



ICTR-98-42-T
(19-08-2005)
(11454 - 11448)

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: 19 August 2005

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The PROSECUTOR

v.

Elie NDAYAMBAJE, Joseph KANYABASHI, Pauline NYIRAMASUHUKO, Arsène Shalom NTAHOBALI, Sylvain NSABIMANA, Alphonse NTEZIRYAYO

Joint Case No. ICTR-98-42-T

DECISION ON PROSECUTOR'S MOTION PURSUANT TO RULES 54, 73, AND 73 *ter* TO PROCEED WITH THE EVIDENCE OF THE ACCUSED NYIRAMASUHUKO AS A WITNESS ON 15 AUGUST 2005 OR IN THE ALTERNATIVE TO PROCEED WITH THE DEFENCE CASE OF THE ACCUSED NTAHOBALI

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Mr. Titinga Frédéric Pacere, Mr. Richard PARRAS

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramarosan and Judge Solomy Balungi Bossa (the “Chamber”);

BEING SEIZED of the Prosecutor’s “Motion Pursuant to Rules 54, 73, and 73^{ter} to Proceed with the Evidence of the Accused Nyiramasuhuko as a Witness on 15 August 2005 or in the Alternative to Proceed with the Defence Case of the Accused Ntahobari”, filed on 20 July 2005 (the “Motion”);

CONSIDERING the subsequent responses and reply:

- i. the Defence for Ntahobali, filed on 22 July 2005 (“Ntahobali’s Response”),¹
- ii. the Defence for Nyiramasuhuko, filed on 25 July 2005 (“Nyiramasuhuko’s Response”),²
- iii. the Defence for Nteziryayo, filed on 26 July 2005 (“Nteziryayo’s Response”),³
- iv. the letter from the Defence for Nyiramasuhuko to the Registrar, filed on 25 July 2005; and,
- v. the Prosecutor’s “Consolidated Rejoinder to the Responses of the Defence of Nyiramasuhuko, Ntahobali and Nteziryayo to his Motion of 20 July 2005”, filed on 28 July 2005 (the “Consolidated Rejoinder”);

NOTING that the Defence case for Ntahobali began on 11 April 2005 with the evidence of Mr. Edmond Babin;

CONSIDERING IN PART the following:

- i. the “Liste des témoins - ordre des 10 premiers témoins de la défense d’Arsène Shalom Ntahobali”, filed on 2 August 2005,
- ii. the “Will-Say et fiches d’identification des 10 premiers témoins de la défense de Ntahobali”, filed on both 2 and 10 August 2005; and,
- iii. the “Mémoire préalable amendé à la défense de l’accusé Arsène Shalom Ntahobali (Art. 73^{bis} Règlement de procédure et de preuve)”, filed on 10 August 2005, and the list of witnesses therein;

RECALLING the Registrar’s Decision to Withdraw the Assignment of Mr. Duncan Mwanyumba as Lead Counsel for Mr. Arsène Shalom Ntahobali, issued on 9 June 2005 (the “Registrar’s Decision”);

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

NOW DECIDES the matter, pursuant to Rule 73 (A), on the basis of both the written submissions of the Prosecutor and the responses as filed by the Parties.

SUBMISSIONS OF THE PARTIES

1. On 20 July, the Prosecutor moved the Chamber to order the Defence for Nyiramasuhuko to call the Accused as a witness from 15 August 2005 or, alternatively, to direct the Defence for Ntahobali to proceed with its defence from 15 August 2005.⁴

¹ “Réponse de Shalom Ntahobali à la Requête du Procureur intitulée ‘Prosecutor’s Motion to Proceed with the Evidence of the Accused Nyiramasuhuko as a Witness on 15 August 2005 or in the Alternative with the Defence Case of the Accused Ntahobali’”, 22 July 2005.

² “Réponse à la ‘Prosecutor’s Motion to Proceed with the Evidence of the Accused Nyiramasuhuko as a Witness on 15 August 2005 or in the Alternative with the Defence Case of the Accused Ntahobali’”, 25 July 2005.

³ “Réponse de Alphonse Nteziryayo à ‘Prosecutor’s Motion to Proceed with the Evidence of the Accused Nyiramasuhuko as a Witness on 15 August 2005 or in the Alternative with the Defence Case of the Accused Ntahobali’”, 26 July 2005.

⁴ The Motion, paras. 9-10.

2. The Prosecutor requests that the Chamber order the Defence for Nyiramasuhuko to disclose the proposed Expert Witness report as per the Chamber's Oral Order of 16 June 2005⁵ and direct the Defence for Ntahobali to comply with its disclosure obligations, primarily to effect the full disclosure of the anticipated witnesses and thus avoiding any further delays to the proceedings.⁶
3. The Defence for Ntahobali, Nyiramasuhuko and Nteziryayo all move for the Motion to be denied; Ntahobali's and Nteziryayo's Defences propose that proceedings recommence on 5 September 2005.⁷

Defence for Ntahobali

4. The Defence for Ntahobali submits that it is unable to call its witnesses before the completion of Nyiramasuhuko's defence case, for the recently appointed Lead Counsel, Mr. Marquis, is not assisted by a Co-Counsel. Mr. Marquis argues that, as a result of the withdrawal of former Lead Counsel, Mr. Mwanyumba, he is unable to both examine witnesses and prepare his case. The Defence for Ntahobali further submits that even in the event that a Co-Counsel is appointed immediately, s/he can not be expected to be adequately familiar with the case by 15 August 2005.
5. The Defence for Ntahobali argues that the Accused should not pay the price for problems resulting from Witness WBNM's testimony via video-link. For these reasons, the Defence for Ntahobali maintains it will be seriously prejudiced should it be ordered to resume its Defence on 15 August 2005.⁸

Defence for Nyiramasuhuko

6. The Defence for Nyiramasuhuko submits that the position of the Accused remains as it was on 16 June 2005, save for the Expert Witness having been approved by the Registry on 7 July 2005. This Witness had been authorised to write a report within 14 days and testify before the Chamber. The Defence for Nyiramasuhuko maintains that it will be unable to observe the 21 day disclosure requirement and that in any event, the report can not be generated by 5 August 2005.⁹
7. In a letter to the Registrar, also dated 25 July 2005, this Defence proposes to call its remaining witnesses in the following order:
 - a. Witness WBNM (by video-link);
 - b. Expert Witness Mr. Maniragaba Baributsa; and,
 - c. The Accused, Pauline Nyiramasuhuko.
8. In the alternative, the Defence for Nyiramasuhuko submits that should it fail to disclose the report of its proposed Expert in a timely fashion, the Accused will testify before the said Expert Witness.¹⁰

Defence for Nteziryayo

9. The Defence for Nteziryayo maintains that a further adjournment of proceedings is the least problematic way of addressing the difficulties faced. It argues that the alternative, namely, that the Accused Nyiramasuhuko testify from 15 August 2005, and thus before Witness WBNM, would result in a far from perfect situation, possibly requiring the Accused Nyiramasuhuko to be recalled.¹¹

⁵ *Ibid.*, para. 7.

⁶ *Ibid.*, para. 10. The Prosecutor highlighted that 17 trial days had been lost, from 15 June to 15 July 2005, due to the lack of Defence witnesses. Para 10, footnote 3.

⁷ Ntahobali's Response, para. 24; Nteziryayo's Response, paras. 20-22.

⁸ Ntahobali's Response, paras. 8-9, 14, 15, 18, and 21.

⁹ Nyiramasuhuko's Response, paras. 3-7.

¹⁰ *See*, letter from the Defence for Nyiramasuhuko to the Registrar, filed on 25 July 2005.

¹¹ Nteziryayo's Response, paras. 10-11.

10. Further, the Defence for Nteziryayo submits that the interchanging of Defence cases, namely, between the Defence for Nyiramasuhuko and that for Ntahobali, is incompatible with the proposed defence strategy and would possibly lead to certain witnesses being recalled.¹²

Prosecutor's Consolidated Rejoinder

11. The Prosecutor, in his Consolidated Rejoinder, rejects the argument that the presence of a single Lead Counsel necessarily results in delays, as submitted by the Defence for Ntahobali, noting that the newly appointed Lead Counsel has been an integral member of the Defence team since 24 October 2001. Relying on the Registrar's Decision of 9 June 2005, the Prosecutor draws attention to assurances contained therein, namely, that the "withdrawal of the Lead Counsel would not cause any delay whatsoever in the trial proceedings."¹³
12. Pursuant to Rule 82, the Prosecutor observes that Pauline Nyiramasuhuko is not the only Accused in these proceedings and that the rights of the other Accused must also be respected. In his objections to the Defence of Nyiramasuhuko's submissions, the Prosecutor submits that it is unsatisfactory for a party to seek an adjournment on the basis that an Expert is unable to complete a report within a stipulated timeframe without offering a justifiable explanation for this delay.¹⁴
13. The Prosecutor disagrees with the Defence for Nteziryayo's submissions and argues that the principle that an Accused has the right to be "heard last" is not fixed. The Prosecutor draws attention to current and previous proceedings before this Tribunal, where an Accused has either testified before all or some of his factual Defence witnesses.¹⁵ The Prosecutor argues that the Defence for Nteziryayo has not demonstrated the prejudice its client will suffer should the Defence for Ntahobali proceed with its defence on 15 August 2005 or should the Defences for Nyiramasuhuko and Ntahobali interchange. Accordingly, the Prosecutor submits that the Defence for Nteziryayo is premature in its submissions that should Nyiramasuhuko testify first, this will necessitate her being recalled.¹⁶

DELIBERATIONS

14. Recalling the Chamber's Scheduling Order of 5 August 2005, which postponed the resumption of proceedings to 29 August 2005, the question as to whether either the Defence for Nyiramasuhuko or that of Ntahobali will proceed with their evidence on 15 August 2005 has been rendered moot.
15. The Chamber will, however, address several issues at the core of the Motion, raised by both the Prosecutor and contained in the subsequent Defence Responses related to the conduct of this trial.
16. The Chamber recalls that, on 16 June 2005, it adjourned trial proceedings to 15 August 2005 "to enable adequate preparations being made in preparation for the continuation of the proceedings", to be completed, in particular by the Defence teams for Nyiramasuhuko, Ntahobali and Nsabimana.

(A) Issues of Disclosure

17. In its Decision of 18 February 2005, the Chamber addressed the 21 day disclosure requirement, observing that:

"[i]t 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

¹² *Ibid.*, paras. 9-11, 15, 18, and 20.

¹³ Consolidated Rejoinder, paras. 17-22.

¹⁴ *Ibid.*, paras. 10-11.

¹⁵ *Ibid.*, paras. 25-27.

¹⁶ *Ibid.*, paras. 30-32.

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.”¹⁷

Defence for Ntahobali

18. The Chamber recalls its Order of 16 June 2005 that the Defence for Ntahobali take all necessary steps to prepare its case, particularly to make all the necessary disclosures, given the fact that it has already commenced with the presentation of its case.¹⁸
19. The Chamber notes that on 2 August, the Defence of Ntahobali disclosed its amended list of witnesses, including identifying information and will-say statements of the first 10 witnesses it intended to call. The Chamber observes that of these 10 witnesses, two are the subject of a Motion requesting their addition to the Defence list of witnesses still under consideration. The Chamber further notes that on 10 August, the Defence of Ntahobali filed an Amended Pre-Defence Brief consisting of the summaries of the proposed testimonies of the proposed 32 witnesses it intended to call.
20. In the Chamber’s view, the manner in which the Defence for Ntahobali is executing its disclosure obligations is unsatisfactory because, should the Defence for Ntahobali be required to resume its defence on 29 August 2005 as ordered, it will only be able to proceed with those eight proposed witnesses for whom identities have been disclosed on 2 August 2005.
21. Given that these proceedings are scheduled to resume on 29 August 2005, the Chamber hereby recalls its orders, directions and recommendations, in particular those of 18 October 2004, 18 February, 16 June, and 5 August 2005, respectively, in which it reminded all Defence teams that it expected them to act diligently when disclosing the identities of witnesses, urging them 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 is in a position to present another witness who has met the 21 day disclosure deadline.
22. Accordingly, the Chamber directs the Defence for Ntahobali to diligently proceed with all necessary disclosures so as to enable it to proceed with the smooth and uninterrupted conduct of its defence, on or after 29 August 2005.

Defence for Nyiramasuhuko

23. The Chamber recalls its Oral Decision of 1 June 2005 following the Defence for Nyiramasuhuko’s application to vary its witness list to, *inter alia*, add the proposed Expert Witness, Mr. Baributsa.¹⁹
24. On 16 June 2005, the Chamber ordered the Defence to diligently follow up issues pertaining to the proposed Expert Witness, and in particular the preparation and disclosure of his report.²⁰
25. This Expert Witness was accordingly approved by the Registry on 7 July 2005. To date, the Defence for Nyiramasuhuko has not indicated what, if any, progress has been made in the preparation and subsequent disclosure of this report. In the absence of any justification as to why the report could not be prepared in time for the resumption of the trial initially scheduled for 15 August 2005, the Chamber is of the view that the proposed Expert Witness has had more than ample time to prepare a report and to disclose it, affording the other parties the opportunity to avail themselves of their rights contained in Rule 94bis (B).

¹⁷ Decision of 18 February 2005, para 23.

¹⁸ Oral Decision, 16 June 2005, paras. 3-4.

¹⁹ T. 1 June 2005, pp.24-25.

²⁰ T. 16 June 2005, p. 3.

26. The Chamber reiterates its Scheduling Order of 5 August 2005 in which the Defence for Nyiramasuhuko was directed to disclose its expert report within two weeks of the date of the Order.

(B) Presentation of the Defence Cases of Pauline Nyiramasuhuko and Arsène Shalom Ntahobali

27. The Chamber once again recalls that the purpose of the Status Conference held on 16 June 2005 was to discuss how best to conduct future proceedings.²¹ The Chamber recalls that during this Conference, it placed both the Defence for Nyiramasuhuko and for Ntahobali on notice that either Defence, if required, should be in a position to present their respective witnesses when the proceedings resumed.
28. The Chamber notes that the Defence alleges inconveniences that will result from tendering its witnesses out of the originally conceived sequence. However, the Chamber finds that the Defence does not provide a cogent argument why the Accused should not testify before Witness WBNM, should the need arise, nor does it demonstrate the prejudice it would suffer
29. The Chamber is of the opinion that the Defence has had ample opportunity to prepare the testimony of the Accused and also the substance of the expected testimony of Witness WBNM is known, as revealed in the Will-Say statement as disclosed.
30. The Chamber underscores that when seeking to give effect to an Accused's rights under Article 20, it has a duty to ensure that there is a balance between the competing and respective rights of all the Parties in the case. The Chamber thus finds that it would not facilitate fairness to the other Parties and/or serve the interests of justice, to postpone the trial merely to allow the Accused to testify at her own convenience.
31. Accordingly, the Chamber rules that should Witness WBNM be unable to commence his testimony as scheduled, on 29 August 2005, for any justifiable reason, the Defence for Nyiramasuhuko should be prepared to call the Accused Nyiramasuhuko to give testimony on her own behalf.
32. The Chamber recalls the submissions of Nyiramasuhuko and Nteziryayo regarding the interchanging of the Defence cases.
33. The Chamber finds that the Defence of Nyiramasuhuko and that of Nteziryayo have not demonstrated the prejudice they would suffer, should the need arise to interchange the presentation of witnesses in either the Nyiramasuhuko or Ntahobali defence case. Further, the Chamber notes that the Defence for Ntahobali has already started. The Chambers accordingly finds no merit in the submissions of the Defence.

(C) Mr. Marquis' Difficulties as Counsel for Ntahobali

34. The Registrar's Decision of 9 June 2005 outlines clear assurances from Mr. Marquis that the withdrawal of Mr. Mwanyumba as Lead Counsel would not "result in any delays whatsoever."²² Mr. Marquis was described by the Registrar as the "sole architect of the defence" strategy because of the role he chose to take in handling all witnesses abroad.²³ Moreover, Mr. Marquis has been an integral member of the Ntahobali Defence team from October 2001. He is well acquainted with the case and, according to the Accused Ntahobali, single-handedly defined the defence strategy.²⁴
35. Mr. Marquis assured the Chamber that he would be ready to conduct his client's case when the time came.²⁵

²¹ Status Conference, T. 16 June 2005, pp. 5-6 (ICS).

²² Registrar's Decision, para 8.

²³ *Ibid.*, paras 1, 3.

²⁴ *Ibid.*, para. 8.

²⁵ *Ibid.*, p.15.

36. Accordingly, the Chamber cannot accept, at this stage, that Counsel for Ntahobali is unable to continue his client's defence, should it be necessary, on the date this trial resumes, as a result of the withdrawal of Mr. Mwanyumba as Lead Counsel. The Chamber expects that Mr. Marquis as Lead Counsel for Ntahobali, shall do everything, as an Officer of the Chamber, to facilitate these proceedings.

(D) General Observations

37. Furthermore, the Chamber reminds all Parties that it is for the Chamber, and not either the Defence or the Prosecution teams, to set the agenda for the conduct of this trial.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DECLARES MOOT the Prosecutor's request for the Chamber to proceed with the evidence of the Accused Nyiramasuhuko or, in the alternative, the Defence case for Ntahobali on 15 August 2005; and,

REITERATES its orders made in the Scheduling Order of 5 August 2005, namely:

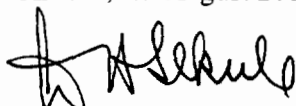
1. That proceedings shall resume on 29 August 2005;
2. That Defence for Nyiramasuhuko shall proceed with its defence on 29 August 2005 with the examination of Witness WBNM;
3. That in the event that Witness WBNM will be unable to testify for any reason, the Defence for Nyiramasuhuko shall put the Accused on the stand to begin her testimony on 29 August 2005 or any date thereafter;
4. The Defence for Nyiramasuhuko to ensure that its defence will be completed in a timely fashion, including the disclosure of the Expert Witness's report no later than two weeks from the date of this Order, to enable all parties to avail themselves of their rights contained in Rule 94bis;
5. That Defence for Ntahobali shall continue to comply with all its disclosure obligations; and,

DIRECTS the Defence of Nyiramasuhuko to take all the necessary steps to ensure that should the testimony of Witness WBNM be unable to commence for any justifiable reason as scheduled, the Accused Nyiramasuhuko will be in a position to give her testimony on 29 August 2005 or any date thereafter;

DIRECTS the Defence for Ntahobali to diligently continue with all necessary disclosures so as to enable it to proceed with the smooth and uninterrupted conduct of its defence, on or after 29 August 2005; and,

DENIES the Motion in all other respects.

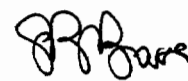
Arusha, 19 August 2005



William H. Sekule
Presiding Judge



Arlette Ramarson
Judge



Scimony Balungi Bossa
Judge

