



UNITED NATIONS  
NATIONS UNIES

ICTR-01-67-R11bis  
27-07-2011  
(2089 - 2087)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

2089  
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OR: ENG

**TRIAL CHAMBER III**

**Before:** Judge Vagn Joensen, Presiding  
Judge Gberdao Gustave Kam  
Judge Mparany Rajohnson

**Registrar:** Mr. Adama Dieng

**Date:** 27 July 2011

**THE PROSECUTOR**

v.

**FULGENCE KAYISHEMA**

**Case No. ICTR-01-67-R11bis**

JUDICIAL RECORDS/ARCHIVES  
RECEIVED  
UNICTR

2011 JUL 27 P 4: 48

*F. J. J. J.*

**ORDER FOR THE ASSIGNMENT OF COUNSEL**

**Pursuant to Rules 11 bis, 45 quater and 54 the Rules of Procedure and Evidence**

**Office of the Prosecutor:**  
Mr. Hassan Bubacar Jallow  
Mr. Bongani Majola  
Mr. Richard Karegyesa  
Ms. Deborah Wilkinson  
Mr. George Mugwanya  
Ms. Inneke Onsea

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**INTRODUCTION**

1. The Chamber recalls its Scheduling Order of 17 January 2011, in which it decided to defer the proceedings in respect of the Prosecutor's request for the transfer of the case of Fulgence Kayishema to the courts of Rwanda either until the Accused is apprehended or until a final determination is made in the *Uwinkindi* referral application, whichever one comes first.<sup>1</sup>
2. The Chamber also recalls its Decision of 3 February 2011 denying the Prosecutor's motion for reconsideration of the Scheduling Order or for certification to file an interlocutory appeal against it.<sup>2</sup> In the Decision, the Chamber noted that it would request the Registrar to appoint Counsel to represent the interests of the fugitive Kayishema "well in advance" of the final decision on the *Uwinkindi* referral application so as to allow the Counsel sufficient time to familiarise himself or herself with the case.<sup>3</sup>
3. On 28 June 2011, the Trial Chamber designated to adjudicate the *Uwinkindi* referral application rendered its decision and the matter is now before the Appeals Chamber.<sup>4</sup>

**DELIBERATIONS***Applicable Law*

4. Pursuant to Rule 45 *quarter* of the Tribunal's Rules of Procedure and Evidence ("Rules"), a 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 an accused. The normal procedure for the assignment of Counsel is stipulated in the Tribunal's Directive on the Assignment of Defence Counsel ("Directive"). Whereas Article 5 of the Directive requires the suspect or accused to make a formal request in writing to the Registrar, Article 10 *bis* (ii) provides that, where it is in the interests of justice and in accordance with Rule 45(E) of the Rules, the Registrar may nevertheless assign Counsel to an accused who fails to make such a written request. Moreover, Rule 54 grants the Trial Chamber broad discretion to issue such orders as may be necessary for the purposes of an investigation or for the preparation or conduct of a trial.
5. Furthermore, the Appeals Chamber has interpreted Article 19(1) of the Statute of the Tribunal

<sup>1</sup> *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-01-67-R11*bis*, Scheduling Order (Rules 11 *bis* and 54 of the Rules of Procedure and Evidence), 17 January 2011 ("Scheduling Order").

<sup>2</sup> *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-01-67-R11*bis*, Decision on Prosecutor's Request for Reconsideration and, in the Alternative, for Certification of Interlocutory Appeal (Rules 11 *bis* and 73 of the Rules of Procedure and Evidence), 3 February 2011 ("Decision").

<sup>3</sup> Decision, para. 4.

<sup>4</sup> *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (Rule 11 *bis* of the Rules of Procedure and Evidence), 28 June 2011.

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to mean that a Trial Chamber may instruct the Registrar to assign Counsel to represent the interests of an accused, even against his will, where the accused has waived his right to be present and to participate in the hearings.<sup>5</sup>


6. The Chamber recalls that this is the second attempt by the Prosecutor to refer the Indictment against Kayishema to the courts of Rwanda.<sup>6</sup> In deciding on the First Referral Request, the designated Trial Chamber observed that an “accused” under Rule 2(A) of the Rules is someone “against whom one or more counts in an indictment have been confirmed in accordance with Rule 47” and that “there is no requirement for the accused to be in the custody of the Tribunal for Rule 45 *quater* to apply.”<sup>7</sup> The designated Trial Chamber also reasoned that in order to fully protect Kayishema’s rights during the Rule 11 *bis* referral proceedings, it was best to instruct the Registrar to assign a Defence Counsel to represent Kayishema’s interests in his absence.<sup>8</sup>


7. In the instant proceedings, this Chamber also considers that it is in the interests of justice to instruct the Registrar to assign a Defence Counsel to represent the interests of the fugitive Accused. In the Chamber’s view, the assignment is necessary in order to protect the rights of the Accused and to ensure the integrity of the process under Rule 11 *bis*.

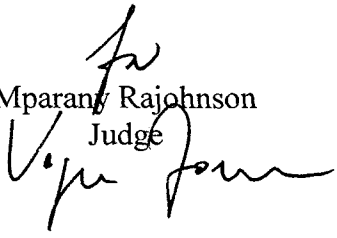
**FOR THESE REASONS, THE CHAMBER:**

**INSTRUCTS** the Registrar to assign Defence Counsel to represent the interests of the fugitive Accused Fulgence Kayishema.

Arusha, 27 July 2011, done in English.

  
Vagn Joensen  
Presiding Judge

  
Gberdao Gustave Kam  
Judge

  
Mparany Rajohnson  
Judge



<sup>5</sup> *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Appeals Judgement, 28 November 2007, para. 127.

<sup>6</sup> *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-01-67-R11*bis*, Prosecutor’s Request for the Referral of the Case of Fulgence Kayishema to the Courts of Rwanda pursuant to Rule 11*bis* of the Rules of Procedure and Evidence, 11 June 2007 (“First Referral Request”).

<sup>7</sup> *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-01-67-R11*bis*, Decision on the Referral of the Application to Appoint Defence Counsel (Rules 11 *bis* and 45 *quater* of the Rules of Procedure and Evidence, 2 May 2008, para. 8.

<sup>8</sup> In his Separate and Dissenting Opinion, Judge Muthoga argues that “the Rules do not contemplate extending the opportunity to be heard to an accused who remains at large” and that “it is illogical to conclude that counsel should be assigned to an accused who has no right to be heard.” Judge Muthoga also argues that the fair trial rights enshrined in Article 20 of the Statute of the Tribunal “clearly contemplate the presence of the accused person.”