for Review of Registrar's Decision as to Assignment of Counsel, 6 September 2002, p. 3; *The Prosecutor v. Gérard Ntakirutimana*, Case Nos. ICTR-96-10-T and ICTR-96-17-T, Decision on the Motions of the Accused for Replacement of Assigned Counsel/Corr., 18 June 1997, p. 5.

[44] Directive, Article 15(C) and (E). *See The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-2000-56-T, Decision on Defence Oral Motion for Adjournment of the Proceedings, 8 October 2004, para. 6 ; *Le Procureur c. Aloys Simba, Affaire n° ICTR-01-76-I, Décision portant report de la date d'ouverture du procès, 18 août 2004*, para. 24 ; *Blagojević* Trial Decision, paras 77, 79, 118; *Prosecutor v. Radislav Brđanin*, Case No. IT-99-36-T, Confidential Order Relating to Lead Counsel's Appeal from Registrar's Confidential Decision of 7 March 2003, 1 April 2003, p. 7.

[45] *Blagojević* Trial Decision, para. 79.

[46] *Cf. Blagojević* Appeal Decision, para. 54.

[47] The Appeals Chamber notes that Article 20(A) of the ICTY Directive on the Assignment of Defence Counsel No. 1/94, IT/73/REV.11 does not contain the requirement of "exceptional circumstances" and instead refers to "the interests of justice". This difference should be born in mind when making parallels between the jurisprudence of the two Tribunals.

[48] *See Blagojević* Trial Decision, para. 116.

[49] *See The Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision by the Registrar of Withdrawal of Mrs. Danielle Girard as Co-Counsel for the Accused François-Xavier Nzuwonemeye, 13 October 2005, p. 3; *Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-T, Decision by the Registrar of Withdrawal of Mr. Alfred Pognon, Lead Counsel for Athanase Seromba, 10 May 2005, p. 3; *Blagojević* Trial Decision, para. 119; *The Prosecutor v. Theoneste Bagosora*, Case No. ICTR-96-7-T, Decision on the Request by the Accused for Change of Assigned Counsel, 26 June 1997; *Prosecutor v. Duško Tadić*, Case No IT-94-1-A, Registrar's Decision on Withdrawal of Co-

No allegations of this kind were made against Co-Counsel in the present case. Therefore, the Appeals Chamber is not convinced that the Registrar's Decision and the President's Decision contradict the Tribunal's jurisprudence.

13. The Appeals Chamber recalls that, according to the jurisprudence of both the Tribunal and the ICTY, an accused's refusal to cooperate with his lawyers does not constitute an exceptional circumstance warranting the Registrar's withdrawal of assigned counsel.[50] More precisely, an accused does not have the right to unilaterally destroy the trust between himself and his counsel, or to claim a breakdown in communication through unilateral actions, in the hope that such actions will result in the withdrawal of his counsel by the Registrar.[51] A lack of trust in counsel based on disagreements in approach to one's defence strategy is distinguishable from a lack of trust due to a breach by counsel in fulfilling his professional and ethical responsibilities in the course of representation.[52] Thus, a divergence of opinion as to the defence strategy cannot in itself justify that there is a loss of trust in the counsel's abilities or commitment to the case. It is even more so when the divergence is between an appellant and a co-counsel, whose mandate is to assist the lead counsel.[53]

14. In the present case, Lead Counsel did not provide the Registrar with any specific complaints regarding the performance of Co-Counsel that may have warranted her disqualification on the grounds of ineffective assistance or breach of professional duties. The Appeals Chamber rejects the Appellant's argument that it is sufficient "to state in broad terms" that the trust and confidence have broken down[54] and, consequently, finds that it was open to the Registrar and the President to conclude that the Appellant's request for withdrawal was not justified.[55]

15. Moreover, the Appeals Chamber is satisfied that the Registrar and the President properly took into account other particular circumstances of the case, such as the potential delay in the proceedings as well as the proper use of the Tribunal's resources.[56] Indeed, in the circumstances

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Counsel, 2 September 1997, p. 1; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Decision on the Request of the Accused for the Replacement of Assigned Counsel, 20 November 1996, pp. 2-3.

[50] *See Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision Affirming the Registrar's Denial of Assigned Counsel's Application to Withdraw, 7 February 2005 ("*Milošević* Decision of 2005"), para. 9.

[51] *Blagojević* Appeal Decision, para. 51. *See also Bagosora* Decision of 24 March 2005, paras 21, 30; *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Assigned Counsel's Motion for Withdrawal, 7 December 2004 ("*Milošević* Decision of 2004"), para. 18; *Blagojević* Trial Decision, para. 100.

[52] *Blagojević* Trial Decision, paras 106, 120.

[53] *See supra*, para. 10.

[54] Motion, para. 5.

[55] *Cf. Blagojević* Trial Decision, para. 90 confirmed by *Blagojević* Appeal Decision.

[56] *See Akayesu* Appeal Judgement, para. 60; *Prosecutor v. Vinko Martinović*, Case No. IT-98-34-A, Decision by the Registrar re: Assignment of Counsel to Vinko Martinović, 19 May 2003, p. 2; *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-PT, Decision by the Registrar to Withdraw the Assignment of Mr. Caglar as Counsel to the Accused and to Assign Mr. Hodžić, 18 February 2003, p. 2; *Prosecutor v. Ranko Češić*, Case No. IT-95-10/1-PT, and *Prosecutor v.*

where no misconduct or manifest professional negligence on the part of the counsel is established, factors such as the efficient management of resources are directly relevant to the decision not to permit withdrawal of counsel.[57] The Registrar noted that "Ms. Mylvaganam submitted claims for 346.43 hours of work [during the months of May, June and July 2005], which were approved and duly paid",[58] and she "has claimed an additional 395.26 hours for the months of August-December 2005. These hours will be paid up to a maximum of 350 hours, making a total of hours paid to Co-Counsel 700 hours."[59] The Registrar submitted that if Ms. Mylvaganam was withdrawn and a new co-counsel appointed, "this would require additional hours over the 700 hours already committed, and [...] this may be a precedent that will have substantial implications for the Legal Aid Programme".[60] The Appeals Chamber notes that Lead Counsel has explained that the remaining work on appeal will amount to at least 150 additional hours.[61]

16. Furthermore, the Appeals Chamber notes that proceedings in this appeal have been delayed for a significant time,[62] notably as a result of changes in the representation of the Appellant.[63] The Appeals Chamber also notes that the request for withdrawal of Co-Counsel came at a late stage of the proceedings, after the Appellant has filed his Reply Brief. At this stage, the introduction of a new co-counsel, unfamiliar with the case, will inevitably result in undue delay,[64] given that this person will require some time to get familiar with the case and its documents.[65] An unnecessary replacement of the current Co-Counsel who is thoroughly familiar with the case and who has already dedicated hundreds of hours to the Appellant's appeal would be detrimental to the Appellant's right to be tried fairly and expeditiously.[66] The Appeals Chamber thus finds that the Registrar and the President did not err in taking these factors into account.[67]

Milorad Krnojelac, Case No. IT-97-25-A, Decision by the Registrar, 6 January 2003, p. 2; *The Prosecutor v. Pauline Nyiramasuhuko & Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Ntahobali's Motion for Withdrawal of Counsel, 22 June 2001, paras 17-19; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Decision on Request by Accused Mucić for Assignment of New Counsel, 24 June 1996, para. 5.

[57] *Blagojević* Appeal Decision, para. 32.

[58] Registrar's Submissions, para. 3 (i).

[59] *Ibid.*, para. 3 (iii).

[60] *Ibid.*, para. 7.

[61] Motion, para. 7; see the President's Decision, para. 8.

[62] Decision on Jean Bosco Barayagwiza's Motion Concerning the Registrar's Decision to Appoint Counsel, 19 January 2005, p. 3.

[63] *See supra*, paras 3-4. As a result of the change of Lead Counsel as well as the appointment of a new Defence team, including the current Co-Counsel, the current versions of the Appellant's Notice of Appeal and Appellant's Brief were filed as late as 12 October 2005, *i.e.* almost two years after the Trial Judgement.

[64] *See Bagosora* Decision, para. 22; *Blagojević* Trial Decision, para. 119.

[65] *Prosecutor v. Radislav Brđanin*, Case No. IT-99-36-T, Decision on Defence Motion for Adjournment, 10 March 2003, p. 2.

[66] *Cf. Blagojević* Appeal Decision, para. 50.

[67] Registrar's Submissions, para. 12; President's Decision, paras 6 and 8.

17. The Appeals Chamber is satisfied that the Appellant suffered no prejudice as a result of the Registrar's and the President's Decisions.[68] The Appellant is a long-time beneficiary of the Tribunal's legal aid system. As noted above, the Appellant appears to have received substantial assistance from the current Co-Counsel throughout the appellate proceedings. The alleged breakdown in trust dates to 16 February 2006,[69] that is, after the filing of the Appellant's Brief and the Reply Brief. The Appeals Chamber reiterates that no allegations of incompetence, negligence or any other breach of professional conduct were made against Co-Counsel and Lead Counsel has been fully satisfied with her performance.[70] In addition, the retention of the Co-Counsel would protect the Appellant's right to be tried fairly and expeditiously.[71] It was thus reasonable for the Registrar and the President to find that there was no basis for Lead Counsel, and *a fortiori* for the Appellant, to be dissatisfied with the quality of legal representation afforded by the Co-Counsel, and that there is no basis for the lack of trust in those abilities.[72] The Appeals Chamber finally notes that Co-Counsel's professional obligations to represent the Appellant remain.[73]

18. In light of the findings above, the Appeals Chamber concludes that there is no reason to quash either the Registrar's Decision or the President's Decision.

III. Disposition

19. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion in its entirety.

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

Dated this 23rd day of November 2006
At The Hague, The Netherlands

Fausto Pocar
Presiding Judge

[Seal of the Tribunal]

[68] *See Akayesu* Appeal Judgement, para. 64.
[69] Request for Withdrawal.
[70] *See* Registrar's Decision, p. 2; Request for Withdrawal, p. 2;
[71] *See Blagojević* Appeal Decision, para. 50.
[72] *Cf. Ibid.*, para. 17.
[73] *Ibid.*, para. 54. *See also Bagosora* Decision, para. 26; *Milošević* Decision of 2005, para. 9; *Milošević* Decision of 2004, para. 17.

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

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APPEALS CHAMBER – PROOF OF SERVICE

CHAMBRE D'APPEL - PREUVE DE NOTIFICATION

November 23, 2006

Case Name / *Affaire:* ***NAHIMANA ET AL.***

Case No / *No. de l'affaire:* ***ICTR-99-52-A***

Ferdinand NAHIMANA,
Jean-Bosco BARAYAGWIZA,
Hassan NGEZE
v.
THE PROSECUTOR

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APPEALS UNIT
✖ Ms Félicité Talon

APPEALS CHAMBER
✖ Judge / Juge Fausto Pocar, Presiding
✖ Judge / Juge Mohamed Shahabuddeen
✖ Judge / Juge Mehmet Güney
✖ Judge / Juge Andresia Vaz
✖ Judge / Juge Theodor Meron

✖ Ms Catherine Marchi-Uhel
✖ Mr Roman Boed
✖ Concerned Associate Legal Officers
✖ Ms. Fatou Fall

DEFENSE
✖ Accused / *accusé* : Ferdinad NAHIMANA, Jean-Bosco BARAYAGWIZA, Hassan NGEZE
(complete CMS4 Form)

✖ Lead Counsel / *Conseil Principal*: **Mr. Biju-Duval, Mr. Donald Herbert, Mr. Bharat Chadha** ☐ In Arusha (complete CMS 2) ✖ Fax Number: **00-33-1 53 80 47 48 00 44 207 841 6199/6197 00 255-27-250 8854**

☐ Co-Counsel / *Conseil Adjoint*: Ms. Diana Ellis, Ms. Gabriele Della Morte, Ms. Nathalie Leblanc
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From: *De:* ✖ **Koffi Afande** ✖ **Patrice Tchidimbo**

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