

ICTR-07-91-I
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(1246-1241)

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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 24 July 2008

JUDICIAL RECORDS ARCHIVES
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THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-2007-91-PT

ORDER TO ASSIGN COUNSEL

*Articles 19 and 20 of the Statute and
Rules 77 (F), 45 and 54 of the Rules of Procedure and Evidence*

Office of the Prosecutor:

Richard Karegyesa
Renifa Madenga
Abdoulaye Seye
Dennis Mabura

For the Accused

Allison Turner

INTRODUCTION

1. On 4 January 2008, the Indictment against the Accused, Leonidas Nshogoza, was confirmed by the President of the Tribunal.¹ The Accused is charged with Contempt of the Tribunal and Attempt to Commit Acts Punishable as Contempt of the Tribunal, contrary to Rule 77 of the Rules of Procedure and Evidence.² Following a Warrant of Arrest issued on 28 January 2008,³ the Accused presented himself voluntarily to the Tribunal on 8 February 2008. On the same date, the Accused assigned Power of Attorney to Ms. Allison Turner, to represent him before the Tribunal.⁴ The President of the Tribunal assigned the case to this Trial Chamber on 2 May 2008.⁵

2. Since February 2008, the Registry and Ms. Turner have been engaged in communications concerning the assignment of Counsel to the Accused.⁶ It is submitted by the Defence that on 26 February 2008, the Accused filed with DCMS, signed forms in relation to his indigency and choice of counsel. The Defence further informs that Ms. Turner was the Accused's first choice of counsel.⁷

3. It is submitted by the Defence that on 2 May 2008, the Accused filed a letter with the Registrar requesting that he be assigned counsel forthwith.⁸ No action having been taken by the Registry, the Defence filed a Motion seeking the Trial Chamber's intervention in this matter – namely, that the Registrar of the Tribunal assign counsel of the Accused's choice to him immediately.⁹

¹ *Prosecutor v. Nshogoza*, Case No. ICTR-2007-91-I.

² *Nshogoza*, Indictment, 7 January 2008.

³ *Nshogoza*, Warrant of Arrest and Order for Transfer and Detention Addressed to All States, 28 January 2008.

⁴ *Nshogoza*, Power of Attorney signed by Leonidas Nshogoza dated 8 February 2008. See Annex A to *Nshogoza*, "Urgent Motion for Assignment of Counsel", filed on 16 May 2008 ("Motion").

⁵ *Nshogoza*, Order Assigning the Case to Trial Chamber III, 2 May 2008.

⁶ (i) "Summons to a Duty Counsel for purposes of Mr. Leonidas Nshogoza Appearing before the International Criminal Tribunal for Rwanda", 11 January 2008. The Summons from Defence Counsel Management Section ("DCMS") is addressed to Ms. Allison Turner. [Although the Summons is actually dated 11 January 2008, it appears from a reading of all the materials that the date was in fact 11 February 2008].

(ii) Letter from DCMS to Ms. Turner entitled "Duty Counsel Inclusion on the List of Duty Counsel" dated 11 February 2008, placing Ms. Turner on the List of Duty Counsel.

(iii) Email from DCMS to Ms. Turner dated 11 February 2008 informing Ms. Turner that the Summons was being withdrawn in order that Ms. Turner "for the time being ... can act on the basis of the letter of attorney."

(iv) Between 19 March and 2 May 2008, DCMS asked Ms. Turner twice for her view on whether she could act for two accused before the Tribunal. Ms. Turner had been acting in the case of *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-I. See Motion para. 7. Ms. Turner replied on 19 March and 17 April 2008 stating that there was no difficulty in this respect as the other case in which she was acting closed on 20 February 2008. See Motion, para. 8.

(v) On 4 April 2008, the Defence submits, Ms. Turner filed a letter with DCMS requesting that Counsel be assigned to the Accused. See Motion, para. 8. The Motion states that no reply, nor acknowledgment, was received by Ms. Turner.

⁷ Motion, para. 5. The Accused's request to assign counsel was in accordance with Rule 45 of the Rules. See footnote 19 to this Order.

⁸ Motion, para. 12. The Motion claims to attach the letter as Annex H but the Annexures to the Motion go no further than Annex E.

⁹ Although the Motion is recorded as being filed on 16 May 2008, it is dated 14 May 2008 and states that at the date of filing, counsel had not been assigned. See Motion, para. 14. Therefore, although the filing date on the Motion is 16 May 2008, it appears from the submissions in the Motion that the filing may not have been

4. On 15 May 2008, the Registrar sent an "Offer of Assignment as Counsel" to Ms. Turner to act for the Accused.¹⁰ The Offer states that the Registrar will pay Ms. Turner up to US \$50,000 to cover legal fees. The Offer further informs that the "Registrar will *also meet other expenses* related to these proceedings."¹¹ On 19 May 2008, Ms. Turner accepted the Offer and, on 30 May 2008, she hand-delivered and filed a signed copy of the Offer.¹²

5. By letter dated 6 June 2008, DCMS informed Ms. Turner that the Offer of US \$50,000 was "to ... cover the fees *and expenses*."¹³ On 9 June 2008, Ms. Turner replied to the said letter advising DCMS of their failure to fulfil their contractual obligations pursuant to their Offer. In particular, Ms. Turner noted DCMS' failure to formally assign her as counsel and its attempt to modify the agreed terms of remuneration.

6. In her submissions, Ms. Turner now informs the Chamber that she is suspending her work until her assignment as counsel is formalised, as per the terms and conditions stipulated in the Offer of 15 May 2008.¹⁴ Further, on 12 June 2008, Ms. Turner filed a Notice to Suspend the Motion.¹⁵ The Notice to Suspend states that on 10 June 2008, DCMS wrote to the Accused stating that the Registrar would *not* assign Counsel.

7. On 1 July 2008, the Registrar filed submissions pursuant to Rule 33 (B) of the Rules.¹⁶ The Defence responded to the Registrar's Submissions on 7 July 2008.¹⁷ On 23 July 2008, the Registrar filed further Rule 33 (B) submissions on the Defence Response.¹⁸

DISCUSSION

8. Pursuant to Article 19 (1) of the Statute, this Chamber has an obligation to "ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused...."

expeditiously processed by the Court Management Section ("CMS"). The Motion appears to have been filed by the Defence *before* the Registrar's offer to assign counsel on 15 May 2008, as described in para. 4 of this Order.

¹⁰ Offer of Assignment as Counsel for the Accused Leonidas Nshogoza dated 15 May 2008 ("Offer"). See *Nshogoza*, "Addendum – Extremely Urgent Motion for Assignment of Counsel (Article 20 (4) of the ICTR Statute and Rule 77F ICTR R.P.E)", 2 June 2008 ("Addendum"), Annex A.

¹¹ Emphasis added.

¹² Letter dated 19 May 2008 from Ms. Turner to Mr. Dunstain Mwaungulu of DCMS, attached to the Addendum as Annex B, and signed copy attached to the Addendum as Annex D.

¹³ Letter dated 6 June 2008 from Mr. Dunstain Mwaungulu of DCMS to Ms. Turner, attached as Annex A to *Nshogoza*, "Second Addendum - Extremely Urgent Motion for Assignment of Counsel (Article 20 (4) of the ICTR Statute and Rule 77F ICTR R.P.E)", 9 June 2008 ("Second Addendum") [emphasis added].

¹⁴ Second Addendum, para. 4.

¹⁵ *Nshogoza*, "Notice to Suspend – Extremely Urgent Motion for Assignment of Counsel (Article 20 (4) of the ICTR Statute and Rule 77F ICTR R.P.E)", 12 June 2008 ("Notice to Suspend").

¹⁶ *Nshogoza*, "The Registrar's Submission Under Rule 33 (B) of the Rules of Procedure and Evidence on Leonidas Nshogoza's Addendum 2 – Extremely Urgent Motion for Assignment of Counsel (Article 20 (4) of the ICTR Statute and Rule 77 (F) International Criminal Tribunal for Rwanda Rules of Procedure and Evidence", 1 July 2008 ("Registrar's Submissions").

¹⁷ *Nshogoza*, "Defence Response to the Registrar's Submissions filed 1 July 2008", filed on 7 July 2008 ("Defence Response").

¹⁸ *Nshogoza*, "The Registrar's Submission under Rule 33 (B) to Defence Response to Registrar's Submissions filed on 1 July 2008", 23 July 2008.

9. Article 20 sets out the "Rights of the Accused" and Article 20 (4) stipulates minimum guarantees to which an accused is entitled. With regard to the issue currently before this Chamber, the following minimum guarantees are particularly relevant:

- (i) Article 20 (4) (c) provides for the right to be tried without undue delay; and
- (ii) Article 20 (4) (d) provides, amongst other things, *the right to legal assistance of the accused's own choosing*,¹⁹ and to have legal assistance assigned, in any case where the interests of justice so require, and without payment if the accused does not have sufficient means to pay for it.

10. Rule 77 (F) of the Rules provides that any person "indicted for or charged with contempt shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45."

11. Pursuant to Rule 45 of the Rules, the Registrar may assign counsel to an indigent accused. Sub-Rule (C) sets out the procedure for the assignment of counsel to an indigent accused.²⁰ The procedure for the assignment of counsel is further provided for by the Directive on the Assignment of Defence Counsel.²¹ Pursuant to Article 10 (A) of the Directive, the Registrar may decide to assign or not to assign counsel after examining an accused's declaration of means and other relevant information.

12. Furthermore, pursuant to Rule 54 of the Rules, the Trial Chamber may issue such orders as may be necessary for the conduct of a trial.²²

13. The jurisprudence of this Tribunal, and that of the International Criminal Tribunal for the Former Yugoslavia, recognises the importance of the Accused's rights under Article 20 (4) of the Statute in respect of a decision to assign or not to assign counsel to represent an Accused person. In particular, the jurisprudence allows for a Chamber to direct the Registrar to assign counsel, and recognises the Chamber's inherent power deriving from its judicial function, and from the provisions of Articles 19 and 20 of its Statute, to control proceedings in such a way as to ensure that justice is done and, particularly, that a trial proceeds fairly and

¹⁹ Emphasis added.

²⁰ Rule 45 (C): "In assigning counsel to an indigent suspect or accused, the following procedure shall be observed:

- (i) A request for assignment of counsel shall be made to the Registrar;
- (ii) The Registrar shall enquire into the financial means of the suspect or accused and determine whether the criteria of indigence are met;
- (iii) If he decides that the criteria are met, he shall assign counsel from the list; if he decides to the contrary, he shall inform the suspect or accused that the request is refused."

²¹ In particular, Articles 5 to 12 of the Directive on the Assignment of Defence Counsel ("Directive").

²² Rule 54: "At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."

expeditiously.²³ Indeed, it is incumbent upon this Chamber to ensure full respect for the Accused's fair trial rights, including the right to have counsel assigned.²⁴

14. Accordingly, although the Registrar has primary responsibility for deciding to assign counsel, the Chamber has an inherent power to order the Registry to assign counsel where the Accused's fair trial rights may be adversely affected.

15. In this case, although the Defence filed a Notice suspending its Motion, the Chamber deems it necessary to act pursuant to its obligation to ensure that there is no further delay in these proceedings and that the Accused receives legal assistance of his own choosing in accordance with Article 20 (4) (d).

16. Although the Chamber notes the background to this issue, which includes the dispute with regard to the Registrar's Offer of 15 May 2008, and has considered the submissions made by the Registrar and Ms. Turner, the Chamber is concerned primarily with ensuring that the Accused's rights under Article 20 are guaranteed. In this respect, the Chamber notes that on 26 February 2008, in accordance with Rule 45 of the Rules, the Accused made a written request to the Registrar for the assignment of counsel, and provided signed forms with regard to his indigency.²⁵ The Chamber further notes that the Registrar decided that the criteria for indigency were met, as a subsequent decision to assign counsel was made, which led to the Offer to Ms. Turner of 15 May 2008.

17. The Chamber wishes to express concern that, despite the Registry having received a request from the Accused for the assignment of counsel, including an indication of counsel of his choice, the Registrar has failed to settle this matter by assigning counsel to the Accused. The Chamber considers that the delay occasioned by the Registry's failure to resolve this matter is adversely impacting upon the Trial Chamber's management of this case. In this regard, the Chamber recalls that a Status Conference, originally scheduled for 18 June 2008, was cancelled as the issue of assignment of counsel remained unresolved.

18. Having given due consideration to the background to this matter, the Chamber finds no valid reason for the Registry's ongoing failure to assign counsel to the Accused. Therefore, in order to ensure that the Accused's fair trial rights are not compromised, in particular his rights to have legal assistance assigned to him, and to be tried without undue delay, the Chamber considers it necessary to direct the Registrar to immediately assign counsel to the Accused. The Chamber notes that it intends to re-schedule the aforementioned Status Conference as soon as practicable, and that this issue should be resolved prior to such Status Conference taking place.

FOR THESE REASONS the Chamber,

HAVING particular regard to the Accused's right to fair trial, as enshrined by Articles 19 and 20 of the Statute; hereby

²³ *Jean Paul Akayesu v. Prosecutor*, Case No. ICTR-96-4-A, Decision Relating to the Assignment of Counsel (AC), 27 July 1999, p. 5; *Prosecutor v. Zejnil Delalic et. al.*, Case No. IT-96-21-A, Order on the Motion to Withdraw as Counsel due to a Conflict of Interest (AC), 24 June 1999; and *Delalic*, Order Regarding Esad Land_ o's Request for Removal of John Ackerman as Counsel on Appeal for Zejnil Delalic (AC), 6 May 1999.

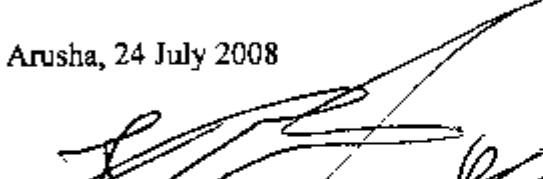
²⁴ *Prosecutor v. Martić*, Case No. IT-95-11-PT, Order, 3 July 2002; and *Prosecutor v. Mrskić et. al.*, Case No. IT-95-13/1, Decision on Defence Preliminary Motion on Assignment of Counsel, 30 September 1997.


²⁵ See para. 2 above.




ORDERS the Registrar, in accordance with Article 20 (4) (d) of the Statute, to assign, without any further delay and in accordance with Rule 77 (F) of the Rules, counsel to Léonidas Nshogoza.

Arusha, 24 July 2008


For and on behalf of
Khalida Rachid Khan
Presiding Judge


Lee Gaciga Muthoga
Judge


For and on behalf of
Emile Francis Short
Judge

[Seal of the Tribunal]

