



**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: 23 November 2007

**The PROSECUTOR v. Élie NDAYAMBAJE
Case No. ICTR-96-8-T**

Joint Case No. ICTR-98-42-T

**DECISION ON NDAYAMBAJE'S EXTREMELY URGENT MOTION
REGARDING PERMISSION FOR EACH OF NDAYAMBAJE'S COUNSEL
TO BRING A LAPTOP INTO THE UNDF**

Office of the Prosecutor

Ms. Silvana Arbia
Ms. Adelaide Whest
Ms. Holo Makwaia
Ms. Madeleine Schwarz
Ms. Althea Alexis Windsor
Ms. Tolulope Olowoye, Case Manager
Ms. Astou Mbow, Case Manager

Defence Counsel for Ndayambaje

Mr. Pierre Boulé
Mr. Claver Sindyigaya

Defence Counsel for Ntahobali

Mr. Normand Marquis
Mr. Bertrand St-Arnaud

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

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

BEING SEIZED of the “*Requête en extrême urgence de la défense d’Élie Ndayambaje afin que la chambre ordonne à l’administration de l’UNDF d’autoriser ses conseils à le rencontrer avec leurs ordinateurs portables chacun*”, filed on 8 November 2007 (“Ndayambaje’s Motion”);

CONSIDERING the:

- i. “Prosecutor’s Response to the ‘*Requête en extrême urgence de la défense d’Élie Ndayambaje afin que la chambre ordonne à l’administration de l’UNDF d’autoriser ses conseils à le rencontrer avec leurs ordinateurs portables chacun*’”, filed on 12 November 2007 (“Prosecutor’s Response”);
- ii. “*Réponse de Arsène Shalom Ntahobali à la requête de Ndayambaje en accès des conseils au client avec chacun un ordinateur portable*”, filed on 12 November 2007 (“Ntahobali’s Response”);
- iii. “Registrar’s Submissions in Response to the Defence ‘*Requête en extrême urgence de la défense d’Élie Ndayambaje afin que la chambre ordonne à l’administration de l’UNDF d’autoriser ses conseils à le rencontrer avec leurs ordinateurs portables chacun*’”, filed on 13 November 2007 (“Registrar’s Submission”);
- iv. “*Réplique de la défense d’Élie Ndayambaje aux soumissions du Greffier reçues le 13 novembre 2007*”, filed on 15 November 2007 (“Ndayambaje’s Reply”);
- v. “*Réplique de Arsène Shalom Ntahobali aux représentations du Greffier à la requête de Ndayambaje en accès des conseils au client avec chacun un ordinateur*”, filed on 16 November 2007 (“Ntahobali’s Reply”);

CONSIDERING the Statute of the Tribunal (the “Statute”), in particular Article 20 (4) (b) of the Statute; the Rules of Procedure and Evidence (the “Rules”), in particular Rule 33(A) of the Rules; and the Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal (the “Detention Rules”), in particular Rules 3 and 65 of the Detention Rules;

NOW DECIDES the Motion pursuant to Rule 73 of the Rules, on the basis of the written briefs, as filed by the Parties.

SUBMISSIONS OF THE PARTIES

The Defence for Ndayambaje

1. The Defence for Ndayambaje requests the Chamber to order that they have permission to enter the UNDF with two laptops or alternatively that they should be allowed to meet Ndayambaje at the ICTR on days when the Chamber is not sitting until the close of Ndayambaje’s case.

2. The Defence submits that in early December 2006, Ndayambaje's Defence Counsel were refused entry to the United Nations Detention Facility ("UNDF") with both their laptops, on the basis of the Interoffice Memorandum of 11 February 2005 limiting counsel to one laptop per team at the UNDF.
3. The Defence submits that on 9 May 2007, Ndayambaje's Defence sent a letter to the Registrar requesting special authorisation to visit their client with both their laptops. They did not receive a response to their request.
4. The Defence submits that on 4 July 2007, Ndayambaje's Lead Counsel met with the Deputy Registrar to discuss the 9 May 2007 letter and the Deputy Registrar indicated that a response would be shortly forthcoming. However, no response was received.
5. The Defence submits that on 29 August 2007, Ndayambaje's Defence wrote a letter to the Deputy Registrar on the same issue. Again, no response was received.
6. The Defence submits that on 30 October 2007, Ndayambaje's Defence made an oral motion to the Chamber requesting that the Chamber direct that Ndayambaje's Counsel be allowed to bring both their laptops into client meetings at the UNDF. The Chamber directed that the Registry should consider how best to facilitate the work of Ndayambaje's Counsel.¹
7. The Defence submits that on 7 November 2007, Ndayambaje's Defence received an email from the Head of the UNDF with an interoffice memorandum dated 1 November 2007 attached reiterating that each team is only entitled to bring one laptop into the UNDF.
8. The Defence argues that the request to use two laptops at the UNDF is to allow them to adequately and quickly prepare Ndayambaje's Defence in view of the fact that his case is to start immediately after that of Kanyabashi and there is a large volume of documents to review and prepare.
9. The Defence submits that they only have access to their client on Fridays and Saturdays given the Chamber's sitting schedule.
10. The Defence argues that each time similar circumstances have arisen, the Chamber has authorised counsel to access their clients outside the limitations imposed by the administration of the UNDF.
11. The Defence submits that the position of the UNDF violates Article 20 (4) (b) of the Statute guaranteeing the Accused the right to adequate time and facilities for the preparation of his case and to communicate with his Counsel.
12. The Defence submits that the administration of the UNDF has no legal position for restricting the right of Ndayambaje to adequately prepare his defence and that the restriction is excessive. They further note that the UNDF has not provided reasons for restricting access to one laptop and that the UNDF has sophisticated security mechanisms for screening for anything dangerous or prohibited.

¹ T. 30 October 2007 p. 53 (French).

The Prosecution's Response

13. The Prosecution submits that it will respect the Chamber's decision on the matter.

The Defence for Ntahobali

14. The Defence for Ntahobali joins Ndayambaje's motion and requests that the Chamber also grant Ntahobali's Defence Counsel the right to enter the UNDF with two laptops.

15. The Defence submits that at the beginning of the proceedings, the Parties could enter the UNDF with their computers but that over the course of the proceedings, what the Defence teams are permitted to enter with, particularly with regards to electronic support, has been considerably reduced. At the same time, the Registry has increasingly communicated via electronic form with the result that the Defence uses almost no paper documents.

16. The Defence submits that the security measures applicable to entrance into the UNDF are more restrictive than those applicable to entrance into the Tribunal itself which demonstrates that the measures at the UNDF are excessive.

17. The Defence submits that entrance into the UNDF with two laptops does not significantly increase the workload of the UNDF security personnel because it decreases the number of paper documents which are brought in.

18. The Defence submits that it is counterproductive to have two Defence Counsel visit the Accused when only one has access to a laptop given the complex and extensive nature of the case as it leads to inefficiency and duplication.

19. The Defence submits that granting to access with two laptops would uphold the rights of the Accused under Article 20 (4) (b) of the Statute.

The Registrar's Submission

20. The Registrar submits that the Commanding Officer has the sole responsibility for all aspects of the daily management of the UNDF pursuant to Rule 3 of the Detention Rules.

21. The Registrar submits that the Standard Operating Procedures of the UNDF strictly prohibit visitors entering with any electronic devices and the Commanding Officer allowed entrance with laptops as a privilege, not a right.

22. The Registrar submits that this privilege was abused with unauthorised laptops being brought in. Furthermore, the increasing number of laptops made it difficult for the UNDF staff to undertake screening. On a number of occasions, unauthorised computer devices allowing communication with the outside world were recovered. As a result, the Commanding Officer circulated an Interoffice Memorandum, dated 11 February 2005 limiting teams to one laptop.

23. The Registrar submits that the request for multiple laptops is a matter of convenience, not necessity for the Defence teams.

24. The Registrar submits that with regards to the Defence for Ndayambaje's request to be able to meet the Accused outside the UNDF facility, no basis has been shown for such a request and the security and logistical resources required to facilitate such a request would place hardship on the Tribunal's resources.

25. The Registrar submits that the UNDF is best positioned to determine the appropriate response to security threats and their response is reasonable.

Ndayambaje's Reply

26. The Defence for Ndayambaje submits that the Registrar's Submission should not be considered because it was filed out of time without an explanation for the late filing. The Defence cites the Chamber's Decision that submissions filed outside the prescribed time limits without good cause being demonstrated will not be considered.²

27. The Defence submits that the Standard Operating Procedures, on which the Registrar finds its position, were hereto unknown to the Defence and furthermore cannot serve as the basis for denying the Accused the right to adequately prepare his Defence.

28. The Defence submits that when the Commanding Officer circulated the interoffice memorandum regarding the use of laptops at the UNDF, the document was ambiguous, and the Commanding Officer orally told Lead Counsel that the interoffice memorandum was to be interpreted such that both the Lead Counsel and Co-Counsel could both meet their client with their laptops. It was only later that the Commanding Officer indicated that his first letter was to be interpreted restrictively such that only one laptop was permitted per team.

29. The Defence submits that Counsel visiting their client at the UNDF should not be considered visitors. The Statute of the ICTR, the Rules and other texts are clear with regards to the nature of the relationship between an accused and his counsel.

30. The Defence rejects the Registry's contention that the use of a laptop at the UNDF is a favour, not a right. The Accused has the right under Article 20 of the Statute to prepare his defence adequately and to have the necessary facilities to do so available. This includes work tools, among which are laptop computers particularly in a case as complex this.

31. The Defence argues that the position of the Commanding Officer does not reflect security requirements but is only an exercise of his power over the Defence teams.

32. The Defence rejects the position that the UNDF is unable to control the entrance of laptops as it already does so without significant delay and one laptop more would not change anything. With regards to the communication devices referred to by the Registry, the Defence submits that no indication has been given as to whether such devices have been linked to the Defence for Ndayambaje or to the use of laptops. Furthermore, the Accused enter and leave the UNDF with their laptops which they bring to the Tribunal without any security concerns.

33. The Defence submits that the Registry gives no explanation of how the use of a laptop may put the security of witnesses at risk.

² *Prosecutor v. Nyiramasuhuko et al.*, Decision on Nteziryayo's motion for variation of protective measures for witnesses AND-36, AND-38 and AND-50, 20 April 2007.

Ntahobali's Reply

34. The Defence for Ntahobali argues that the Registrar's Submission was filed out of time and therefore should not be considered.

35. In the alternative, the Defence submits that the Registrar's Submission is insulting to Defence counsel as it questions their honesty and their respect for professional ethics and the Rules of the Tribunal.

36. The Defence submits that the right of the Accused to the necessary facilities to prepare his Defence case is not a privilege but a fundamental right which cannot be subordinated to the discretion of the Commanding Officer. It is for the Defence counsel to determine what is necessary for the preparation of the Defence case, particularly in a case as complex as this, not the Commanding Officer.

37. The Defence submits that the Registrar's vague allegations of security concerns are only a pretext behind which to hide. It is up to the administration of the UNDF to stay abreast of technological advances and it is not difficult to prevent unauthorised communication.

38. The Defence submits that it has never been accused of possessing unauthorised communication devices and any such allegations should be supported by proof. Furthermore, if the Defence wished to break the rules, they could do so just as easily with one laptop as with two. However, the Defence states that it has never contravened the Rules.

39. The Defence submits that it is for the Registrar to prove concerns about witness security which at any rate relates primarily to Defence witnesses.

DELIBERATIONS

40. As a preliminary matter, the Chamber notes that the Registry's Submission and Ntahobali's Reply were filed outside of the time limit set by the Chamber with no explanation provided. Therefore, the Chamber should not consider these submissions in such circumstances.³

41. However, in light of the fact that some elements of the Registrar's Submission raise important issues on the manner in which the Defence's requests have been handled, the Chamber will consider it for this limited purpose in the interests of justice. Likewise, the Chamber will admit Ntahobali's Reply in the interests of justice. However, the Chamber urges the Parties to respect the time limits it sets.

42. The Chamber recalls that the Registrar is responsible for the administration of the Tribunal under Rule 33 (A) of the Rules and that the administration of visits to the Accused by his defence counsel at the UNDF falls within the jurisdiction of the Commanding Officer, as provided for under Rules 61(i) and (ii) and 65 of the Detention Rules.

³ *Prosecutor v. Nyiramasuhuko et al.*, Decision on Nteziryayo's motion for variation of protective measures for witnesses AND-36, AND-38 and AND-50, 20 April 2007.

43. The Chamber notes Rule 65 of the Detention Rules which stipulates that “[a]ll visits shall be made by prior arrangement with the Commanding Officer as to the time and duration of the visit and shall be subject to the same security controls as are imposed under Rule 61 of the Detention Rules.” Therefore, any requests regarding the conditions of visits should be directed to the Commanding Officer and/ or the Registrar.

44. The Chamber considers that the matters raised in the Motion fall squarely within the Registrar’s competence. Therefore, while Rule 3 of the Detention Rules preserves the overriding jurisdiction of the Tribunal over the UNDF, the Chamber can only be seized of these issues when all available avenues have been exhausted.⁴

45. In that respect, the Chamber recalls Rule 83 of the Detention Rules which provides that if a detainee is not satisfied with the response from the Commanding Officer to a complaint, he has the right to make a written complaint to the Registrar who shall forward it to the President.⁵

46. In this instance, the Chamber notes that the Defence for Ndayambaje complained orally to the Commanding Officer in December 2006 and wrote to the Registry to be allowed to bring two laptops into the UNDF as early as 9 May and 29 August 2007. The Defence indicates that these requests were not answered until an oral motion was argued in Court on 30 October 2007. The Chamber notes that the Registry’s Submission does not dispute this background and considers that the issues were not addressed as promptly as they should have been.

47. The Chamber notes Rule 86 of the Detention Rules which provides that the Registrar must acknowledge every complaint within seventy-two hours and that each complaint must be dealt with promptly and replied to within a reasonable period of time. The Chamber observes that neither of the two complaints referred to above received a response within a reasonable period of time in, thereby breaching Rule 86 of the Detention Rules.

48. The Chamber further notes that pursuant to Rule 83 of the Detention Rules, as the Registrar appears to have upheld the decision of the Commanding Officer, he should have forwarded the complaint to the President who has jurisdiction to consider it at this stage and the Defence should have been duly informed accordingly.

49. As the administrative channel has not yet been exhausted, the Chamber was seized of the matter prematurely. For these reasons, the Motion must fail.

⁴ *Prosecutor v. Nyiramasuhuko et al.*, Decision on Arsène Shalom Ntahobali’s Extremely Urgent Motion for Greater Access to the Accused at the UNDF, 3 March 2006; *Prosecutor v. Nahimana et al.*, Decision on Jean-Bosco Barayagwiza’s Urgent Motion Requesting Privileged Access to the Appellant Without Attendance of Lead Counsel, (AC) 17 August 2006.

⁵ *Prosecutor v. Nahimana et al.*, Decision on Jean-Bosco Barayagwiza’s Urgent Motion Requesting Privileged Access to the Appellant Without Attendance of Lead Counsel, (AC) 17 August 2006; *Prosecutor v. Nahimana et al.*, Decision on Hassan Ngeze’s Motion Appealing the Registrar’s Denial of Marriage Facilities, 20 January 2005; *Prosecutor v. Karemera*, Decision on Complaint by Édouard Karemera, 28 May 2007.

**FOR THE ABOVE REASONS, THE CHAMBER,
DISMISSES** the Motion.

Arusha, 23 November 2007

William H. Sekule
Presiding Judge

Arlette Ramaroson
Judge

Solomy Balungi Bossa
Judge

[Seal of the Tribunal]