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UNITED NATIONS
NATIONS UNIES

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: 5 September 2006

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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 PROSECUTION'S URGENT MOTION TO COMPEL
COMPLIANCE WITH THE TRIAL CHAMBER'S DECISION OF 17 AUGUST 2006**

Office of the Prosecutor

Ms Silvana Arbia
Ms Adelaide Whest
Mr Gregory Townsend
Ms Holo Makwaia
Ms Althea Alexis-Windsor
Ms Astou Mbow, Case Manager

Defence Counsel for Ndayambaje

Mr Pierre Boulé

Defence Counsel for Kanyabashi

Mr Michel Marchand

Ms Simone Santerre

Defence Counsel for Nyiramasuhuko

Ms Nicole Bergevin

Mr Guy Poupart

Defence Counsel for Ntahobali

Mr Normand Marquis

Mr Louis Huot

Defence Counsel for Nsabimana

Ms Josette Kadji

Defence Counsel for Nteziryayo

Mr Titinga Frédéric Pacere

Mr Richard Perras

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 B. Bossa (the "Chamber");

SEISED of the "Prosecutor's Urgent Motion to Compel Compliance With the Trial Chamber's Decision of 17 August 2006", filed on 30 August 2006 (the "Motion");

HAVING RECEIVED the "*Réponse de Sylvain Nsabimana à la requête du Procureur intitulée "Prosecutor's Urgent Motion to Compel Compliance with the Trial Chamber's Decision of 17 August 2006"*", filed on 31 August 2006 ("Nsabimana's Response");

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

RECALLING the Chamber's Decision on Sylvain Nsabimana's Extremely Urgent Motion to Drop and Add Witnesses of 17 August 2006;

NOW DECIDES the Motion, pursuant to Rule 73 (A) of the Rules, on the basis of the written submissions of the Parties.

SUBMISSIONS OF THE PARTIES

The Prosecution

1. The Prosecution moves the Chamber to order the Defence for Nsabimana to comply with the Chamber's Decision of 17 August 2006 and to make further disclosure regarding Witness DEDE, in particular with regard to the exact place where according to Witness DEDE, Prosecution Witness SJ allegedly sought refuge between April and July 1994, and to the alleged aid Witness SJ received from the Accused Nsabimana. Further, the Prosecution moves the Chamber to order the Defence to disclose the names of the "MRND dignitaries" to whom Witness DEDE is expected to refer, if they include any person/s accused in these proceedings. Finally, the Prosecution moves the Chamber to remind the Defence of its order to call Witness DEDE "towards the end of its case".
2. The Prosecution submits that the "supplementary will-say" filed fails to comply with the Chamber's order of 17 August 2006, as it does not provide "further and better particulars" regarding the place where Witness SJ allegedly hid and it only speaks of "aid" the witness allegedly received from Nsabimana, without specifics.¹
3. The Prosecution argues that the Defence intentionally used vague expressions as an attempt to avoid disclosure requirements and to deny the other Parties fair and adequate preparation.² In particular, the Prosecution states that it cannot adequately prepare its cross-examination without sufficient information regarding

¹ The Motion, paras. 12, 13, 16.

² The Motion, paras. 14, 17, 18.

the location where Witness SJ sought refuge.³ The Prosecution also submits that the alleged "aid" the Accused provided to Witness SJ does not appear in the first will-say regarding Witness DEDE, revealing a further intentional failure to disclose.⁴ The repeated failures to fully disclose required information in the will-says for Nsabimana's witnesses reveal a pattern of non-compliance, according to the Prosecution.⁵

4. The Prosecution recalls that Rule 90(G)(ii) of the Rules requires that "counsel shall put to the witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness" and submits that these propositions were not put to Witness SJ during her testimony. Rather, the Defence seeks to impeach her collaterally at this late stage, despite the provisions of Rule 90(G)(ii) of the Rules.⁶
5. ~~The Prosecution also points out that Witness DEDE's will-say filed on 21 August 2006 mentions "some MRND dignitaries" and therefore asks that the Defence disclose which persons Witness DEDE is expected to refer to, if they include persons accused in this trial.⁷~~

Nsabimana's Response

6. The Defence for Nsabimana submits that the Chamber's Decision ordered it to disclose details with regard to the statement that Witness DEDE would contradict Prosecution Witness SJ, and that this has been adequately done in the additional will-say.⁸ According to the Defence, further information need not be included in the will-say, and there is no basis for the Prosecution's request in that matter,⁹ especially as by its own admission, Witness SJ is still alive.¹⁰
7. As to the Prosecution's submissions regarding the aid the Accused Nsabimana allegedly provided, the Defence submits that the disclosures made so far enable all Parties to undertake all necessary investigations.¹¹ The Defence argues that not only does the Chamber's Decision of 17 August 2006 not address this issue, but the additional will-say for Witness DEDE indicates that the Accused assisted that witness after his house had been set on fire.¹² Besides, the Defence indicates that assistance was provided at Mbazi.¹³
8. The Defence submits that among the MRND dignitaries mentioned is Pauline Nyiramasuhuko, Minister of the Interim Government at the time of the events.¹⁴

³ The Motion, paras. 15, 21.

⁴ The Motion, para. 19.

⁵ The Motion, para. 22.

⁶ The Motion, para. 20.

⁷ The Motion, para. 23.

⁸ Nsabimana's Response, paras. 11-13.

⁹ Nsabimana's Response, paras. 14-16.

¹⁰ Nsabimana's Response, para. 17.

¹¹ Nsabimana's Response, para. 22.

¹² Nsabimana's Response, paras. 18-21.

¹³ Nsabimana's Response, para. 24.

¹⁴ Nsabimana's Response, para. 26.

9. With regard to the order of appearance of its witnesses, the Defence refers to the Chamber's invitation to avoid gaps between witnesses.¹⁵ The Defence submits that the current order of appearance has been worked out in order to implement this invitation.¹⁶ It also recalls that the Chamber ordered it to call Witness DEDE towards the end of the Defence case and submits that there are only four witnesses left to be called, one of whom is Witness DEDE.¹⁷ The Defence therefore submits that it has entirely complied with the orders of the Chamber and that all has been done to enable Witness DEDE to testify from 11 September 2006, 21 days after the disclosure of his identity.¹⁸

DELIBERATIONS

10. In its Motion, the Prosecution requests that the Defence complies with the Chamber's order (1) to give further and better particulars to Witness DEDE's Will-say statement; and (2) to call Witness DEDE towards the end of its case.

Regarding Compliance with the Chamber's Order to Give Further and Better Particulars to Witness DEDE's Will-Say Statement

11. The Chamber recalls its Decision of 17 August 2006 in which it ordered the Defence to provide further and better particulars to Witness DEDE's Will-Say statement because the wording of its Paragraph 9 indicating that Witness DEDE will contradict 'certain allegations' of Prosecution Witness SJ is imprecise and may impede the other Parties's right to sufficiently investigate the allegations and conduct cross-examination.
12. The Chamber notes that the Defence filed a supplementary Will-Say Statement of Witness DEDE on 29 August 2006 (the "supplementary will-say statement").¹⁹
13. As for the alleged contradictions between Witness DEDE and Prosecution Witness SJ's testimony, the Chamber notes the Prosecution submissions that the Defence has failed to comply with its order for further and better particulars regarding the exact place where Prosecution Witness SJ was alleged to have hidden during the events, and what assistance *préfet* Nsabimana is alleged to have provided Prosecution Witness SJ. Furthermore, the Prosecution requests for the Defence to disclose the names of the "MRND dignitaries" to whom Witness DEDE is expected to refer, if they include any person/s accused in these proceedings.
14. In the Chamber's opinion, when a party decides to call a witness to give testimony in contradiction to any other witnesses already heard before the Chamber, it is necessary for the calling party to give sufficient and specific information

¹⁵ Nsabimana's Response, para. 27, quoting French Draft Transcripts, 21 August 2006, p. 11.

¹⁶ Nsabimana's Response, para. 28.

¹⁷ Nsabimana's Response, para. 31.

¹⁸ Nsabimana's Response, paras. 31-32.

¹⁹ The supplementary Will-say indicated that *inter alia*; Prosecution Witness SJ's hiding place during the events of April to July 1994 and that SJ had never left this hiding place throughout the period of the events in order to go to the *prefectural* office; and how *prefet* Nsabimana helped Prosecution Witness SJ following the burning down of her house.

regarding the contradictory testimony so that all the parties in the case may prepare their cross-examination.²⁰

15. In the instant case, the Chamber notes that although the supplementary will-say statement of Witness DEDE states that the latter knew where Prosecution Witness SJ hid during the events and that he never left that hiding place to go to the prefectural office, the supplementary will-say is silent about the alleged hiding place of Prosecution Witness SJ. Furthermore, even though the Defence submitted that Nsabimana aided Prosecution Witness SJ when his house was burnt down in Mbazi, the Chamber finds that this kind of information should be detailed in the will-say of Witness DEDE. Regarding the submission that Pauline Nyiramasuhuko was one of the 'MRND dignitaries' mentioned, the Chamber also finds that this kind of information should be detailed in the will-say.
16. Accordingly, the Chamber orders the Defence of Nsabimana to give details regarding the contradictions between DEDE's testimony and that of Prosecution Witness SJ, in particular, the location he alleges Prosecution Witness SJ was hiding; details regarding the 'aid' Nsabimana allegedly gave to Prosecution Witness SJ. The Chamber also orders the Defence of Nsabimana to specifically mention by name or by position held, the 'MRND dignitaries' mentioned in the supplementary will-say and if those 'MRND dignitaries' include Accused person/s before the Chamber, the Defence is ordered to name the said Accused person/s.
17. The Chamber orders the Defence to make the required disclosures regarding the proposed testimony of Witness DEDE as soon as possible and in any case before the close of business on Friday, 8 September 2006.

Regarding Compliance with the Chamber's Order to Call Witness DEDE Towards the End of its Case

18. The Chamber recalls that in its order of 17 August 2006, the Defence was required to call Witness DEDE towards the end of its case.
19. During the course of trial on 31 August 2006, the Chamber discussed the Defence of Nsabimana's correspondence of 29 August 2006²¹ noting that there was a pending Motion on the matter and in order to avoid unnecessary delays, it directed the registry to make all the necessary arrangements so that Witness OYO testifies as from 11 September 2006, as originally scheduled.²²

²⁰ The Chamber recalls that during Ntahobali's case, the Will-Say statements of Defence Witnesses WUNHF and WUNJN detailed the exact areas where these two witnesses would contradict the testimony of Prosecution Witness QBP, by indicating how they knew the witness and by giving the alleged exact location where they saw QBP during the events, contrary to her testimony. Similarly the Will-Say statement of Witness WUNJN detailed the alleged exact areas where he would contradict the testimony of Prosecution Witness TA, by stating how he knew Witness TA and the alleged exact locations where he saw her during the events of 1994, contrary to the latter's testimony

²¹ In the correspondence, the Defence listed its order of calling witnesses so that Witness DEDE was expected to give testimony during the week beginning on 11 September 2006, immediately after Charles Karemano (formerly Witness BURU) and before OYO, AGWA and the Accused Nsabimana

²² T. 31 August 2006 pp 64: "So, in the circumstances, in order to avoid problems and that we do not -- the Trial Chamber -- we do not have a witness to testify, maybe OYO, who was scheduled for 11th, should be --

20. Accordingly, the Chamber finds the Prosecution request moot and reminds the Parties of its order of 31 August 2006 that Witness OYO testifies as from 11 September 2006.

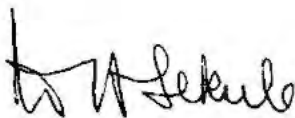
FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS the Prosecution Motion in part and,

- I. **ORDERS** the Defence of Nsabimana to provide detailed information, regarding the areas where Witness DEDE expects to contradict the testimony of Prosecution Witness SJ, in particular, the location he alleges Prosecution Witness SJ was hiding;
- II. **ORDERS** the Defence of Nsabimana to give details regarding the 'aid' Nsabimana allegedly gave to Prosecution Witness SJ and where it was given;
- III. **ORDERS** the Defence of Nsabimana to specifically mention by name or by position held, the 'MRND dignitaries' mentioned in the supplementary will-say and if those 'MRND dignitaries' include Accused person/s before the Chamber, the Defence is ordered to name the said Accused person/s;
- IV. **ORDERS** the Defence to make the required disclosures regarding the proposed testimony of Witness DEDE as soon as possible and in any case before the close of business on Friday, 8 September 2006;

DENIES the Motion in all other respects.

Arusha, 5 September 2006



William H. Sekule
Presiding Judge



Arlette Ramaroson
Judge



Solomy Balungi Bossa
Judge

[Seal of the Tribunal]

everything else should be done to make sure he is available on the 11th of September so that he can continue with the evidence, in the light of the fact that there is a pending motion which we are not going to -- we cannot sure, we cannot be certain, and we cannot tell which way it will go.

20. Accordingly, the Chamber finds the Prosecution request moot and reminds the Parties of its order of 31 August 2006 that Witness DEYO testifies as from 11 September 2006.

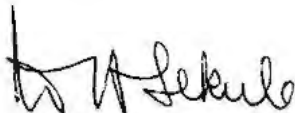
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- IV. **ORDERS** the Defence to make the required disclosures regarding the proposed testimony of Witness DEDE as soon as possible and in any case before the close of business on Friday, 8 September 2006;

DENIES the Motion in all other respects.

Arusha, 5 September 2006



William H. Sekule
Presiding Judge



Ariette Kamaroson
Judge



Solomy Balungi Bossa
Judge

[Seal of the Tribunal]

everything else should be done to make sure he is available on the 11th of September so that he can continue with the evidence, in the light of the fact that there is a pending motion which we are not going to -- we cannot sure, we cannot be certain, and we cannot tell which way it will go.