



**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

Original: English

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Decision of: 13 November 2001

The PROSECUTOR

v.

Pauline NYIRAMASUHUKO et al., Case No. ICTR-97-21-T

Elie NDAYAMBAJE, Case No. ICTR-96-8-T

Joseph KANAYABASHI, Case No. ICTR-96-15-T

**DECISION ON DEFENCE MOTIONS BY NYIRAMASUHUKO,
NDAYAMBAJE AND KANYABASHI ON, *INTER ALIA*, FULL DISCLOSURE
OF UNREDACTED PROSECUTION WITNESS STATEMENTS**

The Office of the Prosecutor:

Silvana Arbia
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Nicole Bergevin
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Counsel for Ndayambaje:

Pierre Boulé
Isabelle Lavoie

Counsel for Kanyabashi

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

SITTING as Trial Chamber II, composed of Judges William H. Sekule, Presiding, Winston C. Matanzima Maqutu and Arlette Ramaroson (the “Chamber”);

BEING SEIZED of:

- (i) the “Requête d’extrême urgence de Pauline Nyiramasuhuko aux fins d’Ordonner au procureur de divulguer l’identité et les déclarations non caviardées des témoins à charge et de sanction à l’endroit du Procureur” filed by Counsel for Nyiramasuhuko on 30 October 2001;
- (ii) the “Requête en extrême urgence afin d’obtenir la comparution du Chef de service de protection des témoins, la divulgation immédiate de la preuve et une sanction contre le Procureur” filed by Counsel for Ndayambaje on 30 October 2001;
- (iii) the “Requête en extrême urgence de Joseph Kanyabashi visant à obtenir la divulgation des noms, des fiches d’identification et des déclarations non caviardées de tous les témoins” filed by Counsel for Kanaybashi on 1 November 2001;
- (iv) the “Prosecutor’s Response to Extremely Urgent Motion of Nyiramasuhuko, Ndayambaje and Kanayabashi regarding disclosure” filed on 1 November 2001;

NOTING the Report on the Status of Protective Measures for the Witnesses in the Butare, Case ICTR-98-42-T, by the Chief of the Witness and Victims Support Section-Prosecutor (WVSS-P), filed on 1 November 2001 upon the Chamber’s Request;

HAVING heard the Parties and the Chief of WVSS-P on 2 November 2001;

CONSIDERING the Statute of the Tribunal (the “Statute”), and the Rules of Procedure and Evidence (the “Rules”), specifically Articles 19 and 20 of the Statute and Rules 66, 69 and 75 of the Rules;

SUBMISSIONS OF THE PARTIES

The Defence

1. Counsel for Nyiramasuhuko argue *inter alia* that the Chamber should order the Prosecutor to disclose the identity and the non redacted statements of Prosecution witnesses and should sanction the Prosecutor for not having done so in a timely manner pursuant to Rules 73, 54, and 46 of the Rules.
2. The Defence for Nyiramasuhuko and Ndayambaje recall that on 8 June 2001 the Chamber rendered a Decision in which it ordered the Prosecutor to communicate to the Defence, within five days, the identity and all non-redacted statements of the witnesses that she intended to call to testify, subject to witness protection provisions articulated by decisions of this Chamber.

3. The Defence recalls that by an “Internal Memorandum” addressed to the Chamber and the Parties, dated 13 June 2001 – that is, five days after the Chamber’s Decision of 8 June 2001- Mr Vahidy, Chief of the WVSS-P, indicated that, while he had been informed of the names of 103 witnesses for the trial, he had received from the Prosecutor’s Office the names, addresses, and other particulars of only 18 of said witnesses. Accordingly, there were no protection measures yet in place for the remaining 85 witnesses. He further stated that his section would need two to three months, from the date that identifying and pertinent information is provided by the Prosecutor to put into place adequate witness protection measures. Nonetheless, by a further Memorandum of 29 June 2001, Mr Vahidy, informed the Chamber that he had received the names and addresses of all the witnesses (103) and that his section needed a minimum of 60 days to complete the witness protection process.
4. The Defence notes however that on 22 October 2001, the Prosecutor indicated her inability to comply with the said Decision of 8 June 2001 because of the significant number of witnesses who require protection and because of the lack of WVSS personnel. The Prosecution disclosed the names and addresses of these witnesses to the WVSS on 17 June 2001 only. Counsel for Ndayambaje alleges that the lack of diligence in implementing the Orders suggests a possible might conspiracy between the Prosecutor and the WVSS.
5. The Defence finally submits that the Chamber should order the WVSS to immediately apply protective measures for the aforesaid witnesses to enable the Prosecution to provide the said disclosure before the end of the present trial session, failure of which, pursuant to Rule 46 of the Rules, the Chamber could sanction Counsel for the Prosecution and limit the number of Prosecution witnesses to those who will be protected by 22 November 2001.
6. Counsel for Kanyabashi joined the above mentioned prayers by Counsel for Nyiramasuhuko and Counsel for Ndayambaje to obtain as rapidly as possible the complete disclosure of the names, identifying information and non-redacted statements of the witnesses no later than 22 November 2001. In essence, Counsel for Nteziryayo, Ntahobali and Nsabimana orally joined the above mentioned pleadings.

The Prosecutor’s Reply

7. The Prosecutor argues that the Defence Motions are a disguised attempt to appeal the 8 June 2001 Decision and submits that she has complied with the said Order and has acted in good faith to find a solution to the present difficulties. The Prosecutor indicated that, as of 2 November 2001, 24 statements had been disclosed to the Defence.
8. The Prosecutor further notes that the WVSS is an organ of the Registry and, accordingly, that she has no control over implementation of the protective measures by the WVSS, as ordered by the Chamber in its Decision of 8 June 2001. Indeed, by 17 June 2001, the Prosecutor had forwarded to the WVSS the names and addresses of the 103 witnesses she intended to call to testify. Therefore, “the Prosecutor simply cannot give any undertaking to any Counsel as

to when the process to implement protective measures will be completed as it is not in her power to influence the decision”. The Prosecutor states that in normal circumstances and by now all the protective measures ought to have been put in place. Considering that such is not the case, the Prosecutor prayed the Chamber to order a timetable for the WVSS to implement the witness protection measures required.

9. Thus, the Prosecutor rejects the Defence allegations as to the prejudice suffered by lack of timely disclosure, stating that Counsel had not specified “any grounds for such an assertion”, and requests the Chamber to warn Counsel for Ndayambaje for making serious allegations against the Prosecutor.

The Witness and Victims Support Section’s Submissions

10. By memorandum filed on 1 November 2001, the WVSS indicates that as of 18 October 2001, protective measures were implemented for the 18 witnesses “that were scheduled to appear in the current session of the Butare Trial from 22 October to 22 November 2001” and that the Section had requested the Prosecution to provide the “tentative order of appearance of witnesses so that the work of putting protective measures in place for the remaining 85 witnesses” could be accomplished.
11. The WVSS also referred to its other commitments to apply protective measures for witnesses appearing in other trials. The Chief of the WVSS that with “the most effective utilisation of the existing resources”, protective measures for 20 to 25 witnesses could be put in place every month and be completed by no later than the end of February 2002.

HAVING DELIBERATED;

12. The Chamber recalls that the acute issue of full disclosure of witness statements pursuant to Rule 66(A)(ii) of the Rules has been raised on numerous occasions since the scheduling of the “Butare Trial” this year. Following its 8 June 2001 “Decision on the Full Disclosure of the Identity and Unredacted Statements of the Protected Witnesses”, the Chamber stressed “the binding nature of the Decisions and Orders”. Moreover, the Chamber has requested the Parties to act diligently in the interest of justice and collaborate to resolve any issue at stake. Having heard the Parties, the Chamber strongly reiterates this request to all concerned Officers of the Court, in light of the seriousness of these proceedings.
13. The Chamber recalls its “Harmonisation Decision” of 8 June 2001, in which it established a deadline for disclosure as 30 days prior to trial in respect of all witnesses which the Prosecutor intends to call to testify, subject to the enforcement of protection measures by the WVSS. The Chamber further ordered the Prosecution to communicate to the Defence, within two days from confirmation of enforcement of the protection measures by the WVSS, the unredacted statements and identity of the witnesses as yet undisclosed. Finally, the Chamber ordered that, if witnesses were not yet under the protection of the Tribunal, the WVSS “shall take all necessary steps so as to provide these witnesses, as soon as possible, with adequate protection, and immediately notify

the Chamber and the parties of such steps” so that full disclosure with respect to the corresponding witnesses should be completed within two days.

14. The Chamber reiterated the specific disclosure measures and corresponding orders in its the 25 September 2001 “Decision on the Prosecutor’s Motion for, *inter alia*, modification of the Decision of 8 June 2001”. In this Decision, the Chamber also dismissed the Prosecutor’s request for modification of this specific order. The Chamber notably indicated that “the Prosecutor is thus ordered to disclose these elements to the defence upon confirmation of the enforcement of the protective measure by the WVSS”.
15. On 24 and 25 October 2001, the Chamber reiterated, on the one hand the necessity to respect the orders for protective measures for concerned witnesses and, on the other hand, the Prosecutor’s duty to complete full disclosure to the Defence, as soon as these protective measures are implemented.
16. In essence, the Chamber specifically emphasises that the disclosure of witness statements pursuant to Rule 66 (A)(ii) is intended to assist the Defence in its understanding of the case, in accordance with the accused’s rights under Articles 20 and 21 of the Statute. Disclosure should thus be provided to the Defence in advance of trial so to allow sufficient time for the preparation of their case and conduct the investigations deemed necessary.
17. Having weighed the statutory rights of the Accused to prepare their defence in sufficient time prior to trial on balance with the orders for protective measures, which are granted in exceptional circumstances, the Chamber finds the explanation for lack of timely disclosure to be unacceptable and therefore grants the Defence Motions for full disclosure of Prosecution witness statements as specified in the present Decision. In that respect the Chamber recalls its Orders of 8 June 2001:

“(B) The Parties to thereupon disclose to the other parties, within 2 days from the confirmation, in the report, of the enforcement of the protection measures, the unredacted statements and identity of the concerned witnesses as yet undisclosed;

(C) The Victims and Witnesses Support Unit, should the report show that some witnesses have no yet been placed under the protection of the Tribunal, **to take all necessary steps so as to provide these witnesses, as soon as possible, with adequate protection, and to immediately notify the Chamber and the Parties of such steps**, when taken;”(Emphasis added)

18. In view of the extended delay and the practical logistics in implementing protective measures for the remaining Prosecution witnesses in the “Butare cases”, the Chamber orders that protective measures for all remaining witnesses be established as soon as possible and, at the latest, by 29 January 2002 and further orders that the Prosecutor fully disclose all remaining witness statements to the Defence by Thursday, 31 January 2002.

FOR THE ABOVE REASONS, THE TRIBUNAL:

GRANTS the Defence Motions on full disclosure of the prosecution witness statements;

DISMISSES the Defence Motions in all other respects;

DISMISSES the Prosecutor's Request for a warning to Counsel;

REQUESTS the Parties to fully co-operate as Officers of the Court in the interest of justice;

ORDERS, pursuant to Rule 54 of the Rules and the Chamber's Decision of 8 June 2001:

- (1) the Witness and Victims Support Section to provide the necessary protective measures for all remaining Prosecution witnesses still unprotected as soon as possible, and, in any event, at the latest by 29 January 2002, and to provide the Chamber with information on a monthly basis of the measures implemented;
- (2) the Prosecution to fully disclose to all six Accused pursuant to Rule 66(A)(ii) the identity and the unredacted statements of all the witnesses she intends to call to testify at trial as soon as the protective measures are implemented on a continuous basis and, in any event, at the latest by Thursday 31 January 2002.

Arusha, 13 November 2001

William H. Sekule
Presiding Judge

Winston C. Matanzima Maqutu
Judge

Arlette Ramarason
Judge

(Seal of the Tribunal)