

ICTR-98-42-T

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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 Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 8 March 2002

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The PROSECUTOR v. Joseph KANYABASHI
Case No. ICTR-96-15-T

The PROSECUTOR v. Alphonse NTEZIRYAYO
Case No. ICTR-97-29-T

(Case No. ICTR-98-42-T)

**DECISION ON DEFENCE MOTIONS FOR *INTER ALIA* DISCLOSURE OF
INFORMATION ON THE COVERSHEETS OF PROSECUTION WITNESS
STATEMENTS**

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

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

BEING SEIZED OF (i) The "Requête en déclaration de nullité de production de moyens de preuve du Procureur et en préservation des droits de l'accusé Alphonse Nteziryayo,"¹ filed on 30 January 2002 ("Nteziyayo's Motion");

(ii) The "Requête de Joseph Kanyabashi afin que le Procureur lui communique des renseignements de la fiche d'identification des témoins, et en précision ou révision partielle de la décision rendue le 25 Septembre 2001,"² with three sets of documents under seal (pièces R1, R2 et R3) filed on 18 February 2002 ("Kanyabashi's Motion");

CONSIDERING (i) The "Prosecutor's Reply to Kanyabashi's Motion for Information on Cover Sheets of Witnesses and to Clarify or Partially Revise the Decision of 25 September 2001," filed on 21 February 2002;

(ii) Kanyabashi's "Réplique de Joseph Kanyabashi à la "Prosecutor's Reply to Kanyabashi's Motion for Information on Cover Sheets of Witnesses and to Clarify or Partially Revise the Decision of 25 September 2001," filed on 26 February 2002;

(iii) The "Prosecutor's Response to Nteziryayo's Motion on Disclosure," filed on 4 February 2002;

(iv) The "Réponse à la réplique du procureur sur la requête en nullité de production soumise par le sieur Alphonse Nteziryayo, »"³ filed on 6 March 2002.

CONSIDERING the Statute and the Rules of Procedure and Evidence (the "Rules"), specifically Rules 66(A) (ii), 69 and 75 of the Rules;

NOW DECIDES the Motions on the basis of the written briefs pursuant to Rule 73 (A) of the Rules;

¹ Unofficial translation of the title of Nteziryayo's Motion: "Defence Motion to Declare Null and Void the Disclosure of Evidence by the Prosecution and for the Protection of Nteziryayo's Rights."

² Unofficial translation of the title of Kanyabashi's Motion: "Motion for the Prosecution to Disclose Information from Witness Identity Documents and for Clarification or Partial Revision of the Decision Rendered on 25 September 2001."

³ Unofficial translation of the title "Response to the Prosecutor's Reply to Nteziryayo's Motion to declare Null and Void the Disclosure of Evidence".

SUBMISSIONS OF THE PARTIES

The Defence

1. Both Counsel for Nteziryayo and Kanyabashi argue that the Prosecution redacts in a semi-systematic manner certain information from the identifying coversheets of the witness statements, whereas it should normally disclose, as provided in the designated spaces on the coversheets, the following:
 - a) present occupation of the witness;
 - b) father's name and mother's name;
 - c) civil status: married, single, widowed, name of spouse;
 - d) past residence outside of Rwanda: period of time, country, reasons, comments;
 - e) membership in a social association or political party, name, office, and period of time;
 - f) name and address of a contact, friend, relative or other.

The Defence for Nteziryayo

2. The Defence argues that the Prosecution has violated its obligations relating to the disclosure of Prosecution witness statements and maintains that all statements disclosed should be declared null and void for having violated the Tribunal's Orders for disclosure and the provisions of Rule 66(A) (ii) and Article 20 of the Statute.
3. The Defence recalls that, for the security of the witnesses, the Tribunal has ordered that the place of the interrogation and the actual address of the witness should not be disclosed.
4. The Defence further argues that the Accused needs adequate time to know the Prosecutor's witnesses and to objectively assess their credibility and the facts invoked by them.

The Defence for Kanyabashi

5. The Defence provides witness statements for Witnesses QBM and QBQ, in French and in English showing that the aforementioned information is available but is redacted.
6. The Defence recalls that on 8 June 2001, in its "Decision on the Full Disclosure of the Identity and Unredacted Statements of the Protected Witnesses", the Chamber ordered the Prosecution to immediately disclose to the Defence of all the Accused, all unredacted witness statements with such information as the name(s) of the witness, his or her date and place of birth, his or her religion, nationality and ethnic origin, his or her residence and profession at the time of the events about which he



or she is to testify, the languages spoken and written by him or her and the signature of the witness.

7. Thus, the Defence argues that the Chamber has not limited disclosure to the enumerated information insofar as the Chamber uses the words "information such as" in its Decision.
8. The Defence further indicates that on 8 June 2001⁴, Judge Güney ruled that the Prosecution communicate to the Defence information about the circumstances of the questioning concerning each of the statements of the witnesses that the Prosecution intends to call, insofar as the information is available and notably: (i) the name of the investigators and interpreters at the interview, (ii) the place, (iii) the date that the statement was taken, as well as (iv) the language or languages used during the interview [...].
9. The "Decision on the Prosecutor's Motion For, *Inter Alia*, Modification of the Decision of 8 June 2001," (25 September 2001) shed important light on the letter and the spirit of the 8 June 2001 Decisions, according to the Defence. In paragraph 22 of the 25 September 2001 Decision, the Chamber granted the Prosecution's Motion for non-disclosure of the place where the statement was taken, on the basis that this place is often the residence of the witness or is located close to that residence.
10. The Defence understands from these three decisions that the Chamber intended to compel the Prosecution to disclose all information contained in the identification documents except for information that could reveal the present location of the witness.
11. Therefore, the Defence requests the Chamber to order the Prosecution to disclose all information listed on the identification document, with the exception of the present residence, pursuant to the spirit of the Decision of 25 September 2001.

Request for Clarification or Partial Revision of the Decision of 25 September 2001

12. Pursuant to Rule 75 (A) of the Rules, the Defence for Kanyabashi also requests the Chamber to clarify or to revise part of its 25 September 2001 Decision, in light of a new fact concerning the Prosecution's allegation that the interviews often took place at the residence of the witness or somewhere near the residence.
13. The Defence maintains that the Chamber's authorisation for non disclosure was based on questionable assertions made by the Prosecution and that there is need for the Defence to know the place where the statement was given. Furthermore, it cannot be presumed that the witness presently resides in the same place, given the

⁴ "Decision On the Extremely Urgent Defence Motion for the Prosecution to respect the "Decision On the Defence Motion for Disclosure of Evidence Rendered on 1 November 2000""



lapse of time between the time when the statements were given and the time when they were disclosed.

14. The Defence further submits that this information may be disclosed without providing the present address of the witness and that, in cases where the statement was taken at the home of the witness, it would be sufficient to indicate merely that the statement was taken at the witness's residence.
15. The Defence requests that the Prosecution be ordered to disclose to the Defence within five days of the decision all information contained on the witness's identification document, with the exception of the witness's present address; to clarify or revise the 25 September 2001 Decision in regard to the place where each statement was taken; to order the Prosecution to disclose to the Defence within five days of the decision the place where the statement was taken for each witness without specifying the present address of the witness if the witness still resides at the place where the statement was taken.

The Reply by the Prosecution

16. The Prosecution recalls that the Defence has already moved for disclosure of all information contained on the coversheets to the witness statements but that in its first Decision, dated 8 June 2001, the Chamber granted disclosure of only ten items of information.
17. The Prosecution indicates that said Defence Motions implicitly included requests for: names of the witness' parents, marital status, residence outside Rwanda, present job, political or other organisational affiliation, the name and contact information for a person or family member. The Prosecution maintains that the Chamber did not grant disclosure of this information sought by the Defence.
18. On 8 June 2001, Judge Güney granted disclosure of two additional items of information on the coversheets: dates of the statements and languages used during the taking of the statements (Order VII of the Motion). On 25 September 2001, the Chamber granted disclosure of two additional items of information: names of the investigators and names of the interpreters.
19. Consequently, the Prosecution submits that the Motion should be dismissed insofar as it is an inadmissible attempt to re-open and re-litigate the Tribunal's Decisions on disclosure of certain portions of the coversheets of the witness statements, and, as such, it is a disguised appeal of the three aforementioned *res judicata* Decisions.

The Reply by the Defence for Kanyabashi and Nteziryayo

20. The Defence replies that, contrary to the Prosecutor's assertion, it is not attempting to re-open or appeal in a disguised manner a litigated issue. The Defence recalls as the legal basis for its Motion Rule 66 (A) (ii) on the disclosure obligation and Rule



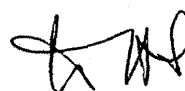
75 on the protective measures for witnesses, which are consistent with the rights of the Accused.

21. The Defence for Kanyabashi and Nteziryayo maintain that the three aforementioned Decisions bind the Prosecution to disclose all information contained in the witness statements, whereas the 25 September 2001 Decision exceptionally authorised non disclosure of the place where said statement was taken.
22. The Defence for Nteziryayo alleges that the aforementioned Orders are not exhaustive and do not limit the disclosure obligation to specific items. Counsel further submits that the Prosecution has not demonstrated that the said available items of information could jeopardise the security of its witnesses whereas they are relevant to the exercise of the Accused's rights.
23. Finally, the Defence for Kanyabashi argues that, if its interpretation of the three decisions on disclosure is correct, then the Motion should be granted. However, if the Chamber has not yet ruled on the disclosure of these precise elements, the Defence argues that the motion is justified and may not, in any event, be considered as a disguised appeal.

HAVING DELIBERATED,

24. The Chamber notes that the Defence is not satisfied with the information provided on the witness statement coversheets as disclosed by the Prosecution and requests more information.
25. The Chamber further notes that the Defence for Nteziryayo requests the Chamber to declare null and void the disclosure made by the Prosecution on the basis that the coversheets on witness statements violate Rule 66 (A) (ii) and Article 20 of the Statute. The Chamber also observes that the Defence for Kanyabashi requests clarification or revision of the 25 September 2001 Decision.
26. The Chamber recalls its specific rulings in the "Butare Cases" on three occasions regarding the scope of information on the coversheets of Prosecution witness statements to be disclosed to the Defence.
27. On 8 June 2001,⁵ the Trial Chamber in the "Butare Cases" ordered disclosure of certain items of information on the basis that "the Defence should have access to a sufficient amount of identifying information in order to prepare for cross-examination and, notably make prior investigations in respect of the witnesses to appear against the Accused."(para. 28 of the Decision)


⁵ Decision on the full Disclosure of the Identity and Unredacted Statements of the Protected Witnesses, The Prosecutor v. Pauline Nyiramasuhuko & Arsène Shalom Ntahobali (Case No. ICTR-97-21-T), Sylvain Nsabimana & Alphonse Nteziryayo (Case No. ICTR-97-29-T), Joseph Kanyabashi (Case No. ICTR-96-15-T) and Élie Ndayambaje (Case No. ICTR-96-8-T), 8 June 2001.



28. The Chamber then ruled that there be disclosure to the Defence of specific information such as the name(s) of the witness, his or her date and place of birth, his or her religion, nationality and ethnic origin, his or her residence and profession at the time of the events he or she is to testify on, the languages spoken and written by him or her and the signature of the witness.
29. The Chamber recalls its holding in the aforementioned Decision that the present address of the witness should not be disclosed. In addition, whereas information such as the identity of the witness' father and mother, marital status, former residence outside Rwanda, current profession, membership in an association or a political party and the name of a contact person was requested by the Defence, the Chamber did not order disclosure of those items (See, *inter alia*, the "Requête en extrême urgence visant à obtenir l'identité complète des témoins que le Procureur entend appeler à la barre de même que les renseignements portant sur les circonstances de ces déclarations" filed by Counsel for Kanyabashi on 7 May 2001).
30. On 8 June 2001⁶, Judge Güney, acting as a single Judge on behalf of Trial Chamber II in the Prosecutor v. Nyiramasuhuko granted disclosure of four specific additional elements of information on the witness statement coversheets: (1) the name of the investigator and the interpreter having conducted the interview, (2) the place where the statement was taken and (3) the date(s) of the statement(s), and, (4) the language(s) used during the taking of the statement. Judge Güney also ordered the Prosecutor to seek leave for non disclosure of the aforementioned information on providing the Chamber with justification for non-disclosure.
31. On 25 September 2001⁷, the Trial Chamber in the "Butare Cases" granted non-disclosure of the place of the interview, on the basis of the Prosecution's argument that the interview often takes place at the residence of the concerned witness or at a nearby location.
32. The Chamber notes that the Defence for Kanyabashi requests revision or clarification of the said Decision pursuant to Rule 75 (A) of the Rules, which addresses *inter alia* the power of the Chamber to order appropriate measures to safeguard the security of witnesses, provided that those measures are consistent with the rights of the accused. The Chamber recalls that, pursuant to Rule 69 (A), the Chamber may order the non disclosure of the identity of a witness "until the Chamber decides otherwise." Accordingly, the Chamber may assess changes of situation in respect of orders for non disclosure of the identity of a witness. In the

⁶ "Décision relative à la requête de la défense en extrême urgence tenant au respect, par le procureur, de la «decision relative à la requête de la défense en communication de preuves» rendue le 1er novembre 2000", Le Procureur c. Pauline Nyiramasuhuko (Case No. ICTR-97-21-T), 8 Juin 2001.

⁷ "Decision on the Prosecutor's Motion for, *inter alia*, modification of the Decision of 8 June 2001", The Prosecutor v. Pauline Nyiramasuhuko & Arsène Shalom Ntahobali (Case No. ICTR-97-21-T), Sylvain Nsabimana & Alphonse Nteziryayo (Case No. ICTR-97-29-T), Joseph Kanyabashi (Case No. ICTR-96-15-T) and Élie Ndayambaje (Case No. ICTR-96-8-T), 25 September 2001.



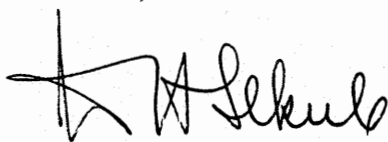
instant case, the Chamber sees no reason to revisit or clarify the aforementioned Decision.

33. The Chamber further finds that, pursuant to Article 25 of the Statute, Rule 120 of the Rules and criteria for review in the Appeals Chamber Decision of 31 March 2000 in the case of *Barayagwiza v. Prosecutor*⁸ only a final judgement which terminates the proceedings may be subject to review. Consequently, insofar as the Decision of 25 September 2001 is interlocutory, there is no legal basis to request review of the aforementioned Decision.
34. Recalling the Decisions of 8 June 2001 and 25 September 2001 concerning the list of specific items of information to be disclosed by the Prosecution, the Chamber finds that the scope of disclosure on the coversheets of the Prosecution witness statements has been adjudicated. The Chamber ordered that specific information be disclosed on the said coversheets: the name(s) of the witness, his or her date and place of birth, his or her religion, nationality and ethnic origin, his or her residence and profession at the time of the events about which he or she is to testify, the languages spoken and written by him or her, the signature of the witness, the name of the investigator and the interpreter having conducted the interview, the date(s) of the statement(s), and, the language(s) used when the statement was taken. Conversely, the Chamber's orders thereby excluded any other information requested. Furthermore, the Chamber is not convinced by the Defence's arguments requesting disclosure of additional information on the coversheets of the Prosecution witness statements.
35. The Chamber further finds that the Prosecution has not violated its disclosure obligation pursuant to Rule 66(A)(ii) of the Rules with respect to the disclosure of the coversheets of the witness statements. Therefore, the Chamber holds that the disclosure of witness statements cannot be declared null and void.

FOR THE AFOREMENTIONED REASONS, THE TRIBUNAL,

DISMISSES the Defence Motions.

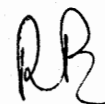
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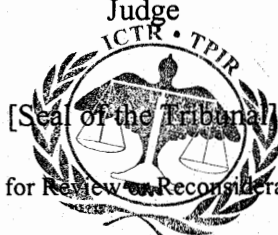
William H. Sekule
Presiding Judge



Winston C. Matanzima Maqutu
Judge



Arlette Ramarosan
Judge



⁸ "Decision on the Prosecutor's Request for Review and Reconsideration", Case No. ICTR-97-19-AR72