

ICTR-96-17-T
18-6-97
(196-191)

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UNITED NATIONS  NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

CHAMBRE I - CHAMBER I

OR:FR

Before: Judge Laïty Kama, Presiding Judge
Judge Yakov A. Ostrovsky
Judge Lennart Aspegren

Registry: Mr. Frederik Harhoff

Decision of: 11 June 1997

THE PROSECUTOR
VERSUS
GÉRARD NTAKIRUTIMANA

Case No. ICTR-96-10-T
Case No. ICTR-96-17-T

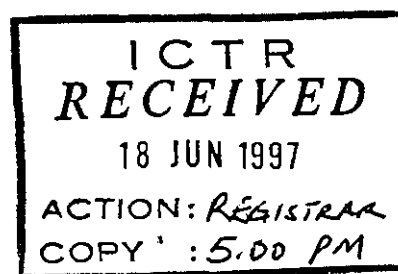
DECISION ON THE MOTIONS OF THE ACCUSED
FOR REPLACEMENT OF ASSIGNED COUNSEL /Corr.

The Office of the Prosecutor:

Mr. Jonah Rahetlah
Ms. Elizabeth Ann Farr
Ms. Brenda Sue Thornton

Counsel for the Accused:

Mr. N. K. Loomu-Ojare



Case No. ICTR-96-10-T
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THE TRIBUNAL,

SITTING as Trial Chamber I of the International Criminal Tribunal for Rwanda (the "Tribunal"), composed of Judge Laïty Kama as Presiding Judge, Judge Yakov Ostrovsky and Judge Lennart Aspegren;

WHEREAS, through numerous letters addressed to the President of the Tribunal, the accused Gérard Ntakirutimana is requesting that the counsel assigned to him by the Registrar on 10 March 1997, in the person of Mr. N. K. Loomu-Ojare of the Tanganyika Bar Association, be replaced on the grounds of having lost confidence in said counsel, and subsequently that the Registrar assign to him a particular counsel of his choice;

WHEREAS, on this last point, he cites the provisions of Article 20 (4) of the Statute of the Tribunal (the "Statute"), which supposedly entitles him, though indigent, to freely choose his counsel, and submits that the Registrar should never have imposed Mr. Loomu-Ojare on him;

WHEREAS it should be recalled that this is the second request made by the accused for replacement of counsel;

WHEREAS in fact, during a hearing on this matter on 4 March 1997, taking into account the crisis situation that had developed between the accused Gérard Ntakirutimana and his counsel at the time, Ms. Ghislaine Moïse-Bazie of the Côte d'Ivoire Bar Association, who had asked to be withdrawn from the case, the Tribunal considered that there existed, on that occasion, an exceptional case as a condition for the change of assigned counsel, as required by Article 19 (D) of the Directive on Assignment of Defence Counsel (the "Directive"), and, for that reason, decided to withdraw Ms. Moïse-Bazie and instructed the Registrar to immediately assign a new counsel to the accused;

WHEREAS it was therefore at the instruction of the Tribunal that the Registrar assigned Mr. N. K. Loomu-Ojare to replace Ms. Moïse-Bazie;

WHEREAS it is, however, worth pointing out that it was at a time when the accused was fearing his imminent arrest by the Côte d'Ivoire authorities, at the request of the Prosecutor of the Tribunal, that he instructed Ms. Moïse-Bazie, to represent him at his own expense, particularly during his detention in Côte d'Ivoire, Ms. Moïse-Bazie having even declared that she had received the sum of CFA 500,000 in legal fees from the accused and his family;

WHEREAS it was later that Ms. Moïse-Bazie requested that her name be placed on the Registrar's list of counsel eligible for assignment and that request was granted;

WHEREAS it would therefore be inaccurate to state that the accused Mr. Gérard Ntakirutimana had chosen his counsel from the list previously established by the Registrar, since, for practical reasons, the Registrar had limited himself to confirming that Ms. Moïse-Bazie had been instructed by the accused, who in the meantime had declared himself to be indigent;

TAKING INTO ACCOUNT the rights of the accused, as set forth in Article 14(3)(d) of the International Covenant on Civil and Political Rights (the "Covenant"), in Article 20(4)(d) of the Statute, in Article 7(1)(c) of the African Charter on Human and People's Rights (the "African Charter") and in Article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention");

AFTER HAVING DELIBERATED,

WHEREAS the Tribunal considers that the correspondence and oral arguments of the accused Gérard Ntakirutimana raise two important issues:

- firstly, the existence of an exceptional case as a condition for the replacement of counsel, upon the decision of a Chamber, at the request of an accused; and
- secondly, consequences of indigence in relation to the choice of counsel.

A. On the replacement of Mr. Loomu-Ojare upon the decision of the Chamber

WHEREAS, in accordance with Article 19 (D) of the Directive, only in exceptional cases may the assigned counsel be replaced, upon a decision by a Chamber, at the request of the accused;

WHEREAS, in support of his request for the replacement of his current counsel, the accused essentially claimed, at the hearing convened on 8 May 1997 to that end, that he no longer had confidence in said counsel, solely on the ground that Mr. Loomu-Ojare was a Tanzanian national and that the United Republic of Tanzania maintained special ties with the present Government of the Republic of Rwanda;

WHEREAS, while objecting to the allegations made by the accused, Mr. Loomu-Ojare asserted, at the same hearing, that, as a lawyer and in accordance with the professional code of ethics of his Bar, he was totally independent of the Tanzanian Government, and was committed to the defence of Gérard Ntakirutimana;

WHEREAS with regard to Mr. Loomu-Ojare, the Tribunal has had occasion to confirm for itself that he has always conscientiously striven to provide effective legal representation for the accused;

WHEREAS, consequently, the Tribunal is not far from believing that the accused's request for change of counsel is motivated solely by his desire to be assigned a particular counsel, and not because of any loss of confidence vis-à-vis Mr. Loomu-Ojare;

WHEREAS an exceptional case, as required by Article 19 of the Directive, to permit a change of counsel therefore does not exist, and thence the accused's request should not be granted;

B. Consequences of indigence in relation to the choice of counsel

WHEREAS, at the above-mentioned hearing of 8 May 1997, the accused Gérard Ntakirutimana, on the basis of the provisions of Article 20(4) of the Statute, submitted that any accused, even if indigent, has the right to choose his own counsel and cannot have one imposed upon him, as the Registrar did when he assigned Mr. Loomu-Ojare to him without his prior accord;

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WHEREAS Article 20(4) of the Statute, which does, actually, simply reiterate Article 14 of the Covenant, stipulates:

“In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(...)

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(...)

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(...)”

WHEREAS it seems that the formula used for the indigent accused, which is the right “to have legal assistance assigned to [him], ... , and without payment by [him] in any such case if [he] does not have sufficient means to pay for it”, involves a party other than the accused in the choice of assigned Defence counsel;

WHEREAS, according to Rule 45 of the Rules of Procedure and Evidence (the “Rules”) and Article 13 of the Directive, it is the Registrar who is vested with such power;

WHEREAS, this being the case, the question is whether, in so doing, the Registrar is necessarily bound to consider the choice made by the indigent accused;

WHEREAS, on this question, the Tribunal points out that Article 20(4) of the Statute outlines two situations:

- the first situation requires that, where the accused has the means to pay for counsel, the accused may choose whomever he or she wishes;
- the second situation is precisely that of the accused Gerard Ntakirutimana who declared himself to be indigent and was so recognized by the Registrar; in this case, it is for the Registrar to assign him counsel who will be remunerated from the funds allocated by the Tribunal for this purpose;

WHEREAS the Registrar shall assign him a counsel whose name is on the list of counsel eligible for assignment, as drawn up by his office, pursuant to Rule 45 of the Rules and Article 13 of the Directive;

WHEREAS this means that the Registrar cannot be expected to fulfill another obligation, that would be to always follow the wishes of the indigent accused with regard to the choice of counsel, furthermore, while in the present case, the accused Gerard Ntakirutimana had requested, when the Tribunal heard his request on 8 May 1997, that the Registrar assign him a particular counsel whose name was not even on the Registrar’s list;

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WHEREAS the Tribunal reads Article 20(4) in the same manner as the Human Rights Committee, the supervisory and interpretation body of the Covenant, established in accordance with Article 28, when it reads Article 14(3)(d) of the said Covenant;

WHEREAS, indeed, in several of its findings, the Human Rights Committee has had to reiterate that the said Article 14 does not entitle the accused to choose Defence counsel assigned to him without payment by him;

WHEREAS, thus, in the cases Little v. Jamaica, [Communication No. 330/1988 UN Doc. CCPR/C/50/D330/1988 (1994)] and Osbourne Wright and Eric Harvey v. Jamaica [Communication No. 459/1991, UN Doc. CCPR/C/55/D/459/1991 (1995)] the Human Rights Committee declared, on the one hand, that Article 14(3)(d) of the Covenant did not entitle the accused to choose counsel provided to him or her without payment by him or her and, on the other, that the counsel must ensure the effective representation of the accused in the interests of justice;

WHEREAS, furthermore, the European Commission on Human Rights also arrived at such an interpretation and adopted a similar position with regard to Article 6(3)(c) of the European Convention, by declaring, in the case F. v. Swiss Confederation (Decision of 9 May 1989, Application No. 12152/86) that Article 6(3)(c) of the European Convention did not guarantee the accused the right to choose the assigned counsel, nor even the right to be consulted on this matter by the court, which must nevertheless ensure that the Defence of the accused is effective;

WHEREAS the European Court of Human Rights, on its part, in the case Croissant v. Germany [62/1991/314/385 (1992)] confirmed the right of an accused to be defended by a counsel of his or her own choosing, while emphasizing that certain limitations apply where free legal representation is concerned; the right of an accused to be defended by counsel of his or her own choosing can therefore not be considered *per se* to be absolute; and while affirming that national courts must certainly take into account the preferences of the accused, such preferences may not be followed when there are relevant and sufficient grounds for maintaining that it was necessary in the interests of justice;

WHEREAS, the principle having thus been set out that the final decision for the assignment of counsel and of the choice of such counsel rests with the Registrar, the Tribunal submits nonetheless that, mindful to ensure that the indigent accused receives the most efficient defence possible in the context of a fair trial, and convinced of the importance to adopt a progressive practice in this area, an indigent accused should be offered the possibility of designating the counsel of his or her choice from the list drawn up by the Registrar for this purpose, pursuant to Rule 45 of the Rules and Article 13 of the Directive, the Registrar having to take into consideration the wishes of the accused, unless the Registrar has reasonable and valid grounds not to grant the request of the accused.

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FOR THESE REASONS

THE TRIBUNAL, by two votes to one,


DECLARES that, in this case, no exceptional case exists to justify the replacement of Mr. N. K. Loomu-Ojare, as requested by the accused Gérard Ntakirutimana;


DECIDES, consequently, not to grant the request made by the accused Gérard Ntakirutimana for Mr. Loomu-Ojare to be replaced;

DECLARES that Article 20(4) of the Statute cannot be interpreted as giving the indigent accused the absolute right to be assigned the legal representation of his or her choice;

DECLARES, nonetheless that, mindful to ensure that the indigent accused receives the most efficient defence possible in the context of a fair trial, and convinced of the importance to adopt a progressive practice in this area, an indigent accused should be offered the possibility of designating the counsel of his or her choice from the list drawn up by the Registrar for this purpose, the Registrar having to take into consideration the wishes of the accused, unless the Registrar has reasonable and valid grounds not to grant the request of the accused.

Arusha, 11 June 1997


Laity Kama
Presiding Judge


Lennart Aspegren
Judge

Judge Yakov Ostrovsky's separate opinion is attached to the Decision of Trial Chamber I.

(Seal of the Tribunal)



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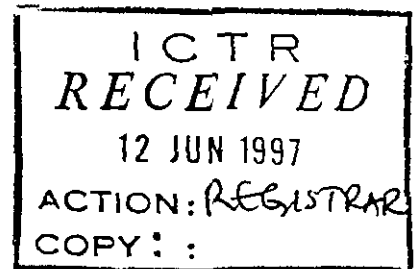
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THE PROSECUTOR
VERSUS
GÉRARD NTAKIRUTIMANA

Case No. ICTR-96-10-T
Case No. ICTR-96-17-T

SEPARATE AND DISSENTING OPINION OF JUDGE YAKOV OSTROVSKY ON
THE REQUEST OF THE ACCUSED FOR CHANGE OF ASSIGNED COUNSEL

The Office of the Prosecutor:

Mr. Jonah Rahetlah
Ms. Elizabeth Ann Farr
Ms. Brenda Sue Thornton

Counsel for the Accused:
Mr. N. K. Loomu-Ojare

YOR

1. I have carefully considered the factual and legal analysis, and the decision taken by my two learned colleagues in the instant case. However, I respectfully differ with their interpretation of Article 20 (4) (d) of the Statute of the International Criminal Tribunal for Rwanda (the "Statute").

2. Article 20 (4) (d) of the Statute stipulates:

"To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, without payment by him or her in any such case if he or she does not have sufficient means to pay for it."

3. The abovementioned provision is a reproduction of the Article 14 (3) (d) of the International Covenant on Civil and Political Rights (the "Covenant").

4. The interpretation of this provision in the abovementioned documents cannot be the same. There is a substantial difference between these two documents. The Covenant is dealing with the domestic legal systems applicable in the Member States. The Statute provides for the situation related to rights of the accused before the International Tribunal.

5. In the case of International Tribunal, the right of the accused to choose his or her defence counsel and right of the Registrar to assign the defence counsel are not absolute. The cooperation between the Registrar and the accused is essential to have mutual confidence between the accused and his or her counsel, in order to render effective defence. It is of crucial importance to take the necessary measures to ensure a fair trial, in view of the circumstances under which this Tribunal was created and working.

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6. In conformity with Article 20 (4) (d) of the Statute, Rule 45 of the Rules of Procedure and Evidence (the "Rules") and Article 13 of the Directive on Assignment of Defence Counsel (the "Directive"), the Registrar assigns a defence counsel to the indigent accused. But the accused has the right to choose his or her defence counsel from the list drawn up by the Registrar in accordance with Rules 44 and 45 of the Rules.

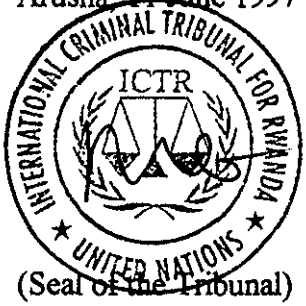
The Registrar may refuse to assign a counsel to the accused of his or her choice if there are reasonable grounds for doing so. But in the light of Article 20 (4) (d) of the Statute, the Registrar cannot impose his or her decision about the assignment of a defence counsel on the accused without taking into account his or her opinion.

7. The assignment of Mr. N.K. Loomu-Ojare, as a defence counsel was made without consulting the accused, and his right to choose his defence counsel was not respected. Consequently, a situation was created in which the accused is alleged to have no confidence in his currently assigned counsel.

8. On the basis of abovementioned reasons, the instant case should be considered as exceptional in accordance with Article 19 (D) of the Directive.

9. Therefore, I am of view that there is a sufficient legal basis to accept the request of the accused and replace his current defence counsel in the interests of justice.

Arusha, 11 June 1997



Yakov Ostrovsky
Yakov Ostrovsky
Judge