



ICTR-96-15-T
23-11-2004
(1437 — 1433)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr. Adama Dieng

Date: 23 November 2004

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The Prosecutor
v.
Joseph KANYABASHI
Case No. ICTR-96-15-T
(Joint Case No. ICTR-98-42-T)

**DECISION ON JOSEPH KANYABASHI'S REQUEST TO MEET SW AND FAT AND
ALL OTHER PERSONS WHOSE IDENTITIES WERE NOT DISCLOSED TO THE
DEFENCE**

Office of the Prosecutor

Ms Silvana Arbia
Ms Adelaide Whest
Ms Adesola Adeboyejo
Ms Althea Alexis
Mr Michael Adenuga
Mr Astoo Mbow

Counsel for Kanyabashi

Mr Michel Marchand
Ms Simone Santere
Ms Julie Veillette

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

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Arlette Ramaroson and Solomy Balungi Bossa, (the "Chamber");

BEING SEIZED of the "*Requête demandant l'autorisation de rencontrer les témoins SW et FAT ainsi que tout autre témoin dont l'identité n'a pas été communiquée à la Défense,*" filed on 10 September 2004;

CONSIDERING the "Prosecutor's Reply to Kanyabashi's *Requête demandant l'autorisation de rencontrer les témoins SW et FAT ainsi que tout autre témoin dont l'identité n'a pas été communiquée à la Défense,*" filed on 15 September 2004 (the "Prosecution Response") **AND** the "*Réplique à la Réponse du Procureur concernant la Requête demandant l'autorisation de rencontrer les témoins SW et FAT ainsi que tout autre témoin dont l'identité n'a pas été communiquée à la Défense,*" filed on 21 September 2004 (the "Defence Reply");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rules 69 and 75 of the Rules;

NOW DECIDES the Motion solely on the basis of the written briefs filed by the Parties pursuant to Rule 73(A) of the Rules.

Defence Submissions

1. The Defence recalls the various orders for the protection of witnesses¹ and the Chamber's Decision of 30 March 2004, in which it granted the Prosecutor's Motion to *inter alia* drop 30 witnesses from its witness list, including witnesses SW and FAT.² The Defence recalls that in that Decision, the Chamber indicated that regarding the request submitted by Counsel for Kanyabashi to meet freely with those witnesses, the Defence should submit the issue in a separate and timely motion.

2. The Defence submits that since Witnesses SW and FAT give favourable accounts about the Accused, it requests the Chamber's authorisation to meet the said witnesses in the absence of the Prosecution.

3. The Defence further submits that, since the Chamber has issued a number of Decisions³ ordering the Prosecution to disclose to the Defence the identities of protected victims and witnesses, in a spirit of collaboration, the Defence wrote to the Prosecution indicating that it interprets the said orders to be to the effect that the Defence has a right to

¹ *Prosecutor v. Kanyabashi* (ICTR-96-15-T) Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses, 6 March 1997 – Measure 7 (the "Kanyabashi Decision of 6 March 1997"); *Prosecutor v. Nyiramasuhuko et al* (ICTR-98-42-T) Decision on the Prosecutor's Allegations of Contempt, the Harmonisation of the Witness Protection Measures and Warning to the Prosecutor's Counsel, 10 July 2001 (the Order for Harmonisation of 10 July 2001");

² *Prosecutor v. Nyiramasuhuko et al* (ICTR-98-42-T) Decision on Prosecutor's Motion to Drop and Add Witnesses, 30 March 2004

³ See the Kanyabashi Decision of 6 March 1997; *Prosecutor v. Nyiramasuhuko et. al.* (Joint Case Number ICTR-98-42-T) Decision on the Full Disclosure of the Identity and Unredacted Statements of the Protected Witnesses, 8 June 2001 (the "Decision on Full Disclosure of Statements of 8 June 2001") and Decision on Defence Motions in Nyiramasuhuko, Ndayambaje and Kanyabashi on, *inter alia*, Full Disclosure of Unredacted Prosecution Witness Statements, 13 November 2001 (the "Decision on Full Disclosure of statements of 13 November 2001")

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meet, in the absence of the Prosecution, any person whose identity has not been disclosed as being a witness for the Prosecution at the time the Defence seeks to meet with that person. The Defence submits that because the Prosecution did not agree with this Defence interpretation, it has impeded the Defence in the preparation of its case.

4. Furthermore, the Defence argues that the Order for Harmonization of 10 July 2001, clearly provides for the contact of any Prosecution witnesses or their close family members and children. The Defence argues that the Chamber decided to apply this order to protected witnesses and victims and not to potential witnesses. Accordingly, the Defence submits that it can meet any witnesses other than those described in this order.

Prosecution Submissions

5. The Prosecution submits that it does not object to the Defence request to interview SW and FAT, provided that the Defence obtains consent to do so from the Trial Chamber and the aforementioned persons and also provided that the Defence is ordered not to reveal the identities of SW and FAT to third parties as envisioned in the Chamber's Order for Harmonization of 10 July 2001.⁴

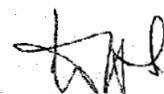
6. The Prosecution submits that a request by the Defence to meet every person whose identity has not yet been disclosed to the Defence as being a protected witness or member of the family of the protected witness such as the father, mother, spouse(s) and children is unreasonable as it is too vague and too wide because if the Chamber consents to such a request it would amount to the Chamber authorising the Defence to meet and interview the protected witnesses of the Prosecution even in cases where the protected witnesses were not on the Prosecutor's witness list for the Butare case.

7. The Prosecution submits that were the Chamber to be inclined to authorise the Defence's request of meeting every person whose identity has not yet been disclosed to the Defence as being a protected witness or member of the family of the protected witness such as the father, mother, spouse(s) and children, the Prosecution prays the Chamber to direct the Defence to make a list of the said persons so that the Prosecution may verify whether or not those persons and their families are not on any other protected list in other cases before the Tribunal. If the Prosecution were to find that those persons and their family members listed by the Defence were on a list of protected witnesses in cases before the Tribunal, then the Chamber would need to order the Defence to be bound by the Tribunal's orders for the protection of said witnesses. (emphasis theirs)

Defence Reply

8. In its Reply, the Defence notes that the Prosecution does not object to it meeting SW and FAT in the absence of the Prosecution. The Defence undertakes to respect the protection orders made with respect to Prosecution Witnesses.

9. The Defence objects to the Prosecution's submissions that the Defence request to meet every person whose identity has not yet been disclosed to the Defence as being a protected witness or member of the family of the protected witness such as the father, mother, spouse(s) and children is unreasonable as it is too vague and too wide. The Defence reminds



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the Chamber of the provisions of Rule 69 that orders for the protection of witnesses are made in exceptional circumstances and that disclosure of the identities of protected witnesses should be made in reasonable time to allow Parties to prepare their case.

10. The Defence argues that the Prosecution, in the present case, has the right of delayed disclosure of the identities of the witnesses it intends to call in this case. It nonetheless argues that the Prosecution does not have this right against other persons that the Defence may wish to meet. Accordingly, the Defence submits that, it is unjust and contrary to its rights to equality of arms for the Prosecution to demand that the Defence disclose to the Prosecution a list of all the persons it wishes to contact, particularly as the Prosecution never disclosed to the Defence the identities of the persons it contacted when it was preparing the case against the Accused.

HAVING DELIBERATED

On the Request to Meet SW and FAT

11. The Chamber recalls the Order for Harmonization of 10 July 2001 which provides;

That contact or communication with either Prosecution or Defence protected victims or witnesses or their close family members, that is to say, the witness' father, mother, spouse(s) and children, is subject to a written request to the Trial Chamber or a Judge thereof, on reasonable notice to either the Prosecution or the concerned Defence. If leave is granted, and with the consent of the concerned protected person or his or her parents or guardian if that person is under the age of 18, the party on behalf of which the victim or witness would testify at trial shall undertake the necessary arrangements to facilitate such contact.

12. The Chamber notes that the Prosecution does not object to the Defence request to meet SW and FAT in the absence of the Prosecution. The Chamber further notes the Defence's undertaking to respect the orders for protection of witnesses and specifically the Order for Harmonization of 10 July 2001.

13. Accordingly, the Chamber grants the Defence request and authorises it to meet SW and FAT in the absence of the Prosecution provided SW and FAT, agree to such a meeting. The Chamber further directs the Prosecution to make the necessary arrangements to facilitate the contact of SW and FAT by the Defence.

On the Request for the Chamber to Make a Declaration

14. The Chamber has taken due consideration of the submissions of both Parties with regard to the Defence's second request for it to declare that, in accordance with the orders relating to prosecution witnesses, the Defence has the right to meet, without advising the Prosecutor, any person whose identity has not been disclosed as being a witness for the Prosecution at the time the Defence seeks to meet with that person.

15. The Chamber is of the opinion that this request is not sufficiently elaborated upon by the Defence therefore, it is unable to make a determination as to whether it may make the declaration requested in the Motion. Accordingly this Defence request is denied.

FOR THE ABOVE REASONS, THE TRIBUNAL

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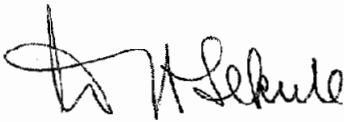
GRANTS the Defence request and authorises it to meet with SW and FAT in the absence of the Prosecution provided that;

1. The Defence abides by its undertaking to respect the orders for protection of witnesses and specifically the Order for Harmonization of 10 July 2001; and
2. The said SW and FAT, agree to such a meeting;

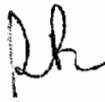
DIRECTS the Prosecution to make the necessary arrangements to facilitate the contact of SW and FAT by the Defence;

DENIES the Defence Motion in all other respects.

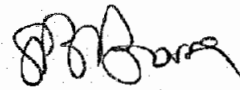
Arusha, 23 November 2004



William H. Sekule
Judge



Arlette Ramaroson
Judge



Solomy Balungi Bossa
Judge

(Seal of the Tribunal)