ICTR-98-42-T
21-11-2002
(7289 — 7286)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

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

Registrar: Adama Dieng

Date: 20 November 2002

The PROSECUTOR v. Pauline NYIRAMASUHUKO *et Al.*
Case No. ICTR-97-21-T
(Case No. ICTR-98-42-T)

DECISION ON THE DEFENCE MOTION FOR ACCESS FOR INVESTIGATORS AND ASSISTANTS TO THE ACCUSED IN THE ABSENCE OF COUNSEL

Office of the Prosecutor
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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

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

BEING SEIZED of the Oral Motion by Counsel for Nyiramasuhuko argued orally in open session on 6 November 2002;

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion after having heard the Parties and the Registry on 6 November 2002.

SUBMISSIONS OF THE PARTIES

1. The Defence submits that there is a problem of access to the UNDF for the investigators and the assistants working with the defence teams as the current rules require that they be accompanied by counsel when meeting with their client.

2. The Defence alleges that this practice raises problems of availability of counsel for the preparation of the case as well as budgetary issues of paying for two people to be present when, for instance, a conversation is taking place between the investigator and the client in Kinyarwanda, a language that counsel does not understand.

3. The Defence further argues that investigators, whose work programmes are approved by counsel, live primarily within the African continent and need to directly report back to the Accused, whereas counsel come from the North American continent, further away.

4. Consequently, the Defence requests, with immediate effect that assistants and investigators be allowed access to their client at the UNDF during allocated hours without the presence of counsel.

5. Counsel for Nsabimana, Counsel for Nteziryayo and Counsel for Ntahobali supported the Motion. Mr. Marchand, lead-counsel for Kanyabashi supported and added to the Motion. Mr. Marchand informed the Chamber that his co-counsel was absent because of illness and asked for permission for his assistant, a counsel in Quebec, to meet with the Accused Kanyabashi in the absence of lead counsel, to assist in the preparation of cross-examination. Counsel for Kanyabashi indicated that the Registry had rejected this request this request. Counsel for Ndayambaje supported the Motion and added that if assistants and investigators were to be granted such access, they should be allowed to bring along their working equipment, such as computers.

6. Counsel for the Prosecutor acknowledgeded that those points seemed to be valid but that, concerning the rationale behind the implementation of the Rules, he suggested that the Chamber hear a representative of the Registry. Nonetheless, with respect to the situation described by Counsel for Kanyabashi, Counsel indicated that it seems

unreasonable that his assistant should not be able to visit that accused at the UNDF in the circumstances outlined.

7. Pursuant to Rule 33 of the Rules, Mr. Preira representing the Registry recalled that the registry had informed all counsel by a letter-circular dated 26 March 2002 of principles governing access to detainees under Rules 61 and 65 of the Rules Governing Detention as well as the jurisprudence of the Tribunal and the International Criminal Tribunal for ex-Yugoslavia. Mr. Preira indicated that, in the past, there had been some leniency in allowing investigators and assistants access to the accused to facilitate the tasks of the Defence. However, due to abuses of the judicial assistance programme, the Registry had returned to a strict application of the Rules.

8. Mr. Preira emphasised that when clear circumstances were submitted by counsel, in specific cases, such strict provisions could be set aside if necessary. It was also recalled that it is the responsibility of counsel to represent his or her client under the seal of confidentiality and thereafter transmit the instructions from the client to assistants or to investigators.

HAVING DELIBERATED

9. The Chamber acknowledges the fundamental right of an accused to communicate freely and confidentially with counsel with respect to the preparation of an accused's defence, pursuant to Articles 19 and 20 of the Statute and to Rule 65 of the Rules of Detention which 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". The Chamber noted in the *Bizimungu* Decision, that both lead counsel and 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.

10. The Chamber has held in the *Mugiraneza* Decision that 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."[1] The Tribunal has since followed this interpretation of the above mentioned rule in the *Nahimana* Decision[2] and in the *Bizimungu* Decision.[3]

11. The Chamber notes statement made by Mr. Preira, the Registry's representative, that visits by assistants and investigators to an accused fall within the ambit of Rule 61 of the Rules of Detention and that, under clear circumstances, a strict application of the Rules may be set aside.

12. The Chamber reiterates that visits by investigators and assistants are not covered by the privilege of Rule 65 of the Rules of Detention, which is reserved for Defence Counsel. Nonetheless, recalling its position in the *Bizimungu* Decision, "the Chamber considers to be in the interests of justice the practice of the Registrar to authorise

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[1] *Ibid.* para. 10.

[2] *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").

[3] *Prosecutor v. Bizimungu*, Case No. ICTR99-50-I, Decision on the Defence Motion to Protect the Applicant's Right to Full Answer and Defence, 15 November 2002 (the "Bizimungu Decision").

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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"[4].

13. The Chamber considers that the procedures authorised under the Rules of Detention and the Regulations adequately protect the accused's right to confidential communication with Counsel. In the instant case, the Chamber does not find that the Defence is prejudiced by the enforcement of the above mentioned rules and regulations.

FOR THE ABOVE REASONS, THE TRIBUNAL,

DISMISSES the Defence Motion.

Arusha, 20 November 2002

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

[Seal of the Tribunal]

[4] See Bizimungu Decision supra.