

ICTR-00-56-I

25. 11. 2002
(2049 — 2044)

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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

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P.O.Box 6016, Arusha, Tanzania - B.P. 6016, Arusha, Tanzanie
Tel: 255 27 2504207-11 2504367-72 or 1 212 963 2850 Fax: 255 27 2504000/2504373 or 1 212 963 2848/49

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Before: Judge Navanethem Pillay, President

Original: English

Registrar: Mr. Adama Dieng

Date: 25 November 2002

JUDICIAL RECORDS/ARCHIVES
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THE PROSECUTOR
V
AUGUSTIN NDINDILYIMANA

Case No. : ICTR-2000-56-T

**THE PRESIDENT'S DECISION ON A DEFENCE MOTION TO REVERSE THE
PROSECUTOR'S REQUEST FOR PROHIBITION OF CONTACT PURSUANT TO
RULE 64**

Defence:

Mr. Christopher C. Black

Prosecution:

Madam Carla Del Ponte

Mr. Richard Karegyesa

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("The Tribunal")

SITTING as Judge Navanethem Pillay, President;

HAVING CONSIDERED a motion from Augustin Ndindiliyimana (the "accused"), dated 17 June 2002, for a reversal of the Prosecutor's request to prohibit contact between the accused and his visitors, Colonel Bem Hubert de Maere and his wife (the "motion");

HAVING CONSIDERED the Prosecution's response of 24 June 2002 and the Registrar's response of 22 July 2002;

HAVING CONSIDERED a letter of 4 November 2002 to the President from Acting Deputy Prosecutor Michael Johnson, in response to the President's request to the Prosecutor for clarification on her general position on detainees receiving visitors, which letter *inter alia* stated:

Without prejudice to the prosecution to object in extraordinary circumstances, the OTP takes the position that visitation is entirely the province of the ICTR Administration and the Chambers. In the opinion of the OTP, factors such as the security of the facility, the integrity of court orders and proceedings, and the conduct of the accused and or his visitors should bear on issues of authorization for visitation. The OTP will only pose objection in specific cases if one of these matters is at issue. Certainly, any information in possession of the OTP relevant to these issues will be forwarded to the Registrar and the Trial Chamber immediately.

NOTES that:

1. Rule 61 of the Tribunal's Rules of Detention¹ states:

Detainees shall be allowed, subject to Rule 64, to receive visits from their family and friends at regular intervals under such restrictions and supervision as the Commanding Officer, in consultation with the Registrar, may deem necessary.

2. Rule 64 of the Rules of Detention states:

The Prosecutor may request the Registrar, or in cases of emergency, the Commanding Officer, to prohibit, regulate or set conditions for contact between a detainee and any other person if the Prosecutor has reasonable grounds for believing

¹ Rules Covering The Detention Of Persons Awaiting Trial Or Appeal Before The Tribunal Or Otherwise Detained On The Authority Of The Tribunal (the "Rules of Detention")

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that such contact is for the purposes of attempting to arrange the escape of the detainee from the Detention Unit, or could prejudice or otherwise affect the outcome of the proceedings against the detainee, or of any other investigation, or that such contact could be harmful to the detainee or any other person or may be used by the detainee to breach an order for non-disclosure made by a Judge or a Chamber pursuant to Rule 53 and Rule 75 of the Rules of Procedure and Evidence. If the request is made to the Commanding Officer on grounds of urgency, the Prosecutor shall immediately inform the Registrar of the request, together with the reasons therefore. The detainee shall immediately be informed of the fact of any such request. A detainee may, at any time, request the President to deny or reverse such request for prohibition of contact.

3. Rule 92 of the UN Standard Minimum Rules for the Treatment of Prisoners² states:

An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervisions as are necessary in the interests of the administration of justice and of the security and good order of the institution.

4. Principle 15 of the UN Principles on Detention³ states:

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned persons with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

5. Rule 70 of the Rules of Procedure and Evidence (“RPE”) states:

Matters not Subject to Disclosure

(A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.

(B) If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the

² Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 31 May 1977.

³ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Adopted by General Assembly resolution 43/173 of 9 December 1998.

purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance.

(D) If the Prosecutor calls as a witness the person providing or a representative of the entity providing information under this Rule, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on grounds of confidentiality.

(E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to limitations contained in Sub-Rules (C) and (D).

(F) Nothing in Sub-Rule (C) or (D) above shall affect a Trial Chamber's power under Rule 89 (C) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

AFTER HAVING DELIBERATED,

6. The accused is indicted for conspiracy to commit genocide, genocide, complicity in genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and Additional Protocol II. He has been in the Tribunal's custody since 22 April 2000 and is currently awaiting the commencement of his trial.
7. The accused requested permission from the Registrar, for "two friends" to visit him at the United Nations Detention Facility ("UNDF"). The Registrar denied his request, following a request from the Prosecutor to prohibit contact between the accused and these two persons. The Prosecutor informed the Registrar that such prohibition was necessary because contact between the accused and his intended visitors "could prejudice or otherwise affect the outcome of the proceedings against the detainee or any other investigations"⁴. The accused now applies, pursuant to Rule 64 of the Rules of Detention, to deny or reverse the Prosecutor's request.
8. The Prosecutor submitted that she had acted under Rule 64 of the Rules of Detention when she requested the Registrar to prohibit contact between the accused and his intended visitors. She stated that she was in possession of 'classified information' protected under Rule 70 of the RPE that were the reasonable grounds upon which she believed that the intended visit would fall within the exceptions of Rule 64 of the Rules of Detention.

⁴ The Registrar's response of 22 July 2002, page 2, paragraph 5.

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9. The Prosecutor has not stipulated these reasonable grounds that led her to believe that the intended visit would fall within the exceptions of Rule 64 of the Rules of Detention. She submitted that these grounds are not subject to disclosure, pursuant to Rule 70 of the RPE. However, the Prosecutor has not indicated which provision in this Rule, she relies on. In terms of Rule 64 of the Rules of Detention, the Prosecutor is required to furnish the Registrar with reasons for requesting a prohibition of contact between the accused and his intended visitors. Such reasons should not constitute a mere repetition of the empowering rule, but should specify the particular threat or prejudice that is feared and be substantiated by information to enable the Registrar to make an informed decision.
10. In general, International Human Rights Law entitles detained persons the right to have visitors. These rights may be proscribed in certain circumstances and in the case of the Tribunal, these circumstances are set out in Rule 64 of the Rules of Detention.
11. Rule 64 of the Rules of Detention, provides for contact between a detainee and any other person to be prohibited, regulated or conducted under certain conditions set by the Registrar. The intent of this Rule is that the Registrar should only prohibit contact between a detainee and his family or friends where circumstances warrant such prohibition. The Registrar should satisfy himself from adequate reasons placed before him, that such circumstances do in fact exist.
12. The Registrar may impose conditions under which the requested visit is to take place, to cater for the Prosecutor's concerns as well as the interests of the safe administration of the UNDF. These conditions may be along the lines ordered in the Ntagerura case⁵. In that case, I reversed the decision prohibiting the accused from being visited, and ordered that the visit take place in the presence of an official of the UNDF, and that neither the accused nor the visitor be permitted to discuss his case. In imposing these conditions, I addressed the Prosecutor's concerns and at the same time respected the accused's visiting rights.

⁵ See The Prosecutor versus Andre Ntagerura, Case No.: ICTR-96-10A-T, Decision of 21 May 2002 and entitled "The President's Decision on the Defence Application made pursuant to Rule 64 of the Reules of Detention"

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13. In this case, I am of the view that the accused's request for permission to be visited by Colonel Bem Hubert de Maere and his wife should be granted.

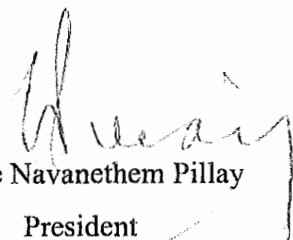
14. In light of the above, I accordingly:

(A) **DENY** the Prosecutor's request for prohibition of contact between the accused and Colonel Bem Hubert de Maere and his wife;

(B) **ORDER** that:

- (i) the accused may be visited once by Colonel Bem Hubert de Maere and his wife;
- (ii) the visit shall be supervised by the Registrar and the Commanding Officer of the UNDF, under conditions necessary to ensure the interests of justice and the security and good order of the UNDF.

Arusha, 25 November 2002


Judge Navanethem Pillay
President



(seal of the Tribunal)