



1CTR-99-50-I
19-9-2001
(2513-2506)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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Mugany

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramarason

Registry: Adama Dieng

Date: 19 September 2001

JUDICIAL RECORDS ARCHIVES
ICTR
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MR

The Prosecutor
v.
Prosper MUGIRANEZA et al.

Case No. ICTR-99-50-T

**DECISION ON THE DEFENCE URGENT MOTION FOR RELIEF UNDER RULE 54
TO PREVENT THE COMMANDANT OF THE UNDF FROM OBSTRUCTING THE
COURSE OF INTERNATIONAL CRIMINAL JUSTICE**

The Office of the Prosecutor:
Ken Fleming

Counsel for the Accused:
Michael Greaves

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II, composed of Judges William H. Sekule, Presiding, Winston C. Matanzima Maqutu and Arlette Ramaroson (the “Chamber”);

BEING SEIZED of the “Urgent Motion for Relief under Rule 54 to Prevent the Commandant of the UNDF from Obstructing the Course of International Criminal Justice” (the “Motion”) filed by Counsel for Prosper Mugiraneza on 20 March 2001;

CONSIDERING that:

- (i) The Parties were informed that the Motion would be decided solely upon on the basis of their written briefs, pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Tribunal (the “Rules”);
- (ii) The Prosecutor did not file a reply;
- (iii) On 10 May 2001, the Chamber “request[ed] the Registrar to address by way of an official Memorandum the allegations raised by the Defence [...]” (the “Interoffice Memorandum of 10 May 2001”);
- (iv) On 17 May 2001, the Registrar thereupon filed the “Representations to Trial Chamber II from the Registrar, Pursuant to Rule 33(B), with regard to the Defence Motion for Relief under Rule 54” (the “Registrar’s Representations”);
- (v) On 24 May 2001, the Chamber invited the Registrar to specify his submissions of 17 May 2001 in respect of the facts alluded to by the Defence;
- (vi) On 29 May 2001, the Registrar thereafter filed his “Representations to Trial Chamber II from the Registrar, Pursuant to Rule 33(B), with regard to the Defence Motion for Relief under Rule 54, Specifically in reply to Request for Additional Information Requested in Interoffice Memorandum ICTR/JUD.TCII.41 dated 24 May 2001” (the “Registrar’s further Representations”);
- (vii) On 8 June 2001, the Defence filed their “[...] Response to Registrar’s Representations of 16 May 2001 and 29 May 2001” (the “Defence Response”);

CONSIDERING the provisions of:

- (i) The Statute of the Tribunal (the “Statute”), specifically Articles 19 and 20 of the Statute;
- (ii) The Rules, as amended on 31 May 2001, particularly Rules 54, 73 and 97 of the Rules;
- (iii) The Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal issued by the Registrar (the “Rules of Detention”), notably, Articles 59, 61, 64, 65 of the Rules of Detention;
- (iv) The Regulations to Govern the Supervision of Visits to and Communications with the Detainees issued by the Registrar (the “Regulations”), specifically Regulations 11 and 40 of the Regulations.

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HAVING DELIBERATED,

1. The Chamber, having identified several issues arising from the Parties' submissions, will review them and decide upon them in the following order: (a) the principles applicable to Defence Investigators in respect of communication from Counsel to Accused; (b) the alleged incident of 12 March 2001; (c) the alleged incident of 14 March 2001.

(a) Principles Applicable to Defence Investigators in Respect of Communication from Counsel to Accused

2. The Defence submits that Defence Investigators should be granted the same privileges as Defence Counsel in regard to visits to the Accused at the United Nations Detention Facility (the "UNDF"), and notably that:
 - (i) Defence Investigators should be authorised to personally hand over communications from Counsel to Accused; and
 - (ii) The contents of such privileged correspondence should never be inspected by the UNDF Security Officers, including when brought by the Investigators.

Rights of Defence Investigators in Respect of Transmission of Privileged Correspondence between Counsel and Accused

3. In respect of the Defence submissions, the Trial Chamber notes, as recalled by the Registrar, that Trial Chamber I of the Tribunal held in the "Decision on the Defence Motion Requesting Permission for Its Investigator to Visit the Accused in the Detention Facilities" rendered on 11 June 1997 in *Prosecutor v. Rutaganda* (Case No. ICTR-96-3-T), that Defence investigators do not have the same privileges as Defence Counsel with regard to visits to detainees. The Chamber indeed ruled in the said Decision that "only visits to the detainees by their Defence [Counsel] [...] can be rendered without any restriction or supervision, subject to prior consultation with the Commanding Officer" and that Defence Investigators may only visit detainees at the UNDF "subject to the restrictions and measures of supervision normally applied to visits by the accused's family, friends and 'others' within the meaning of Rule 61 of the Rules of Detention".
4. The Chamber however held, in the said Decision, that "[an] investigator employed by a Defence Counsel can [...] meet with the accused without any such restrictions or measures of supervision imposed by the Commanding Officer if he is accompanied by the Defence Counsel in person".
5. Pursuant to the said Rule, "[d]etainees shall be allowed ... to receive visits from their family and friends [...] *under such restrictions and supervision as the Commanding Officer, in consultation with the Registrar, may deem necessary*" (Emphasis ours). Adopted under the authority of Rule 61 of the Rules of Detention, Regulation 40(A) of the Regulations further provides that "[n]o visitor, other than counsel, may pass any item to a detainee during a visit" and Regulation 40(B) of the Regulations that "[a]ny items intended for a detainee must be handed to the staff of the detention unit on entry [...]".
6. The Chamber therefore recalls that under Regulation 40 of the Regulations, transmission of any item to the Accused, including privileged correspondence from Counsel, is to be

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carried out by the Registry, following the applicable procedure in this respect. Transmission of any item directly to the Accused is only allowed when Counsel in person brings such items.

7. The Chamber recalls in this respect that Regulation 11 of the Regulations protects in any event the confidentiality of communications between Counsel and detainee in stating that, as a matter of principle, “[c]orrespondence addressed to or from Counsel for the detainee shall not be interfered with in any manner (...)”.

Confidentiality of Correspondence or Communications from Counsel to Accused Carried by Members of the Defence Teams other than Counsel

8. The Chamber acknowledges, as submitted by the Defence, that the right to communicate freely and confidentially with Counsel is a fundamental right with respect to the preparation of an accused’s defence and the fairness of the proceedings before the Tribunal, notably pursuant to Articles 19 and 20 of the Statute. It is therefore in the light of the fundamental rights of the Accused that Rule 65 of the Rules of Detention provides that “[e]ach detainee shall be entitled to communicate fully and without restraint with his Defence Counsel” and that “[a]ll such correspondence and communications shall be privileged”, so that its contents shall not be inspected by the Security Officers, and further, so that such correspondence shall not be retained by the said Security Officers.
9. The Registrar submits in respect of such privileged correspondence, when brought by Investigators, that “it is far from clear that the Registry can or should repose the same degree of trust in the Investigators [as in Counsel]. They are not members of a profession which can regulate their behaviour or sanction it if necessary”. The Defence replies that the detainee’s Investigator, Mr. Ignace Rudahunga, is a member of the Bar of Mozambique and is appointed as an Investigator by the Registrar of the Tribunal.
10. The Chamber, in any case, notes that Rule 65 of the Rules of Detention only applies to communication between detainee and Defence Counsel, as opposed to communication between detainees and Investigators of the Defence team. It is the Chamber’s view indeed that this Rule, which is self-explanatory, does not entitle a detainee to communicate fully and without restraint with *any* other person than his Defence Counsel, including, for that matter, with a Defence Investigator.
11. In view of the above, the Chamber does not agree with the Defence submission, relying on the definition of the term “Counsel” laid out in Article 8(3) of the Code (“Counsel includes employees or associates of Counsel and all others whose services are used by Counsel”), that such broad definition should be applied to Defence Investigators carrying alleged communications from Counsel to the Accused. The Chamber indeed notes that this definition only applies, as stated in Article 8(3) of the Code, “[f]or the purposes of [the said] Article”; that is, in respect of the duty made to Counsel to “preserve the confidentiality of his client’s affairs” (Article 8(1) of the Code). For the same reasons, the Chamber does not accept the Defence submission that Mr. Rudahunga, because he is a member of the Bar of Mozambique and is appointed by the Registrar of the Tribunal as an investigator, should have the same privileges as Counsel.

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12. Therefore, should correspondence or communications from Counsel to the Accused be brought by a member of a Defence team other than Counsel, such correspondence or communications, regardless of format, shall be considered privileged pursuant to Rule 65 of the Rules of Detention, and their contents neither examined nor censored, only if the correspondence is clearly identified as emanating from Counsel, and secured in such a manner as to prevent persons other than the intended recipient from seeing the contents of the communication or correspondence.
13. *A contrario* however, the Security Officers may inspect the content of any communication that is not clearly identified as falling under lawyer-client privilege, regardless of format, when such communication is brought by members of a Defence team other than Counsel.
14. Having thus recalled, for the sake of clarity, the principles in force, the Chamber now turns to their application to the present case.

b) The Alleged Incident of 12 March 2001

15. The Defence submits that on or about 12 March 2001, Mr. Ignace Rudahunga, an investigator, who was part of their Defence team, was searched and subsequently forbidden to take into the UNDF a computer diskette containing confidential information related to the Accused's case which he intended to deliver to the detainee Prosper Mugiraneza. According to the Defence, this constitutes a violation of the Accused's individual rights, notably in respect of Articles 19(1) and 20(2) of the Statute. It is not disputed by the Registrar that an incident took place on 12 March 2001.
16. The Chamber notes that the Defence does not submit that Investigator Rudahunga presented himself at the UNDF in the company of Counsel on 12 March 2001. Neither does the Defence submit, in their Motion, that the diskette carried by Investigator Rudahunga on 12 March 2001 was identified as containing correspondence to the Accused from Counsel, as opposed to the two diskettes brought on 14 March 2001, which they specify in the Motion "were marked 'Confidential Material from/to Counsel'".
17. In his further Representations, the Registrar indicates that the diskette brought on 12 March 2001 by the Defence Investigator "was not marked in any way". The Defence however replies, in the Response, that Counsel personally marked the diskettes and that the Registrar's assertion therefore is "simply untrue".
18. The Chamber notes in this regard that the Defence did not originally submit, in the Motion, that the diskette carried by Investigator Rudahunga on 12 March 2001 was identified as containing correspondence to the Accused from his Counsel, whereas they specified, in the said Motion, that the two diskettes brought on 14 March 2001 "were marked 'Confidential Material to/from Counsel'".

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19. Considering this discrepancy between the Defence submissions in the Motion and the Response, as opposed to the firm refutation in this respect by the Registrar, the Chamber is not satisfied that the diskette brought on 12 March 2001 was properly identified as containing privileged communication from Counsel to the Accused.
20. In view of the principles referred to above, the Chamber therefore concludes that, on 12 March 2001, the UNDF Security Officer in charge acted lawfully as submitted by the Registrar and as not disputed by the Defence as follows, in:
 - (i) Searching the Investigator, upon which search a computer diskette was found in the Investigator's briefcase;
 - (ii) Proposing to the Investigator to leave the diskette at the Security Desk "for subsequent handling over to detainee Prosper Mugiraneza, following censorship" (Registrar's further Representations) "with a view to [the Commanding Officer's] checking whether the contents were materials relating to the detainee's defence" (Registrar's Representations); which proposition appears to have been at first accepted by the Defence Investigator;
 - (iii) Refusing to hand over the diskette when the Defence Investigator thereupon returned to the security desk and requested the diskette in order to hand it over to the Accused; the Defence Investigator thereafter retrieved the diskette from the Security Officer in charge, and placed it back in to his briefcase;
 - (iv) Returning the briefcase to the Defence Investigator, the diskette contained therein, upon the latter's departure from the UNDF, after his meeting with the Accused.
21. For the above reasons, the Chamber dismisses, in respect of the events of 12 March 2001, the prayers for Orders made by the Defence:
 - (i) "That the Commandant of [the UNDF] shall forthwith cease to obstruct the course of international criminal justice";
 - (ii) That the Defence investigator be allowed to enter the UNDF with computer diskettes containing documents in electronic format (...);
 - (iii) "That it be declared that the conduct of the said Commandant [of the UNDF] was [...] unlawful";
 - (iv) "That the Commandant be required to appear before the Trial Chamber [...] so that an inquiry may be conducted into whether his act or acts constitute a contempt of the Tribunal [...] or whether the acts of any of his subordinates or of any other person who has participated in such act or acts constitute a contempt of the Tribunal [...]";

c) The Alleged Incident of 14 March 2001

22. The Defence submits that, on or about 14 March 2001, Defence Investigator Ignace Rudahunga, upon being searched, was forbidden to enter the UNDF with two computer diskettes, so as to hand them over to the Accused. The Defence, in addition, submits that, even though the said diskettes contained confidential information pertaining to the case of Prosper Mugiraneza and were marked as "Confidential Material from/to Counsel", they were examined.

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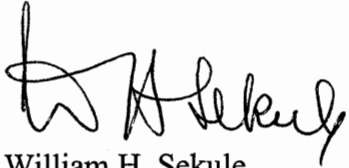
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23. The Chamber notes that the Registrar's first Representations acknowledged that incidents had taken place "on the two dates [of 12 and 14 March 2001]". According to the Registrar in his further Representations however, "[t]o the best knowledge of the Commanding Officer [of the] UNDF no incident took place on 14 March". The Chamber regrets this discrepancy and recalls to the Registrar and all members of the Registry the necessity to be complete and accurate in their representations when acting as officers of the Tribunal.
24. The Defence explicitly submits that an incident did take place at the UNDF on 14 March 2001 and replies that the Registrar's representation is "untrue". In view of the said discrepancy between the Registrar's Representations and his further Representations, the Chamber is not in a position to conclude whether or not an incident took place on or about 14 March 2001.
25. In any case, even if an incident took place on 14 March 2001, the Chamber notes that the UNDF Security Officer in charge would have acted in accordance with the principles referred to above, by allegedly:
 - (i) Searching the Investigator, upon which search two computer diskettes were found;
 - (ii) Refusing to hand over the diskettes to the Accused.
26. The Chamber however notes that the Defence submits that the diskettes were examined, even though marked as "Confidential Material from/to Counsel". Such an act would be in breach of the principle that correspondence for the detainee addressed to or from Counsel shall not be interfered with in any manner. The Chamber nevertheless is not satisfied by the Defence submission that the Security Officer in charge may have examined or censored the diskettes with respect to their contents thereby acting unlawfully.
27. The Chamber therefore dismisses, in respect of the alleged events of 14 March 2001, the prayers for Orders made by the Defence:
 - (i) "That the Commandant of [the UNDF] shall forthwith cease to obstruct the course of international criminal justice";
 - (ii) That the Defence investigator be allowed to enter the UNDF with computer diskettes containing documents in electronic format (...);
 - (iii) "That it be declared that the conduct of the said Commandant [of the UNDF] was [...] unlawful";
 - (iv) "That the Commandant be required to appear before the Trial Chamber [...] so that an inquiry may be conducted into whether his act or acts constitute a contempt of the Tribunal [...] or whether the acts of any of his subordinates or of any other person who has participated in such act or acts constitute a contempt of the Tribunal [...]".

FOR THE ABOVE REASONS, THE TRIBUNAL

DISMISSES the Urgent Defence Motion for Relief under Rule 54 of the Rules.

Arusha, 19 September 2001



William H. Sekule
Presiding Judge



Winston C. Matanzima Maqutu
Judge



Arlette Ramaroson
Judge

(Seal of the Tribunal)

