



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr Adama Dieng

Date: 22 September 2005

The PROSECUTOR

v.

Pauline NYIRAMASUHUKO and Arsène Shalom NTAHOBALI

Case No. ICTR-97-21-T

Joint Case No. ICTR-98-42-T

DECISION ON THE “REQUÊTE D’ARSÈNE SHALOM NTAHOBALI EN AUTORISATION DE RENCONTRER LE DÉTENU GEORGES RUTAGANDA EN L’ABSENCE D’UN REPRÉSENTANT DU PROCUREUR ET DU GREFFE”

(Article 20, Statute of the Tribunal and Rule 73, Rules of Evidence and Procedure)

Office of the Prosecutor

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Mr Titinga Frédéric Pacere, Mr Richard Perras

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the “Chamber”);

BEING SEIZED OF the Defence for Ntahobali’s “*Requête d’Arsène Shalom Ntahobali en autorisation de rencontrer le détenu Georges Rutaganda en l’absence d’un représentant du*

Procureur et du Greffe (Art. 20, Statuts du TPIR et 73, Règlement de procédure et de preuve)", filed on 23 August 2005 (the "Motion");

HAVING RECEIVED:

1. The "Prosecution's Response to the Defence *Requête d'Arsène Shalom Ntahobali en autorisation de rencontrer le détenu Georges Rutaganda en l'absence d'un représentant du Procureur et du Greffe (Art.20, Statuts du TPIR et 73, Règlement de procédure de preuve)*", filed on 26 August 2005 (the "Prosecution's Response");
2. The "Registrar's submissions under Rule 33 (B) of the Rules of Procedure and Evidence to the Defence *Requête d'Arsène Shalom Ntahobali en autorisation de rencontrer le détenu Georges Rutaganda en l'absence d'un représentant du Procureur et du Greffe (Art. 20, Statuts du TPIR et 73, Règlement de procédure et de preuve)*", filed on 8 September 2005 (the "Registry's Response");
3. The *Réponse de Arsène Shalom Ntahobali au 'Registrar's Submissions under Rule 33 (B) of the Rules of Procedure and Evidence to the Defence*", filed on 12 September 2005 (the "Defence Reply");

CONSIDERING the provisions of the Statute of the Tribunal (the "Statute"), in particular Article 20, and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 73;

NOW DECIDES the matter, pursuant to Rule 73 (A) of the Rules, on the basis of the written submissions of the Parties.

INTRODUCTION

1. On the basis of the Defence for Ntahobali's submissions, the Chamber notes the following chronology of events.
2. On 17 January 2005, the Defence for Ntahobali wrote to the Defence Counsel and Detention Management Section (the "DCDMS"), seeking an interview with Georges Rutaganda. Georges Rutaganda's consent to this meeting was confirmed. [\[1\]](#)
3. On 17 February 2005, DCDMS responded to this request informing the Defence for Ntahobali that the Prosecution, in its response dated 10 February 2005, did not support the Defence request to meet with Georges Rutaganda. DCDMS stated that the Prosecution feared that Georges Rutaganda has in his possession certain disclosures that could prejudice the Prosecution and thus a representative from his Office should be present at the meeting should it be granted. DCDMS, nevertheless, granted the request, on the condition that a representative of the Prosecution is present. [\[2\]](#)
4. The Defence for Ntahobali wrote to the Deputy Registrar on 21 February 2005, drawing attention to the DCDMS's decision. The Defence for Ntahobali questioned the basis upon which the Prosecution could interfere with the Defence's request to interview a detained person. In addition, the Defence addressed the Prosecution's concerns, and drew the Registrar's attention to prior meetings between Counsel for the Accused and other detained persons in other proceedings before this Tribunal. In conclusion, the Defence for Ntahobali appealed to the Registrar to intervene and allow the Defence for Ntahobali to meet with Georges Rutaganda without the presence of a member of the Office of the Prosecutor. [\[3\]](#)
5. The Deputy Registrar responded to this communication on 25 February 2005, outlining the procedure for the meeting of detainees under Rule 64. However, he added that if the Defence for Ntahobali was of the opinion that the impending visit was communicated to the Prosecution in an improper manner, it was within the Defence's prerogative to challenge DCDMS' decision before the President of the Tribunal. Secondly, the Deputy Registrar informed the Defence for Ntahobali that under Rule 64, he was unable to intervene on behalf of the Defence in the DCDMS decision. The

Deputy Registrar explained that only the detainee Georges Rutaganda could appeal a decision by the Prosecution that requested the presence of a representative of his Office during a meeting between the detainee and the relevant Defence Counsel. Further, such an appeal could only be made to the President of the Tribunal, not to the Registrar. The Registrar added that this appeal could be made by Counsel on the Accused's behalf. [\[4\]](#)

6. On 28 February 2005, pursuant to Rule 64, the Defence for Ntahobali wrote to the President of the Tribunal, seeking to appeal the Registrar's Decision of 25 February 2005. [\[5\]](#)

7. The President issued a Decision on 6 June 2005, holding that it was not the Registry's role to consider the validity of the Prosecution's objections. Rather, this was the prerogative of the President at the request of the detainee Georges Rutaganda. At the time, the concerned detainee had not expressed his willingness to participate in such an interview or challenged the Prosecution's objection. Considering the above and the fact that Trial Chamber II had recognised that this matter was subject to review and due process needed to be observed, the appeal was rejected.[\[6\]](#) The President suggested that the Accused may "consider seeking appropriate relief from Trial Chamber II. This Chamber would be best placed to determine the merits of his request and the Prosecution's objection to this request."[\[7\]](#)

8. On 15 August 2005, the Defence for Ntahobali communicated with Georges Rutaganda, seeking a confidential interview, with a view to calling him as a possible Defence witness. This letter also sought confirmation of the detainee's opinion as to whether a member of the Office of the Prosecutor and/or the Registry may be present at the interview.[\[8\]](#)

9. The Deputy Registrar, on 16 August 2005, sent a letter to Mr Peter Robinson of the International Criminal Law, who had sought to meet with Georges Rutaganda on 26 August 2005. The Deputy Registrar stated that the request had been granted and all communication would be treated as confidential pursuant to Tribunal practice. [\[9\]](#)

10. On 23 August 2005, Georges Rutaganda responded to the Defence for Ntahobali, stating his willingness to be interviewed by the Defence for Ntahobali, but categorically opposing the presence of a member of the Office of the Prosecutor or the Registry at such a meeting.[\[10\]](#)

SUBMISSIONS BY THE PARTIES

Defence for Ntahobali

11. The Defence for Ntahobali seeks authorisation from the Chamber to meet with Georges Rutaganda privately and without a representative of OTP or the Registry, within five days of this Chamber's decision. In the alternative, the Defence moves to be authorised to meet Georges Rutaganda as above, but with the additional condition that Georges Rutaganda does not attend the interview with any documents. Further, the Defence reminds the Chamber that the Defence for Ntahobali remains bound by Rule 75 (F) with respect to any individuals mentioned in the documents Rutaganda has in his possession and details he may reveal in the course of the intended interview.

12. The Defence for Ntahobali submits that whilst it has been authorised to meet with Georges Rutaganda, it can only do so in the presence of a member of the Office of the Prosecutor pursuant to the Registry's Decision.

13. The Defence for Ntahobali submits that Georges Rutaganda, having been member of the Lead Council of the "*Interahamwe za MRND*," possesses necessary information to counter allegations that Ntahobali was a leader of *Interahamwe*. For this reason, Georges Rutaganda is best placed to enlighten the Defence for Ntahobali and has been added to the amended Defence witness list.

14. The Defence for Ntahobali maintains that Rutaganda is willing to meet with the Defence for Ntahobali but refuses to do so in the presence of the Office of the Prosecutor or the Registry. This is equivalent to the position previously taken by Rutaganda when he agreed to meet with Counsel for Nzirorera.

15. The Defence for Ntahobali argues that the fundamental rights of the Accused Ntahobali, pursuant to Article 20 of the Statute, guarantee that the Accused will be heard equitably, that he will be awarded the necessary time and facilities to prepare his Defence, that he will obtain the appearance and examination of Defence Witnesses under the same conditions as those for the Prosecution, and, finally, that he cannot be forced to incriminate himself.

16. In elaboration of those rights, the Defence for Ntahobali submits that the Accused Ntahobali will not receive a fair hearing if he cannot prepare his Defence case independently and in confidence. The Defence further argues that both the independence and confidentiality of its preparation would be compromised if Counsel has to meet with Rutaganda in the presence a member of the Office of the Prosecutor, particularly if the Defence cannot meet a potential Defence witness due to the imposition of conditions beyond its control.

17. The Defence for Ntahobali contends that the information Georges Rutaganda possesses is potentially exculpatory. Accordingly, the prohibition of a confidential meeting between him and the Defence for Ntahobali would harm the Accused Ntahobali's right to a fair trial. In addition, the Defence argues that it cannot be said that it has been granted the necessary facilities for its Defence, if these facilities are under the control and supervision by its adversary, the Office of the Prosecutor. The Defence for Ntahobali argues that it has not been granted the same conditions for the Defence witnesses as the Prosecution had for Prosecution witnesses, since the latter is able to meet all his witnesses independently and in confidence.

18. In this context, the Defence relies on *Bizimungu et al.*, where it was held that a witness is not the property of either the Office of the Prosecutor or the Defence.^[11] Consequently, the Defence for Ntahobali sees no reason why the Prosecution should be able to dictate the conditions of the meeting with Georges Rutaganda. In conclusion, the Defence for Ntahobali submits that meeting with Georges Rutaganda in the presence of a member of the Office of the Prosecutor would violate the Accused Ntahobali's right against self-incrimination, since the questions put to the potential witness by Counsel would reveal the content and strategy of his defence.

19. The Defence for Ntahobali notes that the objection of the Office of the Prosecutor is based on the fact that Rutaganda has in his possession documents that should not be communicated to the Accused.^[12] The Defence submits that this explanation is both vague and arbitrary and argues that

it is difficult to believe that documents that allegedly contain compromising information would have been left in Georges Rutaganda's possession. The Defence draws the Chamber's attention to the meeting between Counsel for Nzirorera and Georges Rutaganda in the absence of the Prosecution or of an objection raised with respect to these documents.[13]

20. The Defence for Ntahobali submits that Rule 75 (F) clearly stipulates that protective measures continue to apply, rendering the Prosecution's fears groundless. Should Rutaganda reveal confidential information relating to protected witnesses, the Defence for Ntahobali invites the Chamber to issue a Directive in its Decision to the effect that Counsel will have to respect the previous protective measures granted.

21. Distinguishing the *Bizimungu* Decision in part, the Defence recalls that the Prosecution was present at the meeting between Counsel for Mugiraneza and the detained Kambanda because this detainee was listed as a Prosecution witness. The Defence submits that Georges Rutaganda is not a Prosecution witness, and as such should have no condition attached to the requested meeting. The fact that Georges Rutaganda may testify for the Defence is a further reason why no member of Prosecution's office should be present.

22. In conclusion, the Defence states that the presence of a member of the Office of the Prosecutor or the Registry would in all probability prevent the interview being conducted in a manner conducive to the Defence for Ntahobali and infringe the Accused's rights. Moreover, Georges Rutaganda's refusal to be interviewed under these conditions is categorical. The Defence adds that it will abide by a condition prohibiting Georges Rutaganda to have in his possession any documents whatsoever at the time of interview.

The Prosecution's Response

23. Pursuant to Rules 53 (A) and 75 (F), and considering that Georges Rutaganda has since confirmed his wish to meet with the Defence for Ntahobali, the Prosecution does not object to a meeting between the Defence for Ntahobali and this detainee. The Prosecution requests that the Chamber grants the request, on the condition that Georges Rutaganda is not in possession of any documents at the said meeting.

24. The Prosecution takes no position should the Registrar deem it necessary to be present at the meeting.

The Registrar's Response

25. The Registrar submits he is neutral in such matters and will abide by the decision of the Chamber. The Registrar reminds the Chamber of the Decision of 19 January 2005 in *Bizimungu et al*, where the Chamber ordered that the meeting between Counsel for Mugiraneza and the detainee Kambanda be conducted in the presence of the Registry to protect the integrity, fairness and transparency of the process.[14]

The Defence Reply

26. The Defence for Ntahobali submits that both the Counsels for Bagosora and Kajelijeli were afforded the opportunity to meet with detained witnesses without the presence of the Registrar.