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474/H

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-07-91-A
13th April 2010
{474/H – 470/H

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding Judge
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrésia Vaz

Registrar: Mr. Adama Dieng

Decision of: 13 April 2010

ICTR Appeals Chamber
Date: 13th April 2010
Action: R. Turner
Copied To: Concerned Judges, Parties, Judicial Archives, LOs, LSS

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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Léonidas NSHOGOZA

v.

THE PROSECUTOR

Case No. ICTR-2007-91-A

DECISION ON REQUEST FOR JUDICIAL REVIEW OF THE REGISTRAR'S AND PRESIDENT'S DECISIONS CONCERNING PAYMENT OF FEES AND EXPENSES

Counsel for Léonidas Nshogoza:

Ms. Allison Turner

Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Alex Obote-Odora
Ms. Christine Graham
Mr. Shamus Mangan

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of a request, filed on 3 February 2010 by Ms. Allison Turner, Counsel for Léonidas Nshogoza, to quash a decision by the Registrar and to order the payment of fees and expenses.[1] On 17 February 2010, the Registrar filed submissions under Rule 33(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules"),[2] to which Ms. Turner replied on 22 February 2010.[3] On 25 February 2010, the Prosecutor filed submissions in this matter,[4] to which Ms. Turner responded on 1 March 2010.[5]

A. Background

2. Trial Chamber III of the Tribunal ("Trial Chamber") pronounced its judgement in the case of *The Prosecutor v. Léonidas Nshogoza* on 2 July 2009 and issued its reasons in writing on 7 July 2009.[6] The Trial Chamber found Mr. Nshogoza guilty of contempt of the Tribunal and sentenced him to 10 months of imprisonment.[7] On 15 March 2010, the Appeals Chamber affirmed his conviction and sentence.[8]

3. On 13 October 2008, the Registrar appointed Ms. Turner to represent Mr. Nshogoza in this case under the Tribunal's legal aid program.[9] This assignment was made pursuant to a decision of the Trial Chamber, which was issued after a prolonged dispute between Ms. Turner and the Registrar over the terms of her remuneration created an impasse in the trial proceedings.[10] The dispute centred on the Registry's change in the terms of remuneration from its original offer on 15 May 2008 of $50,000 in fees plus additional expenses, to a new offer of a total of $50,000,

[1] Request for Judicial Review to Quash Registrar Decision and Order Payment of Fees and Expenses, 3 February 2010, p. 25 ("Request for Review").
[2] Registrar's Submissions under Rule 33 (B) of the Rules on the Request for Judicial Review to Quash the Registrar's Decision and Order Payment of Fees and Expenses, 17 February 2010 ("Registrar's Submissions").
[3] Submissions on the Registrar's Submissions Filed 17 February 2010, 22 February 2010 ("Counsel's Reply to Registrar's Submissions").
[4] Prosecutor's Submissions on Mr Nshogoza's Submissions on the Registrar's Submissions, Filed on 22 February 2010, 25 February 2010 ("Prosecutor's Submissions").
[5] Submissions on Prosecutor's Submissions Dated 25 February 2010, 1 March 2010 ("Counsel's Reply to Prosecutor's Submissions").
[6] *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-T, Judgement, 7 July 2009 ("Trial Judgement").
[7] Trial Judgement, paras. 188, 189, 233.
[8] Judgement, 15 March 2010, para. 112 ("Appeal Judgement").
[9] *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-I, Decision on Withdrawal of the Assignment of Mr. Philippe Greciano, Counsel for the Accused Leonidas [*sic*] Nshogoza, 13 October 2008.
[10] *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-PT, Decision on Motions Requesting Assignment of Counsel of Choice, 13 October 2008 ("Decision of 13 October 2008"), paras. 2, 25.

including both fees and expenses.[11] In order to break the deadlock and avoid further delays, the Trial Chamber granted Mr. Nshogoza's request that Ms. Turner be assigned under the terms of the Registrar's offer of 15 May 2008.[12]

4. On 23 February 2009, Ms. Turner requested DCDMS to review the $50,000 lump sum agreed to in May 2008, providing her reasons for considering the amount to no longer suffice.[13] Discussions then ensued between Ms. Turner and Mr. Pascal Besnier, Chief of DCDMS, in relation to her request.[14] On 3 April 2009, Ms. Turner was informed by DCDMS that her request for a review of the $50,000 lump sum amount was denied because it was considered to be sufficient.[15]

5. On 20 July 2009, Ms. Turner wrote to the Registrar requesting "payment of outstanding fees and reimbursement of expenses" in the amount of $210,118.43, recalling her request to DCDMS for a review of the original budget.[16] On 29 July 2009, the Registrar directed DCDMS to pay "any outstanding fees and expenses claims duly justified" but declined to alter the $50,000 lump sum for fees originally agreed upon ("Impugned Decision").[17] On 31 August 2009, Ms. Turner wrote to the Registrar again contesting the sufficiency of the original lump sum amount.[18] On 1 September 2009, Mr. Mandiaye Niang, the Special Assistant to the Registrar, informed Ms. Turner that, in light of the Impugned Decision, the issue was closed.[19]

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[11] Decision of 13 October 2008, para. 2, nn. 4, 5. On 15 May 2008, the Defence Counsel and Detention Management Section of the Registry ("DCDMS") sent Ms. Turner a letter which offered to assign her as counsel for Mr. Nshogoza and stating that she would be paid up to $50,000 to cover legal fees and that the Registrar would also meet other expenses related to the proceedings. The offer explained that it would expire in seven days and that its acceptance must be indicated by signing and returning it to DCDMS. Ms. Turner provided the signed acceptance of this offer to DCDMS 15 days later, on 30 May 2008. Following this, on 6 June 2008, DCDMS altered the terms of the original offer, informing Ms. Turner that the $50,000 lump sum offer in fact included fees *and* expenses. In turn, on 9 June 2008 Ms. Turner threatened to suspend all work on the case. *See also* Appeal Judgement, para. 30.

[12] Decision of 13 October 2008, para. 25.

[13] *See* Request for Review, Annex 27 (Urgent Letter from Ms. Allison Turner to Mr. Pascal Besnier and Mr. Dunstain Mwaungulu, Subject: Request for Review of Lump Sum, dated 20 February 2009, filed 23 February 2009).

[14] The content of these discussions is not agreed. Ms. Turner contends that an oral agreement was reached to increase the lump sum. The Registrar, however, maintains that Mr. Besnier merely agreed to review her request, not grant it. *Compare* Request for Review, paras. 14-16 *with* Registrar's Submissions, para. 24.

[15] Request for Review, para. 18; Registrar's Submissions, para. 26.

[16] *See* Request for Review, Annex 3 (Letter from Ms. Allison Turner to Mr. Adama Dieng, Subject: Request for Payment of Outstanding Fees and Reimbursement of Expenses in *re Nshogoza*, dated 16 July 2009, filed 20 July 2009).

[17] *See* Request for Review, Annex 4 (Letter from Mr. Adama Dieng to Ms. Allison Turner, Subject: Request for Payment of Outstanding Fees and Reimbursement of Expenses in the Nshogoza Case, Ref: ICTR/RO/07/09/299, dated 29 July 2009).

[18] *See* Request for Review, Annex 45 (Letter from Ms. Allison Turner to Mr. Adama Dieng, Subject: Request for Payment of Outstanding Fees and Reimbursement of Expenses in *re Nshogoza*, dated 29 August 2009, filed 31 August 2009). *See also* Request for Review, para. 29.

[19] *See* Request for Review, Annex 46 (Email from Mr. Mandiaye Niang to Ms. Allison Turner, Subject: Claims for fees, sent 1 September 2009 at 2:16 p.m). *See also* Request for Review, para. 29.

6. On 27 October 2009, Ms. Turner appealed to the President of the Tribunal for a review of the Registry's decisions in relation to her fees.[20] On 24 November 2009, the President dismissed Ms. Turner's appeal and deferred to the Impugned Decision since she lacked any written documentation in support of her claim that she had been granted an increase of the original lump sum amount.[21]

B. Discussion

1. Submissions

7. Ms. Turner submits that the Appeals Chamber has the power to review the Registrar's administrative decisions in relation to remuneration of counsel and outstanding requests for payment because it is currently seized of Mr. Nshogoza's appeal and because she has exhausted administrative recourse.[22] Ms. Turner contends that the issue of outstanding fees and expenses impacts Mr. Nshogoza's substantive rights to a fair and expeditious trial with adequate time and facilities, and his entitlement to legal representation free of charge, as well as her entitlement to remuneration for reasonable and necessary services performed within the scope of her mandate.[23]

8. The Registrar observes that because the President has already reviewed the Impugned Decision, Ms. Turner should have challenged the President's Decision.[24] He further submits that the Appeals Chamber has the inherent jurisdiction to review decisions of the President and the Registrar, where such decisions are closely related to issues involving the fairness of proceedings on appeal, which the Appeals Chamber has the statutory duty to ensure.[25] The Registrar avers that in the present case, Ms. Turner fails to articulate how Mr. Nshogoza's fair trial rights are violated by the alleged outstanding payment of fees which relate to trial proceedings only.[26]

9. In reply, Ms. Turner submits that because the President's Decision defers entirely to the Impugned Decision without examining the legality thereof, the Request for Review also implicitly requests to review the President's Decision.[27] In addition, Ms. Turner asserts that the violation of Mr. Nshogoza's right to adequate resources for his defence has tainted the proceedings and that the fact that they are currently before the Appeals Chamber does not "cure" the unfairness of the

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[20] *See* Request for Review, Annex 5 (Letter from Ms. Allison Turner to Judge Dennis Byron, Subject: Review of Registry Decisions Concerning Payment of Fees for Professional Services Rendered, dated 26 October 2009, filed 27 October 2009).
[21] *See* Request for Review, Annex 6 (Letter from Judge Dennis Byron to Ms. Allison Turner, Ref: ICTR/PRES/120/09, dated 24 November 2009 ("President's Decision")).
[22] Request for Review, para. 2. *See also* Counsel's Reply to Registrar's Submissions, para. 5.
[23] Request for Review, paras. 33, 34.
[24] Registrar's Submissions, para. 4.
[25] Registrar's Submissions, para. 7.
[26] Registrar's Submissions, para. 8.

Impugned Decision.[28] Counsel further submits that, under the circumstances, the Appeals Chamber ought to consider her Request for Review in the interests of justice.[29]

10. The Prosecutor argues that the contractual dispute between Ms. Turner and the Registrar over payment of additional fees does not confer jurisdiction to the Appeals Chamber in this matter because the fairness of Mr. Nshogoza's proceedings is not at stake.[30] The Prosecutor submits that at no stage during the appeal or anywhere in his appeal filings has Mr. Nshogoza argued that his right to a fair trial has been compromised by the Impugned Decision, which casts doubt on the legitimacy of Ms. Turner's present claim.[31]

11. In reply, Ms. Turner submits that she was required to exhaust administrative recourse before approaching the courts and that burdening the Appeals Chamber in August 2009 was unnecessary as she expected the matter to be resolved at the administrative level.[32]

2. Analysis

12. The Appeals Chamber recalls that the Registrar has the primary responsibility in the determination of matters relating to the remuneration of counsel.[33] Article 22 of the Directive on the Assignment of Defence Counsel ("Directive") empowers the Registrar to establish a "lump sum" system of remuneration to assigned counsel, and, in the event of a disagreement over the sum, the Directive vests the Registrar with the discretion to decide the matter after consulting the relevant Chamber.[34] According to Article 30 of the Directive, the Registrar also decides any disagreement on questions relating to the calculation and payment of remuneration or to the reimbursement of

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[27] Counsel's Reply to the Registrar's Submissions, para. 4.
[28] Counsel's Reply to the Registrar's Submissions, para. 5.
[29] Counsel's Reply to the Registrar's Submissions, para. 5.
[30] Prosecutor's Submissions, para. 3.
[31] Prosecutor's Submissions, paras. 3-5.
[32] Counsel's Reply to Prosecutor's Submissions, para. 3.
[33] *See, e.g., Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase, 3 May 2005, para. 4. *See also Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Nebojša Pavković's Motion for Stay of Proceedings, 2 March 2010, para. 12, *referring to Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003, para. 19.
[34] Article 22(C) of the Directive states: "The Registrar, with the concurrence of the President, may establish an alternative scheme of payment based on a fixed fee ("lump sum") system consisting of a maximum allotment of moneys for each Defence Team in respect of each stage of the procedure taking into account the Registrar's estimate of the duration of the stage and the apparent complexity of the case. In the event that a stage of the procedure is of substantially longer or shorter duration than estimated, the Registrar may adapt the allotment, whether by increasing or decreasing it. In the event of disagreement on the quantum of the maximum allotment, the Registrar shall make a decision, after consulting the Chamber and, if he deems it expedient to do so, the Advisory Panel."

expenses after consulting the President and, if necessary, the Advisory Panel.[35] The Directive does not specify an avenue for review of a decision by the Registrar concerning the lump sum payment.

13. In the circumstances of this case, the Trial Chamber had authority to review the Impugned Decision, in particular, since it related to the terms of Ms. Turner's assignment, which was dictated in its Decision of 13 October 2008. The President of the Tribunal also has inherent authority to review such decisions pursuant to Rules 19 and 33 of the Rules and Ms. Turner opted for his review.

14. However, there is nothing in the Statute of the Tribunal, Rules, or the Directive that provides for a direct appeal of a decision by the Registrar or the President concerning an administrative matter that related exclusively to the trial and has no bearing on appellate proceedings.[36] Rather, the Appeals Chamber's consideration of such matters is limited to an appeal against a conviction or where the issue properly arises in an interlocutory appeal certified by a Trial Chamber.[37] Therefore, the Appeals Chamber considers that it has no jurisdiction over this matter.

15. Accordingly, the Appeals Chamber **DISMISSES** the Request for Review.

Done in English and French, the English version being authoritative.

Done this thirteenth day of April 2010,
at The Hague,
The Netherlands.

[Seal of the Tribunal]

Judge Patrick Robinson
Presiding

[35] Article 30 of the Directive states: "In the event of a disagreement on questions relating to the calculation and payment of remuneration or to the reimbursement of expenses, the Registrar shall make a decision after consulting the President and, if necessary, the Advisory Panel, on an equitable basis. The Registrar may also consult the President and, if necessary, the Advisory Panel, and make a decision under this Article, if it appears to the Registrar that a Counsel has been submitting inflated claims for remuneration or claims for expenses which are unnecessary or unreasonable."

[36] *Cf. The Prosecutor v. Athanase Seromba*, Case No. ICTR-01-66-AR, Decision on Interlocutory Appeal of a Bureau Decision, 22 May 2006, para. 4 ("*Seromba* Decision"); *Case Miscellaneous Kabuga Family-01-A*, Decision (Appeal of the Family of Felicien Kabuga against Decisions of the Prosecutor and President of the Tribunal), 22 November 2002, p. 3; *In Re. André Ntagerura*, Case No. ICTR-99-46-A28, Decision on Motion for Leave to Appeal the President's Decision of 31 March 2008 and the Decision of Trial Chamber III Rendered on 15 May 2008, 11 September 2008, para. 12 ("The Applicant seeks leave of the Appeals Chamber to appeal against the Decision of the President and the Decision of the Trial Chamber. While neither the Statute nor the Rules provide for such appeals, the Appeals Chamber has inherent jurisdiction over the enforcement of its orders and any decisions rendered as a consequence thereof. The Appeals Chamber also recalls that it has inherent jurisdiction to review decisions issued by the President of the Tribunal *in certain instances, including where such decisions are closely related to issues involving the fairness of proceedings before the Appeals Chamber.*") (emphasis added) (internal citations omitted).

[37] *Cf. Seromba* Decision, para. 4. *See also Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.6, Decision on Radovan Karadžić's Appeal from Decision on Motion to Vacate Appointment of Richard Harvey, 12 February 2010; *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-AR73.2, Decision on Zdravko Tolimir's Appeal against the Decision of Trial Chamber II on the Registrar's Decision Concerning Legal Aid, 12 November 2009; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.2, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities, 7 May 2009.