

ICTR-97-21-T

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**International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda**

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UNITED NATIONS  
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*Office of the president  
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Before: Judge Navanethem Pillay, President

Original: English

Registrar: Mr. Adama Dieng

Date: 13 November 2002

JUDICIAL RECORDS/ARCHIVES  
ICTR  
2002 NOV 14 P 16:42

**THE PROSECUTOR**

**V**

**PAULINE NYIRAMASUHUKO**

**&**

**ARSÈNE SHALOM NTAHOBALI**

**CASE NO. : ICTR-97-21-T**

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**THE PRESIDENT'S DECISION ON THE APPLICATION BY ARSÈNE SHALOM  
NTAHOBALI FOR REVIEW OF THE REGISTRAR'S DECISIONS PERTAINING  
TO THE ASSIGNMENT OF AN INVESTIGATOR**

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Defence Counsel:

- Mr. Duncan Mwanyumba
- Mr. Normand Marquis

-0471

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“The Tribunal”)**

SITTING AS Judge Navanethem Pillay, President;

HAVING RECEIVED a motion from Arsène Shalom Ntahobali (the “accused”) on 21 October 2002, for a review of the Registrar’s decisions of 16 July 2001, 18 February 2002 and 9 July 2002 (the “motion”);

HAVING CONSIDERED the submissions in the motion and the relief claimed, namely, to order the Registrar to immediately appoint one of the persons proposed by the accused as an investigator in his defence team;

HAVING CONSIDERED the Registrar’s response received on 7 November 2002;

NOTES that:

- (i) Article 16 of the Statute<sup>1</sup> provides that the Registry shall be responsible for the administration and servicing of the Tribunal;
- (ii) Article 20(d) of the Statute *inter alia* guarantees legal assistance to an indigent accused where the interests of justice so require;
- (iii) Rule 19 of the Rules<sup>2</sup> states that the President shall preside at all plenary meetings of the Tribunal, coordinate the work of the Chambers and supervise the activities of the Registry, as well as exercise all other functions conferred on her by the Statute and Rules;
- (iv) Rule 33(A) of the Rules states that the Registrar shall assist the Chambers, the Plenary Meetings of the Tribunal, the Judges and the Prosecutor in the performance of their functions. Under the authority of the President he shall be responsible for the administration and servicing of the Tribunal and shall serve as its channel of communication;

<sup>1</sup> S/RES/995 (1994) (the “Statute”).

<sup>2</sup> The Rules of Procedure and Evidence (the “Rules”).

(v) Articles 10 and 12 of the Directive.<sup>3</sup>

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**AFTER HAVING DELIBERATED,**

***On the admissibility of the motion***

1. Article 12 of the Directive states that an accused may seek the President's review of the Registrar's decision where his request for assignment of counsel has been denied. There are no specific provisions in the Rules or Directive that allow for review of the Registrar's decisions where requests for assignments of legal assistants or investigators are denied.
2. It is worth noting that the Registrar, having determined that the accused is indigent, has assigned him a lead counsel, a co-counsel and two legal assistants. The accused was also assigned an investigator, but the Registrar subsequently withdrew the assignment of this investigator when this person was suspected by the Prosecutor of being involved in the events in Rwanda in 1994. The accused has had the benefit of investigations being conducted in his case and Lead Counsel confirmed that he had received the files pertaining to these investigations from the investigator.<sup>4</sup>
3. In its decision<sup>5</sup> on the accused's motion for the reinstatement of his suspended investigator, Trial Chamber II stated that:<sup>6</sup>

...in view of the administrative powers and responsibilities of the Registry in organizing and appointing defence investigators, the Chamber finds that the issue of re-instatement of a suspended investigator is an administrative matter resting with the Registrar.

I concur with this reasoning.

4. Modern systems of Administrative Law have built in review procedures to ensure fairness when individual rights and protected interests are in issue, or to preserve the interests of justice. In the context of the Tribunal, Rules 19 and 33(A) of the Rules

<sup>3</sup> The Directive on Assignment of Defence Counsel (the "Directive").

<sup>4</sup> Letter of 16 January 2002 to the Registrar from Lead Counsel, Duncan Mwanumba.

<sup>5</sup> Decision on Ntahobali's extremely urgent motion for the re-instatement of suspended investigator, Mr. Thaddee Kwitonda, dated 14 December 2001.

<sup>6</sup> *Ibid.*, page 4, paragraph 17.

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ensure that such review is available in appropriate cases. While the Registrar has the responsibility of ensuring that all decisions are procedurally and substantially fair, not every decision by the Registrar can be the subject of review by the President. The Registrar must be free to conduct the business of the Registry without undue interference by Presidential review.

5. In all systems of administrative law, a threshold condition must be satisfied before an administrative decision may be impugned by supervisory review. There are various formulations of this threshold condition in national jurisdictions, but a common theme is that the decision sought to be challenged, must involve a substantive right that should be protected as a matter of human rights jurisprudence or public policy. An application for review of the Registrar's decision by the President on the basis that it is unfair procedurally or substantively, is admissible under Rules 19 and 33(A) of the Rules, if the accused has a protective right or interest, or if it is otherwise in the interests of justice.<sup>7</sup>
6. In this case, particularly since the trial of the accused is in progress, the immediate assignment of an investigator does have a bearing on the accused's ability to prepare his defence and his right to defend himself. I therefore find that the motion is admissible.

***On the assignment of an investigator***

7. An indigent accused has a right to have counsel assigned to represent him. He has no right to an investigator. However the Registrar, acting in accordance with his discretionary powers, has assigned investigators to defence teams following requests from lead counsel.
8. In managing the Legal Aid Programme, the Registrar is *inter alia* obliged to ensure that an indigent accused is assigned competent legal representation, and also that there is no abuse of the Legal Aid Programme. The Registrar manages the Legal Aid

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<sup>7</sup> The Prosecutor v. Joseph Nzirorera (Case no. ICTR-98-44-T), The President's Decision on review of the decision of the Registrar withdrawing Mr. Andrew McCartan as lead counsel of the accused Joseph Nzirorera, 13 May 2002, page 3, paragraph xi.



Programme in accordance with the Directive, which was adopted by a Plenary of the Tribunal's Judges.

9. In implementing the Directive and ensuring that there is no abuse of the Legal Aid Programme, the Registrar has issued a Practical Information Kit for lead counsel *inter alia* setting out the administrative procedures to be followed when requesting the assignment of legal assistants and investigators. The Registrar states that, from the documentation completed by the lead counsel, he is in a position to determine, among other things, whether the proposed investigators or assistants have family links with the accused and whether they possess the minimum qualifications to perform their respective duties, if assigned.
10. I note that the Office of Internal Oversight (OIOS), in its report of 26 January 2001, have found evidence of abuse of the Legal Aid Programme which resulted *inter alia*, from the hiring of friends or relatives of accused as investigators, by some defence teams. According to the Registrar, all counsel have been made aware of these findings through the public statement issued by the Registrar on 13 June 2001.
11. In the present case, the Registrar has denied the request of Lead Counsel to appoint any one of the candidates proposed as an investigator for the accused on the basis that the candidates are unsuitable for certain reasons. The factual basis for the Registrar's exercise of discretion in so far as can be gleaned from the documents on record appears to be his concern that one of the candidates is a suspected genocide perpetrator, while the second one has a close family connection with the accused and the third does not meet the required minimum qualifications.
12. It is important to bear in mind that the Registrar has not declined to assign an investigator to the accused. The complaint of the accused is that the Registrar has declined to appoint one of the three candidates proposed by the Lead Counsel. It is still open to the Lead Counsel to submit a candidate who satisfies the criteria made known by the Registrar.
13. Bearing in mind also, the limited scope of my judicial review jurisdiction as opposed to an appeal on merits, I do not find the exercise of discretion by the Registrar in the

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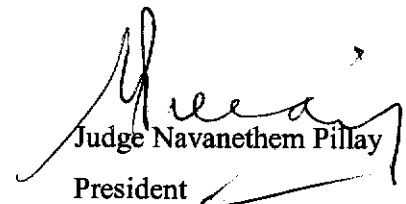
present case to be unreasonable or *malafide* or based on irrelevant or extraneous factors. While the accused has no legal entitlement under the Tribunal's statute, to the services of an investigator at the expense of the Tribunal, the Registrar has agreed to provide one to the accused in the present case purely on a discretionary basis. In doing so, the Registrar is fully entitled to use his discretion on a case-by-case basis to determine the criteria that any proposed candidate should meet, in order to be considered for assignment as an investigator for the accused. Without attempting an exhaustive enquiry into the list of criteria, I find that I cannot fault the application of the criteria used by the Registrar in the present case, to disqualify the candidates proposed by the Lead Counsel.

14. The decision of the Registrar does not result in prejudice to the accused, as Lead Counsel has been and is free to submit further names of suitably qualified and competent candidates for assignment as investigator. Thus, I am not inclined to interfere with the impugned decisions of the Registrar.
15. Further, in taking these decisions, the Registrar has not denied the accused the opportunity of benefiting from the services of an investigator and Lead Counsel is urged to take advantage of this situation and propose a candidate satisfying the required criteria.

In light of the above, I confirm the Registrar's decisions of 6 July 2001, 18 February 2002 and 9 July 2002, and accordingly,

DISMISS the motion.

Arusha, 13 November 2002

  
Judge Navanethem Pillay  
President

(seal of the Tribunal)