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ICTR
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UNITED NATIONS



NATIONS UNIES

International Criminal Tribunal for Rwanda

1998 JUL 10 A 8 04

TRIAL CHAMBER II

OR: ENG.

Before: Judge Yakov A. Ostrovsky, Presiding
Judge William H. Sekule
Judge Navanethem Pillay

Registry: Mr. John Kiyeyeu

Decision of: 7 July 1998

**THE PROSECUTOR
VERSUS
ELIE NDAYAMBAJE**

Case No. ICTR-96-8-T

**DECISION ON THE MOTION OF THE ACCUSED FOR THE
REPLACEMENT OF APPOINTED COUNSEL**

The Office of the Prosecutor:

Mr. Chile Eboe-Osuji

The Counsel for the Accused:

The accused appeared in person

The International Criminal Tribunal for Rwanda (“the Tribunal”),

SITTING AS Trial Chamber II (“the Trial Chamber”), composed of Judge Yakov A. Ostrovsky, Presiding, Judge William H. Sekule, and Judge Navanethem Pillay;

NOTING the indictment filed on 17 June 1996, by the Prosecutor against Elie Ndayambaje, pursuant to Rule 47 of the Rules of Evidence and Procedure (“the Rules”), charging him with genocide, conspiracy to commit genocide, crimes against humanity and violations of Article 3 common to the 1949 Geneva Conventions and the 1977 Additional Protocol II thereto;

HAVING CONSIDERED the decision confirming this indictment, signed by Judge Tafazzal H. Khan on 21 June 1996;

NOTING the assignment of Mr. Charles Tchoungang and Mr. Jean Jacques Makolle, (“the Defence Team”) as lead Counsel and Co-counsel respectively, by the Registrar;

BEING MINDFUL OF the initial appearance of the accused which took place on 29 November 1996;

NOTING the motion of the accused for the replacement of his assigned counsel, filed in two parts, on 16 April 1998 and 8 May 1998;

NOTING the lack of a written reply to the accused’s request by Defence Counsel;

CONSIDERING the absence of the said Defence Counsel on the occasion of the hearing of this motion held on 2 July 1998;

FURTHER NOTING the consent of the accused to have the motion heard without the presence of his counsel;

TAKING NOTE of the Tribunal’s Trial Chamber I decision of 13 March 1998, in the case of the *Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, (ICTR-97-21-T), on the Defence motion for the assignment of co-counsel;

HAVING HEARD the parties on 2 July 1998;

THE SUBMISSIONS OF THE PARTIES

The submissions of the accused:

The accused, in his written request, urged the Trial Chamber to order the withdrawal of his assigned counsel, Mr. Charles Tchoungang, and the assignment of a different counsel in his case, for the following reasons.

The accused stated that he had lost confidence in his Defence Counsel due, *inter alia*, to the latter's "apathy, bluffing, failure to honor firm commitments" and a lack of contact between the said Counsel and the accused. (accused's motion of 16 April 1998, at p. 1.) The accused submitted that the problems he has encountered amounted to a showing of good cause which is required for the replacement of his Counsel. During the hearing of this matter, the accused requested the Trial Chamber to:

- 1) order Mr. Tchoungang to withdraw;
- 2) order the immediate return of all files related to the instant case, in the possession of the Defence Team;
- 3) direct the Registrar to replace Mr. Tchoungang and his partner Mr. Makolle, as Counsel and Co-counsel;
- 4) ensure that the counsel assignment process be made more transparent, thereby allowing the accused to participate in the selection of his own Counsel.

The Prosecutor's response:

The Prosecutor responded that the Office of the Prosecutor ("the OTP") neither opposed nor supported the instant motion, as it had no position on the dispute between the accused and his Counsel. The OTP's concerns centered on the undue delay that may arise in the proceedings, should the Trial Chamber decide to grant the motion.

It was submitted that, should the Counsel be replaced, steps already taken in this case should not be retraced. The Prosecutor also reminded the Trial Chamber of the need to observe applicable provisions in the replacement of assigned counsel, such as the need for exceptional circumstances, request from the accused, a showing of good cause and no design to delay the proceedings.

DELIBERATIONS

As a preliminary matter we note that the replacement of counsel is a serious exercise, one not to be taken lightly. Rule 19 of the Directive on the Assignment of Defence Counsel ("the Directive") provides for the withdrawal of assignment of defence counsel. Rule 19(A)(i) of the Directive states that "The Registrar may in *exceptional circumstances*, at the request of the accused or his counsel, withdraw the assignment of counsel." (Emphasis added). In the instant motion, the accused himself has made the request for withdrawal, therefore, the only remaining issue is whether exceptional circumstances exist to justify granting his request.


The accused has provided documentation outlining his unsuccessful attempts to maintain contact with Mr. Tchoungang, since the latter's assignment, in support of his contention that his right to communicate with his Counsel, in terms of Article 20(4)(b) of the Statute, is violated. This


situation has caused him to lose confidence in his assigned counsel. In the circumstances described by the accused, the lack of confidence constitutes an exceptional case. As the accused has satisfied the Trial Chamber that he now lacks the necessary confidence in his assigned Counsel, we find that the exceptional case requirement of Article 19 of the Directive has been fulfilled and therefore grant his request.

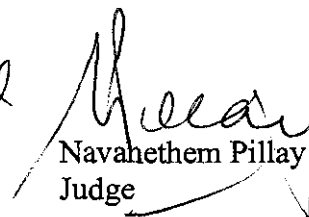
FOR THE REASONS STATED ABOVE THE TRIAL CHAMBER:-

- (1) **GRANTS** the accused's request for the withdrawal of assigned Counsel, Mr. Charles Tchoungang, and Co-counsel, Mr. Jean Jacque Makolle.
- (2) **DIRECTS** the Registrar to ensure that the Counsel immediately returns the case files and all related materials to the accused.
- (3) **DIRECTS** the Registrar to assign new defence counsel, in compliance with Article 20(4)(d) (Rights of the Accused) of the Statute and Rule 45(C)(iii) (Assignment of Counsel) of the Rules, without delay.

Arusha, 7 July 1998.


Yakov A. Ostrovsky
Presiding Judge


William H. Sekule
Judge


Navahethem Pillay
Judge

(Seal of the Tribunal)