

Case No. ICTR-97-21-T

ICTR 97-21-1
(321-315)
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UNITED NATIONS  NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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CHAMBER I - CHAMBRE I

OR : ENG

Before: Judge Laïty Kama, Presiding Judge
Judge Lennart Aspegren
Judge Navanethem Pillay

Registry: Mr. Alessandro Caldarone
Mr. Lars Plum
Mr. Antoine Kesia-Mbe Mindua

Decision of: 13 March 1998

THE PROSECUTOR
VERSUS
PAULINE NYIRAMASUHUKO
AND
ARSÈNE SHALOM NTAHOBALI

Case No. ICTR-97-21-T

DECISION ON A PRELIMINARY MOTION BY THE DEFENCE
FOR THE ASSIGNMENT OF A CO-COUNSEL
TO PAULINE NYIRAMASUHUKO

The Office of the Prosecutor:

Mr. Frédéric Ossogo

Counsel for the Accused:

Ms. Nicole Bergevin for Pauline Nyiramasuhuko
Ms. Frédérique Poitte for Arsène Shalom Ntahobali

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("THE TRIBUNAL"),

SITTING as Trial Chamber I of the Tribunal, composed of Judge Laïty Kama as Presiding Judge, Judge Lennart Aspegren and Judge Navanethem Pillay;

HAVING RECEIVED from the Defence Counsel Ms Nicole Bergevin, who is assigned to the accused Pauline Nyiramasuhuko in the present matter, a preliminary motion, filed on 26 November 1997, based on the denial of a request for assignment of counsel;

CONSIDERING the response from the Registrar, filed on 19 February 1998, to the said motion;

HAVING HEARD the Defence Counsel and the representative of the Registrar, Mr. Alessandro Caldarone, Officer-in-Charge of the Lawyers and Detention Facilities Management Section, during the audience held on 20 February 1998 to that end;

TAKING INTO ACCOUNT Rules 19, 33, 45, 54 and 72 of the Rules of Procedure and Evidence (the "Rules"), Articles 19 and 20 of the Statute (the "Statute") and also Articles 13 and 15 of the Directive on Assignment of Defence Counsel (the "Directive");

TAKING NOTE of the majority Decision dated 11 June 1997 rendered by the Tribunal on "The motions of the accused for replacement of assigned counsel", in the case of The Prosecutor versus Gérard Ntakirutimana (Case Nos. ICTR-96-10-T & ICTR-96-17-T) (hereinafter the "Ntakirutimana decision");

AFTER HAVING DELIBERATED,***On the competence of the Tribunal***

1. The Defence Counsel brought her preliminary motion of 26 November 1997 before the Tribunal based on the provisions of Rule 54 generally or alternatively under Rule 72(B)(iv) of the Rules. Rule 72(B)(iv) states that the preliminary motions of the accused shall include objections based on the denial of request for assignment of counsel; hence the implicit submission of the Defence that the Chamber is competent to hear matters pertaining to disputes on assignment of counsel to accused persons.
2. The Registrar, in his response to the above mentioned motion, affirmed that the responsibility of appointing co-counsel, pursuant to Article 15(C) of the Directive, belongs to the Registrar alone. Furthermore, he argued that for the Chamber to order, as requested by the Defence, the Registrar to assign not only a co-counsel, but a specifically named individual as co-counsel, would be *ultra vires*. In concluding his submissions thereon, the Registrar was of the opinion that were the Chamber to make such an order, the respective roles of the Registry and the Trial Chambers would become confused.



3. The Tribunal, in assessing the extent of its competence in this particular matter, refers firstly to Rule 19 of the Rules (Functions of the President) wherein it is stipulated that the President shall supervise the activities of the Registry, and, secondly, to Rule 33 of the Rules (Functions of the Registrar) which states, *inter alia*, that the Registrar shall assist the Chambers and the Judges in the performance of their functions. One of the functions of the Chambers, as prescribed by Article 19 of the Statute, is to ensure that a trial is fair and expeditious. It is fundamental that, in ensuring that a trial is fair, the rights of the accused are fully respected. Thereupon, Article 20(4)(d) of the Statute stipulates that an accused has the right to defend himself or herself in person or through legal assistance of his or her own choosing, and to have assistance assigned to him or her, in any case where the interest 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.

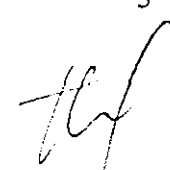
4. The question of the right to legal assistance is therefore, in the opinion of the Tribunal, a matter subject to judicial supervision.

5. It is unclear exactly what the Registrar construes to be *ultra vires* or judicial scrutiny of the reasonable exercise of the discretionary powers he holds by virtue of his office. While the Registrar is correct in assessing that the decision to appoint defence counsel falls within his discretion, the exercise of such administrative discretion is still subject to judicial scrutiny or review to ensure that the Tribunal's Directive is complied with and that the discretionary powers are exercised fairly and justly. Hence, the Tribunal believes that a matter affecting the right of an accused to have the most efficient defence possible in the context of a fair trial, namely the appointment of a co-counsel, is a judicial matter which necessitates the supervision of the Trial Chamber seized thereof.

On the assignment of co-counsel

6. The Defence referred to Article 15(C) of the Directive as the Article which provides the mechanism for appointment of co-counsel. This mechanism, she iterated, could only be put into operation following a request having been made to that effect by the assigned counsel. Moreover, the Defence Counsel submitted that, whether or not to make such a request to be assisted by a co-counsel is a matter of assessment belonging to the lead counsel alone. The Registrar not being privy to the information pertaining to the workload, strategy and requirements of the case, is not, according to the Defence, in a position to assess the need of the assigned counsel to be assisted by a co-counsel.

7. In support of her arguments, the Defence Counsel informed the Tribunal that of those accused persons, presently detained at the Tribunal's detention facilities, who had been arrested with her client during the 'Naki' operation, the majority, including the co-accused in the present case, had benefitted from the appointment of a co-counsel in the preparation of their defences. All persons being equal before the Tribunal, her client, she believed, should therefore be entitled to the assistance of a co-counsel in the conduct of her client's defence.

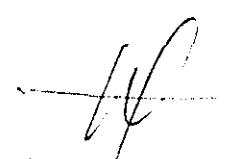


8. The Registrar, in response to the above submissions of the Defence, reminded the Tribunal of the discretionary nature of Article 15(C) of the Directive, whereby the Registrar may, whenever appropriate and at the request of the assigned counsel, appoint a co-counsel to assist the assigned counsel. The Registrar interpreted the wording of the said Article to mean that he may appoint a co-counsel when the lead counsel has provided enough elements to convince him that the request of appointment of a co-counsel is appropriate. Furthermore, in noting that there are twice as many lead counsel than co-counsel presently assigned to cases before this Tribunal, the Registrar affirmed that the right to appointment of co-counsel is not an automatic entitlement.

9. In concluding his submissions on the above matter, the Registrar reminded the Defence and the Tribunal of Article 15 (A)(i) of the same Directive which clearly stipulates, *inter alia*, that an accused shall only be entitled to have one counsel assigned to him and that counsel shall deal with all stages of procedure and all matters arising out of the representation of the accused or the conduct of his Defence. Thence, when Ms. Bergevin accepted to be assigned as counsel, she did so knowing that the appointment of co-counsel was a discretionary matter and not an automatic appointment, albeit during the pre-trial stage.

10. The Tribunal, as already mentioned, shall, of course, at all times respect the rights of the accused and ensure that these are respected, none more so than those enunciated in Article 20 (4) of the Statute. Thus, when contentious matters arise which affect the defence of the accused, the Tribunal will apply those procedures which best favour the accused. Furthermore, the Tribunal recalls the Ntakirutimana decision wherein it held that, mindful to ensure that the indigent accused receives the most efficient defence possible in the context of a fair trial, it was convinced of the importance to adopt a progressive practice in matters pertaining to the assignment and choice of counsel. The Tribunal, having considered the facts of the present matter, believes that the reasoning followed in the said decision should be applied *mutatis mutandis* in this instance.

11. Article 15(C) of the Directive, as referred to by the Defence, sets up the mechanism for the appointment of co-counsel. Whereas the Tribunal notes the Defence submission that this Article does not confer an absolute power upon the Registrar with respect to the appointment of co-counsel, it agrees with the Registrar that the wording "where appropriate" does grant the Registrar discretion in deciding whether or not to appoint a co-counsel to the accused. In view of the serious charges against the accused, the need to ensure that an accused receives the most efficient defence possible in the context of a fair trial, and the fact that the majority of those persons arrested during the 'Naki' operation, including the co-accused, Arsène Shalom Ntahobali, have each been appointed co-counsel, the Tribunal believes that it is appropriate in the present case that the accused, Pauline Nyiramasuhuko, be appointed a co-counsel to assist the assigned counsel in the conduct of the Defence. Consequently, the Tribunal, in carrying out its judicial functions pursuant to Article 19 of the Statute, deems it necessary to direct the Registrar to so appoint a co-counsel, subject to the findings of the Tribunal hereinafter.



On the choice of co-counsel

12. The Defence Counsel contended that pursuant to Article 15 of the Directive, she had requested the Registrar to appoint co-counsel to assist her in the conduct of the defence of her client. In so doing she had forwarded the name of a specific individual whom, the Defence argued, fulfilled all the requirements of 13 of the Directive (Pre-requisites for the assignment of counsel). The Defence Counsel submitted that the pre-requisites listed in the Article 13 were exhaustive. The specifically named individual, having complied with all of these, there could be no more objective obstacles in the appointment of this person. However, according to the Defence, and although the conditions laid out in Article 13 of the Directive had been met by the suggested co-counsel, the Registrar declined to appoint the specifically named individual on the ground that the Defence had failed to meet the requirements of what she claimed were retroactively imposed new procedures and conditions. In the opinion of the Defence Counsel, the conditions listed in Article 13 being exhaustive in nature, the retroactive application of new conditions and procedures violates the said Article.

13. In his written response and during the audience, the Registrar explained that though he had received a request from the Counsel on 3 September 1997 for the appointment of co-counsel, there had been insufficient information therein to allow the Registrar to decide whether the request was appropriate pursuant to Article 15(C) of the Directive. On 15 October 1997, stated the Registrar, a general procedure already under elaboration was put into place to regulate the appointment of co-counsel, including appropriate forms for Counsel to explain and justify their requests for co-counsel. The Registrar submitted that pursuant to Article 16 of the Statute the Registry is responsible for the administration and servicing of the Tribunal. Therefore, it is within his discretion to set and implement internal procedures to ensure proper administration - specifically, in this case, the implementation of internal procedures regarding the appointment of co-counsel. The Registrar concluded that, although the Defence Counsel had been made aware of the new procedure, he had yet to receive a valid application from her, as he has from other defence counsel, requesting the appointment of co-counsel; hence, the Registrar has not been given the opportunity to reach an appropriate decision thereon.

14. The Tribunal does not wish to enter into factual disputes of the kind but recognizes that the Registrar has the discretion to impose internal regulations provided these are reasonable and fair.

15. The Tribunal as previously mentioned finds in the wording of Article 15(C) an element of discretion in favour of the Registrar. Indeed, the words "where appropriate" clearly indicate that the right to co-counsel is not absolute and is subject to certain conditions. Furthermore, the Tribunal believes that the right of an accused to have a co-counsel of his or her choice is also not absolute.

16. In the Ntakirutimana decision, the Tribunal held that an indigent accused should be offered the opportunity of designating the counsel of his 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. In reaching his decision, the

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Registrar shall also take into consideration, *inter alia*, the resources of the Tribunal, competence and recognized experience of counsel, geographical distribution, a balance of the principal legal systems of the world, irrespective of the age, gender, race or nationality of the candidates. The Tribunal believes that the same should be applied *mutatis mutandis* with respect to the appointment of co-counsel. Thus, an accused and Counsel in agreement, shall be permitted to designate a name or names of co-counsel of their choice from the list of counsel drawn up by the Registrar pursuant to Rule 45 of the Rules. This designation shall be taken into consideration by the Registrar, unless the Registrar has reasonable and valid grounds for not granting the request of the accused and Counsel. Thereupon, the Tribunal finds that this procedure is implied in Article 15(C) of the Directive by the words "where appropriate".

17. Consequently, the Tribunal believes that, subject to the above findings, a co-counsel should be assigned without delay to the accused Pauline Nyiramasuhuko in the present case;

FOR ALL THE ABOVE REASONS,


THE TRIBUNAL


FINDS the motion of the Defence to be admissible;

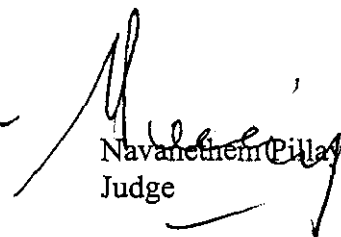
DIRECTS the Registrar to appoint a co-counsel for the accused Pauline Nyiramasuhuko without delay;

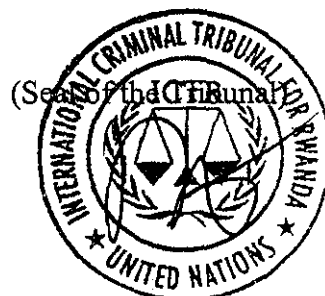
DECLARES mindful to ensure that in order to ensure the most efficient defence possible in the context of a fair trial, and where appropriate, the accused and Counsel should be offered the possibility of designating the counsel of their choice from the list drawn by the Registrar for this purpose, the Registrar having to take into consideration the wishes of the accused and Counsel, along with namely the resources of the Tribunal, competence and recognized experience of counsel, geographical distribution, a balance of the principal legal systems of the world, irrespective of the age, gender, race or nationality of the candidates.

Decision of 13 March 1998,
Signed in Arusha on 23 March 1998,


Laity Kama
Presiding Judge


Lennart Aspegren
Judge


Navanethem Pillay
Judge



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