



ICTR-97-31-T
01-11-2005
(1456 — 1451)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 1 November 2005

The PROSECUTOR

v.

Tharcisse RENZAHO

Case No. ICTR-97-31-I


2005 Nov 1 10 21 11

**DECISION ON RENZAHO'S MOTION TO RECONSIDER THE DECISION ON
PROTECTIVE MEASURES FOR VICTIMS AND WITNESSES TO CRIMES ALLEGED IN
THE INDICTMENT**

Office of the Prosecutor

Mr Jonathan Moses
Ms Katya Melliush
Mr Ignacio Tredici

Defence Counsel

Mr. François Cantier

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1455

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

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

BEING SEISED of Renzaho's "*Requête de la Défense en demande de rabat de la Décision du 17 août 2005 et de réouverture des débats*", filed on 26 August 2005 (the "Motion");

NOTING the Prosecutor's "Response to '*Requête de la Défense en demande d'autorisation de faire appel en vertu de l'Article 73 C du Règlement de Preuve et de Procédure*'", filed on 6 September 2005 (the "Prosecutor's Response");

CONSIDERING the Defence's "*Réplique de la Défense à la Réponse du Procureur à la Requête de la Défense en demande d'autorisation de faire appel en vertu de l'Article 73 C du Règlement de Preuve et de Procédure*"¹, filed on 13 October 2005 (the "Defence's Reply");

RECALLING the Prosecutor's "Motion for Protective Measures for Victims and Witnesses to Crimes alleged in the Indictment", filed on 6 June 2005 (the "Prosecutor's Motion");

NOTING the "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes alleged in the Indictment", issued on 17 August 2005 (the "impugned Decision");

NOTING FURTHER the Registry's directions to the Parties regarding filing of responses and replies to the Prosecutor's Motion, dated 4 July 2005 (the "Registry's Directions");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Rule 73 (E);

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

INTRODUCTION

1. On 6 June 2005, the Prosecutor moved the Chamber to award protective measures for several witnesses. Of the 18 Annexes supporting the motion, 17 were in English.
2. On 4 July 2005, the Registry informed the Parties of the time limits with respect to the filing of responses and replies. The Defence for Renzaho was directed to file its response within five days after the receipt of the French translation and the Prosecution within five days of receipt of the Defence response.
3. On 14 July 2005, the Registry informed the Defence that it was awaiting its response to the Prosecutor's Motion and asked the Defence to indicate its position so the Chamber could be informed of the current status.
4. On 17 August 2005, the Chamber issued a Decision granting in part, the Prosecutor's Motion for witness protective measures.

¹ This Reply concerned both the Motion for Certification to Appeal and the instant Motion, *see* the Defence's e-mail to the Registry of 13 October 2005.

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SUBMISSIONS OF THE PARTIES

1454

The Motion

5. The Defence submits that it received the Prosecutor's Motion, in English, on 8 June 2005. Attached to this motion were several Annexes, comprising over 70 pages.
6. The Defence submits that it understands Rule 73(E) to provide a Party with five days within which to reply to a motion from the date on which it is received in the working language of the Party, in this case, French.
7. In the Annexes adjoining the Motion, the Defence attaches an email it sent to the Registry on 8 July 2005, informing the Registry that it was still awaiting the Prosecutor's Motion and Annexes. The Defence noted that it had received a communication from the Registry via electronic mail but had been unable to open and print the attachments. The Defence requested that the Registry transmit the translated Motion and adjoining Annexes by facsimile. The Defence also sought confirmation from the Registry that the time limits imposed by the Chamber for filing its response had not begun to run, considering the translated documents had not been received.
8. The Defence submits that on 11 July 2005, it received the French translation of the Prosecutor's Motion, but not of the Annexes. The Defence subsequently wrote to the Registry, noting the sheer number of the Annexes, as well as the Prosecutor's reliance upon them in justifying its Motion. The Defence informed the Registry that since it had not received a translation of these Annexes, it was of the view that the period within which it had to reply to the Motion would not begin to run until receipt of the translated Annexes.
9. The Defence reiterated its request for translation of the Annexes on 20 July 2005, noting that it was unable to respond without a translation of the Annexes. In view of the lack of response from the Registry on the issue of time limits, the Defence submits it was justified in believing the Registry would not object to the delay in the submission of its response.
10. On 17 August 2005, the Defence received the impugned Decision. The Defence maintains that it was not given an opportunity to reply to the Prosecutor's Motion, the core of which concerned the fundamental rights of the Defence. As a result, the Defence submits that it has been prevented from knowing the identity of the Prosecution witnesses for whom protective measures are sought until the last moment.
11. The Defence informs the Chamber that it has filed a separate Motion seeking certification to appeal the impugned Decision. However, it maintains that since the Chamber was unaware that the lack of a Defence Response was due to the non-receipt of the relevant documents in its working language, the only language the Accused understands, the Chamber has the discretionary power to reconsider the impugned Decision.

The Prosecutor's Response

12. The Prosecutor submits that the Chamber has no jurisdiction to withdraw its decision, and neither is there a provision within the Rules for either party to request a withdrawal of a Trial Chamber decision. Accordingly, the Prosecutor moves the Chamber to deny the Motion in all respects.² The Prosecutor maintains that the impugned decision is consistent with this Tribunal's and the International Criminal Tribunal for the Former Yugoslavia's jurisprudence, and does not prejudice the rights of the Accused.³

² Prosecutor's Response, para. 15.

³ *Ibid.*, para. 10-14 and 16, relying on *Bagosora et al.*, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses (TC), 21 July 2005, para. 6; *Zigiranyirazo*, Décision relative à la requête en extrême urgence de la Défense aux fins de traduction des éléments essentiels du mémoire préalable au procès du Procureur (TC), 30 August 2005, para. 3; *Muhimana*, Décision relative à la requête de la Défense aux fins de traduction des documents de l'accusation et des actes de procédure en Kinyarwanda, langue de l'Accusé et en français, langue de son Conseil – Articles 10 et 31 du Statut et 3, 19, 31, 33 (B), 54, 66 (A) et 73 du Règlement (TC), 6 November 2001, para. 33; *Delalic et al.*, Décision relative à la requête de la Défense aux fins de transmission des documents dans la langue de l'Accusé (TC), 25 September 1996.

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1453

13. The Prosecutor notes that the Defence has failed to raise any substantial objection to the terms of the Chamber's orders.⁴

The Defence's Reply

14. The Defence's Reply reiterates the arguments contained in the Motion and stresses the importance of the equality of arms for a fair trial, which it submits has been violated because the Defence's arguments were not heard.⁵
15. The Defence further submits that the Prosecution's prayer to be authorised to disclose the witnesses' identities 21 days before the start of their testimony can only be ordered pursuant to Rule 69 (A). This Rule, however, is only applicable in exceptional circumstances and therefore cannot be sought as a blanket protection for all witnesses. Besides, this measure violates the rights of the Accused to have the time and facilities to adequately prepare his defence, pursuant to Art. 20 of the Statute.⁶
16. The Defence observes that the disclosure of documents to the Defence within reasonable time would expedite the proceedings. It points out that if it was clear that the Annexes would not be communicated in French, it would have been good manners to inform it, rather than take a decision without informing the Defence that its arguments would not be heard.⁷
17. The Defence accepts that the Accused does not have the right to receive each and every document translated into a language s/he understands. It submits, however, that the Annexes were of fundamental importance for the Prosecution's Motion and thus had to be translated in the interests of a fair trial.⁸

DELIBERATIONS

18. The Chamber has carefully considered all the submissions of the Parties.
19. The Chamber recalls the facsimile sent to the Defence on 4 July 2005, directing the Defence to file its response within five days of the receipt of the translation and notes the correspondence between the Defence and the Registry as contained in the Defence Annexes A and B.
20. The Chamber further recalls its jurisprudence on reconsideration, namely that,

[t]he 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.⁹

⁴ Prosecutor's Response, para. 17.

⁵ Defence's Reply, paras. 10-15, relying on Art. 10 of the Universal Declaration of Human Rights; ECHR *Neumeister v. Austria*, 27 June 1968, para. 22; ECHR, *Dumbo Beheer BV v. The Netherlands*, 27 October 1993, para. 33.

⁶ *Ibid.*, paras. 16-20.

⁷ *Ibid.*, paras. 22-29.

⁸ *Ibid.*, paras. 32-35.

⁹ *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Ex-Parte- Extremely Urgent Motion for Reconsideration of Trial Chamber II's Decision on Nyiramasuhuko's Strictly Confidential Ex-Parte - Under Seal - Motion for Additional Protective Measures for Defence Witness WBNM dated 17 June 2005 or, Subsidiarily, on Nyiramasuhuko's Strictly Confidential Ex-Parte - Under Seal - Motion for Additional Protective Measures for Defence Witness WBNM (TC), 4 July 2005, para. 3, quoting *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.

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1452

21. The Chamber notes that it has the inherent jurisdiction, to be exercised at its discretion, to reconsider an impugned decision, including but not limited to the following circumstances:
 - i) Where the impugned decision was erroneous in law or an abuse of discretion when decided and for this reason a procedural irregularity has caused a failure of natural justice; or,
 - ii) Where new material circumstances have arisen since the decision was issued.¹⁰
22. Pursuant to Article 16(1) of the Statute and Rule 33(A) of the Rules, the Chamber notes that the Registry is responsible for the administration and servicing of the Tribunal, whilst Rule 3(E) of the Rules and Article 13(6) of the Directive for the Registry place the responsibility of overseeing the translation of documents on the Registry.¹¹
23. The Chamber recalls Tribunal jurisprudence which states that “parties can only refer a matter to the Chamber if the Party or parties concerned and the Registrar have been unable to settle by themselves a dispute concerning a problem of translation or interpretation”, as is the case here.¹²
24. The Chamber notes that the Registry did not respond to the Defence’s concerns communicated on 20 July 2005 in relation to the questions of the translation of the Annexes and the interpretation of the Chamber’s stipulated time limits. The Defence submits that this absence of a response led it to believe that the specific time frames directed by the Chamber had not begun to run. Furthermore, these concerns were not communicated to the Chamber by the Registry.
25. In these particular circumstances, the Chamber notes that the impugned Decision was made in the absence of any knowledge of the Defence’s concerns. Therefore, the Chamber finds that the Defence has demonstrated a new material circumstance that has arisen since the Decision was issued. The Chamber acknowledges and recognises the right of the Accused to be heard, pursuant to Article 20 of the Statute, and that any measures awarded should be consistent with the rights of the Accused as provided by Rule 75 (A). The Chamber hence finds that the Accused could have suffered prejudice arising from the fact that he was not heard.
26. The Chamber is mindful of the fact that witness protection measures for both Prosecution and Defence witnesses relate to the security and safety of witnesses, and are serious matters and of special concern to the Chamber.
27. Furthermore, protective measures, once granted, are neither definitive nor permanent, for they may be rescinded, varied or augmented, should good cause be demonstrated, pursuant to Rule 75(I). In ordinary circumstances, the possibility of prejudice in this particular case would have warranted a vacation of the impugned Decision as a remedy to the Defence. However, after careful consideration of the above issues and the provisions of Rule 75(I), the Chamber is of the view that this is not necessary. The Parties, if they so wish, may file an appropriate Motion under these provisions. The Chamber therefore invites the Defence, if it so wishes, to address any prejudice suffered by utilising Rule 75(I), with a view to having the measures awarded in the impugned Decision either rescinded, varied, or augmented.

¹⁰ *Barayagwiza*, Decision (Prosecutor’s Request for Review or Reconsideration) (AC), 31 March 2000, Separate Opinion of Judge Shahabuddeen, paras. 4-5; *Bagosora et al.*, Decision on Reconsideration of Order to Reduce Witness List and on Motion for Contempt for Violation of that Order (TC), 1 March 2004, para. 11; *Bagosora et al.*, Decision on Defence Motion for Reconsideration of the Trial Chamber’s Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003, para. 25.

¹¹ *Bisengimana*, Decision on Bisengimana’s Motion for Complete and Accurate Translation into Working Languages of the Tribunal and Respect for the Rights of the Accused (TC), 7 March 2003, para. 6.

¹² *Muhimana*, Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel (TC), 6 November 2001, para. 10.

1451

28. The Chamber wishes to underscore that parties should exercise all diligence to ensure an effective working practice in the management of their case. Should parties wish to rely upon supporting material that exists in the public domain and which can also be found in the other official language of the Tribunal, it would be good practice for the moving party to serve the material in both languages to prevent a recurrence of this very situation. In addition, the Chamber would like to underscore that in the interests of judicial economy, should the Defence wish to have Annexes translated in the future, it should act diligently and seize the Chamber with a request for translation in a timely fashion.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion in part and **DIRECTS** that:

- I. The Defence for Renzaho, should it wish to do so, file a Motion under Rule 75(I) to rescind, vary or augment the protective measures granted in the impugned Decision of 17 August 2005;
- II. The protective measures granted in the Decision of 17 August 2005 remain in place until the Chamber renders a Decision following any Motion under Rule 75(I) that may be made by the Parties; and,

DENIES the Motion in all other respects.

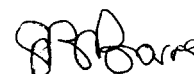
Arusha, 1 November 2005



Arlette Ramaroson
Presiding Judge



William H. Sekule
Judge



Solomy Balungi Bossa
Judge

