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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 31 March 2010

JUDICIAL RECORDS ARCHIVES
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The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

**DECISION ON DEFENCE MOTION FOR RECONSIDERATION OF THE
DECISION ON THE DEFENCE MOTION FOR PROTECTIVE MEASURES OF
9 FEBRUARY 2010**

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. William Egbe
Mr. Patrick Gabaake
Mr. Iskandar Ismail

Defence Counsel

Mr. Peter Herbert
Ms. Mylène Dimitri

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa and Mparany Rajohnson (the “Chamber”);

BEING SEIZED of the “Defence Motion for Reconsideration of the Trial Chamber’s Decision on the Defence Urgent Motion for Witness Protective Measures Rendered on 9 February 2010” (the “Motion”), filed on 3 March 2010;

CONSIDERING:

- (a) The “Prosecution’s Response to Defence Motion for Reconsideration of the Trial Chamber’s Decision on the Defence Urgent Motion for Witness Protective Measures Rendered on 9 February 2010” (the “Response”), filed on 8 March 2010;
- (b) The “Defence Reply to Prosecution’s Response to Defence Motion for Reconsideration of the Trial Chamber’s Decision on the Defence Urgent Motion for Witness Protective Measures Rendered on 9 February 2010” (the “Reply”), filed confidentially on 12 March 2010; and

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

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

INTRODUCTION

On 9 February 2010, the Chamber granted the Defence motion for witness protection in part. The Chamber denied the Defence request for the Prosecution to provide the Defence and the Witness and Victims Support Section (WVSS) a list of officially authorized persons who will have access to any identifying information and guarantee that if any of the said persons leave the Prosecution they have remitted all material containing this information.¹

¹ Decision, para. 9, referring to Defence Urgent Motion for Witness Protective Measures, filed on 15 December 2009, paras. 44-45.



SUBMISSIONS OF THE PARTIES

Defence Motion

1. The Defence requests the Chamber to exercise its inherent power to reconsider the impugned Decision in the interest of justice, and to order the Prosecution to identify its team members with access to witness protected information.²
2. The Defence submits that the Chamber has inherent power to reconsider its own decision, which it should do only in exceptional circumstances.³ These include: a) Discovery of a new fact not known by the Chamber at the time it made its original decision; b) A material change in circumstances since the original decision; or c) A reason to believe that the original decision was erroneous, or constituted an abuse of power that resulted in an injustice.⁴ The Defence considers that legal errors have been committed by this Chamber warranting reconsideration of the Decision.⁵
3. Firstly, the Defence asserts that it has been treated differently from the Prosecution: the Chamber denied the protective measure required, while granting an identical measure for Prosecution witnesses in the Decision of 6 May 2009.⁶
4. The Defence affirms that the difference in treatment vis-à-vis the Prosecution deprives the Accused of his right to the full equality of arms, without any justification by the Chamber.⁷ The Defence argues that it is equally bound to ensure that confidential information is not disclosed.⁸ It recalls that trial fairness favors similar or identical measures for Defence and Prosecution witnesses, as illustrated by decisions from this Tribunal.⁹
5. The Defence also observes that nine days after this Chamber's Decision, another Trial Chamber composed *inter alia* of two Judges sitting also in the present case ordered the Prosecution in the *Nzabonimana* case to provide the WVSS, the Chamber and the Defence, with the names of all persons working on its team with access to information about the witnesses, to advise that Chamber in writing of any changes in the composition

² Motion, paras. 19-20.

³ *Id.*, para. 13.

⁴ *Id.*, para. 14.

⁵ *Id.*, Title "Legal Error Meriting Reconsideration of the Trial Chamber's Decision", above para. 5.

⁶ *Id.*, paras. 6-7, citing Decision on Prosecution's Motion for special protective measures for prosecution witnesses and others, 6 May 2009, para. (vii) of the Orders.

⁷ *Id.*, paras. 8-9.

⁸ *Id.*, para. 10.

⁹ *Id.* para. 11, citing *The Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-2001-69-I, Decision on Protective Measures for Defence Witnesses, 28 February 2008, at para. 3; *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36A-T, Decision on Yussuf Munyakazi's Motion for Protective Measures for Defence Witnesses, 16 July 2009, at para. 6; *The Prosecutor v. François Karera*, Case No. ICTR-01-74-T, Decision on Defence Motion for Protection of Witnesses, 9 February 2006; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Bagosora Motion for Protection of Witnesses, 1 September 2003; *The Prosecutor v. Éliézer Niyitegeka*, Case No. ICTR-96-14-T, Decision (Defence Motion for Protective Measures for Defence Witnesses), 14 August 2002.

of its team and to ensure that any member leaving the Prosecution team has remitted all material that could lead to the identification of Defence witnesses.¹⁰

6. The Defence submits that the *Nzabonimana* Decision improves the level of protection for Defence witnesses and shows that Ngirabatware is treated differently than Nzabonimana with a similar bench, without justification.¹¹ The Defence submits that the right of the Accused to a fair trial and full equality of arms pursuant to Article 20 of the Statute is violated by this unequal treatment.¹²

7. Finally, it notes that the Chamber seized of the *Nyiramasuhuko et al.* case granted reconsideration of an order denying protective measures where the Defence provided further information after the original decision.¹³

Prosecution Response

8. The Prosecution submits that the Motion should fail as it is frivolous, vexatious and has no basis in law and the Defence has not shown exceptional circumstances warranting reconsideration.¹⁴

9. The Prosecution notes that the Defence fails to clarify what grounds of reconsideration it relies on. As it has neither raised a new fact nor shown a material change in circumstance, the Defence may be positing that the original decision was erroneous or constituted an abuse of power resulting in an injustice.¹⁵ However, that there is no basis for reconsideration.¹⁶

10. The Prosecution states that the Defence failed to show how the Decision was erroneous, and observes that the Chamber cited and analyzed relevant authorities before denying the relief sought by the Defence.¹⁷ The Chamber held that protective measures are granted on a case-by-case basis, meaning that decisions granting similar relief do not necessarily imply that such relief is to be granted in the present case.¹⁸

¹⁰ Motion, para. 12, referring to *The Prosecutor v. Callixte Nzabonimana*, Case No. 98-44D-T, Decision on Urgent Motion for Protective Measures, Article 19, 20 and 21 of the Statute and Article 54, 69, 73 and 75 of the Rules, 18 February 2010 ("*Nzabonimana* Decision"), para. (g) of the Orders.

¹¹ Motion, paras. 15, 17.

¹² *Id.*, paras 16-17.

¹³ *Id.*, para. 18, citing *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, 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 17 June 2005, 4 July 2005.

¹⁴ Response, para. 6.

¹⁵ *Id.*, para. 9.

¹⁶ *Id.*, para. 10.

¹⁷ *Id.*, para. 11, citing Decision, para. 27.

¹⁸ Response, para. 12, citing Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others, 6 May 2009, para. 15, and *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, Decision on Defence Motion for Protective Measures, 25 February 2009.

11. The Prosecution alleges that the Defence seeks to mislead the Chamber by citing Decisions in other cases, as the relief sought by the Defence was not granted, or even sought for, in some of these cases.¹⁹

12. The Defence has not alleged an abuse of power that resulted in injustice and that there is thus no basis for the Defence to seek reconsideration.²⁰ In any event, the Prosecution considers that there is no basis to infer bias or an abuse of power, as the Chamber has had regard to the equality of arms principle as shown for instance by paragraph 25 of the Decision.²¹

13. The Prosecution further asserts that Judges sitting on one Bench as well as another need not issue identical decisions in different cases.²² Therefore, the fact two of the three Judges sitting in the present case also sit on the Bench of the *Nzabonimana* case has no relevance here.²³

14. Moreover, the Prosecution underscores that the circumstances in *Nzabonimana* were different. The Prosecution in that case had not objected to a protective measure similar to the one sought by the Defence here. The Chamber therefore had no reason to consider competing arguments regarding the provision of that protective measure, unlike in this case, where the Prosecution has objected to the protective measure at issue.²⁴ The Defence, on the other hand, has not objected to similar protective measures requested by the Prosecution in this case.²⁵

15. The Prosecution states that no authority in the jurisprudence of the Tribunal implies that the exact same protective measures must be granted to both parties, and reiterates that protective measures are awarded on a case-by-case basis.²⁶

Defence Reply

16. The Defence clarifies that the Chamber's Decision constitutes an abuse of power that results in an injustice, as it led to a difference in treatment between the Prosecution and the Defence, as well as between Ngirabatware and Nzabonimana.²⁷ It further considers that the *Nzabonimana* Decision constitutes a material change of circumstances providing a clear illustration of differential treatment causing serious prejudice to the Accused.²⁸

¹⁹ Response, para. 13.

²⁰ *Id.*, para. 15.

²¹ *Id.*, para. 16.

²² *Id.*, para. 18.

²³ *Id.*, paras. 17-18.

²⁴ *Id.*, paras. 19-20, referring to referring to Prosecutor's Response to the Defence Urgent Motion for Witness Protective Measures, 18 December 2009, paras 13-14.

²⁵ Response, para. 22, referring to Prosecution's Extremely Urgent Motion for Special Protective Measures for Prosecution Witnesses and Others, filed 25 April 2009, para. 24 (i), which included a protective measure identical to the one requested by the Defence in paragraph 10 (ix) of its Motion of 9 February.

²⁶ Response, para. 21.

²⁷ Reply, para. 14, referring to *Nzabonimana* Decision.

²⁸ *Id.*, para. 15.

17. The Defence affirms that contrary to the Prosecution's allegations, it cited various cases to demonstrate that the Tribunal favors identical protective measures for the Defence and the Prosecution with regard to trial fairness.²⁹

18. The Defence also underlines that the Prosecution is considered a single entity at the Tribunal. As the Prosecution which recognized the protective measures in the *Nzabonimana* case is the same as here, the Defence considers the situations in both cases the same. It concludes that both cases cannot warrant differential treatment.³⁰

19. The Defence also submits that it agreed to the special measures requested by the Prosecution under the provision that the same conditions apply to Defence witnesses.³¹

20. By claiming the right to a privileged treatment, the Prosecution is insinuating that its witnesses are more vulnerable than the Defence witnesses or that the Defence might be unable to ensure that witness protected information is not disclosed to an unauthorized person.³² It recalls the importance of control over witness information, as that may determine a witness's willingness to testify.³³

DELIBERATIONS

21. The Chamber recalls the Tribunal's jurisprudence on reconsideration:³⁴

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.³⁵

22. Reconsideration is permissible when: (1) a new fact has been discovered that was not known to the Chamber at the time it made its original decision; (2) there has been a material change in circumstances since it made its original decision; or (3) there is reason

²⁹ *Id.*, paras. 16-18.

³⁰ *Id.*, para. 20.

³¹ *Id.*, paras. 25-26, quoting Defence Response to the Prosecutor's Extremely Urgent Motion for Special Protective Measures for Prosecution Witnesses and Others, 29 April 2009, para. 12.

³² Reply., para. 9.

³³ *Id.*, para. 28.

³⁴ See, *inter alia*, *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for Reconsideration of the "Decision on Ntahobali's Motion for Separate Trial" (TC), 22 February 2005, para. 17; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Second Motion for Reconsideration of the Trial Chamber's "Decision on Prosecution Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E)" (TC), 14 July 2004, para. 7; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecution Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E)" (TC), 15 June 2004, ("*Bagosora et al.* Decision of 15 June 2004") para. 7.

³⁵ *Bagosora et al.* Decision of 15 June 2004, para. 7.

to believe that its original decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice.³⁶ The Chamber recalls that the burden rests upon the party seeking reconsideration to demonstrate the existence of sufficiently special circumstances.³⁷

23. With respect to the alleged difference of treatment between Ngirabatware and Nzabonimana, the Chamber does not consider the two situations comparable. The Prosecution in the *Nzabonimana* Decision did not object to the protective measures requested by the Defence, including the request that the Prosecution identify all team members who have access to the witness information (similar to the request of the Defence in this case).³⁸ In the present case, the Prosecution had presented and substantiated its objections to such a measure.³⁹ The Chamber recalls that witness protection measures are determined on a case-by-case basis.⁴⁰ As the situations in both cases differed, the Defence errs in considering that both situations had to be treated identically. The fact that the Bench in both cases was comprised of two of the same Judges cannot have any relevance regarding the decision of the Tribunal in the present case.

24. The Defence also argues that the Accused has been deprived of his right to full equality of arms, as the Defence has to provide a written list of persons having access to identifying information.⁴¹ The Chamber recalls that equality of arms does not necessarily imply that both Parties are treated identically, but that it “obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case”.⁴² The Defence failed to substantiate how it would have been put at a disadvantage by the Chamber’s Decision.

25. The Defence has therefore failed to substantiate a material change of circumstances or an abuse of power resulting in an injustice.

**FOR THE ABOVE REASONS, THE TRIBUNAL
DENIES the Motion.**

³⁶ *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion for Reconsideration of Decision on Joseph Nzirorera’s Motion for Inspection: Michel Bagaragaza (TC), 29 September 2008 (“*Karemera et al.* Decision”), para. 4; see also *Bagosora et al.* Decision of 15 June 2004, para. 9.

³⁷ *Karemera et al.* Decision, para. 4.

³⁸ *Id.* para. 20 (g).

³⁹ Decision, para. 13, referring to the “Prosecutor’s Response to the Defence Urgent Motion for Witness Protective Measures”, filed on 18 December 2009.

⁴⁰ *Id.*, para. 17.

⁴¹ Motion, para. 7.

⁴² *The Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 (AC), para. 69, citing *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, 15 July 1999, Appeal Judgment, para. 48.

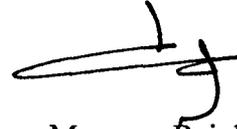
Arusha, 31 March 2010



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

