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13-11-2008
(5917-5914)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Sergei Alekseevich Egorov
Judge Florence Rita Arrey

Registrar: Adama Dieng

Date: 13 November 2008

THE PROSECUTOR

v.

Tharcisse RENZAHO

Case No. ICTR-97-31

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**DECISION ON RUTAGANDA'S MOTION FOR RECONSIDERATION OR
ALTERNATIVELY, CERTIFICATION TO APPEAL THE DECISION OF 3 APRIL
2008 ON REQUEST FOR CLOSED SESSION TESTIMONY AND SEALED EXHIBITS**

The Prosecution
Jonathan Moses
Katya Mclluish

The Applicant
Georges Rutaganda

The Defence
François Cantier
Barnabé Nekuie
Julie Veillette

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Florence Rita Arrey;

BEING SEIZED OF Georges Rutaganda's "Request for Reconsideration of the 'Decision on Request for Closed Session Testimony and Sealed Exhibits' of 3 April 2008 or alternatively, Certification to Appeal" etc., filed on 17 April 2008;

CONSIDERING the Prosecution Response, filed on 17 April 2008, Rutaganda's Reply, filed on 1 May 2008 and the Renzaho Defence's notice, filed on 27 May 2008.

HEREBY decides the request.

INTRODUCTION

1. Georges Rutaganda was convicted on 6 December 1999 of genocide, and extermination and murder as crimes against humanity. He was sentenced to life imprisonment.¹ On 26 May 2003, the Appeals Chamber vacated a conviction for murder and upheld Rutaganda's other convictions, as well as his sentence.²

2. On 3 April 2008, the Chamber denied Rutaganda's motion seeking disclosure of closed session testimony and sealed exhibits of a protected witness, AWE, who testified in the *Renzaho* trial in January 2007.³ Rutaganda had alleged that disclosure of Witness AWE's confidential transcripts and sealed evidence may assist his case materially, and that it was necessary to seize the Chamber because the Prosecution had not disclosed these transcripts as exculpatory pursuant to Rule 68 of the Rules of Procedure and Evidence. The Chamber found that as Rutaganda currently has no case before the Tribunal, the only legitimate forensic purpose the requested disclosure could have would be in relation to a request for review of the judgment pursuant to Rule 120. The Chamber further found that the sealed evidence sheds no light on Rutaganda's conduct and was unlikely to materially assist him, and that the failure to disclose this testimony did not amount to a breach by the Prosecutor of its obligation to disclose exculpatory material pursuant to Rule 68.⁴

3. Rutaganda requests reconsideration or in the alternative, certification of the decision for appeal. He alleges that the Chamber erroneously applied the law, as the fact that his trial is closed does not remove the right to seek confidential evidence produced in another case. As the Chamber acknowledged, a significant factual, geographic and temporal overlap to exist between the *Renzaho* and Rutaganda cases, the Chamber erred in finding that Rutaganda lacked a legitimate forensic purpose. Finally, the Chamber erred by referring to Rule 68, which was not relied upon by the Applicant.⁵

¹ *Prosecutor v. Rutaganda*, Judgement and Sentence (TC), 6 December 1999.

² *Prosecutor v. Rutaganda*, Judgement (AC), 23 May 2003.

³ *Prosecutor v. Renzaho*, Decision on Request for Closed Session Testimony and Sealed Exhibits (TC), 3 April 2008.

⁴ *Ibid.*, paras. 5-6.

⁵ "Requête urgente en reconsideration de la "Decision on Request for Closed Session Testimony and Sealed Exhibits" du 03 avril 2008 ou, alternativement, en certification d'appel de ladite décision" etc., filed on 17 April 2008.

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4. The Prosecution opposes the request, on grounds that the Trial Chamber correctly applied the law and reasonably exercised its discretion when concluding that the mere existence of a factual nexus does not amount to a legitimate forensic purpose where an Applicant's proceedings before both the Trial and Appeals Chamber have concluded. The Chamber considered whether a nexus existed between the material sought and Rutaganda's case, and concluded that it did not. Further, no error was occasioned in considering *proprio motu* the applicability of Rule 68, as this was a basis upon which disclosure might have been granted to Rutaganda in these circumstances. Finally, and in addition to lacking merit, Rutaganda's request for certification was filed out of time. The Renzaho Defence has indicated that it does not oppose Rutaganda's request.

5. Rutaganda has since seized the Appeals Chamber of this motion; a measure opposed by the Prosecution on grounds that relief pursuant to Rule 73 (B) is only applicable at the time of proceedings before Trial Chambers, and as Rutaganda's motion before the Appeals Chamber is premature.⁶ On 11 November 2008, the Appeals Chamber dismissed the motion.⁷

DELIBERATIONS

6. Rutaganda has requested reconsideration, or in the alternative, certification of the decision. Reconsideration is justified when there have been new circumstances since the filing of the challenged decision that affect the premise of the decision. It can also be permissible where the impugned decision was erroneous in law or an abuse of discretion.⁸

7. According to Rule 73 (B) of the Rules of Procedure and Evidence, a Trial Chamber may only grant 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. It is settled law that Rule 73 is only applicable at the time of proceedings before Trial Chambers.⁹ The Trial Chamber's Decision of 3 April 2008, which is the subject of Rutaganda's motion, was rendered after the close of the trial and appeal proceedings in his case. However, the Appeals Chamber has held that under certain conditions an applicant

is entitled to challenge a decision by a Trial Chamber, pursuant to Rule 75 (G) of the Rules, rendered after the close of trial and appeal proceedings before the Appeals Chamber. As with

⁶ "Rutaganda's Appeal Motion Against the Trial Chamber Decision on Request for Closed Session Testimony and Sealed Exhibits of Witness AWE in Renzaho" etc. filed on 6 October 2008; "Prosecutor's Response to the Applicant's 'Appeal Motion'," etc., filed on 10 October 2008, paras. 3-6.

⁷ *Prosecutor v. Rutaganda*, Decision on Georges Rutaganda's Appeal Concerning Access to Closed Session Testimony and Sealed Exhibits (AC), 11 November 2008 (Rutaganda's motion found to be improperly before the Appeals Chamber, as it was pending before the Trial Chamber, which therefore remained seized of it).

⁸ *Bagosora et al.*, Decision on Prosecutor's second motion for reconsideration of the Trial Chamber's "Decision on Prosecutor's motion for leave to vary the witness list pursuant to Rule 73 bis (E)" (TC), 14 July 2004, para. 7; *Bagosora et al.*, 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 73 bis (E)", 15 June 2004, para. 9; *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.

⁹ *Prosecutor v. Niyitegeka*, Decision on Motion for Clarification (AC), 20 June 2008, para. 13. See also *id.*, para. 14 (noting that issues related to access to confidential material by a convicted person concern the important question of balance between the right of the convicted person to access potentially exculpatory material and the need to guarantee the protection of victims and witnesses).

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any discretionary decision, the applicant would have to demonstrate that the Trial Chamber committed a discernible error in its decision because it was based on an incorrect interpretation of the governing law, a patently incorrect conclusion of fact, or because it was so unfair or unreasonable as to constitute an abuse of discretion.¹⁰

8. The criteria for reconsideration and a challenge to a Trial Chamber Decision under Rule 75 (G) are therefore similar: namely, an incorrect interpretation of the law, an incorrect conclusion of fact, or an abuse of discretion.

9. Rutaganda does not seek to justify the late filing of his request. In any case, the decision does not merit reconsideration. Rutaganda has no ongoing proceedings before either the Trial or Appeals Chamber. The only future proceedings for which disclosure could be of relevance are review proceedings pursuant to Rule 120, which are not mentioned in his Motion. The Chamber has already determined that the material sought is unlikely to assist Rutaganda in obtaining review under Rule 120 of the Rules.

10. The Chamber's decision of 3 April 2008 was not based on an incorrect interpretation of the governing law or an incorrect conclusion of fact. Nor was the decision unfair or unreasonable so as to constitute an abuse of discretion. Certification or reconsideration of that decision is accordingly denied.

FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the request.

Arusha, 13 November 2008



Erik Mose
Presiding Judge



Sergei Alekseevich Egorov
Judge



Florence Rita Arey
Judge

[Seal of the Tribunal]



¹⁰ *Id.* Rule 75 (G) allows for the possibility of seeking to rescind, vary, or augment protective measures ordered at trial.