UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER I

Before: Judge Erik Møse

Decision of: 13 July 2001

THE PROSECUTOR
VERSUS
ELIZAPHAN NTAKIRUTIMANA
GERARD NTAKIRUTIMANA

Case No. ICTR-96-10-T
and
Case No. ICTR-96-17-T

DECISION ON THE MOTION OF THE DEFENCE FOR THE ASSIGNMENT OF CO-COUNSEL FOR ELIZAPHAN NTAKIRUTIMANA

Counsel for Elizaphan Ntakirutimana:

Mr Ramsey Clark

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

SITTING in the person of Judge Erik Møse, member of Trial Chamber I, in pursuance of Rule 73(A) of the Rules of Procedure and Evidence (the "Rules");

BEING SEIZED of a motion filed by the Defence on 19 June 2001, requesting that the Trial Chamber direct the Registrar to assign Ephrem Gasasira as co-Counsel to lead Counsel Ramsey Clark for Elizaphan Ntakirutimana;

DECIDES AS FOLLOWS:

Background

1. On 2 May 2001 the Lawyers and Detention Facilities Management Section (the "LDFMS") received an application dated 27 April 2001 from the Defence for the appointment of Ephrem Gasasira as co-Counsel for Elizaphan Ntakirutimana. In a fax to the Defence on the same day, the LDFMS recalled that lead Counsel is entitled to request assignment of co-Counsel "by selecting three names from the list of Defence Counsel maintained by the Registrar". Reference was made to Rule 45 of the Rules and Article 15 of the Directive on Assignment of Defence Counsel (the "Directive"). The LDFMS indicated that the application would be processed once the Defence had provided the names of three prospective candidates. In relation to the credentials of Mr Ephrem Gasasira the LDFMS stated that "… pursuant to Article 15 (C) of the Directive, co-counsel has to fulfil the prerequisites listed in Article 13 of the Directive, that is ten years of experience as a professor of law or as a lawyer".

2. In his letter of 4 May 2001 to the LDFMS, Counsel for the Defence argued that Mr Gasasira had the necessary qualifications as required by the Directive. He also disagreed with the position of the LDFMS that Mr Gasasira could not be considered for assignment as co-Counsel unless two other names were designated for the same position. The Defence requested the review of both issues by the Registrar. In a letter to the LDFMS of 25 May 2001 the Defence recalled its request for review of 4 May 2001 and inquired as to the status of the application for assignment of co-Counsel.

3. In a response to the Defence of 29 May 2001, the Registrar sought "to emphasise the substance of the rules and procedure applied by the ICTR" with respect to the request for assignment of co-Counsel. It was recalled that such an application had to be made using the appropriate form and that the names of three prospective candidates had to be submitted. The Registrar noted that the form "not only made provision for the names to be listed following an order of preference but there is also provision for the accused to specify his choice". It was explained that the three names procedure "is designed to facilitate the judicial work of the Tribunal" and "consolidates the rights of the accused". The Defence was requested to submit any relevant documents that would justify the experience of Mr Gasasira.

4. Following this correspondence, the Defence filed its motion for the assignment of Mr Gasasira as co-Counsel.

Submissions of the Defence

5. The Defence argues that Mr Gasasira served as a Prosecutor in Rwanda for three years and then was a Judge, including President of the Court of Appeals, for 16 years. He is presently completing his pupilage with the Brussels Bar. He has also been a visiting professor at the *Centre de formation judiciaire* and at the Law Faculty in Rwanda for many years, and he has taught law in Belgium. According to the Defence, this experience is sufficient to meet the requirements of the Tribunal's Rules and Directive.

6. The Defence disagrees that Mr Gasasira cannot be considered unless two other names for assignment are submitted. He is the best qualified candidate and has agreed to serve as co-Counsel. There is no need to judge others on the list kept by the Registry.

Deliberations

7. The motion raises several issues. Before considering Mr Gasasira's qualifications in relation to the applicable provisions the Chamber will address certain procedural questions.

Procedure

8. Rule 45 (A) reads as follows:

> "A list of counsel who speak one or both of the working languages of the Tribunal, meet the requirements of Rule 44, have at least 10 years' relevant experience, and have indicated their willingness to be assigned by the Tribunal to indigent suspects or accused, shall be kept by the Registrar."

9. Information Circular No. 2 of 22 November 1999 concerning assignment of Counsel outlines the procedure to be followed. According to paras. 6 and 8 of that circular (in particular the French version) the detainee shall select three names from the list. The same requirement, albeit differently formulated, is found in Article 13 (iv) of the Directive. In the present case, the Defence did not follow this procedure.

10. The Chamber recalls that current provisions and practice of the Tribunal require that the Defence shall select three potential candidates for co-Counsel from the list. Consequently, Counsel is under an obligation to make inquiries with respect to persons on that list. Reference is made to the decision of 29 March 2001 in the case of "*The Prosecutor v. Hassan Ngeze*":

> "The appointment of co-counsel, assistants and investigators are administrative matters falling within the powers and discretion of the Registrar. Lead counsel must initiate requests for such appointments, and he is held responsible for complying with the practice directions of the LDFMS".[1]

11. The next issue to be considered is the legal effect of the Defence's non-compliance with the administrative conditions for processing with the request for co-Counsel. In the Registrar's fax of 29 May 2001 to the Defence it was stated:

[1] Case No. ICTR-97-27-T.

> "The three-name procedure is designed to facilitate the judicial work of the Tribunal by ensuring that if one selected Counsel is for some reason not available, it will be possible to pass on to the next one without the need to return each time to the Lead Counsel, who, depending on which country or city he or she is in, may, as experience has shown, not be readily accessible."

12. In the present case there seems to be virtually no risk that co-Counsel will not be available. On 2 April 2001 the trial date was fixed to 17 September 2001. Mr Gasasira has stated that he is available. Consequently, the purpose of the three-names procedure, as quoted above, does not prevent that Mr Gasasira is assigned as co-Counsel provided that his qualifications are considered sufficient. This being said, the Chamber recalls, in view of the submissions of the Defence, that neither human rights law nor the provisions and case law of this Tribunal gives an accused an unfettered right to choose assigned counsel.

Qualifications

13. Rule 44 (A) contains two alternative conditions for being considered qualified to represent an accused:

> "Subject to verification by the Registrar, a counsel shall be considered qualified to represent a suspect or accused, provided that he is admitted to the practice of law in a State, or is a University professor of law."

14. Rule 45 (A), which directly deals with the list of Counsel to be drawn up by the Registrar, adds that Counsel must have at least 10 years' experience. Article 13 of the Directive, which applies to both Counsel and co-Counsel, reiterates the conditions laid down by Rules 44 and 45:

> "Any person may be assigned as Counsel if the Registrar is satisfied that he fulfils the following pre-requisites:
>
> (i) He is admitted to practice law in a State, or is a professor of law at a university or similar academic institution and has at least 10 years' relevant experience;"

15. The first condition in Rule 44 is that the person must be "admitted to the practice of law in a State". The English version indicates that Counsel must be a practicing lawyer (barrister), and the French text ("l'habileté à exercer la profession de l'avocat dans un Etat") is quite explicit on this point.

16. Mr Gasasira does not fulfil this requirement. He is not admitted to a bar association, but is presently doing his pupilage at the Bruxelles Bar ("avocat stagiaire"). There is no information that he has previously been admitted to the bar.

17. The second alternative in Rule 44 is that Counsel is a "University professor of law". Article 13 (i) of the Directive is more generally formulated and includes "similar academic institution". It is clear from the term "professor" that the mere fact that a person teaches at a University or similar institution ("chargé de cours") is not in itself sufficient to qualify under this alternative. Furthermore, the person concerned must have "ten years relevant experience" as required by Rule 45. It is not required, however, that the experience includes practice as a lawyer. The purpose of these provisions is to ensure assignment of counsel with relevant and extensive expertise at a high level who can mount an effective defence of the accused.

18. According to the *curriculum vitae* of Mr Gasasira, he was for nine years (1985-1994) a visiting professor at the Law Faculty of Rwanda ("*Faculté de Droit de l'Université Nationale du Rwanda*"). For sixteen years (1980-1996) he was a visiting professor at the Center of Judicial Education ("*Centre de formation judiciaire*"). Even if he is not a permanent University professor, the available information indicates that he had a considerable attachment and regularity to academic institutions. The Chamber notes, however, that the Defence has not produced any written documentation concerning these activities. This is not in conformity with Article 14 of the Directive, which reads:

> "In support of the pre-requisites provided for in Article 13 (i), the Registrar *shall* be supplied with certification of professional qualifications issued by the competent professional or governing body for that Counsel *and such other documentation as the Registrar deems necessary*." (Italics added.)

19. The motion did not provide any documents in order to establish that he acted as a visiting professor. Assuming that the Defence will be able to provide further documentation in this regard, the Chamber observes that Mr Gasasira fulfills the requirement of at least ten years relevant experience as required by Rule 45. He served as a Prosecutor for three years and as a judge, including as a Presiding Judge of the Court of Appeals, for sixteen years in Rwanda. There is every reason to assume that he has valuable experience in criminal proceedings which may be useful for the Defence in the present case. It is also noted that among his publications figure a manual for the police and a commentary on the law of 30 August 1996 concerning the prosecution of crimes constituting genocide and crimes against humanity. Even if he was a visiting – not permanent – professor at academic institutions the Chamber is convinced that his qualifications, seen as a whole, are sufficient to meet the requirements of Rules 44 and 45 and Articles 13 and 15 of the Directive.

FOR ALL THE ABOVE REASONS

THE CHAMBER

ORDERS the Defence to produce documentation that Mr Gasasira has acted as visiting professor at a certain level and with sufficient regularity.

DIRECTS the Registry to assign Mr Gasasira as co-Counsel for Elizaphan Ntakirutimana provided that it receives from the Defence sufficient documentation that Mr Gasasira has acted as visiting professor at a certain level and with sufficient regularity.

Arusha, 13 July 2001

Erik Møse
Judge

(Seal of the Tribunal)