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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR-ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa
Registrar: Mr Adama Dieng
Date: 29 June 2006

ICTR-97-29-T
29-06-2006
(4870-4866)

The PROSECUTOR

v.

Sylvain NSABIMANA
Case No. ICTR-97-29A-T
Joint Case No. ICTR-98-42-T

2006 JUN 29 AM 11:15

DECISION
ON THE PROSECUTOR'S URGENT MOTION TO COMPEL DISCLOSURE OF
UNREDACTED WITNESS STATEMENTS BY NSABIMANA'S DEFENCE

Office of the Prosecutor
Ms Silvana Arbia, Senior Trial Attorney
Ms Adelaide Whest, Trial Attorney
Ms Holo Makwaia, Trial Attorney
Mr Gregory Townsend, Trial Attorney
Ms Althea Alexis Windsor, Trial Attorney
Mr Michael Adenuga, Legal Advisor
Ms Astou Mbow, Case Manager

Defence Counsel
Ms Josette Kadji

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 Urgent Motion to Compel Disclosure of Nsabimana’s Witnesses Non-Redacted Statements”, filed on 23 June 2006 (the “Motion”);

CONSIDERING the “*Réplique de Sylvain Nsabimana au ‘Prosecutor’s Urgent Motion to Compel Disclosure of Nsabimana’s Witnesses’s Non redacted Statements’ déposée le 23 juin 2006*”, filed on 26 June 2006 (the “Defence Response”);

CONSIDERING the “Prosecutor’s Reply to Nsabimana’s *réplique* re Witsnesse’s Non-Redacted Statements”, filed on 27 June 2006 (the “Prosecution Reply”);

NOTING the “Scheduling Order of 14 December 2005”, ordering “the Defence for Sylvain Nsabimana to continue its disclosure obligations in a timely fashion with a view to being ready to start their Defence case immediately after the close of the case for Ntahobali”;¹

RECALLING the “Oral Decision on the Prosecutor and Pauline Nyiramasuhuko’s Motion to Have Disclosure of Sylvain Nsabimana’s Unredacted Statements”, issued on 22 June 2006 (the “Oral Decision of 22 June 2006”);²

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 the written submissions of the Parties.

SUBMISSIONS OF THE PARTIES

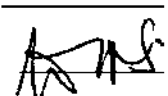
The Prosecution

1. The Prosecution prays the Chamber to order the Defence for Nsabimana to disclose the unredacted statements of its witnesses within 48 hours pursuant to Rule 54. Failure to do so, the Prosecution requests that the concerned witnesses be stricken off the list of Defence witness.
2. The Prosecution submits that despite the Chamber’s Decision of 22 June 2006, the Defence for Nsabimana has not made any effort to provide the Prosecutor with the requested statements, yet it was due to start its case on 26 June 2006.
3. The Prosecution argues that it cannot accept the Defence’s representation that it does not have a copy of the said statements and submits that there has been no advance notice of this loss and no showing of due diligence by the Defence to enquire about these statements more than five years after the arrest of their former investigator.³

¹ Paragraph *f* of the Scheduling Order.

The Prosecutor v. Pauline Nyiramasuhuko et al.; T. 22 June 2006, p. 11

³ Paragraph 22 of the Motion.



4. The Prosecution further alleges that it cannot accept the Defence's representation that the arrest of its former investigator Joseph Nzabirinda and seizures carried out in 2001 resulted in loss of the only existing copy of statements⁴ and that the Accused Nsabimana does not have a copy of any of the statements collected on his behalf.⁵

The Defence

5. The Defence points out that in its Oral Decision of 22 June 2006, the Chamber asked not only the Defence but also any other Party, including the Prosecution, to disclose the sought statements if they have them.⁶
6. The Defence submits that neither the original, nor the copies of the unredacted statements of its witnesses contacted by Joseph Nzabirinda, its former investigator who is now an accused before the Tribunal, are in its possession.⁷
7. The Defence argues that the Prosecution could not assume that the Defence possesses those statements simply because they were not part of the items seized from Joseph Nzabirinda upon his arrest in November 2001.⁸
8. The Defence also submits that striking some of its witnesses because of its failure to disclose statements which are not in its possession would cause considerable prejudice to the Accused Nsabimana's rights and to the fairness of the trial.⁹
9. The Defence underscores that the issue of impossibility to disclose the unredacted statements only concerns the witnesses who were contacted by its former investigator Joseph Nzabirinda.¹⁰ With respect to the remaining witnesses, whose redacted statements have been disclosed to the Parties, the Defence asserts that their unredacted statements are available and will be disclosed in due time.¹¹

The Prosecution Reply

10. The Prosecution submits that the Defence for Nsabimana had never mentioned the absence of the unredacted statements, neither in 2005 when it filed the redacted statements, nor on 15 June 2006, when it indicated the order of appearance of its witnesses and the status of its disclosure.¹²
11. The Prosecution argues that the Defence had the obligation to obtain the full unredacted statements from the witnesses if it had lost both the originals and all the copies, and to bring this situation to the notice of the Chamber and the Parties.¹³

⁴ Paragraph 19 of the Motion.

⁵ Paragraph 20 of the Motion.

⁶ Paragraph 7 of the Response.

⁷ Paragraph 18 of the Response.

⁸ Paragraph 17 of the Response.

⁹ Paragraph 27 of the Response.

¹⁰ Paragraph 28 of the Response.

¹¹ Paragraph 29 of the Response.

¹² Paragraphs 07-08 of the Reply.

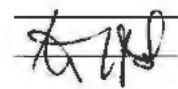
¹³ Paragraph 10 of the Reply.

DELIBERATIONS

12. The Chamber recalls its Oral Decision of 22 June 2006 and reiterates that where statements were made by potential witnesses, the concerned Party is bound to disclose the said statements in their entirety, in conformity with the Rules. The Chamber points out that one of the purposes of such disclosure is to enable the other Parties to conduct an effective cross-examination of the witnesses if they so wish.
13. With respect to the request for disclosure, the Chamber has noted the Defence's submissions that the said unredacted witness statements are apparently unavailable and cannot therefore be disclosed. Accordingly, the Chamber denies the Prosecutor's request.
14. With respect to the request for striking off witnesses, the Chamber notes that there exists a distinction between the obligation of the Prosecution and that of the Defence with regard to the disclosure of witness statements. As regards the Prosecution, under Rule 66 (A) failure to disclose may lead to striking off the concerned witnesses. As for the Defence, failure to disclose witness statements does not necessarily lead to the striking off of witnesses particularly taking into account Rule 73 *ter*. The Chamber therefore finds no merit in the Prosecution's request to strike off Defence witnesses whose unredacted statements are apparently unavailable and cannot be disclosed.
15. The Chamber further notes that the *will-say* statements as well as the personal particulars of the said witnesses have already been disclosed by the Defence. The Chamber recalls that *will-say* statements must be "clear enough to cover the scope of the proposed testimony of the witness; they must be full and comprehensive, not in the sense of giving all the details, but at least laying out the scope of what the witness is expected to cover in clear terms."¹⁴ The Chamber therefore expects the *will-say* statements to meet the requirements set out above. The Chamber further observes that *will-say* statements of such nature enable "the other party or the other parties to prepare and to raise issues",¹⁵ as it has been reiterated in the instant proceedings.
16. Finally, the Chambers finds it unacceptable that the Defence of Nsabimana did not inform the Parties and the Chamber about the problems concerning the disclosure of some of the unredacted witness statements until this issue was formally raised by the Prosecution just before the start of Nsabimana's case. The Chamber reminds the Parties that compliance with disclosure obligations is crucial to the smooth conduct of proceedings. In addition, the Chamber considers that the Defence should have been diligent and made reserve copies of the alleged unredacted statements. In the Chamber's view, this omission amounts to negligence on the part of the Defence. The Chamber therefore does not expect from the Defence of Nsabimana a repeat of this conduct.

¹⁴ *Nyiramasuhuko et al.*, Decision on Arsène Shalom Ntahobali's Motion to Amend His Witness List and to Reconsider the Decision of 26 August 2005 Titled: "Decision on the Defence Motion to Modify the List of the Defence Witnesses For Arsène Shalom Ntahobali" (TC) 27 January 2006, para. 24.

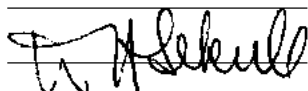
¹⁵ *Idem.*



FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Prosecutor's Motion in its entirety.


Arusha, 29 June 2006



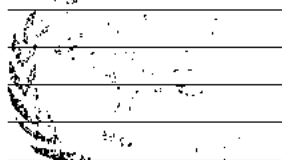
William H. Sekule
Presiding Judge



Arlette Ramaroson
Judge



Solomy Balungi Bossa
Judge



[Seal of the Tribunal]