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ICTR-98-41-T
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER III

Original: English

Before: Judge Lloyd George Williams, Q.C., Presiding
Judge Pavel Dolenc
Judge Andréia Vaz

Registrar: Mr. Adama Dieng

Date: 4 April 2003

THE PROSECUTOR
v.
THÉONESTE BAGOSORA
GRATIEN KABILIGI
ALOYS NTABAKUZE and
ANATOLE NSENGIYUMVA

INTERNATIONAL RECORDS MANAGEMENT
ICTR
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Case No. ICTR-98-41-T

**DECISION ON THE EXTREMELY URGENT MOTION BY THE DEFENCE FOR
NTABAKUZE TO ASSIGN ANDRÉ TREMBLAY AS LEAD COUNSEL**

The Office of the Prosecutor:

Ms. Barbara Mulvaney
Mr. Drew White
Mr. Segun Jegede
Ms. Christine Graham
Mr. Rashid Rashid

Defence Counsel

Mr. Raphaël Constant
Mr. Paul Skolnik
Mr. Jean Yaovi Degli
Ms. Sylvia Olympio
Mr. André Tremblay
Mr. Kennedy Ogetto
Mr. Gershom Otachi Bw'Omanwa

The International Criminal Tribunal for Rwanda (the "Tribunal"), sitting today as Trial Chamber III composed of Judges Lloyd George Williams, Q.C., Presiding, Pavel Dolenc, and Andréia Vaz (the "Chamber");

BEING SEISED OF the Extremely Urgent Motion by the Defence for Aloys Ntabakuze to Assign André Tremblay as Lead Counsel (Art. 20(4)(d) of the Statute; Rules 5, 45 *ter* and 73 of the Rules; Articles 12 and 19 of the Directive on the Assignment of Counsel), filed by Raphaël Constant Lead Counsel for the Accused Bagosora as *ad hoc* Counsel for the Accused Ntabakuze in French on 3 December 2002 (hereinafter, the "Motion");

CONSIDERING The Registrar's Response to the Motion, filed on 18 December 2002;

CONSIDERING the Brief in Reply and Additional Submissions, filed by Counsel Raphaël Constant as *ad hoc* Counsel for the Accused Ntabakuze on 21 January 2003 (hereinafter the "Reply Brief");

NOTING that the Office of the Prosecutor has not filed any submissions in response to the Motion;

THE TRIBUNAL NOW DECIDES the matter solely on the basis of the written briefs pursuant to Rule 73(A).

I. SUBMISSIONS

A. Submission of Counsel for Bagosora on Behalf of Ntabakuze

1. Raphaël Constant, lead Counsel for the Accused Bagosora, files the instant Motion to obtain an order directing the Registrar to assign Mr. André Tremblay as lead counsel for the Accused Ntabakuze. The Registrar's impugned decision is dated 6 November 2002, which among other things, instructs the Accused to submit three additional names as candidates for lead counsel. The end result of the Registrar's decision, claims the Defence, is that someone other than Maitre Tremblay will likely be appointed as lead counsel to Ntabakuze. Ntabakuze has indicated that Mr. Tremblay is his first choice for the position as lead counsel.

2. After reciting the background of Ntabakuze's efforts to replace his Lead Counsel, Mr. Clément Monterosso, who resigned on 31 July 2002, and the subsequent assignment and withdrawal of Mr. Nadesan Ganesan as replacement Lead Counsel on 6 November 2002, the Motion invokes the following arguments as militating in favour of the outcome he seeks--assignment of Mr. Tremblay as lead counsel for the Accused Ntabakuze: (1) the right of the Accused to choose his counsel; (2) the case-law established right to have an accused's first choice for lead counsel honoured by the Registrar; (3) the Tribunal's practices; (4) "the timeliness and importance, for the Tribunal, of the assignment of Mr. Tremblay as Lead Counsel;" and (5) the prejudice visited upon the Accused Ntabakuze by the Registrar's refusal to engage Mr. Tremblay as his lead counsel.



3. In the Reply Brief, the Defence reiterates many of the same substantive and procedural arguments stated in the Motion. In addition, the Defence stresses that it was necessary for Mr. Constant to act as ad hoc counsel to Ntabakuze in filing the instant Motion because it would have gone "against the code of professional ethics" for Mr. Tremblay "to plead on his own behalf." The Defence also contends that the Chamber is competent to assign Mr. Tremblay as lead counsel to Ntabakuze.

B. Submissions of the Registrar

4. In response to the Motion, the Registrar advances the following principal arguments. At the outset, the Registrar challenges the admissibility of the Motion, stating that, Mr. Constant lacks *locus standi* to pursue the interests of another accused whom he does not, and indeed, cannot represent under the current directives of the Tribunal's Legal Aid Program. The only counsel who is currently authorized to represent the interests of Ntabakuze is Mr. Tremblay, his counsel of record by reason of having been assigned by the Registrar and charged with such a mandate after having executed a power of attorney pursuant to Rule 44(A) of the Tribunal's Rules of Procedure and Evidence. Furthermore, Mr. Constant who is counsel for another accused, namely Bagosora, may not take instructions from Ntabakuze. See President's Decision of 9 October 2002 on Ms. Dickson's Application for Review of the Registrar's Decision to remove her from the Tribunal's list of counsel for indigent accused. Finally, in this regard, the Registrar contends that Rule 45(H) is inapposite because it provides an accused with a right to recourse to the Chamber only in the event where the Registrar has failed to assign counsel. In this connection, the Registrar avers that he was not served a copy of Ntabakuze's Urgent Request to Registrar for Assignment of Andre Tremblay as Lead Counsel, filed on 20 November 2002.

5. Addressing the substantive merits of the Motion, the Registrar argues that Article 20(4) of the Tribunal's Statute and Article 10(A)(i) of the Directive on Assignment of Counsel and the jurisprudence of the Tribunal, all of which are consonant with the universal rules and practices of national and international jurisdictions, including Article 14 of the Covenant on Civil and Political Rights, the United Nations Human Rights Committee as well as the European Court of Human Rights, do not confer upon an indigent accused *any right* to choose *counsel assigned to him*. In addition, the Registrar argues that the Chamber should not entertain the request of the Accused Ntabakuze to have his counsel of choice appointed as lead counsel because to do so would gravely undermine the Registrar's ability to properly administer the Tribunal's Legal Aid Program.

**II.
DELIBERATIONS**

A. Motion is Inadmissible as a Procedural Matter

6. As a threshold matter, the Chamber finds that the Motion suffers from several procedural maladies that render it inadmissible. First, pursuant to Rule 44 (A) only engaged counsel who has filed his or her power of attorney with the Registry may represent an accused before this Tribunal. In this case, where Mr. Constant has the power or attorney to represent Bagosora, rule

44(A) does not permit him to exploit that assignment to represent the interests of Ntabakuze, another accused.

7. Under the Tribunal's current regime, an accused may be represented by counsel in four sets of circumstances. First, an accused who possesses the financial means to do so, may retain his counsel of choice pursuant to Rule 44 (A). Second, an indigent accused may be assigned counsel by the Registrar pursuant to Rule 45 (B)(iii). Third, an accused may be represented by counsel who has been appointed by the Tribunal in the interest of justice pursuant to Rule 45 *quarter*. Finally, an accused may be represented by duty counsel pursuant to Rule 44 *bis*. None, of the foregoing circumstances is extant in this case with regard to Mr. Constant representing the interests of Ntabakuze. The only person currently holding a mandate to represent the interest of Ntabakuze is Mr. Tremblay, his assigned co-counsel. Consequently, the Motion is inadmissible as a procedural matter because Mr. Constant lacks the requisite *locus standi* to make any submissions on behalf of Ntabakuze.

8. The Motion is also inadmissible because the accused has failed to exhaust his remedies before the Office of the Registrar, which office is vested with the exclusive power to assign counsel by virtue of Rule 45(H). Thus, even if the Motion were meritorious on its substantive arguments, the Chamber would still not be competent to make the order Ntabakuze seeks in these circumstances. Rule 45(H) only empowers the Chamber, upon a showing of exceptional circumstance, to "*instruct the Registrar to replace an assigned counsel.*" The Rule does not possess the Chamber of the right to usurp the role of the Registrar by ordering him to assign a particular counsel in a particular hierarchical role. Moreover, Rule 45 *quarter* together with Article 12 of the Directive for the Assignment of Defence Counsel, which the Defence invokes as the grounds for the instant Motion, is inapposite because it applies only in circumstances where the Registrar has failed to activate the process for assignment of lead counsel. In this case the Registrar is waiting for the Accused Ntabakuze to comply with the administrative rules governing the Assignment of Counsel under the Tribunal's Legal Aid regime by providing a list of three possible qualified candidates to replace his lead counsel so that the Registrar may assign lead counsel to represent the Accused in collaboration with Mr. Tremblay in this case.

9. In addition to lacking standing as a procedural matter, the Motion is inadmissible because the Chamber harbours concerns about the ethical propriety of the counsel of record for one accused representing the interests of another co-accused. Each counsel engaged to represent the interests of the accused appearing in this case is subject to the strictures of Rule 44(B), which provides, among other things, that counsel must abide by the Code of Professional Conduct for Defence Counsel of the Tribunal. Article 9 of the Code of Professional Conduct imposes upon all counsel a duty of loyalty to their clients and a duty to exercise all care to avoid conflicts of interests. In addition, Article (9) (3) of the Code provides that counsel may not represent another client if to do so would likely adversely affect the representation or likely compromise of his professional judgment on behalf of his client. Moreover, the need to avoid likely conflicts of interest also finds expression in the President of the Tribunal's Decision of 9 October 2002, which states that it is improper for a counsel to take instruction from anyone other than the accused to whom he has been assigned.



B. Motion Would Fail on its Substantive Merits

10. Putting aside the procedural irregularities and the ethical concerns, were the Chamber to consider the Motion on its substantive merits, the Motion would nevertheless fail because the Chamber is not competent in view of the current factual circumstances to grant the relief Ntabakuze seeks. Article 20(4)(d) of the Statute and Rule 45(H) of the Rules do not sanction the enforcement of a supposed *unfettered* and *unqualified* right of an indigent accused to counsel of his own choice appointed in precisely the hierarchical arrangement he wishes. *E.g., Prosecutor v. Kambanda*, Case No. ICTR-97-23-A, (ICTR) App. Ch., Judgement, 9 October 2000, para. 33 (holding that "the right to free legal assistance by counsel does not confer the right to choose one's counsel"); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, (ICTR), App. Ch., Judgement, 1 June 2001, para. 61 (holding that "the right to free legal assistance of counsel does not confer the right to counsel of one's own choosing. The right to choose counsel applies only to those accused who can financially bear the costs of counsel.").

11. Nevertheless, in the interests of justice, the Chamber directs the Registrar, the Accused Ntabakuze, and his co-counsel, Mr. Tremblay to cooperate to facilitate the assignment of lead counsel for Mr. Ntabakuze in the shortest delay.

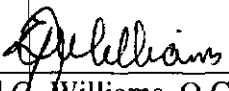
C. Fees for the Motion Should Be Denied

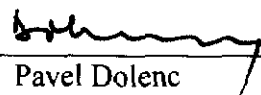
12. In the Reply, Mr. Constant has indicated that his representation of Ntabakuze in respect of this Motion was done free of charge. Accordingly, no fees or costs should be paid to Mr. Constant in connection with this Motion.

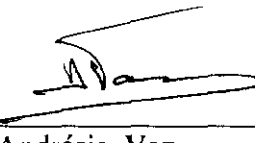
13. For the foregoing reasons, the Chamber:

DENIES the Motion in its entirety.

Arusha, 4 April 2003


Lloyd G. Williams, Q.C.,
Presiding Judge


Pavel Dolenc
Judge


Andréia Vaz
Judge

[Seal of the Tribunal]