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22/6/2001
(1095-1088)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 22 June 2001

THE PROSECUTOR
v.
Pauline NYIRAMASUHUKO
And
Arsène Shalom NTAHOBALI

Case No. ICTR-97-21-T

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DECISION ON NTAHOBALI'S MOTION FOR WITHDRAWAL OF COUNSEL

The Office of the Prosecutor:

Sylvana Arbia
Japhet Mono
Jonathan Moses
Adesola Adeboyejo
Gregory Townsend
Manuel Bouwknecht

Counsel for Ntahobali :

René Saint-Léger
James Michael Bailey

Counsel for Nyiramasuhuko:

Nicole Bergevin
Guy Poupart

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

SITTING as Trial Chamber II (the "Chamber"), composed of William H. Sekule, Presiding Judge, Judge Winston C. Matanzima Maqutu, and Judge Arlette Ramarason;

BEING SEIZED of the "Requête en extrême urgence aux fins de retrait de la commission d'office des conseils Me St-Léger et de Me Michael Bailey", filed by Accused Ntahobali on 11 June 2001 (the "Motion");

CONSIDERING the "Prosecutor's Reply to Ntahobali's Motion to Remove Counsel" filed on 14 June 2001;

CONSIDERING the "Response to Arsène Shalom Ntahobali's Urgent Motion for Withdrawal of Counsel Me St- Leger and Me James Michael Bailey" filed by Counsel for Ntahobali on 14 June 2001;

NOTING the Registrar's "Decision to Reject Shalom Ntahobali's Request for Withdrawal of his Lead Counsel, Me René Saint-Léger", filed on 4 April 2001;

NOTING the President's "Decision on Review, in Accordance with Article 19(E) of the Directive on Assignment of Defence Counsel", filed on 4 June 2001;

HAVING HEARD the Parties on 15 June 2001;

NOTING that co-Accused Nyiramasuhuko and her Counsel were present during the said hearing;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), specifically Articles 19 and 20 of the Statute and Rules 73, 54 and 45(F) of the Rules;

SUBMISSIONS OF THE PARTIES

Accused Ntahobali

1. Ntahobali alleges that since his assignment as Lead Counsel on 7 February 2000, Saint Léger has shown lack of interest and lack of professionalism, and that, despite several warnings, his conduct has not improved and consequently, Ntahobali has definitely lost confidence in his Counsel and co-Counsel in January 2001.
2. The reasons for Ntahobali's withdrawal request with respect to both Counsel are, *inter alia*, the following:

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2.1. Counsel have failed to hold consultations with him. For instance, they should not have filed the Motions for the suppression of custodial statements and for a separate trial. Ntahobali objected to the procedure followed in respect of the drafting and the filing of these Motions. Further, Ntahobali alleges that his Counsel have bluntly copied portions of Motions submitted by his co-Accused Nyiramasuhuko to support the claim of their lack of professionalism;

2.2. Counsel did not discuss with him the content of these Motions whereas the Accused does not have an enabling command of English, language in which these Motions were drafted. With regards co-Counsel Bailey, Ntahobali alleges that despite the latter's claim to have a good working knowledge of French, Ntahobali has not been able to communicate with him in the said language and adds that Counsel Bailey refused to visit him at the detention centre;

2.3. Counsel fired the Defence assistant Isabelle Bouchard, who was experienced in his case, without reason and without prior consultation with him;

2.4. Counsel Saint Léger and Bailey have endangered the existing co-operation between his Defence and that of his mother and co-Accused Pauline Nyiramasuhuko, and they have allegedly threatened him after a hearing;

2.5. Ntahobali stated that he had personally withdrawn the Counsel's assignment and had not authorised them to act on his behalf anymore. Rather, since a letter dated 24 April 2001, Ntahobali has expressed his willingness to conduct his own defence, pursuant to his statutory right to do so, pending assignment of new counsel of his choice from the Registry's list of Counsel, with the formal undertaking that he shall not request an adjournment of the proceedings pending assignment of new counsel;

2.6. Finally, during the hearing of 15 June 2001, Ntahobali dismissed the Counsel's submissions that there had been some communication between them since the opening of his trial and further alleged that co-Counsel Bailey had refused to hand over to him two Prosecution videotapes for inspection.

Response by Counsel

3. Counsel for Ntahobali replied that they "have at all times acted professionally, have at no time created conflict with their client, nor have they jeopardized their client's rights".
4. They added that "recently there has been some communication established with the Accused in reviewing exhibit videotapes."

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Response by the Prosecutor

5. The Prosecutor submits that both the Registrar and the President made the correct decision in denying the Accused's requests.
6. The Prosecutor replies that the Accused's request should be dismissed on the grounds, *inter alia*, that the Accused does not have the right to counsel of his choice as stated in the Appeals Judgement rendered on 1 June 2001 in the *Prosecutor v. Akayesu*, (Case No. ICTR- 96-4-A) and that the Accused has not demonstrated that the problems of communications existing between him and his Counsel amounted to exceptional circumstances justifying the removal of his Counsel.
7. Further, the Prosecutor submits that the Accused has not made a complete or categorical request to act for himself, and seemed to have conditioned it to the right to have a counsel of his choice and that his insistence on having other counsel appointed each time he faces divergences with the assigned counsel is an indication that the Accused sees the need for counsel to assist him.
8. Finally, the Prosecutor raises an objection, pursuant to Common Law principles, as to the direct cross-examination of victims of rape testifying against the Accused by the latter, and would then prefer that the questions be put in writing and read out either by the Trial Chamber or by the Registry if he was to represent himself.

HAVING DELIBERATED

9. As a preliminary matter, the Chamber notes that, despite the Decisions rendered by the Registrar and the President on the Accused's request for withdrawal of Counsel, since the commencement of his Trial on 11 June 2001, Ntahobali has orally and in writing maintained his application for withdrawal of his Counsel and co-Counsel on the basis that he no longer has confidence in their competence to represent him and that there has been a complete breakdown of communication between them.
10. The Chamber has then considered the President's Decision on Review, dated 4 June 2001 in which the President declared herself unable "to make a factual determination of the allegations made by the Accused [...] This is a matter best left for consideration by the Trial Chamber."
11. The Chamber recalls that Rule 45 (H) of the Rules states that: "under exceptional circumstances, at the request of the suspect or accused or his counsel, the Chamber may instruct the Registrar to replace an assigned counsel, upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings."
12. The Chamber should therefore firstly be satisfied that exceptional circumstances exist and good cause is shown warranting withdrawal of counsel, and secondly, that the

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request is not deigned to delay the proceedings, particularly at this stage of the proceedings.

Exceptional circumstances and showing of good cause

13. The Chamber notes the relevant case-law of this Tribunal and of the International Criminal Tribunal for ex-Yugoslavia (ICTY), and concurs with the findings of the "Decision on the Request by the Accused for Change of Assigned Counsel" rendered on 26 June 1997, (Case No. ICTR-96-7-T, *The Prosecutor v. Bagosora*) that if "there was no meaningful communication between the accused and his counsel", whereas "an accused person needs constant contact with his counsel", the Chamber considered that "there no longer existed a relationship of trust between the accused and the assigned counsel", the "lack of confidence by the accused in his Counsel to be an exceptional circumstance warranting the replacement of assigned counsel within the ambit of Article 19 (d) of the directive". Further, the Chamber takes note of the reasoning retained by the ICTY Trial Chamber seized of the 'Celebici' case, in the "Decision on request by Accused Mucic for assignment of new counsel" dated 24 June 1996, whereby "though the overriding interest of the administration of justice means that [an Accused] should not be permitted to seek withdrawal of his assigned counsel without establishing good cause", the occurrence of a complete breakdown of communication between the Accused and his Counsel which could "adversely affect the rights of the Accused" (*See Decision of 24 June 1996*) constitutes exceptional circumstances required for the replacement of assigned counsel provided for in Article 19(d) of the Directive.
14. In the circumstances of this case, the Chamber is of the view that the breakdown in communication and trust between the Accused and his Defence team, a situation which the Chamber has even observed in Court on several occasions since the start of the trial of the Accused constitutes exceptional circumstances within the ambit of Rule 45 (H) of the Rules. In making this finding, the Chamber has considered the necessity for a proper relationship of communication and trust to be established between the Accused and his defence team to ensure an effective defence and for smooth proceedings in relation to the Trial as a whole.
15. The Chamber notes however that, as the Defence Counsel expressed the need to preserve the confidentiality of their client's affairs, the underlying reasons for the breakdown of trust and confidence remain unknown to the Chamber which however cannot but notice the severe absence of a good working relationship.
16. The Chamber strongly emphasises that it has not been proven that the Accused's Counsel have done anything to the prejudice of the Accused, notably by associating themselves with concerns raised by other accused. Rather than proving such allegations, it seems that the Accused either inadvertently or deliberately rendered his Counsel's tasks difficult, while the latter did not appear to be in a position to explain why the Accused was acting in such a manner in view of their duty, as submitted to

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the Chamber during the hearing to maintain professional confidentiality and not divulge what could be detrimental to the interest of the Accused

Undue delay

17. Before ordering replacement of Counsel, the Chamber must also be satisfied that the withdrawal of Counsel in those exceptional circumstances will not pervert the course of justice by unduly delaying the proceedings in light of the on-going Trial of the Accused and of five Accused jointly tried since 12 June 2001.
18. The Chamber takes note of the fact that Ntahobali has firmly reiterated during the hearing that, if his assigned counsel were to be withdrawn, he is unambiguously willing to exercise his right to represent himself pursuant to Articles 20 and 20 (4)(d) of the Statute and Rule 45 (F) of the Rules pending the assignment of new counsel of his choice from the list of Counsel provided for by the Registry, so as to not delay the proceedings.
19. Thus, being satisfied that withdrawal of the Accused's Counsel is not designed to delay the proceedings since the Accused has elected to exercise his right, pursuant to Rule 45 (F) and Article 20 of the Statute, to conduct his own defence pending assignment of new Counsel, the Chamber grants the Accused's request.
20. Nonetheless, the Chamber has duly considered the seriousness of the charges pending against the Accused who is currently being tried and has taken note of the Prosecution's arguments as to the Accused directly cross-examining witnesses. In light of these factors, and by virtue of its inherent powers to control its own proceedings, the Chamber decides *proprio motu* that it is in the interest of justice that a Duty Counsel be immediately appointed so as to ensure that the Accused is assisted in the conduct of his defence pursuant to Rule 44*bis* (D) of the Rules.

Clarification on the status and duties of Counsel

21. Having considered the issues at stake, the Chamber is bound to find that the Accused was mistaken about the role and status of his Counsel in the administration of justice which has created a difficult situation.
22. Therefore, the Chamber wishes to take this opportunity to clarify for the future the nature of the Counsel-Accused relationship and recalls that in the exercise of his professional judgement, Counsel is independent of the Accused, even if Counsel is expected to maintain a proper Counsel-Client relationship. The Trial Chamber has to be assured that a Counsel properly conducts an accused's defence and protects the latter's lawful interest during trial, but also has to verify that the accused does not abuse this right.
23. As a matter of principle, the Chamber finds that an accused is mistaken when saying that counsel must consult with him, whereas there are matters of professional

judgement for which Counsel alone is liable. While Counsel should take full instructions about facts surrounding the case, this does not imply that Counsel have to consult with the accused whenever any step in his defence is taken by the Counsel. Nevertheless, Counsel have to keep the Accused informed of the steps taken to protect his interests and provide the Accused with a reasoned explanation as to why they took such steps.

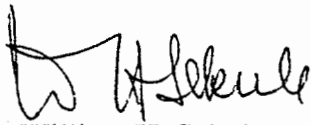
24. Finally, in view of the fact that (1) Accused Ntahobali had already requested the withdrawal of the previous assigned Counsel in February 2000, (2) that the Chamber did not find that Counsel for Ntahobali were at fault but (3) rather, acted in a professional manner and were willing to continue to conduct the Accused's Defence, the Chamber formally invites Accused Ntahobali to endeavour in the future to co-operate with the Registry and with replacement Counsel so as not to affect the due course of the administration of justice and to ensure smooth proceedings.
25. Having made these clarifications, the Trial Chamber decides that it will not tolerate such behaviour in the future.

THE TRIBUNAL HEREBY

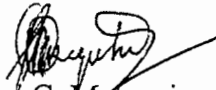
- I. Directs the Registry to withdraw immediately the assignment of Counsel Saint Léger and co-Counsel Bailey.
- II. Instructs the Registry that Accused Ntahobali be immediately provided with a list of potential counsel from which to choose, and that, as soon as possible from the date of this decision, the Accused lodges a written request for Counsel with the Registry by means of an appropriate form pursuant to Article 5 of the Directive indicating three names of counsel from the list.
- III. Instructs the Registry, in accordance with Article 19(D) of the Directive, to proceed with the assignment of new Counsel without delay.
- IV. Once Lead counsel is appointed, instructs the latter to choose immediately a co-Counsel from the list provided by the Registry.
- V. Decides that Counsel for Ntahobali will immediately assist the Accused and shall conduct its Defence without delay and will conform to the dates set for Trial decided by the Tribunal so as to not delay the proceedings.
- VI. Pending the replacement of Counsel and in the interest of a proper administration of justice, instructs the Registry to appoint a Duty Counsel with immediate effect pursuant to Rule 44*bis* of the Rules to assist the Accused in the conduct of his defence pending replacement of Counsel.

VII. Directs the Registry, pursuant to Article 20(A) and 20(B) of the Directive to ensure that Counsel remits immediately to the Duty Counsel all the original documents in the file pending assignment of new Counsel.

Arusha, 22 June 2001.



William H. Sekule
Presiding Judge



Winston C. Matanzima Maqutu
Judge



Arlette Ramaroson
Judge



[Seal of the Tribunal]