



ICTR-98-42-T  
04-02-2005  
(11264 — 11260)

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 Ramarason  
Judge Solomy Balungi Bossa

Registrar: Mr. Adama Dieng

Date: 4 February 2005

The PROSECUTOR v. Élie NDAYAMBAJE  
(Case No. ICTR-96-8-T)  
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. Sylvain NSABIMANA & Alphonse NTEZIRYAYO  
(Case No. ICTR-97-29-T)  
Joint Case No. ICTR-98-42-T

**DECISION ON PROSECUTOR'S MOTION FOR CERTIFICATION TO APPEAL THE DECISION  
OF THE TRIAL CHAMBER DATED 30 NOVEMBER 2004 ON THE PROSECUTION MOTION FOR  
DISCLOSURE OF EVIDENCE OF THE DEFENCE**

**Office of the Prosecutor**

Sylvana Arbia  
Adelaide Whest  
Adesola Adeboyejo  
Holo Makwaia  
Althea Alexis  
Michael Adenuga  
Cheikh T. Mara, Legal Adviser  
Astou Mbow, Case Manager

**Defense Counsel for Ndayambaje**

Pierre Boulé  
Claude Desrochers

**Defense Counsel for Kanyabashi**

Michel Marchand  
Simone Santerre

**Defense Counsel for nyiramasuhuko**

Nicole Bergevin  
Guy Pourpart

**Defense Counsel for Ntahobali**

Duncan Mwanyumba  
Normand Marquis

**Defense Counsel for Nsabimana**

Josette Kadji  
Charles Patié Tchacounté

**Defense Counsel for Nteziryayo**

Titinga Frédéric 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 Arlette Ramaroson and Judge Solomy Balungi Bossa (the “Chamber”);

**BEING SEIZED** of the “Prosecutor’s Motion for Certification to Appeal the Decision of the Trial Chamber Dated 30 November 2004 on the Prosecution Motion for the Disclosure of Evidence” filed on 7 December 2004 (the “Motion”);

**CONSIDERING** the

- (i) “*Réponse à la Requête du Procureur intitulée* “Prosecutor’s Motion for Certification to Appeal the Decision of the Trial Chamber Dated 30 November 2004 on the Prosecution Motion for the Disclosure of Evidence”” filed by Kanyabashi on 13 December 2004 (“Kanyabashi’s Response”);
- (ii) “*Réponse de Sylvain Nsabimana à la Requête du Procureur en certification d’appel de la Décision de la Chambre II datée du 30 Novembre 2004*” filed by Nsabimana on 15 December 2004 (“Nsabimana’s Response”);
- (iii) “Prosecutor’s Reply to Defence Responses on Motion for Certification to Appeal the Decision of the Trial Chamber Dated 30 November 2004 on the Prosecution Motion for the Disclosure of Evidence for the Defence” filed on 20 December 2004 (the “Prosecutor’s Reply”)

**NOTING** the Chamber’s “Decision on the Prosecutor’s Motion for Disclosure of Evidence for the Defence and Harmonization of Protective Measures for Victims and Witnesses” of 30 November 2004 (the “Impugned Decision”);

**CONSIDERING** the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”) in particular Rules 69, 73 and 75 of the Rules;

**CONSIDERING** that pursuant to Rule 73(A) of the Rules, the Motion will be decided on the basis of the written briefs only, as filed by the Parties.

**SUBMISSIONS OF THE PARTIES**

*The Prosecutor’s Submissions*

1. The Prosecutor moves under Rule 73(B) for certification to appeal the Impugned Decision arguing that it involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

2. The Prosecution submits that it would be in the interests of judicial economy and for a smooth, fair and expeditious trial if the timeframes for disclosure of the identities of Defence witnesses would be modified to be 21 days before the commencement of the Defence case or any timeframe prior to the commencement of the Defence case rather than 21 days before the witness testifies. The Prosecution argues that because each trial session would involve the calling of various witnesses and because the Prosecution team would be fully engaged, it would not have adequate time and facilities to prepare for cross-examination. The Prosecution further argues that if disclosure of the identities of Defence witnesses is made before the Defence case, it would prevent a stalemate, incessant adjournments and a delay in

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the proceedings in the instances where particular witnesses are delayed because of illness, indisposition, unwillingness or reluctance to testify or unavailability.

*Kanyabashi's Response*

3. The Defence for Kanyabashi objects to the Motion on the basis that it does not meet the conditions required for certification under Rule 73(B) as it was filed outside of the timeframes prescribed under the Rule.

4. Alternatively, the Defence argues that in its Motion, the Prosecution pleads fresh facts that were not invoked before the Chamber rendered the Impugned Decision. Moreover, the Defence argues that in its response to Nyiramasuhuko's Motion for Protective Measures, the Prosecution had requested that disclosures of the identities of witnesses be made at least 21 days before testimony. Consequently, the Prosecution cannot be heard to ask that the disclosure deadline be changed after having requested it. Finally, the Defence argues that the 18 October 2004 Oral Ruling is in conformity with previous Decisions on harmonization of protective measures rendered by the Chamber.

*Nsabimana's Response*

5. The Defence for Nsabimana submits that the Motion must fail because it does not meet the criteria that would amount to an exception that would warrant certification rather the Motion amounts to a review of the Impugned Decision. Moreover, if the Chamber awaits the Appeals Chamber ruling, it would delay the trial against the Accused who has been in detention since July 1997.

6. The Defence further submits that the issue canvassed in the Motion was already decided upon on 18 October 2004 and that the Prosecution was reminded of this fact in the Impugned Decision. In rendering the Impugned Decision, the Chamber had considered the Parties' arguments before reaching the conclusion that there was no fresh circumstance that would warrant a revision of its Oral Ruling of 18 October 2004.

7. The Defence argues that reversing the Impugned Decision would adversely affect the preparation of the Defence, particularly as it would not have had the time to diligently disclose the said identities before commencement of the Defence case on 31 January 2005.

*Prosecution's Reply to Kanyabashi and Nsabimana*

8. The Prosecution submits that the Defence of Kanyabashi is mistaken in arguing that the instant Motion is filed out of time because it was filed within the prescribed seven day timeframe for filing Motions under Rule 73(B). The Prosecution further argues that contrary to the Defence arguments, it has a right to submit fresh facts in support of its Motion in order to assist the Chamber in its consideration of the matters before it.

9. In reply to Nsabimana's submissions, the Prosecution argues that in the Motion that gave rise to the Impugned Decision, it had requested a review of the Chamber's Oral Ruling of 18 October 2004 and that in the instant Motion, it has satisfied the certification criteria. Contrary to the Defence arguments, the Prosecution argues that the requests will not violate the rights of the Defence since the Defence was directed in the Chamber's Oral Ruling of 18 October to file their Pre-Defence Briefs before the commencement of the Defence case and

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therefore, the Defence could similarly file the identities of their witnesses before the commencement of the Defence case.

### **HAVING DELIBERATED**

10. The Chamber recalls Rule 73 (B), which stipulates:

Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the Decision involves an issue that would significantly affect the fair and expeditious conduct of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

11. The Chamber notes that decisions rendered under Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for the very limited circumstances stipulated in Rule 73 (B). The Chamber may grant certification to appeal if both conditions of Rule 73 (B) are satisfied. Under the first limb of Rule 73(B), the applicant must show how an appellate review would significantly affect (a) a fair and expeditious conduct of the proceeding, or (b) the outcome of the trial. This condition is not determined on the merits of the appeal. Second, the applicant has the burden of convincing the Chamber that an "immediate resolution by the Appeals Chamber may materially advance the proceedings". Both of these conditions require a specific demonstration, and are not met through a general reference to the submissions on which the Impugned Decision was rendered.<sup>1</sup>

12. Having reviewed the submissions of the Parties, the Chamber is of the opinion that in its Motion, the Prosecution generally revisited the thrust of its previous arguments which led to the Impugned Decision rather than demonstrating the conditions required for the Chamber to grant certification to appeal the Impugned Decision. The Prosecution has therefore failed to satisfy the criteria for the grant of certification under Rule 73(B).

13. The Chamber further notes that the Prosecution observed in their Reply that "[t]he purport of their motion was not to re-litigate issues already decided upon but to assert that the Trial Chamber's 18 October ruling gave the parties a window of opportunity to raise related disclosure issues subsequently for review and this is the opportunity the Prosecution is raising to have these disclosure dates harmonized."<sup>2</sup> The Chamber finds that this Prosecution observation cannot be entertained as a subject matter for motions brought under Rule 73(B). In any case, the Chamber notes that, as it indicated on 18 October 2004,<sup>3</sup> the decision that the Defence discloses the identities of its witnesses to the Prosecution at least 21 days before they testify is a direction, which the Chamber may revisit on application from the Prosecution or any party after a showing of good cause.

<sup>1</sup> *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Defence Motion for Certification to Appeal the "Decision on Defence Motion for a Stay of Proceedings and Abuse of Process", 19 March 2004 paras. 12 – 16; *Prosecutor v. Ntahobali and Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 18 March 2004, paras. 14 – 17.

<sup>2</sup> See Reply at para. 15

<sup>3</sup> T. 18 October 2004 pg. 20

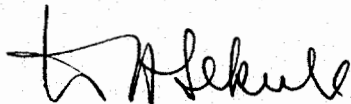
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14. Accordingly, the Chamber denies the Prosecution Motion for certification to appeal the Decision of the Trial Chamber Dated 30 November 2004 on the Prosecution Motion for the Disclosure of Evidence for the Defence.

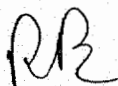
**FOR THE ABOVE REASONS, THE TRIBUNAL,**

**DENIES** the Motion.

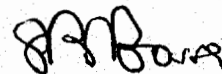
Arusha, 4 February 2005



William H. Sekule  
Presiding Judge



Arlette Ramarosan  
Judge



Solomy Balungi Bossa  
Judge

