

ICTR-98-42-T
11-6-2002
(6792-6788)

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Mwamba



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: 11 June 2002

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

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

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

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

**DECISION ON DEFENCE MOTIONS TO *INTER ALIA* ORDER THE
PROSECUTOR AND THE RWANDAN GOVERNMENT TO OBTAIN
STATEMENTS AND TO SUSPEND THE HEARING OF DETAINED
WITNESSES**

The Office of the Prosecutor
Silvana Arbia
Japhet Mono
Jonathan Moses
Adesola Adeboyejo
Gregory Townsend
Manuel Bouwknecht

Counsel for Kanyabashi
Michel Marchand
Michel Boyer
Counsel for Nyiramasuhuko
Nicole Bergevin
Guy Poupart
Counsel for Ntahobali
Duncan Mwanyumba
Normand Marquis
Counsel for Nteziryayo
Titinga F. Pacere
Richard Perras

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

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

BEING SEIZED OF

- i) The "Requête en extrême urgence de Joseph Kanyabashi afin d'exclure de la preuve tout témoignage des témoins annoncés par le procureur qui sont détenus par les autorités du Rwanda"¹ filed on 20 February 2002 ("Kanyabashi's Motion");
- ii) The "Requête en extrême urgence de Arsène Shalom Ntahobali et Pauline Nyiramasuhuko en exclusion de preuve"² filed on 1 March 2002 ("Ntahobali's & Nyiramasuhuko's Motion");
- iii) The "Requête en extrême urgence d'Alphonse Nteziryayo afin d'exclure de la preuve tout témoin détenu par les autorités rwandaises"³ filed on 4 March 2002 ("Nteziryayo's Motion");

CONSIDERING

- i) The "Prosecutor's Response to Kanyabashi's Motion to Exclude the Testimony of Detained Witnesses" filed on 25 February 2002;
- ii) The "Réplique à la Prosecutor's Response to Kanyabashi's Motion to Exclude the Testimony of Detained Witnesses" filed on 27 February 2002;
- iii) The "Prosecutor's Response to Kanyabashi's *Réplique* on the Motion to Exclude the Testimony of Detained Witnesses" filed on 28 February 2002;
- iv) The "Réplique de Joseph Kanyabashi à la Prosecutor's Response to Kanyabashi's *Réplique* on the Motion to Exclude the Testimony of Detained Witnesses" filed on 5 March 2002;
- v) The "Prosecutor's Response to Kanyabashi's Second *Réplique* on the Motion to Exclude the Testimony of Detained Witnesses" filed on 6 March 2002;
- vi) The "Prosecutor's Response to Nteziryayo's Extremely Urgent Motion to Exclude the Testimony of Detained Witnesses" filed on 5 March 2002 and translated into French on 30 May 2002;
- viii) The "Prosecutor's Response to Nyiramasuhuko's and Ntahobali's Joint Motion to Exclude the Testimony of Detained Witnesses" filed on 5 March 2002 and translated into French on 28 May 2002;

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

¹ "Kanyabashi's Extremely Urgent Motion to Exclude the Testimony of Prosecution Witnesses Detained by the Rwandan Authorities" (Unofficial translation).

² "Ntahobali and Nyiramasuhuko's Extremely Urgent Motion to Exclude Evidence" (Unofficial translation).

³ "Nteziryayo's Extremely Urgent Motion to Exclude the Testimony of All Prosecution Witnesses Detained by the Rwandan Authorities" (Unofficial translation).

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

SUBMISSIONS OF THE PARTIES

The Defence

1. The Defence for Kanyabashi recalls that on 15 November 2001 this Chamber articulated in its "Decision on the Defence Motions Seeking Documents in Relation to Detained Witnesses or Leave of the Chamber to Contact Protected Detained Witnesses" the following principle:

"Should any statement [...] pertaining to these judicial proceedings come into the custody or control of the Prosecution, the statements should be disclosed to the Defence pursuant to Rule 66(A) (ii)";

2. Counsel for Kanyabashi also states that the Chamber affirmed that this disclosure was valid for all of the Accused and ruled that the Prosecution was responsible for obtaining from the Rwandan authorities and communicating to the Defence the said documents.

3. The Defence for Kanyabashi recalls that, on 3 December 2001, the Prosecution indicated having fulfilled its obligations pursuant to the Decision of 15 November 2001 and that on 4 and 8 February 2002, the Prosecution reiterated this position in writing.

4. Nonetheless, the Defence for Kanyabashi submits that the Prosecutor's obligations are not limited simply to writing a letter to the Rwandan authorities. Accordingly, the Defence submits that, after receiving notice of the Rwandan authorities' refusal, the Prosecution should have filed a motion to request the Rwandan State to fully co-operate and to order communication of the relevant documents.

5. The Defence recalls that in the *Prosecutor v. Blaskic*, Case No-IT-95-14-AR, Decision of 29 October 1997, the ICTY Appeals Chamber addressed the scope of the Chamber's power, pursuant to the provisions of the Statute and the Rules, regarding the obligations of States to co-operate. In the instant case, the Defence argues that the Prosecutor has not used all means to ensure the right of the Accused to a fair trial pursuant to Article 19(1) of the Statute and Rule 82(A) of the Rules.

6. In addition to the submissions made by Counsel for Kanyabashi, Counsel for Nteziryayo submits that it is impossible for the Trial Chamber to assess the credibility of detained witnesses if the prior statements of the aforementioned witnesses are not obtained from the Rwandan authorities.

7. Counsel for Nyiramasuhuko and Ntahobali submit that their right to cross-examination is violated because the Prosecutor did not make all efforts to obtain the aforementioned witness statements.

8. Accordingly, the Defence for Kanyabashi, Nteziryayo, Nyiramasuhuko and Ntahobali request the Chamber to exclude testimonial evidence of the witnesses detained by the Rwandan authorities, namely: FAC, FAM, FAR, FAT, QAH, QCB, FAB, FAD, FAG, FAH, FAI, FAK, FAL, FAN, FAO, FAQ, FAS, FAJ, FAW, QAF, QAG, QBU, QBV, QBY, QBZ, RV, TQ, QBX.

The Prosecution's Responses

9. The Prosecution argues that it does not have the power to order the Rwandan government to communicate the documents sought and that it cannot disclose documents which are not in its possession.

10. The Prosecution argues that there is no basis for criticism of its efforts to comply with the Decision of 15 November 2001. The Prosecution further draws the Chamber's attention to the fact that, prior to the Order of 15 November 2001, it had already sought the said documents and had obtained some statements, which were disclosed to the Defence.

11. In response to Counsel for Nteziryayo, the Prosecution argues that the submission that it will be impossible for the Trial Chamber to assess the credibility of the detained witnesses is incorrect.

12. The Prosecution submits that the statements to investigators of the Tribunal and the testimony of the detained witnesses will provide the Trial Chamber with ample information on which to assess the credibility of the witnesses.

13. The Prosecution posits that witnesses, whether or not detained, may have made oral or written statements to third parties, which are not in its possession, or within the knowledge of the Prosecution. The Prosecution further argues that this possible situation does not prevent the Defence from cross-examining these detained witnesses and any court from properly assessing the credibility of these witnesses, within the meaning of the Statute and Rules.

14. The Prosecution therefore prays the Chamber to deny the Motions by Kanyabashi, Nteziryayo, Nyiramasuhuko and Ntahobali to exclude the testimony of the detained witnesses.

HAVING DELIBERATED,

15. The Chamber notes that the Defence for Kanyabashi, Nteziryayo, Nyiramasuhuko and Ntahobali raise issues similar to those raised by Counsel for Ndayambaje in its

Motion filed on 17 January 2002, concerning the receipt of statements of detained witnesses from Rwandan authorities.

16. Ndayambaje's Motion was decided by the Chamber on 6 March 2002, subsequent to the filing of the present Motions under consideration. In the "Decision on Ndayambaje's Motion to, *inter alia*, Order the Prosecutor and the Rwandan Government to Obtain Statements and to Suspend Hearing of Detained Witnesses", the Chamber ordered the following (par.17):

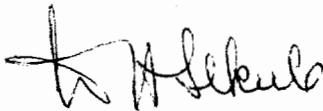
As regards the Defence request to deny the Prosecutor authorization to call the Detained witnesses until the Rwandan government has fulfilled its duty to cooperate and the Prosecutor has communicated the statements to the Defence, the Chamber notes that the said witnesses are competent to testify before the Tribunal and as provided for under Rule 90(A) of the Rules *inter alia*, "[w]itnesses shall, in principle, be heard directly by the Chambers." The Chamber is aware that, some statements could be used pursuant to Rule 90(G) of the Rules for matters affecting the credibility of the witness. Notwithstanding, the Chamber considers that this possible eventuality shall not preclude it from hearing the witnesses that are competent to testify before the Tribunal. On these grounds, the Chamber denies the Defence request.

17. In the instant case, considering that the issues raised by the Defence for Kanyabashi, Nteziryayo and Nyiramasuhuko and Ntahobali have already been adjudicated in the aforementioned Decision concerning the same Detained witnesses, the Chamber denies the Motions.

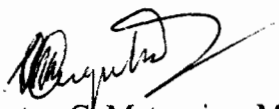
FOR THE ABOVE REASONS, THE TRIAL CHAMBER,

DENIES the Motions by the Defence.

Arusha, 11 June 2002



William H. Sekule
Presiding Judge



Winston C. Matanzima Maqutu




Arlette Ramaroson
Judge