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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

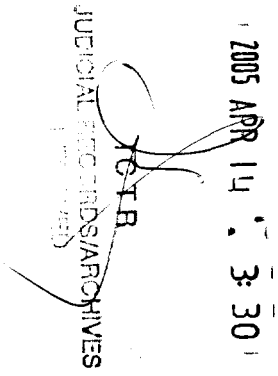
TRIAL CHAMBER II

ICTR-98-42-T
14-04-2005
(11361 - 11356)

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

Registrar: Mr Adama Dieng

Date: 14 April 2005



The PROSECUTOR

v.

Pauline NYIRAMASUHUKO
Case No. ICTR-97-21-T
Joint Case No. ICTR-98-42-T

DECISION ON PROSECUTOR'S URGENT MOTION FOR RECONSIDERATION OR CERTIFICATION TO APPEAL TRIAL CHAMBER II'S DECISION ON NYIRAMASUHUKO'S STRICTLY CONFIDENTIAL *EX-PARTE* - UNDER SEAL - MOTION FOR ADDITIONAL PROTECTIVE MEASURES FOR SOME DEFENCE WITNESSES DATED 1 MARCH 2005

Office of the Prosecutor
Ms Silvana Arbia
Ms Adelaide Whest
Ms Holo Makwaia
Ms Adesola Adeboyejo
Mr Cheikh T. Mara
Ms Altea Alexis
Mr Michael Adenuga
Ms Astou Mbow, Case Manager

Defence Counsel
Ms Nicole Bergevin
Mr Guy Poupart

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 SEISED of the "Prosecutor's Urgent Motion for Reconsideration or Certification to Appeal Trial Chamber II's Decision on "Nyiramasuhuko's Strictly Confidential *Ex-Parte* – Under Seal – Motion for Additional Protective Measures for Some Defence Witnesses" Dated 1 March 2005, filed on 7 March 2005 (the "Motion");

CONSIDERING Nyiramasuhuko's Response to Prosecutor's Urgent Motion for Reconsideration or Certification to Appeal Trial Chamber II's Decision on 'Nyiramasuhuko's Strictly Confidential *Ex-Parte* – Under Seal – Motion for Additional Protective Measures for Some Defence Witnesses' dated 1 March 2005, filed on 14 March 2005 (the "Response") ;[1]

NOTING the "Decision on Nyiramasuhuko's Strictly Confidential *Ex-Parte* – Under Seal – Motion for Additional Protective Measures for Some Defence Witnesses" of 1 March 2005 (the "Impugned Decision");

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

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

SUBMISSIONS OF THE PARTIES

The Prosecution

1. The Prosecution challenges the way the Impugned Decision was reached on the basis of a strictly confidential *ex-parte* application by the Defence, the Prosecution being thus denied the right to be heard. The Prosecution submits that this approach is contrary to the generally accepted principle of law of *audi alteram partem* and the jurisprudence of the Appeals Chamber in the same regard. The Prosecution relies in particular on the Appeals Chamber Decision of 21 June 2004 in the *Prosecutor v. Karemera et al.* Case.

2. The Prosecution also challenges the grant of immunity or so-called order for "safe-conduct" to witnesses who may have participated in genocide in Rwanda and who may be subject of investigations, warrant of arrest or indictment. The Prosecution submits that such measure clearly affects the very mandate of the Prosecutor to investigate, arrest and indict all those with the greatest responsibility in those crimes. Had the Chamber allowed the Prosecution to be heard, it would have made submissions which could have assisted the Chamber in its deliberations and in reaching a correct decision in the circumstances without granting such an extraordinary measure of protection.

[1] The Response was originally filed in French and entitled "*Réponse de l'accusée Pauline Nyiramasuhuko à la* 'Prosecutor's Urgent Motion for Reconsideration or Certification to Appeal Trial Chamber II's Decision on Nyiramasuhuko's Strictly Confidential *Ex Parte* – Under Seal – Motion for Additional Protective Measures for Some Defence Witnesses Dated 1 March 2005'".

3. The Prosecution submits that the Impugned Decision has given Witnesses BN and NEM immunity as from the date of the Impugned Decision and shall remain in force for a maximum of seven days following the completion of their testimony. By not ordering a specific date when Witnesses BN and NEM should testify before it, the Chamber has in effect given them an open ended immunity that will hinder the Prosecutor in the execution of his mandate during the entire time they have not testified. The Prosecution prays the Chamber to limit the start of the safe conduct to the date witnesses BN and NEM start travelling from the countries they are residing to the seat of the Tribunal to give their testimony and to a maximum of seven days following the completion of their testimony.

4. The Prosecution further submits that fear of lawful arrest or prosecution falls outside the danger or risk criteria applied by the Tribunal in reaching witness protection measures and that the Impugned Decision's grant of safe-conduct is therefore erroneous. The Prosecution submits that, even assuming that immunity may be accepted as an exception, which assertion is challenged, the special circumstances of the case militate against such order: in the *Dokmanovic* case cited in the Impugned Decision, the Prosecution was allowed the right to be heard, the duration of the order of safe conduct was very short, running only for two days from the time the witness reached The Hague and one day after his testimony, it was not clear whether the witness may have committed crimes within the jurisdiction of the Tribunal for the Former Yugoslavia and the witness was legally resident in the country where he was resident, had not falsified his identity to evade justice and his transfer did not raise matters of state cooperation as the instant case. The Prosecution submits that the situation is very different in the current case and concludes that the Chamber erred by granting the extraordinary remedy of immunity or order of safe conduct for the witnesses.

5. The Prosecution submits that the safe-conduct granted has serious implications on the issue of state cooperation: the order immunizing the witnesses from prosecution and granting them safe conduct to return to the countries where they are illegally hiding and evading justice is irreconcilable with and in practice complicates the ever-indispensable state cooperation with the Prosecutor or indeed the Tribunal.

6. The Prosecution stresses that, in addition to the normal disclosure of identifying information and unredacted summaries of the anticipated testimony of Witnesses BN and NEM, it shall be served with their full particulars with respect to their immigration status and relevant information on their false identities given to immigration authorities where they are residing no later than 21 days before their testimony. The Prosecution submits that it has shown good cause why the false identities of Witnesses BN and NEM should be disclosed.

7. As a remedy, the Prosecution prays the Chamber to reconsider the Impugned Decision and to allow the Prosecution to be heard on the legal issues raised by the Defence *ex parte* Motion for additional protective measures for some Defence witnesses. The Prosecution submits that reconsideration is available when special circumstances are demonstrated, where a clear error has been exposed, or where it is necessary to do so in order to prevent an injustice. It is the Prosecution submission that in the instant case, failure of the Chamber to allow the Prosecution to be heard is a clear error of law.

8. Should the Chamber deny the remedy of reconsideration, the Prosecution prays the Chamber to certify appeal of the Impugned Decision. The Prosecution submits that the terms of Rule 73(B) call for a purposive interpretation and should encompass the broader interest of justice, which extends beyond the fairness of a given trial to the parties, but also the fairness of such trials to the victims, the international community and the capacity of the Prosecution and the Tribunal to ensure those broader interests. The Prosecution submits that the issues involved are of general importance as they impact on the Prosecution mandate and should be resolved by the Appeals Chamber.

Nyiramasuhuko's Response

9. The Defence for Nyiramasuhuko challenges the Prosecution's right to be heard on an *ex-parte* Motion. The Defence quotes a Decision in the *Simic* case[2] which states that "applications by either party for protective measures are determined on an *e- parte* basis where the persons to be protected would otherwise be identified". The Defence submits that the Motion had to reveal identifying information on witnesses whose protection was requested and that it could not be disclosed to the Prosecution.

10. The Defence submits that the Prosecution submission that "because of his mandate, the Prosecutor is in possession of information on persons who are the targets of investigation, arrest or indictments" demonstrates the need for non-disclosure of the *ex-parte* Motion to the Prosecution. To disclose the information to the Prosecution would cause a serious prejudice to the witnesses concerned.

11. The Defence further submits that the Prosecution has no title to challenge the Decision and apply for certification to appeal.

12. On the issue of limitation of the Prosecution mandate, the Defence submits that this mandate is limited: in particular, the Defence relies on a 8 October 2004 Decision in the *Bagosora* case stating that the fear of arrest is a sufficient ground for the application of special protective measures. The Defence agrees that the allowed safe-conduct is the only way to prevent Witnesses NEM and BN from being arrested. The Defence submits that the Prosecutor's motion underlines the objectivity of the fear expressed by the witnesses.

13. The Defence submits that the allowed safe-conduct is justified by the circumstances of the case, namely the particular situation of Witnesses BN and NEM, but adds that this measure shall be completed by others. In particular, the Defence opposes the Prosecutor's request that he be availed with the full particulars of Witnesses BN and NEM with respect to their immigration status and relevant information on their false identities given to the immigration authorities where BN and NEM are residing 21 days before their testimony. The Defence submits that, should those measures be granted, the witnesses would refuse to come to testify and that their situation would be so threatened that it would be contrary to the interest of justice and would ruin the Defence opportunities to call witnesses. The Defence further submits that such information has never been requested as regards Prosecution witnesses.

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[2] *Prosecutor v. Simic*, Decision on (1) Application by Todorovic to re-open the decision of July 27, 1999, (2) Motion by ICRC to re-open scheduling order of November 18, 1999, and (3) Conditions for access to material, February 28, 2000, para. 40.

14. The Defence finally submit that the Prosecution has failed to demonstrate a new fact that would justify a reconsideration of the impugned decision.

DELIBERATIONS

Prosecution Title to Challenge the Impugned Decision

15. Before determining the merits of the Motion, the Chamber notes the Defence submissions that, since the Impugned Decision was rendered on the basis of an *ex-parte* Motion, the Prosecution was not a Party to that Decision and has therefore no title to challenge it by way of a motion for reconsideration or certification to appeal. The Chamber recalls that in view of the sensitive information contained in the Motion for additional protective measures, it had decided to use its discretion to hear the Motion *ex-parte*, but that the Impugned Decision was rendered *inter partes*. It is therefore the view of the Chamber that the Prosecution is a Party to the case as regards the Impugned Decision and is therefore entitled to challenge it either by way of a motion for reconsideration or for certification to appeal.

On the Effects of the Safe-Conduct

16. The Chamber notes the Prosecution submission that the allowed safe-conducts have given Witnesses BN and NEM immunity as from the date of the Impugned Decision until a maximum of seven days following the completion of their testimony. The Chamber considers that this was a misinterpretation of the Impugned Decision, which clearly states that safe-conduct is granted during the witnesses' presence in Tanzania and their travel between that country and their current place of residence. The Prosecution therefore erred in its interpretation of the Impugned decision by submitting that the Witnesses BN and NEM were granted immunity from the date of the Impugned Decision.

On the Disclosure of Information Related to the Immigration Status and False Identity of the Witnesses

17. As regards the Prosecution request for disclosure of information on the immigration status and the false identity of Witnesses BN and NEM, it is the view of the Chamber that such a request cannot be made by way of a motion for reconsideration or certification to appeal. The Chamber therefore denies the request as it stands.

On the Request for Reconsideration

18. The Chamber notes the Prosecution submission that the Impugned Decision shall be reconsidered because the Chamber committed an error of law by denying the Prosecution right to be heard. The Chamber considers that it is in its discretion to rule on *ex-parte* motions without hearing the other Parties when special circumstances so dictate. The Chamber considered the special circumstances of the *ex-parte* Motion aimed, *inter alia*, at further preventing disclosure to the other Parties of the identity of the witnesses before disclosure was due and that the object of the Motion would have been rendered ineffective if this information had been disclosed to the Prosecution. For the foregoing reasons, the Chamber denies the motion for reconsideration.

On the Request for Certification to Appeal

19. The Chamber recalls that certification to appeal a decision under Rule 73 must meet the specific criteria enounced in Paragraph B of the Rule:

> Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

20. The Chamber refers to its discussion of those criteria in its former decisions, in particular the "Decision on Defence Motion for Certification to Appeal the 'Decision on Defence Motion for a Stay of Proceedings and Abuse of Process'" rendered in the current case on 19 March 2004.[3] In particular, the Chamber recalls the principle that decisions rendered under Rule 73 are "without interlocutory appeal" and that certification to appeal is an exception to that general principle that the Chamber may allow. As such, the criteria for certification shall be given their full meaning and the applicant bears the burden of proof of their fulfilment.

21. As regards the first criterion, namely the fact that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, the Chamber recalls that the safe-conduct was granted to Witnesses BN and NEM *proprio motu* and in the interest of justice, because those witnesses met the criteria for further protective measures and that this measure was appropriate to their situation. The Chamber further considers that this additional protective measure does not affect the substance of the testimonies of Witnesses BN and NEM. It is the view of the Chamber that the Prosecution has failed to demonstrate how the Impugned Decision would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Certification is therefore denied.

FOR THE ABOVE REASONS,

THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Arusha, 14th April 2005

William H. Sekule Presiding Judge	Arlette Ramaroson Judge [Seal of the Tribunal]	Solomy Balungi Bossa Judge

[3] *Prosecutor. v. Nyiramasuhuko*, ICTR-97-21-T, Decision on Defence Motion for Certification to Appeal the "Decision on Defence Motion for a Stay of Proceedings and Abuse of Process", 19 March 2004, para. 12-17.