

ICTR-99-50-I
15-11-2002
(5388-5381)

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Mwama



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Original: English

TRIAL CHAMBER II

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

Registry: Adama Dieng

Date: 15 November 2002

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The PROSECUTOR
v.
Casimir BIZIMUNGU
Case No. ICTR-99-50-I

**DECISION ON THE DEFENCE MOTION TO PROTECT THE APPLICANT'S
RIGHT TO FULL ANSWER AND DEFENCE**

The Office of the Prosecutor:
Douglas Marks Moore
Ibukunolu Alao Babajide
Elvis Bazawule
George William Mugwanya

Counsel for the Defence:
Michelyne C. St. Laurent

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

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

BEING SEISED of:

- (i) The “*Requête en extrême urgence, de la Défense afin de protéger le droit du requérant à une défense pleine et entière devant le TPIR*”,¹ filed by the Defence on 17 May 2002 (the “Motion”); and
- (ii) The “Prosecutor’s Response to the Extremely Urgent Motion to Protect the Applicant’s Right to Full Answer and Defence Before the ICTR”, filed on 17 September 2002;

NOTING the:

- (i) Memoranda addressed to all Defence Counsel by the Lawyers and Detention Facilities Management Section (the “LDFMS”) on the subject of “Visit of Defence team members to UNDF”, dated 20 March and 26 March 2002; and
- (ii) The Registrar’s Representations Pursuant to Rule 33 (B) of the Rules of Procedure and Evidence Regarding the Defence Request for the Lifting of Measures Restricting Defence Investigators & Assistants’ Access to the United Nations Detention Facilities”, filed on 19 September 2002 (the “Registrar’s Representations”);

CONSIDERING the provisions of:

- (i) The Statute of the Tribunal (the “Statute”), specifically Articles 19 and 20 of the Statute;
- (ii) The Rules of Procedure and Evidence (the “Rules”), particularly Rules 33, 44, 45, 46 and 73 of the Rules;
- (iii) The Code of Professional Conduct for Defence Counsel (the “Code of Conduct”), particularly Article 8;
- (iv) The Directive on the Assignment of Defence Counsel (the “Directive”), particularly Article 13;
- (v) The Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal

¹ Extremely Urgent Defence Motion to Protect the Applicant’s Right to Full Answer and Defence Before the ICTR, Official Translation filed on 4 September 2002.



issued by the Registrar (the “Rules of Detention”), notably, Rules 61, 65 and 82 through 86 of the Rules of Detention; and

- (vi) The Regulations to Govern the Supervision of Visits to and Communications with the Detainees issued by the Registrar (the “Regulations”), specifically Regulation 11 of the Regulations;

NOW CONSIDERS the Motion based solely on the written briefs filed by the Parties, pursuant to Rule 73 (A) of the Rules.

ARGUMENTS OF THE PARTIES AND SUBMISSIONS OF THE REGISTRAR

The Defence

1. The Defence submits that on or around 15 March 2002, the United Nations Detention Facility (the “UNDF”) authorities refused to allow Mr. Ephrem Munyankaka, an investigator of the Defence team, to have a working visit with the Accused, instead permitting the investigator to have a 15-minute private visit.
2. The Defence requests that the Chamber reinstate the visiting rights of the investigator and legal assistant who are members of the Accused’s Defence team. The Defence alleges, *inter alia*, that preventing members of the Defence team from conducting privileged meetings with the Accused :
 - a. Violates the Accused’s rights to “adequate time and facilities for the preparation of his or her defence and to communicate with Counsel of his or her choosing”, pursuant to Article 20 of the Statute;
 - b. Violates the Accused’s right to privileged communication with Defence Counsel pursuant to Rule 65 of the Rules of Detention;
 - c. Is contrary to purpose and objective of the Rules of Detention;
 - d. Makes it impossible for Defence Counsel to fulfil her duty of representing the Accused “at reasonable cost”; and
 - e. Increases costs to the Tribunal.
3. The Defence further argues that investigators should be granted the same privileges as Counsel under Rule 65 of the Rules of Detention. The Defence argues that investigators and assistants work under the supervision of Counsel, that Counsel is answerable for the acts of Defence team members and that Defence Counsel can be sanctioned for the improper actions of an investigator by the bar and the Tribunal, pursuant to Rule 46 of the Rules. The Defence cites the obligations of Defence Counsel to supervise the Defence team under Article 8 of the Code of Conduct, and cites English legal doctrine supporting the right to confidentiality of communications between accused and agents of Defence Counsel.
4. The Defence further calls the Chamber’s attention to a Memorandum sent on 20 March 2002 to all Defence Counsel from the LDFMS, which stated that all visits of



assistants and investigators to accused persons shall be granted “under such restrictions and supervision the Commanding Officer may deem necessary”. Citing the Tribunal’s Decisions in *Rutaganda*² and *Mugiraneza*,³ the Memorandum asserted that visits by investigators fall under the provisions of Rule 61 of the Rules of Detention.

5. The Defence adds that the *Rutaganda* Decision, denying a private investigator unrestricted visits to an accused, distinguishes between private investigators hired by Defence Counsel and those recognised by the Registrar.
6. The Defence argues that the *Mugiraneza* Decision denying privileged visits to an authorised investigator incorrectly relied on the *Rutaganda* Decision’s analysis of Rule 61 of the Provisional Rules of Detention, governing visits by “family, friends and others.” The Defence notes that at the time of the *Mugiraneza* Decision, the Provisional Rules of Detention were no longer in effect, and that the new Rule 61 omitted the words “and others.” The Defence submits that since legal assistants and investigators are not family or friends, the Tribunal in the *Mugiraneza* Decision erred in ruling that Rule 61 governs their visits. The Defence further notes that Rule 61 appears under the section of the Rules entitled “Rights of Detainees”, and should not be interpreted to limit a detainee’s rights.
7. The Defence submits that the Rules of Detention are meant to safeguard the security and good administration of the UNDF, and not to supervise the management of the Defence case. The Defence argues that the interpretation of Rule 65 of the Rules of Detention espoused by the Registrar and articulated in the *Mugiraneza* Decision unfairly prejudices the Accused’s ability to prepare an adequate defence.
8. The Defence notes its own obligation under the Code of Professional Conduct to represent the Accused “effectively, diligently and at reasonable cost” and that in order to discharge this obligation Counsel must delegate tasks to assistants, including investigators.
9. The Defence argues that allowing investigators and assistants to meet directly with their clients would save the Tribunal significant costs in transportation, *per diem* and fees. The Defence points out that in the instant case, the investigator resides in Africa, and notes that if the Tribunal prohibits the investigator from meeting directly with the Accused, Lead Counsel will be obliged to personally file requests for both her and the investigator seeking authorisation to meet the client, resulting in increased fees.

² *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Decision on the Defence’s Motion Requesting Permission for its Investigator to Visit the Accused in the Detention Facilities, 11 June 1997 (the “Rutaganda Decision”).

³ *Prosecutor v. Mugiraneza*, 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, 19 September 2001 (the “Mugiraneza Decision”).



10. The Defence notes that in practice, before March 2002, the Registrar had authorised assistants and investigators to meet the Accused under the same conditions as Counsel.

The Prosecution

11. The Prosecution has no objection to the Motion.

The Registrar's Representation Pursuant to Rule 33 (B) of the Rules

12. The Registrar made a submission pursuant to Rule 33 (B) of the Rules following a status conference held on 9 September 2002 in the present case, in which Counsel for Mugenzi raised a similar issue pertaining to the restrictions placed upon visits to the Accused at the UNDF by legal assistants and investigators in the absence of Counsel. In its submission, the Registrar indicated that the issue raised might affect the Registry in discharging its functions and made these representations for the benefit of the Chamber. Because the Defence in the instant case raises the same issue, the Chamber deems it appropriate to consider the Registrar's Representation in deciding the present Motion.
13. The Registrar submits that investigators and legal assistants do not have the status of Counsel and that therefore lawyer-client privilege does not extend to meetings between an accused detainee and investigators and/or assistants.
14. The Registrar submits that Article 8 (3) of the Code applies only to Counsel's duty towards a client. The Registrar asserts that investigators and legal assistants, while bound to preserve the confidentiality of their clients, do not benefit from privilege and, therefore, their visits fall within the ambit of Rule 61 of the Rules of Detention.
15. The Registrar, citing the *Mugiraneza* Decision,⁴ submits that whether or not the investigator is a lawyer or appointed by the Registrar is irrelevant.
16. The Registrar asserts that "for good administration of justice as well as good administration of the detention unit", Defence Counsel must meet directly with the detainee, and, if necessary, give instructions to other members of the Defence team.
17. The Registrar argues that it is in the best interests of an accused to obtain legal representation solely from lawyers meeting the requirements of Rule 44 (A) of the Rules and Article 13 of the Directive. The Registrar asserts that the current policy is necessary to "limit the potential for members of the Defence teams to meet and exchange communications with the Accused without the express permission or even knowledge of Counsel."
18. The Registrar further recalls that, pursuant to Rule 45 *ter* of the Rules, Defence Counsel for an indigent accused is obliged "to be available at all time as specified

⁴ *Ibid.* para. 11.



by the Registrar”, that “any derogation” is grounds for withdrawal, and that “the request of Counsel [...] has not referred to any rule that allow them to flout their undertaking under Rule 45 *ter* of the Rules.”

19. Nonetheless, the Registrar notes that the Tribunal’s practice allows for communication between the Defence team and an accused to benefit from privilege in “certain very exceptional circumstances.” The Registrar further asserts that it is “incumbent on Counsel to demonstrate the existence of such exceptional circumstances to the satisfaction of the Registry.”
20. The Registrar recalls that the confidentiality of documentation and materials sent to an accused detainee by Counsel will be respected if clearly marked.
21. The Registrar asserts that allowing detainees to meet with legal assistants and investigators who then report to Lead Counsel “leads to duplication of work and double payment.” The Registrar recalls that he is under the obligation to administer the Legal Aid Fund from which these legal fees are paid.
22. Finally, the Registrar submits that the proper way for the Defence to proceed is to seek an “amendment of the relevant rules” at the next Plenary Session of Judges.

HAVING DELIBERATED

23. The Chamber notes the Registrar’s statement that visits by assistants and investigators to an accused detainee fall within the ambit of Rule 61 of the Rules of Detention. The Chamber finds that Rule 61 (i) in its current form applies only to visits from “family and friends” but that “all visitors” to an accused detainee, which could include investigators and assistants, remain subject to the “requirements of the visiting regime of the host prison”, pursuant to Rule 61 (ii) of the Rules of Detention, which include such requirements that the Registrar determines are necessary to ensure the safety and good administration of the UNDF.
24. The Chamber acknowledges that the right of an accused to communicate freely and confidentially with Counsel is a fundamental right with respect to the preparation of an accused’s defence and to the fairness of the proceedings before the Tribunal, pursuant to Articles 19 and 20 of the Statute. It is in consideration of these rights 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”.
25. The Chamber holds that Rule 65 of the Rules of Detention only applies to communication between a detainee, lead Counsel and co-Counsel. It does not apply to meetings between a detainee and an investigator or a legal assistant. As this Chamber has previously held in the *Mugiraneza* Decision, Rule 65, “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.”⁵ The Tribunal has since followed this interpretation of the above mentioned Rule in the *Nahimana* Decision.⁶

26. The Chamber notes that both the lead Counsel and the co-Counsel have a duty to be available whenever they are needed to enable them to represent the Accused pursuant to Rule 45 *ter* of the Rules.
27. The Chamber reiterates the position in the *Mugiraneza* Decision that the definition of “Counsel” in Article 8 (3) of the Code (“Counsel includes employees or associates of Counsel and all others whose services are used by Counsel”), applies only to the duty of members of the Defence team to preserve the confidentiality of the client’s affairs pursuant to Article 8 (1) of the Code,⁷ and does not make a conversation between an investigator and an accused detainee at the UNDF a privileged exchange. Neither the fact of an investigator’s appointment by the Registry nor the obligation of Lead Counsel to supervise the work of the Defence team has bearing on the applicability of this privilege.⁸ The Chamber notes that Defence investigators and assistants may visit a detainee in the presence of Counsel and that such visits will be covered by the confidentiality provisions of Rule 65 of the Rules of Detention. Legal assistants and investigators can also meet an accused outside the presence of Counsel subject to the requirements set forth by the UNDF, which fall under the administrative authority of the Registry. Furthermore, Regulation 11 of the Regulations protects the confidentiality of “[c]orrespondence addressed to or from Counsel” for the detainee.
28. The Chamber further notes the Registrar’s submissions that “in certain very exceptional circumstances [when] counsel and co-Counsel are unavoidably absent from Arusha, yet need to be able to communicate with the Accused on a confidential basis for the continued preparation of the Defence”, the Registrar will allow for visits by non-Counsel members of the Defence team.
29. While the Chamber reiterates its ruling in *Mugiraneza* that Rule 65 applies only to counsel, the Chamber considers to be in the interests of justice the practice of the Registrar to authorise meetings between an accused and members of the Defence team where *inter alia*, Defence Counsel can demonstrate that he cannot access his client for an essential purpose without an unreasonable delay or expenditure of funds.
30. The Chamber considers that the current procedures and safeguards under the Rules of Detention and the Regulations adequately protect an accused’s right to confidential communication with Counsel. In the instant case, the Chamber does not

⁵ *Ibid.* para. 10.

⁶ *Prosecutor v. Nahimana*, Case No. ICTR-99-52-I, Decision on the Defence Motion for Declaratory Relief from Administrative Measures Imposed on Hasan Ngeze at the UNDF, 9 May 2002 (the “*Nahimana* Decision”).

⁷ *Mugiraneza* Decision, para. 11.

⁸ *Ibid.*



find that the Defence has shown that the enforcement of UNDF rules and regulations has in any way prejudiced the Accused's rights.

31. In conclusion, the Chamber reiterates that visits by Defence investigators and assistants are not covered by the privilege of Rule 65 of the Rules of Detention, which is reserved for Defence Counsel, but notes that the Registrar may permit such confidential communication in "exceptional circumstances."


FOR ALL THE ABOVE REASONS,


THE TRIAL CHAMBER

DISMISSES the Motion.

Arusha, 15 November 2002


Winston C. Matanzima Maqutu
Presiding Judge


William H. Sekule
Judge


Arlette Ramaroson
Judge

[Seal of the Tribunal]