ICTR-99-52-T
(3937-3927)

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International Criminal Tribunal for Rwanda

TRIAL CHAMBER I

OR: ENG

Before: Judge Navanethem Pillay, Presiding
Judge Erik Møse
Judge Asoka de Zoysa Gunawardana

Registry: Aminatta N'gum

Decision of: 2 November 2000

THE PROSECUTOR
v.
JEAN-BOSCO BARAYAGWIZA
(Case No. ICTR-97-19-T)

DECISION ON DEFENCE COUNSEL MOTION TO WITHDRAW

The Office of the Prosecutor:

Carla Del Ponte
Bernard Muna

Counsel for Barayagwiza:

Carmelle Marchessault
David Danielson

The Motion

1. On 26 October 2000, the lawyers for Mr Barayagwiza filed a motion for withdrawal of their mandate to represent him. The motion reiterates that it is his view that the trial against him will not be just and fair. In particular, Mr Barayagwiza is of the opinion that the Tribunal is dependant on what he refers to as the "dictatorial anti-hutu regime in Kigali" ("la dépendance de ce Tribunal auprès du Régime dictatorial anti-hutu de Kigali"). According to the motion, he is ready to contest the allegations against him and prove his innocence before any independent and impartial Tribunal of any democratic state, which respects the law and observes the procedure.

2. The motion was introduced following the Chamber's oral decision of 25 October 2000 on the lawyers' request to withdraw from the hearing as a consequence of their client's instruction not to represent him in any respect during the trial. The Chamber rejected the request and allowed the accused time for further reflection.

3. The present motion reiterates that Mr Barayagwiza has indeed reflected on the issue. Reference is made to his letter of 24 October 2000, which – according to the lawyers – was handed over to them in the evening of 25 October after the Chamber's decision. The lawyers maintain that it is unreasonable that their presence is requested when they take no active part in the trial following their client's instruction not to represent him in any respect during the trial. The decision of 25 October 2000 places the lawyers in an untenable situation. They reiterate that they are willing to represent their client until the end of the case, in conformity with the wish of the accused. However, both the accused and the lawyers are now forced to ask for withdrawal of their mandate, in the absence of a decision to allow them not to be present during the proceedings.

4. During the hearing of 26 October 2000, the Chamber allowed comments from the Prosecution, as well as Counsel for the Defence, on the issues raised by the motion.

Deliberation

A: Absence of the Accused

5. The trial in the so-called Media-cases started on 23 October 2000. One of the three accused, Mr Barayagwiza, has chosen not to attend the proceedings. The reasons for his absence were advanced in his letter of 24 October 2000, where he stated:

> "I would like to confirm to you the content of my statement of 23 October 2000, by which I informed you of my decision not to attend the so-called "Media Trial" in the Trial Chamber I to the International Tribunal for Rwanda (ICTR) for the reasons stated in that statement.
>
> I challenged the ability of the ICTR to render and independent and impartial justice due, notably, to the fact that it is so dependent on the dictatorial anti-hutu regime of Kigali to which two of you paid recently a working visit aimed at strengthening relations to the detriment of my rights."

6. Thus, in the present case, Mr Barayagwiza is fully aware of his trial, but has chosen not to be present, despite being informed by the Chamber that he may join the proceedings at any time. In such circumstances, where the accused has been duly informed of his ongoing trial, neither the Statute nor human rights law prevent the case against him from proceeding in his absence.

7. Article 20 of the Statute is modelled on Article 14 (3)(d) of the International Covenant on Civil and Political Rights, which is equivalent to Article 6 (3)(d) of the European Convention on Human Rights. Human rights case law does not prevent that a trial takes place in the absence of the accused provided that he has been duly notified of the proceedings. Reference is made to *Maleki v Italy*, views of the Human Rights Committee, adopted on 27 July 1999 (Communication No 699/1996). Here, the Committee reiterated that a trial in absentia is compatible with Article 14, only when the accused is summoned in a timely manner and informed of the proceedings against him. In that case, the accused was convicted in absentia, duly represented by his court-appointed lawyer (paragraph 9.3). Similar principles are developed in Strasbourg case-law, see, for instance, the Court's judgement of 28 August 1991 in *F C B v Italy* (Series A 208-B) with further references (paragraphs 29-36).

B: Withdrawal of Counsel

8. Rule 45 (I) reads as follows:

> "It is understood that Counsel will represent the accused and conduct the case to finality. Failure to do so, absent just cause approved by the Chamber, may result in forfeiture of fees in whole or in part. In such circumstances, the Chamber shall make an order accordingly. Counsel shall only be permitted to withdraw from the case to which he has been assigned in the most exceptional circumstances."

9. This provision should be read together with Rule 45 *ter* (A):

> "Counsel and Co-Counsel, whether assigned by the Registrar or appointed by the client for the purposes of proceedings before the Tribunal, shall furnish the Registrar, upon date of such assignment or appointment, a written undertaking that he will appear before the tribunal within a reasonable time as specified by the Registrar."

10. Thus, only in "most exceptional circumstances" will Counsel assigned by the Tribunal to represent an accused be permitted to withdraw from the case. Ms Marchessault and Mr Danielsson, Counsel and Co-Counsel, have been assigned by the Registrar and have signed written declarations in conformity with Rule 45 *ter* (A). The motion implies that the Chamber must decide whether there are "most exceptional circumstances" which allow Counsel to withdraw. Different reasons have been advanced in support of withdrawal, and the Chamber considers it important to distinguish between them in its deliberations. First, the Chamber will address the reasons provided by the accused for giving instructions to his lawyers not to represent him during the trial. Second, the Chamber will consider his instructions, including the situation of his lawyers.

<u>The Reasons for the Instructions</u>

11. Mr Barayagwiza's position in this regard is explicit in his letters of 23 and 24 October 2000 to the Chamber, appended to the present motion. His first letter reads as follows:

> " If this Chamber rules that my counsels are required to continue to be present at trial contrary to my instructions, I no longer wish to be represented by them. I would regret it if I am forced to make this decision because my counsel have properly represented me from the beginning. However, under no circumstances are they authorized to represent me in any respect whatsoever in this trial. It is for this reason that I am forced to put an end to the mandate I entrusted given them."

12. The reasons for not wanting them to appear, are the same as for his absence from the proceedings. In his letter of 24 October 2000, he stated:

> "My Counsels are instructed not to represent me in that trial. Thus, their forced presence in the trial is the continuation of violation of my rights by a Tribunal incapable of respecting fundamental human rights, contrary to the UN Charter.
>
> I repeat, that I am willing to face any accusation against me before any independent and impartial Tribunal which applies law and respect procedure in any democratic State. But, I will never accept to give support to a mockery of justice by this Tribunal."

13. Mr Barayagwiza develops upon his views of the Tribunal in Chamber Exhibit 4 A, B and C, one of which consists of 67 pages.

14. As the Chamber observed in its decision of 25 October 2000, Mr Barayagwiza does not lack confidence in his two lawyers. Neither does he argue that they are incompetent. The core of his argument is that he will not be given a fair trial. He argues that the International Criminal Tribunal for Rwanda is not an independent and impartial Tribunal, but dependent on the Kigali regime.

15. This allegation is without foundation. Political considerations play no role whatsoever in the judicial activities of Chambers. In the present context, it is sufficient to refer to the Appeal Chamber's decision of 31 March 2000, in particular the declaration of Judge Nieto-Navia, which explicitly addressed this issue. Reference is also made to the decision of 11 September 2000 of Trial Chamber I, which rejected a motion on behalf of Mr Barayagwiza to the effect that two of the Judges in this Chamber are disqualified because of the Tribunal's visit to Kigali in the end of August 2000. In fact, Mr Barayagwiza is partially revisiting issues that were dealt with in that decision.

16. The Chamber finds it obvious that Mr Barayagwiza's arguments do not constitute exceptional circumstances as required under Rule 45 (I). Rather, Mr Barayagwiza is merely boycotting the trial and obstructing the course of justice. As such, the Chamber shall not entertain the request of the accused for the withdrawal of his counsel, on this basis.

The Instructions of the Accused

17. Mr Barayagwiza has instructed his lawyers not to represent him in the courtroom. As a consequence, they have remained passive and have not mounted any active defence. In the present motion, it is argued that they are placed in an untenable position if the Court requires that they remain in the courtroom in spite of his instructions not to represent them. They argue that they have to withdraw as a consequence of the Chamber's decision of 25 October 2000.

In that decision, the question at issue was whether the lawyers should be excused from the trial. The concluding paragraphs of that order read as follows:

> "In spite of the fact that the accused by his own act has taken the position to instruct his Counsel not to represent him in the trial nor to be present in Court and has conveyed to the Chamber through his Counsel that his position is final and irrevocable, the Chamber in an abundance of caution and in the interest of preserving the Accused's rights wishes to provide him the opportunity for further reflection.
>
> Consequently, the Chamber is not disposed to grant the request by Counsel to leave the courtroom at this stage."

18. Counsel has referred, *inter alia*, to Article 4 of the Tribunal's Code of Professional Conduct for Defence Counsel. Article 4 (2) reads as follows:

> "When representing a client, Counsel must:
> (a) Abide by a client's decision concerning the objectives of representation if not inconsistent with Counsel's ethical duties; and
> (b) Consult with the client about the means by which those objectives are to be pursued."

19. The lawyers of Mr Barayagwiza argue that they have to abide with the their client's decision. To do otherwise, would be in breach of their respective codes of ethics. Consequently, their mandate must be withdrawn. In particular, the lawyers have stressed that they are prevented from acting against their client's instruction according to the national codes of ethics by which they are bound, in Canada (Quebec) and the United States (The State of Washington), respectively. In this context, both the Prosecution and the Defence have submitted information concerning rules of professional conduct in the United States.

20. Under the Tribunal's provisions, Counsel are under an obligation to continue to represent an accused to the best of his ability, unless the Chamber decides that they are permitted to withdraw. The Chamber notes that under Rule 45 and Rule 45 *ter*, the lawyers have been assigned as Counsel and are under an obligation to represent the Accused and to conduct the case to finality. On the other hand, their client has decided not to give them any instructions. Consequently, the lawyers have remained in the courtroom, but have remained passive, arguing that it would be a breach of their obligation towards their client to defend him contrary to his instructions to them. The question is whether the dilemma with which the lawyers are faced constitutes "most exceptional circumstances" under our Rule and is a reason for withdrawal.

21. According to Rule 45 (I), Counsel is under an obligation to "represent the accused and conduct the case to finality". Article 6 of the Code requires that Counsel must represent a client "diligently in order to protect the client's best interest". It follows from the same provision that Counsel must "carry through to conclusion all matters undertaken for a client", as long as the representation is not terminated. The wording of these provisions clearly indicate that Counsel are under an obligation to mount an active defence in the best interest of the Accused. It should further be noted that Counsel is assigned, not appointed. In the view of the Chamber, this does not only entail obligations towards the client, but also implies that he represents the interest of the Tribunal to ensure that the Accused receives a fair trial. The aim is to obtain efficient representation and adversarial proceedings.

22. The Chamber also notes that within several jurisdictions, a lawyer will not be obliged to comply with the client instructions to take no action in court. This supports the conclusion reached above on the interpretation of the relevant provisions of the Tribunal. Even if the national codes of ethics of the two lawyers defending Mr Barayagwiza should lead to a different result, this is not decisive. Before this Tribunal, its provisions prevail.

23. In this connection, the Chamber recalls that Mr Barayagwiza is faced with serious charges, including genocide, crimes against humanity and serious violations of Article 3 common to the Geneva Conventions and the Protocols thereto. It is a well established principle in human rights law that the judiciary must ensure the rights of the accused, taking into account what is at stake for him. The Chamber is anxious that Mr Barayagwiza has access to legal advice. Reference is made to *Poitrimol v France*, judgement of 23 November 1993 by the European Court of Human Rights (Series A 277-A). According to that Court, a person charged with a criminal offence does not lose the benefit of the right to legal assistance merely on account of not being present at the trial (paragraph 34).

24. In the present case, Mr Barayagwiza is actually boycotting the United Nations Tribunal. He has chosen both to be absent in the trial and to give no instructions as to how his legal representation should proceed in the trial or as to the specifics of his strategy. In such a situation, his lawyers cannot simply abide with his "instruction" not to defend him. Such instructions, in the opinion of the Chamber, should rather be seen as an attempt to obstruct judicial proceedings. In such a situation, it cannot reasonably be argued that Counsel is under an obligation to follow them, and that not do so would constitute grounds for withdrawal.

25. For the reasons stated above, the Chamber does not find "most exceptional circumstances" under Rule 45 (I), warranting Counsel for the Accused to withdraw from the case.

26. Article 4 (1) of the Code of Professional Conduct for Defence Counsel reads as follows:

> "Counsel must advise and represent their client until the client duly terminates Counsel's position, or Counsel is otherwise withdrawn with the consent of the Tribunal."

27. In the present case, it is not clear whether the client has duly terminated Counsel's position. Reference is made to paragraph 13 of the motion, where both the Accused and Counsel consider themselves forced to ask for withdrawal, even if it is against the will of both the Accused and Counsel. Paragraph 13 reads as follows in the original French version:

> "Par conséquent, l'accusé est contraint et/ou forcé de mettre fin au mandat de ses conseils et ces derniers sont aussi contraints et/ou forcés de demander leur retrait, et ce, à l'encontre de la volonté tant de l'accusé que de celle de ses conseils."

This is not an unequivocal termination of Counsel's mandate. Unless Mr Barayagwiza makes a clear and unequivocal decision to terminate representation, the Chamber has to deny the request for withdrawal.

FOR THESE REASONS

THE CHAMBER

DENIES THE MOTION FOR WITHDRAWAL

Done in Arusha on 2 November 2000.

Navanethem Pillay
Presiding Judge

Erik Møse
Judge

Judge Asoka de Zoysa Gunawardana attaches a separate and concurrent opinion.

(Seal of the Tribunal)

I agree with the facts as stated by the Majority and confirm that the motion submitted by Ms Marchessault and Mr Danielson should be denied. However, I take a different view with regard to the approach that should be adopted to overcome the problem that we have in hand.

The assigned Counsel for Mr Barayagwiza, Ms Marchessault and Mr Danielson, have submitted that it serves no purpose for them to sit in Court in view of the instructions given to them by the accused Mr Barayagwiza, not to represent him at the trial. They further pointed out that, as Counsel assigned by Court to defend the accused, it is not possible for them to go against those specific instructions given to them, by the accused. Therefore, they have moved that they be permitted to withdraw from the case.

It is apparent that if this motion were to be granted it would affect the due administration of justice. Mr Barayagwiza has instructed his assigned Counsel not to represent him, and has decided not to attend his trial. These steps have been taken by the accused with a view to obstructing the proceedings and as a form of protest. However, it is important to note that he is not dissatisfied with the conduct or the competence of his Counsel and, in fact, has full confidence in them. Further, he has not asserted his right to self-representation. In such a situation, it is imperative that the Tribunal should act to ensure that justice is done. In the US Supreme Court case of *Feretta v. California*, 422 US 806 (1975), Chief Justice Burger has pointed out that, " . . . the prosecution is more than an ordinary litigant, and the trial judge is not simply an automation who insures that technical rules are adhered to. Both are charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial." He added that, "[t]he system of criminal justice should not be available as an instrument of self destruction."

In the said US Supreme Court case of *Feretta,* Justice Blackmun, in his Dissenting Opinion remarked,

> "I cannot agree that there is anything in the Due Process Clause or the Sixth Amendment that requires the States to subordinate the solemn business of conducting a criminal prosecution to the whimsical - albeit voluntary – caprice of every accused who wishes to use his trial as a vehicle for personal or political self-gratification."

He went on to point out that,

> ". . . the established principle that the interest of a State in a criminal prosecution "is not that it shall win a case, but that justice shall be done." *Berger v US,* 295 U.S. 78 (1935). For my part, I do not believe that any amount of pro se pleading can cure the injury to society of an unjust result, but I do believe that a just result should prove to be an effective balm for almost any frustrated pro se defendant."

The situation that has arisen in this case now, requires us to look for an appropriate solution. This is particularly important considering the possibility of similar situations arising in the future.

In the instant case, the interests of justice would not be best served by allowing the accused, who does not wish to attend his trial, to remain without representation. As stated by Justice Blackmun, "the right to Counsel has been based on the premise that representation by Counsel is essential to insure a fair trial." Therefore, in my view, the Chamber is bound to ensure that Mr Barayagwiza is represented at the trial. In that context, in my view, it will be useful to consider the established procedure adopted in the United States of appointing standby counsel, by the Court. The Supreme Court approved the appointment of standby counsel and discussed the role of such a Counsel, in its Decision in *McKaskle v. Wiggins*, 465 US 168 (1984) where, in a robbery trial, the accused was permitted to proceed pro se, but the trial court appointed a standby counsel to assist him. The Supreme Court held,

> "Accordingly, we make explicit today what is already explicit in Feretta: A defendant's Sixth Amendment rights [to self representation] are not violated when a trial judge appoints standby counsel – even over the defendant's objection – to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the pro se defendant's appearance of control over his own defence."

This solution has been tried and tested in the United States, and has been proved to be an effective and appropriate procedure to assist the proper administration of justice. In my view, the appointment of a standby counsel is the proper solution to the problem presented in the instant case. And it is even more important in this case than in *Wiggins,* since Mr Barayagwiza has stated his intention to stay away from his own trial.

Since Mr Barayagwiza has instructed his assigned Counsel not to represent him in Court, it would be difficult to force the Counsel to appear for Mr Barayagwiza, as assigned Counsel. However, this may not prevent the same or different Counsel to appear for the Defence, even against the wishes of Mr Barayagwiza, as the standby counsel, appointed by the Court, in the interests of justice. In such a case, Counsel would act, not only to protect the interests of the accused, but also the due administration of justice. Although the appointment of standby counsel is not specifically catered for in the Rules, Article 20(4)(d) of the ICTR Statute clearly envisages such an appointment. Article 20(4) states,

> **"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:**
> (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 the sufficient means to pay for it;" (emphasis added)

It is pertinent to note that, in the above provision, the assignment of Counsel is envisaged "where the interests of justice so require." In my view, this could be considered as an enabling provision for the appointment of a "standby counsel."

In any event, the Court has the inherent power to control its own proceedings, which in this case, could be achieved by such an appointment.

It is to be observed that it is an advantage in the present case to require Ms Marchessault and/or Mr Danielson to be appointed as standby counsel, as they are already fully conversant with the facts of the case and, as is evident from the communication by the accused to the Court, enjoy the confidence of Mr Barayagwiza. Thus, such an appointment would avoid any delay that the appointment of new counsel may ensue.

In this context it must be pointed out that the Washington State Bar Association Rules, cited by Mr Danielson, do not seem to prevent him from acting as standby counsel, or that such an appointment by Court is prohibited. The position relating to Ms Marchessault appears to be much the same.

Therefore, in my view the motion filed by Ms Marchessault and Mr Danielson to withdraw from the case should be denied. Further Ms Marchessault and/or Mr Danielson should be appointed as standby counsel for the Defence.

Done in Arusha
This 2nd November 2000

Judge Asoka de Z. Gunawardana