



UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

11278  
Mwanja

OR: ENG

TRIAL CHAMBER II

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

ICTR-98-42-T

18 - 02 - 2005

Registrar: Mr Adama Dieng

(11278 - 11272)

Date: 18 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 THE PROSECUTOR'S MOTION FOR EXCLUSION OF WITNESSES  
WHOSE IDENTITIES HAVE BEEN DISCLOSED OUT OF TIME PURSUANT TO RULES  
54, 73, 73ter AND THE CHAMBER'S ORDER OF 18 OCTOBER 2004**

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JUDICIAL RECORDS/ARCHIVES  
ICTR

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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 SEISED** of the “Prosecutor’s Motion for Exclusion of Witnesses Whose Identity Has Been Disclosed Out of Time Pursuant to Rules 54, 73, 73ter and TC II’s Order of 18<sup>th</sup> October 2004” filed on 28 January 2005 (the “Motion”);

**CONSIDERING** the “*Réponse de Pauline Nyiramasuhuko à la “Prosecutor’s Motion for Exclusion of Witnesses whose Identity has been Disclosed Out of Time Pursuant to Rules 54, 73, 73ter and TC II’s Order of 18<sup>th</sup> October 2004”*” filed on 31 January 2005 (“Nyiramasuhuko’s Response”);

**NOTING** the Chamber’s Oral Ruling of 18 October 2004<sup>1</sup> that the Defence teams were ordered to:

- (A) File their Pre-Defence Briefs under the terms of Rule 73ter by 31 December 2004; and
- (B) In a bid to harmonize the time-frames within which each Defence team is to disclose to the Prosecution the full identities of the witnesses they intend to call to testify, the Defence should, for the meantime, make the required disclosures to the Prosecution at least twenty-one (21) days before the witness is called to testify.

**CONSIDERING** the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”) in particular Rules 54, 73 and 73ter of the Rules;

**NOW DECIDES** the Motion pursuant to Rule 73(A) on the basis of the written submissions filed by the Parties.

**SUBMISSIONS OF THE PARTIES**

*Submissions of the Prosecution*

1. The Prosecution submits that despite the Chamber’s Oral Ruling of 18 October 2004 requiring the Defence to disclose to the Prosecution the identities of its witnesses at least 21 days before testimony, the Defence for Nyiramasuhuko has failed to do so.

2. The Prosecution submits that the majority of the 21 witnesses that Nyiramasuhuko intends to call between 31 January and 18 February 2005 do not meet the 21 day disclosure order. The Prosecution submits that disclosure was made as follows:

- (A) On 11 January 2005, the identity of Witnesses WFGS and WMCZ was disclosed for the first time;
- (B) On 12 January 2005, the identity of Witness CHD was disclosed for the first time;
- (C) On 19 January 2005, the identity of Witnesses, CEM, LHC, MNW, WHNC, WKKTD, WKNNC1, WTMP, WZJM and WZNJC was disclosed for the first time;<sup>2</sup>

<sup>1</sup> T. of 18 October 2004 (TC) pg. 20

- (D) On 25 January 2005, the identity of Witnesses WBKPP, KNNC1, WKNK1, WKNN1, WNKPP, WTRT, WZAN, WZMR and WZNA was disclosed for the first time. The Defence also disclosed the will-say statement of WBND for the first time and for the second time, it disclosed the identity of Witness CHD.

3. Apart from three witnesses - WFGS, WMCZ and CHD - who meet the 21 day disclosure deadline, the rest of the witnesses may only testify from the weeks starting 8 and 14 February 2005 respectively.

4. The Prosecution brings to the attention of the Chamber that from a correspondence dated 27 January 2005, the Defence for Nyiramasuhuko continues to modify the order of appearance of its witnesses. Furthermore, in violation of its obligations under Rule 73ter(b), (c) and (d), the Defence of Nyiramasuhuko has indicated in its Pre-Defence Brief that it cannot provide summaries of the intended testimonies of Witnesses BH, BK, BN, DN, NEM, WBKP, WBNC, WBNM, WBND, WBNM, WBUC, WFMG, WHNC, WJN, WLMF and WLNA's testimonies for fear of compromising their identities. The Prosecution argues that since the Defence has disclosed "will-say" statements for Witnesses WBND and WHNC, the Defence should be equally capable of disclosing summaries of said witnesses' proposed testimonies without compromising their identity.

5. The Prosecution submits that due to the late disclosure to the Prosecution of the identities of Defence witnesses, the Prosecution has been deprived of adequate time to undertake investigations on the witnesses' antecedents thereby causing prejudice to the Prosecution who will be unable to conduct an effective cross-examination. The Prosecution relies on the jurisprudence of the Tribunal in the cases of *Nyiramasuhuko et al*<sup>3</sup> and *Bagilishema*.<sup>4</sup>

6. The Prosecution submits that it will suffer prejudice if the Defence is allowed to call witnesses who do not meet the 21 day disclosure requirement. The Prosecution therefore moves the Chamber to exclude from giving evidence the witnesses whose identities were disclosed for the first time on 19, 25 and 27 January 2005 or in the alternative, that they should only be allowed to testify from 8 and 14 February 2005 respectively, when they meet the 21 day requirement.

#### *Nyiramasuhuko's Response*

7. The Defence opposes the Prosecution submission that apart from three witnesses (i.e., Witnesses WFGS, WMCZ and CHD who are the first, second and twelfth witnesses intended to be called to testify) the disclosure of the identities of all the other witnesses was made late. The Defence submits that the Prosecution has failed to indicate that the Defence had personally disclosed to Ms. Silvana Arbia, Senior Trial Attorney in charge of the case, the identity of four of its other witnesses – MNW, WHCN, WKKTD and WTMP – on 14 January

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<sup>2</sup> The identity of Witnesses WFGS and WMCZ was disclosed for the second time on 19 January 2005.

<sup>3</sup> *Prosecutor v Nyiramasuhuko et al*, Decision on the Prosecutor's Motion to Stay Disclosure until Protection Measures Are Put in Place, (TC), 27 March 2002; *prosecutor v. Nyiramasuhuko et al.*, *Decision on Defence Motions by Nyiramasuhuko, Ndayambaje and Kanyabashi on inter alia, Full Disclosure of Unredacted Witness Statements*, (TC) of 13 November 2001 at para. 16.

<sup>4</sup> *Prosecutor v. Bagilishema*, Oral Decision found in transcript of 25 January 2000 (TC) at pg. 13

2005. For this reason, the Defence submits that these four witnesses may be called to testify as from Thursday 3 January 2005 [sic]<sup>5</sup>.

8. Regarding the other Defence Witnesses whose identities were disclosed on 18 January 2005 – CEM, LHC, WBNC, WZJM and WZNJC – the Defence argues that the said witnesses may be called to testify as from the week commencing on 7 February 2005.

9. Regarding the ten witnesses whose identities were disclosed on 24 January 2005 - Witnesses WBKPP, KNNC1, WKNK1, WKNN1, WNKPP, WTRT, WZAN, WZMR and WZNA and the will say of WBND. The identity of CHD was also disclosed for the second time on this date - the Defence agrees with the Prosecution that this batch of witnesses may only testify as from the week commencing on 14 January 2005 [sic]<sup>6</sup> – the Monday of the third week of the trial session. With regard to Witness WTBE whose identity was disclosed on 26 January 2005, the Defence notes that this witness may testify as from 15 January 2005 [sic]<sup>7</sup> – the Tuesday of the third week of the trial session.

10. The Defence submits therefore that it continues to respect the Chamber's order for disclosure of the identities of its witnesses.

11. With regard to the Prosecution contention that the Defence continues to modify the order of calling its witnesses, the Defence submits that this modification was necessary following information it received from the Witnesses and Victims Support Section (the "WVSS") about witnesses' availability.

12. With regard to the issue of disclosure of summaries of the testimonies of Defence Witnesses WHNC, WBNC and WBND, the Defence submits that they were disclosed to the Prosecution on 18, 19 and 24 January respectively. The Defence adds that it continues to disclose summaries of testimonies and that it shall make such disclosure at least 21 days before the said witnesses testify.

13. With regard to those witnesses whose summaries have not been provided for reasons outlined in its Pre-Defence Brief, the Defence submits that it maintains its reasons and that in any case, it shall disclose summaries at least 21 days before the respective witnesses testify.

14. In conclusion, the Defence requests the Chamber's indulgence in the event certain delays are occasioned when the WVSS encounters difficulties or in other instances when these are caused by the health of witnesses.

15. For all these reasons, the Defence requests that the Chamber reject the Motion.

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<sup>5</sup> In its Response, the Defence mistakenly referred to 3 January 2005 when it should correctly be 3 February 2005.

<sup>6</sup> In its Response, the Defence mistakenly referred to 14 January 2005 when it should correctly be 14 February 2005.

<sup>7</sup> In its Response, the Defence mistakenly referred to 15 January 2005 when it should correctly be 15 February 2005.

## DELIBERATIONS

16. The Chamber notes that the Motion raises two specific issues, that of disclosure of the identities of witnesses and that of disclosure of the summary of the testimony of witnesses. The Chamber shall address both these issues hereunder.

(A) On the Issue of Disclosure of the Identities of Witnesses

17. The Chamber observes that, knowing that the trial was scheduled to commence on 31 January 2005, the Prosecution expected the Defence for Nyiramasuhuko to have disclosed to the Prosecution the full identities of the witnesses it intended to call during this session at least 21 days before the testimonies of said witnesses thereby allowing it enough time to conduct investigations and to prepare cross-examination.

18. The Chamber further notes that the Defence for Nyiramasuhuko submits that it had disclosed the identities of its first and second witnesses – WFGS and WMCZ - to be called to testify on 11 January 2005, thereby allowing it to call the said witnesses according to schedule. With regard to the other witnesses scheduled to appear between 31 January and 19 February 2005, the Chamber notes that the Defence for Nyiramasuhuko submits that it disclosed the identity of Witness CHD on 12 January 2005; of a second batch of witnesses on 14 January 2005 (Witnesses, MNW, WHCN, WKKTD and WTMP ); a third batch on 18 January 2005 (Witnesses CEM, LHC, WBNC, WZJM and WZNJC) and a fourth batch on 24 January 2005 (Witnesses WBKPP, KNNC1, WKNK1, WKNN1, WNKPP, WTRT, WZAN, WZMR and WZNA and the will say of WBND). The Chamber further notes that it is the Defence submission that most of these witnesses may be called to testify by the second and third weeks of February 2005. The Chamber observes that the Defence has been disclosing the identity of its witnesses at different times, in a rolling system.

19. On this issue, the Chamber recalls its Oral Ruling of 18 October 2004<sup>8</sup> where, in a bid to harmonize the disclosure deadlines of the identities of Defence witnesses, the Chamber ordered disclosure of the identities of all Defence witnesses 21 days before the testimonies of witnesses. Therefore, any witness called to testify must have had his/her full identity disclosed to the Prosecution at least 21 days before he/she is called to testify.

20. The Chamber notes that the Prosecution requests the exclusion of the witnesses who are called to testify in breach of the 21 day disclosure deadline or, in the alternative, that said witnesses be called at the stage when the 21 day disclosure deadline is met. The Chamber further notes the Prosecution argument that if witnesses are called to testify without having met the 21 day disclosure deadline, this would cause prejudice to the Prosecution who would not have had adequate time to conduct investigations and to prepare cross-examination of the concerned witnesses.

21. Regarding the Prosecutions request to exclude witnesses whose identities were not disclosed within the 21 day disclosure deadline, the Chamber finds this request to be theoretical, at this stage, because, as submitted by the Defence, the first and second witnesses heard have met the 21 day disclosure deadline before being called upon to testify. In the Chamber's opinion, the Prosecution request for exclusion of witnesses is unjustified particularly as it does not indicate which witnesses have not met the 21 day disclosure

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<sup>8</sup> T. 18 October 2004 p 20

deadline. The Chamber considers that the Defence's purported failure to fulfil its disclosure obligation, as submitted by the Prosecution without specifics, does not warrant the exclusion of witnesses at this stage. Accordingly, the Chamber denies the Prosecution request to exclude Defence witnesses.

22. Regarding the alternative prayer of the Prosecution that a witness should be called only at the time when he/she has met the 21 day disclosure deadline, the Chamber finds this Prosecution request to be premature at this stage. Given that all Parties are aware of the Chamber's Oral Ruling of 18 October and that the Defence has submitted that its witnesses will meet the 21 day disclosure deadline when called as scheduled, the Chamber accordingly denies this Prosecution request because it is moot.

23. Nonetheless, the Chamber wishes to underscore that it expects Counsel to act diligently when disclosing identities of witnesses so that the Trial is conducted in a smooth manner. Recalling its Oral Ruling of 18 October 2004, the Chamber urges Defence Counsel not to be too rigid on the 21 day timeframe but to disclose the identities of a larger number of witnesses at a time so that if a witness becomes unavailable at any given time, the Defence should be in a position to present another witness, who has met the 21 day disclosure deadline.

(B) On the Disclosure of Summaries of Anticipated Witness Testimonies

24. The Chamber notes the Prosecution submission that the Defence of Nyiramasuhuko has not disclosed a number of summaries of the anticipated testimonies of their witnesses thereby violating the Chamber's Order, Rule 73ter(b), (c) and (d) and prejudicing the Prosecution.

25. At the outset, the Chamber reminds the Defence of its obligations under Rule 73ter (B)(iii)(b) requiring the Defence to disclose in its Pre-Defence Brief, "a summary of the facts on which each witness will testify," and the order of the Chamber in its Oral Ruling of 18 October 2004 that all the Defence teams are obliged to file a Pre-Defence Brief by 31 December 2004.

26. Given the provisions of Rule 73ter and the Chamber's Oral Ruling of 18 October 2004, the Defence was obliged to file its Pre-Defence Brief containing all the requirements under Rule 73ter by 31 December 2004. The Chamber emphasizes that the requirement to disclose a summary of the facts on which each witness will testify upon is different from the requirement to disclose the identities of a witness: Disclosure of witness summaries ought to have been made by 31 December 2004, whereas disclosure of witness' identifying information should be made at least 21 days before testimony of a witness.

27. The Chamber underscores that it should be possible for parties to provide an intelligible summary of a witness' anticipated testimony without compromising his/her identity. Nonetheless, the Chamber notes that if the Defence encountered any impediment in complying with its obligations under Rule 73ter and the Chamber's Oral Ruling of 18 October 2004, the Defence was required to make an appropriate and prompt application to the Chamber. In this connection, the Chamber notes that the Defence for Nyiramasuhuko has filed an *ex parte* Motion seeking extra protection measures for some of its witnesses. The Chamber observes, without prejudice that in filing the said *ex parte* Motion after the date for

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filing its Pre-Defence Brief, the Defence has violated its obligations under Rule 73ter and the Chamber's Oral Ruling of 18 October 2004.

28. The Chamber therefore, orders the Defence for Nyiramasuhuko to immediately comply with its Oral Ruling of 18 October 2004 and to disclose to the Prosecution and other Parties, "a summary of the facts on which each witness will testify" pursuant to Rule 73ter.

**FOR THE ABOVE REASONS, THE TRIBUNAL**

**ORDERS** the Defence for Nyiramasuhuko to immediately comply with its Oral Ruling of 18 October 2004 and to disclose to the Prosecution and other Parties, "a summary of the facts on which each witness will testify" pursuant to Rule 73ter.

**DENIES** the Motion in all other respects.

Arusha, 18 February 2005



William H. Sekule  
Presiding Judge



Arlette Ramarosan  
Judge



Solomy Balungi Bossa  
Judge

