



UNITED NATIONS  
NATIONS UNIES

ICTR-01-67-I  
02-05-2008  
(701-674)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

701  
A

OR: ENG

**TRIAL CHAMBER DESIGNATED UNDER RULE 11 BIS**

**Before:** Inés M. Weinberg de Roca, Presiding  
Lee Gacuiga Muthoga  
Robert Fremr

**Registrar:** Adama Dieng

**Date:** 2 May 2008

2008 MAY -2 P 1:01  
JUDICIAL RECORDS ARCHIVES  
RECEIVED

**THE PROSECUTOR**

v.

**Fulgence KAYISHEMA**

*Case No. ICTR-2001-67-I*

**DECISION ON THE REFERRAL OF THE APPLICATION TO APPOINT DEFENCE  
COUNSEL**

*Rules 11 bis and 45 quater of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**  
Hassan Bubacar Jallow  
Bongani Majola  
Alex Obote-Odora  
Richard Karegyesa  
George Mugwanya  
Inneke Onsea  
François Nsanzuwera  
Florida Kabasinga

**Defence Counsel:**

→

700

## INTRODUCTION

1. On 10 June 2001, the Prosecutor of the International Criminal Tribunal for Rwanda ("the Tribunal") filed an indictment ("the Indictment") against Fulgence Kayishema ("the Accused"). The Indictment charges the Accused with genocide; or in the alternative complicity in genocide; conspiracy to commit genocide and extermination as a crime against humanity.<sup>1</sup> The Indictment was confirmed on 4 July 2001 by Judge Lloyd G. Williams.<sup>2</sup>
2. On 11 June 2007, the Prosecutor filed a request for the referral of the Indictment against the Accused to the Republic of Rwanda ("the Referral Request").<sup>3</sup> Pursuant to Rule 11bis of the Rules of Procedure and Evidence ("the Rules"), the President of the Tribunal, on 11 July 2007, designated this Trial Chamber to decide the Referral Request.<sup>4</sup> The Chamber notes that the Accused is at large and is not represented in the proceedings.
3. On 27 October 2007, Mr. David Hooper wrote to the President of the Tribunal requesting the appointment of counsel to represent the interests of the Accused in the Rule 11bis referral proceedings. He stated that he had suggested Mr. Alun Jones QC as possible counsel in previous correspondence with the Defence section of the Tribunal. However, he stressed that he was not requesting the appointment of Mr. Alun Jones QC specifically, but noted his experience and reputation. On 11 November 2007, Mr. David Hooper wrote a similar letter to the Registrar of the Tribunal.
4. On 13 November 2007, the President of the Tribunal formally referred Mr. Hooper's request of 27 October 2007 to this Chamber.<sup>5</sup> The President recognised that whilst the letter from Mr. Hooper could not be regarded as a formal motion, it warranted a formal procedure in light of the need to ensure the transparency of the proceedings and the seriousness of the issue at hand.<sup>6</sup>
5. On 22 November 2007, the Registrar wrote in response to Mr. Hooper's letter dated 11 November 2007. The Registrar stated that "absent any other determination by the competent Trial Chamber, the position of the Registry is that Rule 11bis does not foresee that the Registry should provide counsel to a person yet to be arrested, in the context of referral

<sup>1</sup> Indictment, 10 June 2001.

<sup>2</sup> Decision on Confirmation of the Indictment, 4 July 2001.

<sup>3</sup> Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda pursuant to Rule 11 bis of the Tribunal's Rules of Procedure and Evidence, 11 June 2007.

<sup>4</sup> Designation of a Trial Chamber for the Referral of the Case to a State, 11 July 2007.

<sup>5</sup> Referral of the Application to Appoint Defence Counsel, 13 November 2007.

<sup>6</sup> *Ibid.*, para 2.

679

proceedings." However, the Registrar recognised that should the need arise, a special *ad hoc* procedure could be put in place.

### DISCUSSION

6. The Chamber recalls the Registrar's position (as set out in his letter to Mr. Hooper dated 22 November 2007) that the Directive on the Assignment of Defence Counsel 2007 ("Directive on the Assignment of Defence Counsel") requires that the suspect or accused notify the Registry of a request for assignment of counsel before counsel can be designated.<sup>7</sup> Accordingly, the Registrar concludes that this procedure does not apply in the present case as the whereabouts of the Accused are unknown. However, notwithstanding this provision, the Chamber also notes that pursuant to Article 10bis(ii) of the Directive on the Assignment of Defence Counsel, the Registrar may assign counsel to a suspect or an accused if he has failed to request such an assignment and it is in the interests of justice to do so. In this case, the Chamber considers that the absence of the Accused is a reason for his failure to request counsel. Furthermore, the Chamber recalls the Registrar's previous expressed amenability to a special *ad hoc* procedure being put in place in this case should the need arise.<sup>8</sup>

7. Furthermore, the Chamber observes (as stated by the President in his Referral of the Application to Appoint Defence Counsel)<sup>9</sup> that pursuant to Rule 45quater of the Rules, it may, if it decides that it is in the interests of justice, instruct the Registrar to assign counsel to represent the interests of the Accused.

8. The definition of an "accused" under Rule 2(A) of the Rules is "A person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47." On the plain language of the rule, there is no requirement for the accused to be in the custody of the Tribunal for Rule 45quater to apply. The Chamber notes that judicial interpretation of Rule 45quater has specifically taken into account the plain language of the rule in deciding to which situations it applies. For example, in *The Prosecutor v. Bagosora et al.*,<sup>10</sup> the chamber assigned Defence counsel to the Accused pursuant to Rule 45quater. The chamber considered that even if Rule 45quater may have been adopted to address situations similar to the one faced by the chamber in *The Prosecutor v. Barayagwiza*, *Decision on*

<sup>7</sup> Article 5 Directive on the Assignment of Defence Counsel 2007.

<sup>8</sup> Letter from the Registrar to Mr. Hooper, 22 November 2007.

<sup>9</sup> Referral of the Application to Appoint Defence Counsel, 13 November 2007, para 4.

<sup>10</sup> *The Prosecutor v. Bagosora, Kabiligi, Ntabukuze, Ntengiyumva*, Case No. ICTR-98-41-T Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi, 19 January 2005.

*Defence Counsel Motion to Withdraw*,<sup>11</sup> the situation in that case was similar, and, in any event, the plain language of the rule covered the situation at hand.<sup>12</sup> Consequently, the Chamber finds, on a plain language reading of Rule 45quater, that it can be applied to the Accused who is currently at large; and therefore, that the Chamber can appoint counsel to represent him should it decide that it is in the interests of justice.

9. In this case, the Chamber holds that it is in the interests of justice to appoint Counsel to represent the interests of the Accused in his absence. The Chamber is intent to ensure that any legal rights the Accused may have in relation to the proposed Rule 11bis proceedings are fully protected and considers that the optimum way to do so is through the appointment of counsel to represent his interests in his absence. The Chamber is mindful to avoid any possible criticism that the Accused's rights were not adequately guaranteed in these Rule 11bis referral proceedings.

10. Accordingly, the Chamber, in the interests of justice, noting Article 10bis(ii) Directive on the Assignment of Defence Counsel and pursuant to Rule 45quater of the Rules, instructs the Registrar to immediately appoint Defence counsel to represent the interests of the Accused.

11. In reaching this Decision, the Chamber has been mindful that as the Accused is currently at large he will not be able to give instructions to the Defence counsel to be assigned to him. However, the Chamber is faced with two possible realities: either, if counsel is denied, the Accused will not be represented at all in the Rule 11bis proceedings, or alternatively, if it is granted, he will be represented but will not have the chance to instruct his counsel. The Chamber prefers the latter option on the basis that it is the solution most preferable to the Accused. The consequences any Rule 11bis decision could have a very significant impact on the Accused as the forum of his trial could be changed to Rwanda. Consequently, whilst not the perfect solution, the Chamber is of the opinion that assigning the Accused Defence counsel to represent his interests *in absentia* is the best solution possible for him in the circumstances and is accordingly in the interests of justice.

<sup>11</sup> *The Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-T Decision on Defence Counsel Motion to Withdraw, 2 November 2000.

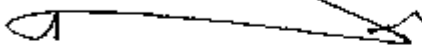
<sup>12</sup> *The Prosecutor v. Bagosora et al*, *supra* note 10, footnote 38. Emphasis added.

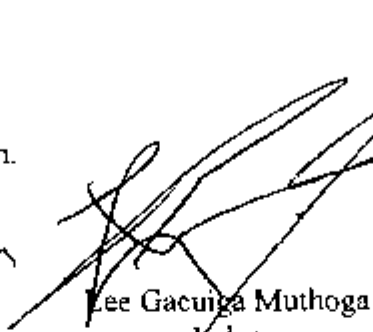
677

**FOR THE FOREGOING REASONS, THE CHAMBER:**

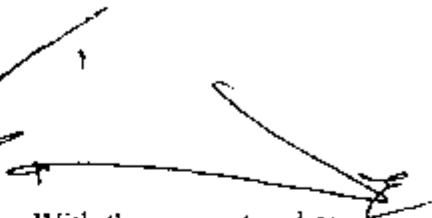
- I. INSTRUCTS** the Registrar to immediately appoint Defence counsel to represent the interests of the Accused in his absence.
- II. REQUESTS** the Registrar to notify, without delay, the present Decision to the Prosecutor.

Arusha, 2 May 2008, in English.

  
Inés M. Weinberg de Roca  
Presiding Judge

  
Lee Gacuga Muthoga  
Judge

Dissenting

  
With the consent and on  
behalf of  
Robert Fremr  
Judge

(Absent during signature)



Judge Lee Gacuga Muthoga appends a Separate and Dissenting opinion to this Decision

676

## SEPARATE AND DISSENTING OPINION OF JUDGE LEE GACUIGA MUTHOGA

1. I have had the opportunity to peruse the Decision of the majority but I am unable to agree with the reasoning thereof. I respectfully set out my separate and dissenting opinion.

2. Rule 11*bis* (B) provides:

"The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, *where the accused is in the custody of the Tribunal*,<sup>13</sup> the accused, the opportunity to be heard."

Based on the plain language of Rule 11*bis* (B), the Rules do not contemplate extending the opportunity to be heard to an accused who remains at large. Where an accused person is in the custody of the Tribunal, the right to be heard may, if he or she chooses, be exercised through his or her counsel. However, it is illogical to conclude that counsel should be assigned to an accused who has no right to be heard. One of the main purposes of assigning counsel is to represent the interests of the accused, as provided by Rule 45 (1)<sup>14</sup> and Rule 45*quater*.<sup>15</sup> The other purpose would be to represent the interests of the Tribunal to ensure the accused receives a fair trial.<sup>16</sup> However, where an accused remains at large, and there are no trial proceedings, the purpose of assigning counsel pursuant to Rule 45*quater* becomes redundant. It is worth stressing that this conclusion does not impact upon the Accused's Article 20 fair trial rights which clearly contemplate the presence of the accused person.<sup>17</sup> These rights are not engaged until the accused surrenders himself or is arrested.

3. With regard to representation, Rules 45 and 45*quater* provide a mechanism to assign counsel to *represent* the interests of the accused.<sup>18</sup> Counsel therefore essentially acts as an agent for the accused person. Where an accused remains at large, counsel cannot effectively fulfill the role of representing that accused when he has no means of even establishing the circumstances or the wishes of his notional client. Indeed, assigning counsel who has no contact with the accused may prejudice his case. For example, it may unfairly impact on an accused person's right to appeal a decision to refer a case pursuant to Rule 11*bis*. Sub-Rule

<sup>13</sup> Emphasis added.

<sup>14</sup> Rule 45 (1) provides that "Counsel will *represent* the accused and conduct the case to finality." (Emphasis added).

<sup>15</sup> Rule 45 *quater* provides "The Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign a counsel to *represent* the interests of the accused." (Emphasis added).

<sup>16</sup> *The Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-T ("*Barayagwiza*"), Decision on Defence Counsel Motion to Withdraw, 2 November 2000, para. 21.

<sup>17</sup> Article 20 (4) (d) states that the Accused has the right "[T]o be *tried* in his or her *presence* ... and to have legal assistance assigned to him or her, in any case where the interest of justice so require ...." (Emphasis added).

<sup>18</sup> *Supra* notes 14 and 15.

675

(H) of that Rule provides that a notice of appeal by the accused "shall be filed within fifteen days of the decision unless the accused was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the accused is notified of the decision." If counsel is assigned in the present case, the Accused will be regarded as "represented" and therefore deemed to have knowledge of the Chamber's Rule 11bis decision notwithstanding the fact that he may not have any knowledge of the Prosecutor's Rule 11bis request, nor of any proceedings or subsequent decision. Regardless of this possibility, he will be bound by the fifteen day time limit within which to file a notice of appeal. This cannot be right as there is no means of informing the Accused of the Prosecutor's Rule 11bis request, nor any decision that may follow.

4. In my view, Rule 45quater was never intended to apply to a case such as this one. The Tribunal has previously considered the issue of whether an accused person should be represented by counsel where that accused does not appear for trial. For example, in *Prosecutor v. Barayagwiza*,<sup>19</sup> the issue involved the right to counsel during trial where the accused clearly had a right to be heard in accordance with his Article 20 fair trial rights regardless of his refusal to appear before the Tribunal. The accused was fully aware of his trial but chose not to be present, despite being informed of the ongoing proceedings. *Barayagwiza* is an example of the kind of situation envisaged by Rule 45quater, that is, where an accused is within the custody of the Tribunal for trial but is refusing to instruct counsel. The Chamber's discretionary power pursuant to Rule 45quater to assign counsel in such a case may be in the interests of justice because counsel can represent the interests of the Tribunal to ensure that the Accused receives a fair trial.<sup>20</sup> Hence, the purpose of counsel is to guard against any adverse interference in the Accused's fair trial rights, as well as to ensure these rights. In the present case, there are no ongoing trial proceedings and none are envisaged while the Accused remains at large. His fair trial rights therefore are not affected and accordingly, the interests of justice do not necessitate the assignment of counsel.

5. In line with the above reasoning, I further consider that the plain language of Article 10bis (ii) of the Directive on the Assignment of Counsel contemplates the presence of the accused. In my view, the words "[f]ails to obtain or to request assignment of Counsel" anticipates the accused actively deciding not to request counsel or being unable to do so, for example, due to illness or other incapacity.

<sup>19</sup> *Supra* note 16.

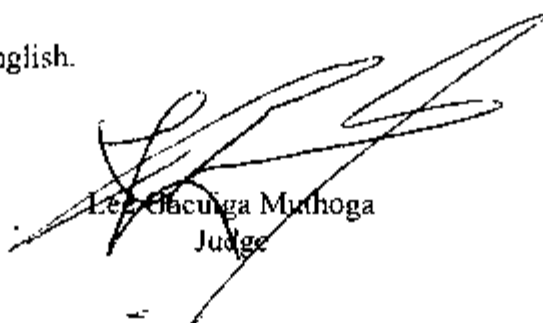
<sup>20</sup> *Barayagwiza*, Decision on Defence Counsel Motion to Withdraw, para. 21.

674

6. Finally, if the purpose of assigning counsel is to appraise the Chamber of the Accused's interests and assist it in ensuring that these are respected and ensured throughout the Rule 11bis proceedings, the correct procedure would not be Rule 45quater but Rule 74, which allows the Chamber to invite a person to appear before it and make submissions on an issue to assist in the proper determination of the case. However, the present situation does not demand such assistance.

7. I therefore find that Rule 45quater does not provide this Chamber with the discretion to request the Registrar to assign counsel to the Accused in this case. The Chamber should only imply a power, not expressly provided for by the Rules, where the situation plainly demands it. The present situation does not demand it because the function of determining the Prosecutor's Rule 11bis request can be performed without occasioning injustice to the Accused. In any event, counsel to be assigned, who has no means of establishing the circumstances or the wishes of his notional client, cannot bring to the proceedings anything that has not already been brought to the attention of the Chamber by the Prosecutor and amici.<sup>21</sup> It is for these reasons that I consider the better course to take is to decline the appointment of counsel in this case and proceed to determine the application on the basis of the materials presently available to the Chamber.

Arusha, 2 May 2008, in English.



Lee Oculunga Muthoga  
Judge

<sup>21</sup> There are currently three amici who have filed *amicus curiae* briefs: "Amicus Curiae Brief of the Republic of Rwanda in the Matter of an Application for the Referral of the above case to Rwanda Pursuant to Rule 11 bis," dated 1 October 2007; "Brief of Amicus Curiae, International Criminal Defence Attorneys Association (ICDAA), Concerning the Request for Referral to the Accused to Rwanda Pursuant to Rule 11 bis of the Rules of Procedure and Evidence", filed 4 January 2008; "Brief of Human Rights Watch as Amicus Curiae in Opposition to Rule 11 bis Transfer", filed 4 January 2008.