International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 11May 2007

The PROSECUTOR v.
Pauline NYIRAMASUHUKO & Arsène Shalom NTAHOBALI
Case No. ICTR-97-21-T

Joint Case No. ICTR-98-42-T

DECISION ON PAULINE NYIRAMASUHUKO'S MOTION FOR RECALL OR RECONSIDERATION OF WITNESS AND-44, OR CERTIFICATION TO APPEAL THE DECISION OF 23 APRIL 2007

Office of the Prosecutor
Ms Silvana Arbia
Ms Adelaide Whest
Ms Holo Makwaia
Ms Althea Alexis Windsor
Ms Madeleine Schwarz
Ms Tolulope Olowoye

Defence Counsel for Nteziryayo
Ms Nicole Bergevin
Mr Guy Poupart

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 de Pauline Nyiramasuhuko en rappel du témoin AND-44 et subsidiairement en reconsidération ou certification des décisions orales de la chambre 11 du 23 avril 2007 (Rules 54, 73(A) et (B), 90 (G) du Réglement de procédure et preuve)*" filed on 1 May 2007 (Nyiramasuhuko's Motion);

CONSIDERING the "Prosecutor's Response to the '*Requête de Pauline Nyiramasuhuko en rappel du témoin AND-44 et subsidiairement en reconsidération ou certification des décisions orales de la chambre 11 du 23 avril 2007 (Rules 54, 73(A) et (B), 90 (G) du Réglement de procédure et preuve) "*, filed on 7 May 2007;

CONSIDERING the "*Réponse de la Défense d'Alphonse Nteziryayo à la* '*Requête de Pauline Nyiramasuhuko en rappel du témoin AND-44 et subsidiairement en reconsidération ou certification des décisions orales de la Chambre II du 23 avril 2007*,'" filed on 7 May 2007 ("Nteziryayo's Response");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") in particular Rule 73 (B) of the Rules;

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

INTRODUCTION

1. On 19 April 2007, after the start of its cross-examination of Defence Witness for Nteziryayo AND-44, the Prosecution disclosed a document in connection with the immigration files of that Witness. All Defence Counsel objected to the use of this document on the grounds that any party wishing to use a document for purpose of cross-examination should disclose it in a timely manner, and in any case before it starts its cross-examination.

2. On the same day, the Defence for Nteziryayo relied upon an Appeals Chamber Decision,[1] and submitted that immigration files are specific and should have been disclosed much earlier than at the beginning of cross-examination by the Prosecution. In its oral Decision issued on the same day (the "Impugned Decision"), the Chamber ruled that documents that may be used in cross-examination should be disclosed to the other party in a timely manner and in any case before the beginning of the cross-examination, unless there are other circumstances.The Chamber further emphasized that there is a distinction between the disclosure of documents to be used in cross-examination and the disclosure obligations that a party may have at different stages of the proceedings and that distinction must be borne in mind. If the document concerned is alleged to go beyond the requirement for cross-examination and would have necessitated an earlier disclosure, this

[1] *Prosecutor v. Bagosora et al*, Case No. 98-41-AR73, "Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence", (AC) 25 September 2006.

element should be demonstrated. The Chamber therefore authorized the Prosecution to make use of the aforesaid document for cross-examination purposes after granting to the parties additional time to get familiarized with it.[2]

3. On 23 April 2007 and during the cross-examination of Witness AND-44 by the Prosecution, the Defence for Nteziryayo objected again to the use of the immigration files in question on the same grounds. In its oral decision overruling the objection, the Chamber stressed that a decision had already been rendered on that issue on 19 April 2007.[3]

4. At the close of cross-examination by the Prosecution, the Defence for Nyiramasuhuko moved the Chamber to further cross-examine the Witness following the disclosure of the immigration files by the Prosecution.[4] The Defence for Nteziryayo objected to the request, and the Chamber orally dismissed the request on the basis that Nyiramasuhuko had failed to demonstrate any exceptional circumstance such as a specific prejudice that could have arisen in the course of the cross-examination or the testimony of the witness concerned after the Defence for Nyiramasuhuko had finished its cross examination, nor was there a specific demonstration of the exact purpose or specific element warranting further cross examination.[5]

5. On 1 May 2007, the Defence for Nyiramasuhuko filed the present motion for recall of Witness AND-44, or in the alternative, reconsideration of the Impugned Decision, or certification to appeal the Impugned Decision.

SUBMISSIONS OF THE PARTIES

The Defence for Nyiramasuhuko

6. Relying on Article 20 of the Statute and Rules 73, 54 and 90 of the Rules, the Defence argues that the Prosecution's choice to disclose the documents in issue at the time of its cross examination when the Defence could not have obtained them on their own, amounts to a 'substantial reason in law amounting to a legal excuse for failing to perform a required act.' Further the Defence intends to use specific elements referred to in Exhibit P.190, which go to the heart of its defence strategy notably at pages 12 and 19. The Defence also submits that some of these elements could be in contradiction with the Witness testimony or support the case of the Accused under Rule 90 (C), and that if it does no put these questions to the Witness, the Accused will suffer great prejudice.

7. In the alternative, the Defence for Nyiramasuhuko submits that the Chamber should use its inherent discretion to reconsider its previous Decision which, as it stands, is an abuse of the said discretion and has caused serious prejudice to the Accused. Further, the Defence alleges that the Chamber did not allow it to state the specific facts and the prejudice suffered by the Accused when it denied the request for further cross examination in violation of the *audi alteram partem* principle.

[2] T. 19 April 2007, p.52 (ICS).
[3] T. 23 April 2007, pp. 21-22 (ICS).
[4] T. 23 April 2007, p.76.
[5] T. 23 April 2007, p.80.

8. Alternatively, the Defence for Nyiramsuhuko requests certification to appeal the oral decisions of 19 and 23 April 2007 stating that they are erroneous in law in sofar as they are contrary to the Accused's right to be heard, fairness of the proceedings against the Accused, and there is a need for an immediate solution as the situation may arise again. Additionally, that an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings.

The Defence for Nteziryayo

9. In its response, the Defence for Nteziryayo calls for a denial of the Nyiramasuhuko's Motion as the Decision of 23 April 2007 unequivocally denied the right to further cross-examine the Witness, and the current motion to recall is substantially the same as the one orally argued and is therefore resjudicata. On the issue of reconsideration, the Defence for Nteziryayo submits that the transcripts quoted by the Defence for Nyiramasuhuko do not demonstrate the existence of contradictions in the witness testimony, or, if there are any, these are too minor to justify recall, reconsideration or certification. Further, the Defence for Nteziryayo submits that contrary to the arguments by the defence for Nyiramasuhuko, the evidence is not of significant probative value but only of a cumulative nature. In the alternative the Defence for Nteziryayo sumits that if the Chamber were to grant the motion, then the cross examination should be strictly limited in the instant case, to the use of only the portions of Exhibit P.190 mentioned in the Motion.

The Prosecution

10. The Prosecution objects to the recall of Witness AND-44.[6] It recalls Paragraph 18 of the Motion quoting the Trial Chamber on 3 March 2006 deciding that ''the right to be tried without undue delay as well as the concerns of judicial economy demand that recall should be granted only in the most compelling of circumstances where the evidence is of significant probative value and not of cumulative nature.''[7]

11. The Prosecution also submits that the Defence has on several occasions put her case to numerous witnesses that the RPF killed persons in and around Kigali on or after 7 April 1994, including while cross examining AND-44.[8] Further, the Prosecution contends that recalling a witness to give this evidence is cumulative, wastage of precious time and resources, goes against Article 20 (4) (c), and that all the Accused have the right to a speedy trial.[9]

12. In respect of reconsideration or certification, the Prosecution submits that it is entirely within the Chamber's discretion to reconsider its own decisions, but this discretion should be exercised only in limited circumstances.[10] It further submits that the Defence has not demonstrated how the Chamber's Decision in the instant case involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

[6] Para 8 of Prosecution response
[7] Prosecution Response para 9.
[8] Prosecution Response para 10.
[9] Prosecution Response para 11
[10] Prosecution Response para 15.

DELIBERATIONS

Recall and Reconsideration of the Chamber's Decision

13. The Chamber recalls its jurisprudence on reconsideration:

> 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.[11]

12 The Chamber notes that it has the inherent jurisdiction to exercise its discretion to determine whether 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.[12]

13. After examining the Defence submissions which in the Chamber's view do not advance any new material circumstances nor demonstrate that the Chamber committed an error in law or an abuse of its discretion, the Chamber considers that the Defence for Nyiramasuhuko merely repeats arguments already raised and disposed of in the Impugned Decision. The Defence for Nyiramasuhuko has therefore failed to demonstrate the existence of "particular circumstances" that might warrant reconsideration of the Chamber's Decision. The Chamber also finds no demonstration of good cause to warrant recall of the witness.[13]

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[11] *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.

[12] *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.

[13] The Tribunal's jurisprudence allows recall of witnesses if ''good cause'' has been shown, and good cause has been defined to be ''a substantial reason amounting in law to a legal excuse for failing to perform a required act'' ; See *Prosecutor v. Kayishema and Ruzindana*, TC11, Decision on the Defence Motion for the Re-examination of Defence Witness DE, 19 August 1998, para.14, reiterated in *Prosecutor v. Bagosora et al.*, TC1, Decision on the Prosecution Motion to recall Witness Nyanjwa, 29 September 2004, para. 6 ; Prosecutor v. Simba, TC 1, Decision onthe Defence Motion to Recall Witness KEL for Further Cross-Examination, 28 October 2004, para. 5 ; Prosecutor v. Bagosora et al. TC 1, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 September 2005, para.2.

Certification to Appeal

14. The Chamber, recalling its jurisprudence[14] notes that decisions rendered under Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for the very limited circumstances stipulated in Rule 73 (B).[15] These conditions require a specific demonstration, and are not met through a general reference to the submissions on which the Impugned Decision was rendered.[16]

15. The Chamber is of the opinion that in its Motion, the Defence for Nyiramasuhuko generally revisited the thrust of its previous arguments which led to the Impugned Decision rather than demonstrating the conditions required for the Chamber to grant certification to appeal the Impugned Decision. The Defence has therefore failed to satisfy the criteria for grant of certification under Rule 73(B).

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion in its entirety.

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Arusha, 11May 2007

William H. Sekule Presiding Judge	Arlette Ramaroson Judge	Solomy Balungi Bossa Judge

[Seal of the Tribunal]

[14] *Prosecutor v. Nyiramasuhuko*, Case No. 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 paragraphs 12 – 16; Prosecutor v. Ntahobali and Nyiramasuhuko, Case No. ICTR-97-21-T, "Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 18 March 2004, paragraphs 14 – 17.

[15] Under the first limb of Rule 73(B), the applicant must show how an appellate review would significantly affect (a) a fair and expeditious conduct of the proceeding, or (b) the outcome of the trial. This condition is not determined on the merits of the appeal. Second, the applicant has the burden of convincing the Chamber that an "immediate resolution by the Appeals Chamber may materially advance the proceedings."

[16] *Prosecutor v. Nyiramasuhuko et al*., "Decision on Prosecutor's Motion for Certification to Appeal the Decision of the Trial Chamber dated 30 November 2004 on the Prosecution Motion for Disclosure of Evidence", 4 February 2005, para.11; *Prosecutor v. Nyiramasuhuko*, Case No. 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 paras. 12 – 16; *Prosecutor v. Ntahobali and Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 18 March 2004, paras. 14 – 17.