



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

11367
Mwanja

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 14 April 2005

ICTR-98-42-T
14 - 04 - 2005
(11367 - 11362)

The PROSECUTOR

v.

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

**DECISION ON NYIRAMASUHUKO'S MOTION FOR CERTIFICATION TO
APPEAL THE DECISION ON NYIRAMASUHUKO'S STRICTLY CONFIDENTIAL
EX-PARTE - UNDER SEAL - MOTION FOR ADDITIONAL PROTECTIVE
MEASURES FOR SOME DEFENCE WITNESSES AND RECONSIDERATION OF
THAT DECISION AS REGARDS WITNESS BK**

Office of the Prosecutor

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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 Nyiramasuhuko’s Extremely Urgent Motion for Certification to Appeal the Decision on Nyiramasuhuko’s Strictly Confidential *Ex Parte* – Under Seal - Motion for Additional Protective Measures for Some Defence Witnesses (Article 21 and Rules 54, 69 and 75), filed on 7 March 2005 (the “Motion”),¹ and its redacted version filed on 10 March² pursuant to the Chamber’s instruction of 8 March 2005;

NOTING the “Prosecutor’s Response to Nyiramasuhuko’s *Requête d’extrême urgence aux fins de certification d’appel de la Décision sur la requête strictement confidentielle ex parte sous scellés de Pauline Nyiramasuhuko en mesures de protection additionnelle de certains témoins à décharge et en reconsidération de la Décision concernant le témoin BK Article 73(B)*”, filed on 15 March 2005 (the “Response”);

CONSIDERING 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 Defence

1. The Defence annexes the will-say statement of Witness BK to the Motion for certification and prays the Chamber to decide on the additional protective measures that were requested for this witness in its *ex- parte* Motion. The Defence admits that it mistakenly annexed the will-say statement of Witness BK to the *ex-parte* Motion without mentioning its pseudonym. The Defence prays the Chamber to state that Witness BK is irregularly settled on the territory of a State and to decide accordingly.
2. The Defence further applies for certification to appeal the Impugned Decision pursuant to Rule 73 (B). It submits that the Impugned Decision jeopardizes the fairness of the proceedings, that it is directly related to the outcome of the trial and that an immediate resolution of the question may materially advance the proceedings.

¹ The Motion was originally filed in French and entitled : « *Requête d’extrême urgence aux fins de certification d’appel de la Décision sur la requête strictement confidentielle ex parte sous scellés, de Pauline Nyiramasuhuko en mesures de protection additionnelles de certains témoins à décharge et en reconsidération de la Décision concernant le témoin BK* ».

² The redacted Motion was originally filed in French and had the same title as in its unredacted version.

3. The Defence underscores the relevance and importance of Witnesses MAC, WLNA, NEM and BN for its case. The Defence submits that the Chamber was consequently bound, pursuant to Article 19(1) of the Statute to order the necessary measures for the appearance of these witnesses and their protection.
4. The Defence submits that the Chamber can consider that the measures ordered in this case for the protection of Defence witnesses are sufficient, but the witnesses refuse to testify in these conditions. Those witnesses were expected to give exculpatory information on some charges and the Impugned Decision therefore jeopardizes the fairness and the outcome of the trial. The Defence submits that the resolution of the Decision [sic] by the Appeals Chamber may materially advance the proceedings because it would give an opportunity to the Appeals Chamber to rule upon the right to be granted appropriate protective measures once the criteria of relevance of the testimony and objectively underscored fears are met.
5. Moreover, the Defence submits that the safe-conducts granted to Witnesses NEM and BN can be considered as appropriate, but that this measure is incomplete and is insufficient for the witnesses to appear: the safe-conduct does not protect the witnesses from arrest by Rwandan authorities on the ground of crimes that are outside the jurisdiction of the Tribunal, such as looting or non assistance to endangered people ; neither does it protect the witnesses from risks related to their illegal situation on the territory of the States where they are refugees. The Defence further submits that the same safe-conduct should also have been granted to Witnesses MAC, WLMF and WLNA.
6. The Defence submits that the fears expressed by Witness NEM are not different from those expressed by Witnesses WLMF, WLNA and MAC as regards their security and the harassment of the Rwandan government against the Hutu refugees, as confirmed by Amnesty International in the Report annexed to the *ex-parte* Motion.
7. The Defence submits that the Impugned Decision is contrary to the jurisprudence quoted in the *ex-parte* Motion since it does not consider the refusal of the witnesses to testify in Arusha. Since the Chamber found that their testimony was relevant and that their fears were objectively underscored, it should have considered that their refusal to come to the ICTR was justified.
8. The Defence submits:
 - That the Chamber erred in law and in facts by denying the appearance of witnesses by way of video-conference from an European country;
 - That the Chamber erred in law and in facts by denying the alteration of the witnesses' voice and image;
 - That the Chamber erred in law and in facts by refusing to guarantee the witnesses against the "voluntary deportation" they would incur if their "irregular situation" was to be discovered by the national authorities of the States where they are refugees. The Defence submits that it did not believe that the Chamber would require a proof of their irregular situation and the Chamber should have asked the Defence to adduce such a proof before denying the Motion, or grant the protective measure under reserve of proof of their irregular situation;
 - That, as regards Witness WBKP, if a witness who cannot come to the Tribunal because of his health is authorized to testify by way of video-conference, a witness who cannot come because of his marital situation should as well be granted that measure.

9. The Defence submits that the postponement of disclosure of the witnesses' identity to the Prosecution and to other Defence teams is justified: as confirmed in the *Ndindabahizi* Case, the ICTR cannot guarantee the confidentiality of documents, despite all the orders rendered on this issue. The Defence submits that, very recently, the identity, whereabouts and unredacted statements of Kanyabashi's Defence witnesses have been circulated to all Parties, when the Defence Counsel had stipulated that those documents were confidential. Therefore, the Defence submits that the Chamber erred in law and in facts by denying the requested modification of the time limits for disclosure of the witnesses' identity.

Prosecutor's Response

10. The Prosecution submits that the certification requested does not meet the conditions of Rule 73(B).
11. The Prosecution submits that the irregular situation of Defence witnesses is supported by no evidence and that the risks connected with this situation are no ground for protective measures.
12. With respect to the request for reconsideration of the impugned Decision with regard to Witness BK, the Prosecution submits that the Defence does meet the threshold requirements for reconsideration. The Defence has failed to provide the Chamber with the "will-say" of Witness BK and has failed to demonstrate how the Chamber has occasioned a miscarriage of justice in the Impugned Decision with respect to Witness BK when the Defence's omission prevented the Chamber from assessing the relevance and importance of his testimony.
13. As regards the Defence assertion that additional protective measures must be applied if a witness refuses to appear before the Tribunal, the Prosecution submits that the Defence did not demonstrate that special circumstances nor that there was a clear error or that it is necessary to reconsider the impugned Decision to prevent an injustice. The Prosecution submits that the Defence is simply re-litigating issues it had raised in its *ex-parte* Motion.
14. The Prosecution makes the same submissions as regards the request for late disclosure of the witnesses' particulars.
15. The Prosecution prays the Chamber to dismiss the Motion in its entirety as it is without merit in law or fact.

DELIBERATIONS

Request for Reconsideration as Regards Witness BK

16. With respect to the criteria for reconsideration, the Chamber recalls the finding of the "Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E)" rendered on 15 June 2004 by Trial Chamber I:³

³ *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E)" (TC), 15 June 2004, para. 7.

The fact that the Rules are silent as to reconsideration, however, is not, in itself, determinative of the issue whether or not reconsideration is available in “particular circumstances” and a judicial body has inherent jurisdiction to reconsider its decision in “particular circumstances”. Therefore, although the Rules do not explicitly provide for it, the Chamber has an inherent power to reconsider its own decisions. However, it is clear that reconsideration is an exceptional measure that is available only in particular circumstances.

17. The Chamber notes that the only ground submitted by the Defence in support of its request for reconsideration is the fact that the Defence mistakenly omitted to mention Witness BK’s pseudonym on the will-say statement annexed to the *ex-parte* Motion for additional protective measures filed on 19 January 2005. The Chamber finds that a mistake committed by the moving Party is not a particular circumstance justifying such an exceptional measure and is therefore no ground for reconsideration. In the view of the Chamber, such request should rather have been made by way of a new motion. Therefore, the Chamber denies the request for reconsideration of the Impugned Decision as regards Witness BK.

Request for Safe-Conduct for Witnesses MAC, WLMF and WLNA

18. As regards the Defence submission that witnesses MAC, WLMF and WLNA should also be granted safe-conduct, the Chamber notes that the original *ex-parte* motion for additional protective measures for Defence witnesses filed on 19 January 2005 did not request safe-conducts for any witnesses and that this measure was granted *proprio motu* to Witnesses NEM and BN by the Chamber. Therefore, the Chamber considers that this is a new request that cannot be made within a Motion for certification to appeal the Impugned Decision and denies the Motion on this point.

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 the discussion it has already held on 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 present case on 19 March 2004.⁴
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 notes the Defence submission that the witnesses

⁴ *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.

whose additional protection is requested were expected to give exculpatory information on some charges and that the appearance of Defence witnesses may affect the outcome of the trial. The Chamber considers that all Defence witnesses have already been granted protective measures in order to facilitate their appearance before the Tribunal. The Chamber further considers that new additional protective measures would not affect those witnesses' testimonies. For these reasons, it is the view of the Chamber that the Defence has failed to demonstrate that 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



Solomy Balungi Bossa
Judge

[Seal of the Tribunal]