

UNITED
NATIONS



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

Case No: ICTR-97-21-A

Date: 28 October 1998

Original: English

IN THE APPEALS CHAMBER

Before: Judge Gabrielle Kirk McDonald (Presiding)
Judge Mohamed Shahabuddeen
Judge Lal Chand Vohrah
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar: Mr. Agwu U. Okali

Order of: 28 October 1998

1998 NOV 10 P 7 05
ICTR
CRIMINAL REGISTRY
RECEIVED

PROSECUTOR

v.

PAULINE NYIRAMASUHUKO
AND
ARSÈNE SHALOM NTAHOBALI

ORDER DISMISSING APPEAL

The Prosecutor:
Frédéric Osigo

Counsel for the Accused:
Nicole Bergovin for Pauline Nyiramasuhuko
Frédérique Poitte for Arsène Shalom Ntahobali

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIÉE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM: Antoine K. M. MINBUA
SIGNATURE: [Signature] DATE: 11.11.1998

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 ("International Tribunal for Rwanda"),

NOTING that in its Decision on A Preliminary Request by the Defence for the Assignment of A Co-Counsel to Pauline Nyiramasubuko, rendered orally on 13 March 1998 and confirmed in a written Decision filed on March 24 1998 (together, "Decision"), Trial Chamber I ordered the Registrar to assign a co-counsel to the Appellant, holding that such assignment was justified by the gravity of the charges against the Accused, which necessitated facilitating presentation of the most effective defence possible by the Accused,

NOTING FURTHER the Trial Chamber's determination that, in exercising his discretion to select a co-counsel for assignment to the Appellant, in addition to the requirements of Rule 45 of the Rules of Procedure and Evidence of the International Tribunal for Rwanda ("Rules") and Article 13 of Directive on the Assignment of Defence Counsel (Directive n° 1/96) ("Directive"), the Registrar "shall...take into consideration, *inter alia*, the resources of the Tribunal, [the] competence and recognised 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" ("Trial Chamber's Conditions") and the preferences of the Appellant (Decision at p. 6),

CONSIDERING the Notice of Appeal-Objection Based on Lack of Jurisdiction, Writ of Certiorari, Appeal on a Point of Law, filed on 29 April 1998, by Counsel for the Appellant ("Notice of Appeal"), in which the Appellant seeks leave to appeal the Decision, asserting:

1. that Article 13 of the Directive stipulates the conditions for the assignment of counsel and co-counsel;
2. that the Trial Chamber's Conditions supplement those articulated in Article 13 and, therefore, constitute an amendment to the Directive;

3. that any such amendment may only be made by approval of at least seven Judges of the International Tribunal for Rwanda, in accordance with the procedure provided in Article 32 of the Directive;
4. that the Trial Chamber, therefore, lacked jurisdiction to impose the Trial Chamber's Conditions, and;
5. that, accordingly, leave to appeal should be granted pursuant to Sub-Rule 72(B)i) of the Rules, or, in the alternative, pursuant to the theory that higher courts are vested with an inherent power to review *ultra vires* acts of lower courts,

CONSIDERING the Brief by the Prosecutor, Intervening in the Interest of the Law, in Response to the Notice of Appeal Filed by the Accused, Pauline Nyiramasuhuko, Against the Decision of 13 March 1998 Rendered by Trial Chamber I on the Denial of the Request for Assignment of a Co-counsel, filed on 17 June 1998,

CONSIDERING that Sub-Rules 72 (B) i) and iv), (C), (D), (E) and (F) provide as follows:

(B) Preliminary motions by the accused are:

i) objections based on lack of jurisdiction;

....

iv) objections based on the denial of request for assignment of counsel.

(C) The Trial Chamber shall dispose of preliminary motions *in limine litis*.

(D) Decisions on preliminary motions are without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction, where an appeal will lie as of right.

(E) Notice of appeal envisaged in Sub-rule (D) shall be filed within seven days from the impugned decision.

(F) Failure to comply with the time-limits prescribed in this Rule shall constitute a waiver of the rights. The Trial Chamber may, however, grant relief from the waiver upon showing good cause,

CONSIDERING that the Appellant has failed to file a motion pursuant to Sub-rule 72(B)i with the Trial Chamber challenging its jurisdiction to render its Decision of 13 March 1998,

CONSIDERING that the Notice of Appeal, even if otherwise competent, has not been timely filed within the seven-day time limit provided by Sub-rule 72(E) and that the Appellant failed to show good cause before the Trial Chamber to be relieved of this limit,


NOTING that the Appellant has not shown good cause to merit consideration by the Appeals Chamber of the question of whether it may entertain the present appeal under the doctrine of inherent powers,

NOTING ALSO the difficulties experienced by the Registry in translating the supporting materials filed with the Notice of Appeal and transmitting the said translations to the Appeals Chamber, which impediment has occasioned the substantial delay between the filing of the Notice of Appeal and its disposition,

NOTING ALSO that the Registrar shall comply without further delay with the Trial Chamber's order to appoint co-counsel for the Appellant.

HEREBY DISMISSES THE APPEAL.

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


Gabrielle Kirk McDonald
Presiding Judge

Judge Shahab uddeen appends a separate Declaration to this Order.

Dated this twenty-eighth day of October 1998
At The Hague:
The Netherlands.





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PROSECUTOR

v.

**PAULINE NYIRAMASUHUKO
AND
ARSÈNE SHALOM NTAHOBALI**

DECLARATION OF JUDGE SHAHABUDEEN

The Prosecutor:
Frédéric Ossogo

Counsel for the Accused:
Nicole Bergevin for Pauline Nyiramasuhuko
Frédérique Poitte for Arsène Shalom Ntahobali

My agreement with the decision of the Appeals Chamber is based on the sufficient fact that the appeal is out of time. There are two points to which I should refer.

The first point relates to the first paragraph on p.4 of the Decision. There could be argument that the motion before the Trial Chamber was in substance based on lack of jurisdiction on the part of the Registrar to deny the Appellant's request for assignment of co-counsel on the ground on which the request was denied. In my respectful view, the position at this stage is not sufficiently clear to justify summary rejection of that possible, if not unanswerable, argument.

The second point relates to the last paragraph on p.4 of the Decision. That paragraph is not a "Noting"; it is really an "Order". If the Appeals Chamber notes "that the Registrar shall comply without further delay with the Trial Chamber's order to appoint co-counsel for the Appellant", it is impliedly making a finding on a possible issue whether the Registrar has complied. Moreover, if the Appeals Chamber considers that the Registrar has not sought to comply correctly, it should say in what respect it judges that he has not. But to take either of these positions is to exercise jurisdiction over an appeal which, because it is out of time, is not properly before the Appeals Chamber.

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



Mohamed Shahabuddeen

Dated this 28 October 1998
At The Hague,
The Netherlands.



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