



ICTR-99-52-A
20-09-2007
(10278/A - 10273/A)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

10278/A
R

OR: ENG

OFFICE OF THE PRESIDENT

Before Judge: Dennis C. M. Byron, President
Registrar: Mr. Adama Dieng
Date: 20 September 2007

THE PROSECUTOR

v.

Hassan NGEZE
Case No. ICTR-99-52-A

Document of the Tribunal
No. 10278/A
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DECISION ON REQUESTS FOR REVERSAL OF PROHIBITION OF CONTACT

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INTRODUCTION

1. Hassan Ngeze was convicted of conspiracy to commit genocide, genocide, direct and public incitement to commit genocide and crimes against humanity, and sentenced to imprisonment for the remainder of his life.¹ As the appeal against his convictions and sentence is still pending, he continues to be held at the United Nations Detention Facilities (UNDF) in Arusha.

2. On 5 July 2005, the Prosecution made an urgent request to the Commanding Officer of the UNDF to impose restrictive measures in respect of Mr. Ngeze's contact with the outside world for a period of 30 days.² The request was granted and since then, the Prosecution has consistently renewed its request for prohibition of contact,³ all of which were granted. As a result, he has been subject to the restrictive measures continuously since July 2005.

3. The restrictive measures imposed upon Mr. Ngeze (1) prohibit private, unmonitored visits, except by legal counsel;⁴ (2) prohibit telephone communication with anyone, except immediate family and legal counsel; (3) monitor all authorized telephone conversations, except with legal counsel; and (4) monitor all written communications, except with legal counsel.⁵

4. These restrictive measures were again granted in July and August 2007 by the Registrar. The President is now seized of two motions filed by Hassan Ngeze to reverse those measures (the "Applications").⁶ Rule 64 of the 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") affords detainees the right to request the President to "deny or reverse" restrictive measures imposed pursuant to this Rule. In considering such applications, the President reviews the matter on the basis of the submissions of the Parties. In respect of the instant Motion, the President has written submission from the Applicant, the Prosecutor and the Registrar.

¹ *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-T, Judgement and Sentence (TC), 3 December 2003.

² See *The Prosecutor's Request for Urgent Restrictive Measures in the Case of Prosecutor v. Hassan Ngeze*, pursuant to Rule 64 of the Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, dated 5 July 2005.

³ Requests for further extension of these restrictive measures were lodged by the Office of the Prosecutor on 4 August 2005, 2 September 2005, 29 September 2005, 10 November 2005, 12 December 2005, 12 January 2006, 13 February 2006, 9 March 2006, 7 April 2006, 9 May 2006, 6 June 2006, 10 July 2006, 3 August 2006, 6 September 2006, 6 October 2006, 6 November 2006, 6 December 2006, 22 January 2007, 21 February 2007, 22 March 2007, 20 April 2007, 22 May 2007, 18 June 2007, and 23 July 2007 respectively.

⁴ Visits by immediate, and specified, family members are allowed and have been allowed consistently throughout the period during which restrictive measures have been in place. These family visits have at all times, been monitored and never private.

⁵ See *supra*, note 2, para. 2.

⁶ *The Appellant Hassan Ngeze's Extremely Urgent Motion to the Honorable President for Reversal of 'The Prosecutor's Request for a Further Extension of the Urgent Restrictive Measures Pursuant to Rule 64 Covering the Detention [sic] of Persons Awaiting Trial or Appeal Before the Tribunal [sic] Otherwise Detained on the Authority of the Tribunal', of Dated 15.06.2007, dated 12 July 2007 ('Appellant's Motion I')*; *The Appellant Hassan Ngeze's Extremely Urgent Motion to the Honorable President for Reversal of 'The Prosecutor's Request for a Further Extension of the Urgent Restrictive Measures Pursuant to Rule 64 Covering the Detention [sic] of Persons Awaiting Trial or Appeal Before the Tribunal [sic] Otherwise Detained on the Authority of the Tribunal', of Dated 23.07.2007, dated 13 August 2007 ('Appellant's Motion II')*

DISCUSSION

Are the restrictive measures still warranted?

5. In the instant application, the Prosecutor justifies the extension of the restrictive measures against Mr. Ngeze as being necessary to conduct and finalise the investigation into possible contempt and false testimony involving people close to Mr. Ngeze.⁷ The Special Counsel to the Prosecutor appointed to conduct this investigation has to consider all developments, including the circumstances surrounding multiple copies of a letter received in July 2006, purportedly from Witness EB and mailed from points in both Rwanda and Tanzania. The Prosecutor maintains that these letters constitute further evidence of the continuing campaign to interfere with protected prosecution witnesses and subvert the course of justice.

6. Mr. Ngeze maintains that in the absence of any report from the Special Counsel to the Prosecutor, allegations that he tampered with witness testimony are unfair and based only on speculation.⁸ He further argues that the letters referred to by the Prosecutor cannot form the basis for the most current request extending the restrictive orders as they were already admitted by the Appeal Chamber during the 16 January 2007 evidentiary hearing of Witness EB and there is no risk to the security of Witness EB, who was examined by the Appeal Chamber.⁹

7. In view of the parties' submissions,¹⁰ the President is satisfied that reasonable grounds remain for believing that unsupervised contact with Mr. Ngeze by individuals not detained at the UNDF could prejudice or affect the outcome of ongoing investigations and perhaps even threaten the safety and security of some witnesses. The President notes that nothing in Mr. Ngeze's submissions indicate that the situation requiring protection for EB and other witnesses has changed, particularly given the fact that Mr. Ngeze's appeal was in an identical phase when the President rendered his decision in May of this year. Mr. Ngeze's argument that nothing is pending before the Appeals Chamber except the delivery of Judgement is correct but does not substantially change Mr. Ngeze's circumstance such as to warrant the removal of current restrictions. As noted in the President's Decision of 28 May 2007, although the appeal hearing has been conducted, "proceedings in respect of Witness EB pursuant to Rule 115 have nevertheless not concluded, and he and other protected witnesses cite ongoing security concerns."¹¹ The rights of the protected prosecution witnesses outweigh Mr. Ngeze's rights and privileges.

⁷ See The Prosecutor's Request for an Extension of Urgent Restrictive Measures in the Case Prosecutor v. Hassan Ngeze, pursuant to Rule 64 Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or (Otherwise Detained on the Authority of the Tribunal, dated 18 June 2007, para 8, and 23 July 2007, para 7 ("The Prosecutor's Requests")

⁸ Appellant's Motion I, para 10; Appellant's Motion II, para 7

⁹ Appellant's Motion I, para 9; Appellant's Motion II, para 6.

¹⁰ See The Prosecutor's Requests, *supra*, note 6; The Registrar's Submissions, *infra*, note 25; see also the Prosecutor's Response to "The Appellant Hassan Ngeze's Extremely Urgent Motion to the Honourable President for Reversal of the Prosecutor's Request for a further extension of the urgent restrictive measures pursuant to Rule 64 of the Rules covering the detention of persons awaiting trial or appeal before the Tribunal or otherwise detained on the authority of the Tribunal", of dated 23 07 2007, dated 16 August 2007, ("The Prosecutor's Response")

¹¹ See *Hassan Ngeze v. The Prosecutor*, Decision on Request for Reversal of Prohibition of Contact (The President), 28 May 2007, para 9

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Do the continuous restrictive measures violate UN standards?

8. In his applications of 12 July and 13 August 2007, Mr. Ngeze contends that the continuing imposition and extensions of restrictive measures over the period of two years amounts to inhumane and degrading treatment and stand in violation of United Nations Standard Minimum Rules for the Treatment of Prisoners ("Standard Minimum Rules"), particularly Rule 92¹² thereof, and contrary to Principle 15¹³ of the United Nations Principles on Detention.¹⁴

9. Mr. Ngeze's position is misconceived in law. Mr. Ngeze's reliance on Rule 92 is erroneous given that the Rule expressly refers to an "untried prisoner", which Mr. Ngeze is not. More relevant provisions to Mr. Ngeze's circumstance include, *inter alia*, Rule 37¹⁵ of the UN Standard Minimum Rules, and Principle 19¹⁶ of the UN Principles on Detention. These provisions guarantee the prisoner *reasonable facilities* to communicate with his family. In Mr. Ngeze's case, the Prosecutor has shown that the restrictions and supervisions placed upon his visitation rights are necessary for the administration of justice and the security of others.¹⁷ Moreover, Mr. Ngeze has been allowed regular contact with both family and counsel.¹⁸

11. Mr. Ngeze contends that the restrictive measures imposed on him amount to inhumane and degrading treatment as defined by international law. International standards and expert bodies provide that a prisoner's access to the outside world may only be restricted in very exceptional circumstances and for very short periods of time.¹⁹ In the instant situation,

¹² United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted August 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/C.2/1961/1, annex I, amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/1988/1977. Rule 92 provides: "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."
¹³ 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 (U.N. Principles of Detention), Principle 15 states: "Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, counsel, shall not be denied for more than a matter of days."
¹⁴ Appellant's Motion I, paras. 1-4; Appellant's Motion II, paras. 1-3.
¹⁵ Rule 37 provides: "Prisoners shall be allowed under necessary supervisions to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits."
¹⁶ Principle 19 states: "A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations."
¹⁷ See The Prosecutor's Response, *supra* note 9.
¹⁸ See *supra* note 9.
¹⁹ See e.g. *Albert Thomas/Alkanay v. Cameroon*, (458/1991) 21 July 1994, U.N. Doc. CCFR/C/51/D/458/1991 and *Et-Aligeyem v. Libya/Arab Jamahiriya*, (440/1991), 23 March 1994, U.N. Doc. CCFR/C/50/T/440/1990 whereby the Human Rights Committee (HRC) found that the practice of incommunicado detention may violate Article 7 of the International Covenant for Civil and Political Rights (ICCPR) (prohibiting torture and ill-treatment) or Article 10 of the ICCPR (safeguards for people deprived of their liberty). The HRC has also stated that "[p]risoners should also be made against incommunicado detention" as a safeguard against torture and ill-treatment [see HRC (General Comment 20 on Article 7 (1992), A/47/40, Annex VI A, para 11]. The later American Court of Human Rights has also found that incommunicado detention of 36 days violated the prohibition against torture and ill-treatment set out in Article 5(2) of the American Convention on Human Rights [see the *Suarez Rovero Case*, Judgment of November 12, 1997, Inter-Am.C.H.R., (Series C) No. 35].

the President notes that Mr. Ngeze is allowed access to his family by means of supervised visits and telephone calls, so that the restriction which have been imposed cannot be said to amount to "inhumane and degrading treatment" under international standards.

Should the restrictive measures be limited?

12. Mr. Ngeze further argues that the prescribed period of 30 days for the imposition of restrictive measures pursuant to Rule 64²⁰ of the Rules of Detention²¹ "cannot be stretched to an unlimited period."²²

13. Nothing in Rule 64 or elsewhere in the Rules of Detention indicate a time frame for the imposition of restrictive measures. The principle, as stipulated in Rule 64, is that so long as there are still reasonable grounds for believing that such contact 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 any other person or may be used by the detainee to breach an order for non-disclosure made by a Judge or a Chamber, then restrictive measures are warranted.

Is the UNDF Commanding Officer acting independently of the Registrar?

14. Mr. Ngeze also complains that the Commanding Officer of the UNDF has been implementing the Prosecutor's requests for extension independently of any direction from the Registrar.²³ He submits that he is being constantly subjected to mental agony and suffering because proper procedure is not being followed. He requests that the President intervene to check such unfettered powers.

15. These complaints were addressed by the Registrar.²⁴ In his submissions filed before the President, the Registrar dismisses this allegation as being unsubstantiated,²⁵ and maintains that contrary to Mr. Ngeze's assertions, the extension of Mr. Ngeze's restrictive measures is not automatic. The Registrar assures the President that the UNDF Commanding Officer acts with the full input of the Registrar.²⁶ According to the Registrar, each of the Prosecutor's

see also Amnesty International Fair Trials Manual, available online at <http://www.amnesty.org/silib/inteam/fairtrial/index.htm#4>

²⁰ Rule 64 provides "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 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 or 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 therefor. 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 a request for prohibition of contact."

²¹ Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal ("Rules of Detention")

²² Appellant's Motion I, para. 3

²³ Appellant's Motion I, paras. 5, 7, Appellant's Motion II, paras. 2, 4

²⁴ See *The Registrar's Submissions Regarding the Appellant Ngeze's Extremely Urgent Motions to Reverse or Deny the Prosecutor's 18 June 2007 and 23 July 2007 Requests for Further Extensions of Urgent Restrictive Measures Under Rule 64 of the Rules of Detention* dated 24 August 2007 ("The Registrar's Submissions").

²⁵ *Id.*, para. 10

²⁶ *Id.*, para. 11

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requests has been reviewed and approved by the Office of the Registrar before being forwarded to the UNDF Commanding Officer for information and action.²⁷

16. Based on the Registrar's submissions, the President is satisfied that the UNDF Commanding Officer has been acting under the Registrar's instructions and in accordance with Rule 64 of the Rules of Detention. The President is further satisfied with the Registrar's explanation that each of the Prosecutor's requests was supported by satisfactory evidence justifying the need for continuing the restrictions.²⁸ The President therefore concludes that there has been no automatic extension of the restrictive measures.

FOR THESE REASONS, the President

DENIES the Applications.

Arusha, 20 September 2007.


Dennis Byron
President



²⁷ *Id.*, para. 3.

²⁸ *Id.*, para. 13.