



UNITED NATIONS  
NATIONS UNIES

**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:** 21 March 2007

**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*

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**DECISION ON JOSEPH KANYABASHI'S MOTIONS FOR MODIFICATION OF  
HIS WITNESS LIST, THE DEFENCE RESPONSES TO THE SCHEDULING  
ORDER OF 13 DECEMBER 2006 AND NDAYAMBAJE'S REQUEST FOR  
EXTENSION OF TIME WITHIN WHICH TO RESPOND TO THE SCHEDULING  
ORDER OF 13 DECEMBER 2006**

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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 B. Bossa (the “Chamber”);

**BEING SEIZED** of the ‘*Requête en modification de la liste des témoins de la Défense de Joseph Kanyabashi en vertu de l’article 73ter*’ filed on 22 December 2006 (the “first Motion”);<sup>1</sup>

**CONSIDERING**

- I. the ‘*Réponse de Arsène Shalom Ntahobali à la requête de Joseph Kanyabashi en modification de sa liste de témoins*’ filed on 30 December 2006 and filed on 2 January 2007;<sup>2</sup>
- II. the ‘*Réplique de Joseph Kanyabashi à la réponse de Arsène Shalom Ntahobali à la requête de Joseph Kanyabashi en modification de sa liste des témoins*’ of 8 January 2007,<sup>3</sup> and
- III. the ‘*Réplique supplémentaire de Joseph Kanyabashi suite à la directive de la Chambre datée du 16 Janvier 2007 relativement à la requête de Joseph Kanyabashi en modification de sa liste des témoins*’ filed on 25 January 2007;<sup>4</sup>

**BEING SEIZED** of the ‘*Demande d’extension de délais pour répondre au ‘Scheduling Order’ du 13 décembre 2006*’ filed by the Defence for Ndayambaje on 25 January 2007;<sup>5</sup>

**CONSIDERING the**

- I. ‘*Prosecutor’s Response to the ‘Demande d’extension de délais pour répondre au ‘Scheduling Order’ du 13 décembre 2006*’ filed on 31 January 2007;<sup>6</sup>
- II. ‘*Réponse de Joseph Kanyabashi au ‘Scheduling Order’ du 13 décembre 2006*’ filed on 31 January 2007;<sup>7</sup> and the ‘*Réplique de Arsène Shalom Ntahobali à la réponse de Joseph Kanyabashi au Scheduling Order du 13 décembre 2006*’ filed on 5 February 2007;<sup>8</sup>

**BEING SEIZED** of the ‘*Deuxième requête en modification de la liste des témoins de la defense de Joseph Kanyabashi en vertu de l’article 73ter*’ filed on 7 February 2007 (the second Motion);

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<sup>1</sup> Unofficial translation: Kanyabashi’s Confidential Motion for Modification of Witness List pursuant to Rule 73ter.

<sup>2</sup> Unofficial translation : Ntahobali’s response to the Confidential Motion.

<sup>3</sup> Unofficial translation : Kanyabashi’s reply to Ntahobali’s response .

<sup>4</sup> Unofficial translation : Kanyabashi’s supplementary reply.

<sup>5</sup> Unofficial translation : Ndayambaje’s request for extension of time to respond to the scheduling order.

<sup>6</sup> Unofficial translation: Prosecutor’s response to Ndayambaje’s request for extension of time to respond to the Scheduling Order of 13 December 2006.

<sup>7</sup> Unofficial translation : Kanyabashi’s response to the Scheduling Order of 13 December 2006.

<sup>8</sup> Unofficial translation : Ntahobali’s response to Kanyabashi’s response.

**CONSIDERING** the '*Réponse de Arsène Shalom Ntahobali à la seconde requête de Joseph Kanyabashi en modification de sa liste de témoins*' filed on 9 February 2007 ;<sup>9</sup>

- I. the 'Prosecutor's response to *Deuxième requête en modification de la liste des témoins de la défense de Joseph Kanyabashi en vertu de l'article 73ter*' filed on 12 February 2007 ;
- II. the '*Réplique de Joseph Kanyabashi aux réponses du Procureur et de Arsène Shalom Ntahobali relativement à la deuxième requête en modification de la liste des témoins de la défense de Joseph Kanyabashi en vertu de l'article 73ter*' filed on 15 February 2007 ;<sup>10</sup>
- III. the '*Duplique de Arsène Shalom Ntahobali à la réplique de Kanyabashi aux réponses de Ntahobali et du Procureur à la seconde requête de Joseph Kanyabashi en modification de sa liste des témoins*' filed on 20 February 2007 ;<sup>11</sup>

**BEING SEIZED** of the '*Requête de Joseph Kanyabashi en vertu de l'article 73 et demandant de retirer neuf témoins*' filed on 05 March 2007 (the third Motion)<sup>12</sup>

**CONSIDERING** the '*Prosecutor's Response to Kanyabashi's Motion filed on 5 March 2007 to withdraw 9 witnesses under Rule 73.*'

**NOW DECIDES** Kanyabashi's Motions as well as Ndayambaje's Motion, pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules"), on the basis of the written submissions of the Parties.

## INTRODUCTION

1. This is a joint trial of six Accused. The Prosecution closed its case on 5 November 2004 after calling 59 witnesses. The Defence case is on-going. During the Pre-Defence Conference of 18 October 2004, the Chamber ruled that each Accused's Pre-Defence Brief should be filed by 31 December 2004, including the lists of witnesses that they intended to call to testify. This order was complied with.<sup>13</sup>
2. Of the six Accused, Pauline Nyiramasuhuko, Arsène Shalom Ntahobali and Sylvain Nsabimana have completed their respective Defences after having called respectively 26, 22, and 11 witnesses. The Accused Alphonse Nteziryayo is now presenting his Defence case and has hitherto called fifteen of a total of 23 Witnesses. He will be followed by Joseph Kanyabashi and Elie Ndayambaje.
3. Having reviewed the Pre-Defence Briefs, the Chamber concluded that an excessive number of witnesses had been listed by the Defence teams for

<sup>9</sup> Unofficial translation : Ntahobali's response to Kanyabashi's second request to modify his witness

<sup>10</sup> Unofficial translation : Kanyabashi's reply to the Prosecutor and Ntahobali's responses to his Second Motion to modify his witness list.

<sup>11</sup> Unofficial translation : Ntahobali's response to Kanyabashi's reply to the Prosecutor and Ntahobali's responses to the Second Motion.

<sup>12</sup> Unofficial translation : Kanyabashi's third motion to remove nine witnesses from the list filed with the pre-defence brief.

<sup>13</sup> The Defence for Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi and Ndayambaje filed their Pre-Defence Briefs on 31/12/2004, 30/12/2004, 30/12/2004, 31/12/2004 and 23/12/2004 respectively.

Nteziryayo, Ndayambaje and Kanyabashi. It therefore issued a Scheduling Order dated 5 October 2006 (the “5 October Order”) requesting the three Defence teams to reduce their numbers of witnesses by 6 November 2006. The 5 October Order not having been complied with, the Chamber issued a new Scheduling Order dated 9 November 2006 (the “9 November Order”) reminding the Defence teams of its previous Order, directing compliance by 4 December 2006 and stressing that failure to comply with the 9 November Order could attract sanctions as per the Rules.

4. On 4 December 2006, the Chamber received a partly joint response to the 9 November Order. In his response, Nteziryayo indicated that he would drop four witnesses, thus calling 24 witnesses, while Kanyabashi and Ndayambaje maintained 49 and 56 witnesses respectively on their lists. Kanyabashi further indicated his intention to move the Chamber at a later stage for leave to add 23 other witnesses.
5. In a Scheduling Order of 13 December 2006 (the “13 December Order”), the Chamber reiterated its exclusive role in controlling the proceedings and its resolve to see the Defence case end by mid-2007. It ordered the Defence teams for Ndayambaje and Kanyabashi to further review their witness lists with a view to significantly reduce the total number of witnesses and file their final lists by 31 January 2007.
6. On 25 January 2007, the Defence for Ndayambaje filed a Motion for extension of time up to 16 April 2007 to respond to the 13 December Order. On 31 January 2007, the Defence for Kanyabashi indicated that it had removed 12 witnesses from its list.<sup>14</sup> It also intimated that it would file another Motion for leave to add seven witnesses.
7. Meanwhile, on 22 December 2006, the Defence for Kanyabashi filed the First Motion where the Accused seeks leave to withdraw 61 witnesses<sup>15</sup> from the list filed with the Pre-Defence Brief and add 22 new witnesses.
8. In the supplementary reply to the First Motion, the Defence for Kanyabashi advised that it was removing three witnesses from the list of 22, leaving a total of 19 witnesses as the subject for addition in the First Motion.<sup>16</sup>
9. In its response to the First Motion of 30 December 2006, the Defence for Ntahobali asked the Chamber as a preliminary matter, to extend the timeframes for responding to the Motion. Noting that its 27 December 2006 instruction on timeframes within which to respond to the Motion were not communicated by the Registry, the Chamber set new dates.<sup>17</sup>

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<sup>14</sup> D-1-SS, D-1-Y, D-2-LLLL, D-2-VVVV, D-2-7-A, D-2-9-M, D-2-11-C, D-2-12-W, D-2-14-R, D-2-15-K; D-13-C and SW.

<sup>15</sup> The withdrawal of 61 witnesses from the initial list in the Pre-Defence brief was already communicated and accepted by the Chamber.

<sup>16</sup> D-2-19-G, D-2-19-M and D-2-19-W.

<sup>17</sup> The Chamber directed that, any party wishing to react was to do so within five days from 16 January 2007, and the Defence for Kanyabashi was to file any reply thereto within the following five days.

10. In the Second Motion, the Defence for Kanyabashi requested the addition of seven new witnesses.
11. In the third Motion, the Defence for Kanyabashi requested leave from the Chamber to remove nine witnesses.
12. If the First, Second and Third Motions were to be granted in whole, the Defence for Kanyabashi would have a list of 61 witnesses to call.

## **SUBMISSIONS OF THE PARTIES**

### **Defence for Kanyabashi**

13. The Defence argues in the First Motion that it is in the interests of justice that the additional 19 witnesses<sup>18</sup> are heard; that they were not known to the Defence or accepted to testify after the Pre-Defence Brief had been filed, and will give relevant evidence to the Accused's Defence.
14. The Defence further submits that the 19 witnesses are to testify on (a) events at Matyazo dispensary, (b) events at Kabakobwa, (c) events at Cyarwa, (d) the presence of Interahamwe in Butare, (e) threats against Kanyabashi, (f) meetings held by Kanyabashi with his staff during the events and (g) the roadblock not far from Hotel Ihuliro.
15. In the Second Motion, the Defence advances the same arguments as in the First Motion in order to be granted leave to drop 12 witnesses<sup>19</sup> and add seven witnesses.<sup>20</sup>
16. In the third Motion, the Defence for Kanyabashi requests leave from the Chamber to delete nine witnesses from the list filed with the Pre-Defence brief.<sup>21</sup>

### **Ntahobali's Response**

17. The Defence for Ntahobali objects to the First and Second Motions arguing that they do not comply with the previous Orders directing Kanyabashi to reduce his witness list. It further contends that if the number of witnesses already called by the Defence teams for Nyiramasuhuko, Ntahobali and Nsabimana were to be used as a yardstick, and if the Chamber were to grant the additional witnesses, Kanyabashi's Defence would prolong the presentation of the Defence case well beyond the target date envisaged by the Chamber.
18. The Ntahobali Defence further submits that some of the proposed additional witnesses simply level accusations against Ntahobali, which is unfair as the latter's

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<sup>18</sup> D-2-14-F, D-2-15-V, D-2-15-X, D-2-16-A, D-2-16-C, D-2-16-L, D-2-16-O, D-2-16-P, D-2-17-A, D-2-17-F, D-2-17-I, D-2-17-K, D-2-17-L, D-2-17-M, D-2-18-O, D-2-19-F, D-2-19-J, D-2-19-K, D-2-19-P.

<sup>19</sup> These witnesses whose removal was previously indicated to the Chamber are : D-1-SS, D-1-Y, D-2-LLLL, D-2-VVVV, D-2-7-A, D-2-9-M, D-2-11-C, D-2-12-W, D-2-14-R, D-2-15-K, D-13-C and SW.

<sup>20</sup> These are : D-2-10-YD-2-20-A, D-2-20-C, D-2-20-E, D-2-20-F, D-2-20-G, D-2-20-K.

<sup>21</sup> These are D-2-10-L, D-2-13-F, D-2-15-I, D-9-S, D-20-M, D-20-N, D-20-S, D-20-EE and FAT.

Defence is already concluded (with the exception of Witness NMBMP).<sup>22</sup> It adds that all Accused were treated fairly when they were ordered to file their respective Pre-Defence Briefs on the same date, as this allowed all parties to adequately prepare. Therefore, to allow Kanyabashi at this stage to modify his witness list would be to give him an unfair advantage over those Accused who have closed their defences. It concludes that, the excessive number of witnesses violates Ntahobali's right to a fair and expeditious trial and the Chamber should decide the names and number of the witnesses to be called, and limit the range of subjects on which they are to be heard.

### **Prosecutor's Response**

19. The Prosecutor submits that the proposal to add even more witnesses does not comply with the 9 November 2006 and 13 December 2006 Orders and that the Kanyabashi Defence has not significantly reduced the total number of witnesses it intends to call.<sup>23</sup>
20. The Prosecution emphasises that during its case, it significantly reduced its list of witnesses, calling only 59, which is an average of less than 10 witnesses per accused.<sup>24</sup>
21. The Prosecutor does not oppose the third Motion for removing nine witnesses.

### **Kanyabashi's Reply**

22. With respect to the statistics presented by the Defence for Ntahobali in response to the First Motion, the Defence refers to the 13 December 2006 Order in which the Chamber stressed that the number of witnesses proposed by a party could not be justified simply by referring to the number called by another party. Rather, the criterion should be the right to an expeditious trial and a full defence.
23. As for the substantive reasons, the Defence contends that *Ngoma* commune is the epicentre of the Butare proceedings, hence justifying a large number of witnesses to testify on these events.
24. With respect to the responsibility for the roadblock close to Hotel Ihuliro, it submits that this matter was raised only when the Accused Ntahobali testified. It is therefore in Kanyabashi's defence and not an attack on Ntahobali, that witnesses are proposed to testify on this point.
25. In its reply to the Prosecution and the Defence for Ntahobali's responses, the Defence argues that Witnesses D-2-20-A, D-2-20-F and D-2-20-G will testify among other things on threats addressed to Kanyabashi between April and July 1994.

### **Ntahobali's Rejoinder**

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<sup>22</sup> Ntahobali's Defence refers to Witnesses D-2-16-A., D-2-17-A, D-2-17-I, D-2-17-K.

<sup>23</sup> Para. 12 of the Prosecutor's Response.

<sup>24</sup> Para. 13 of the Prosecutor's Response.

26. The Defence submits that it is odd for Kanyabashi to maintain Witness D-9-S on his list as he has already been called by the Defence for Ntahobali as Witness WCKJ and was cross examined by the Defence for Kanyabashi on 31 January 2006. The Defence also submits that it has never had the intention of holding Kanyabashi liable for setting up the roadblock mentioned in the latter's reply.

#### **Ndayambaje's Submissions**

27. The Defence for Ndayambaje moves the Chamber for permission to file its response to the Scheduling Order of 13 December 2006 at the beginning of the next trial session on 16 April 2007. It submits that, despite field investigations conducted during the Christmas recess, it has not yet managed to locate all its potential witnesses, who are scattered across many countries.
28. The Defence for Ndayambaje submits that an extension of two and a half months would be reasonable as it would allow the Defence to visit the remaining countries to locate its witnesses in order to fully comply with the 13 December 2006 Scheduling Order. To assist in this process, the Defence submits that it has been granted an additional investigator by the Registry. The Defence for Ndayambaje submits that it will not have begun the presentation of its case by 16 April 2007.

#### **Prosecution Response to Ndayambaje's Motion**

29. The Prosecution does not oppose the motion so long as the requested extension will effectively permit the Defence to submit a final and realistic list of witnesses. The Prosecution submits, however, that the time for further investigation, if granted, should not be used as an opportunity to add more witnesses, thereby prolonging the Defence case.

#### **HAVING DELIBERATED**

30. The Chamber recalls that in determining the number and category of witnesses to be called by a party, there is a need to balance the rights of each accused to a fair trial, including the right to have adequate time and facilities for the preparation of his defence, pursuant to Article 20(4) (b) of the Statute and the right of each Accused in this joint trial to be tried without undue delay, pursuant to Article 20 (4)( c) and Rule 82 (A) of the Rules.<sup>25</sup>
31. The Chamber notes that its previous Orders of 5 October 2006, 9 November 2006 and 13 December 2006 clarified that the Defence teams for Kanyabashi and Ndayambaje should file new lists containing reasonable numbers of witnesses within a prescribed deadline. Those Orders did not call for any response but rather for compliance.
32. The Chamber notes that at the time of its Orders, the Defence for Kanyabashi had 56 witnesses. In its response to the 13 December Order and in the Third Motion, it removed 12 and nine witnesses respectively from the list attached to the Pre-

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<sup>25</sup> The Prosecutor v. Nyiramasuhuko et al., Scheduling Order (Under Rule 54 ) of the Rules of Procedure and Evidence, 13 December 2006, p. 3.

Defence Brief, leaving a total of 35 witnesses. In the First and Second Motions, the Defence requested the addition of 19 and seven witnesses respectively, who, if admitted, would raise to 61 the total number of Kanyabashi's witnesses.

33. The Chamber considers that Kanyabashi's successive motions for variation of his witness list are unnecessary, and constitute an abuse of process as they endlessly relitigate an issue already adjudicated upon. The previous Orders required the Defence to reduce significantly their witness lists at the time. The appropriate course of action would have been to reduce substantially the said witness lists and not to move the Chamber afresh for any addition or substitution of witnesses. Therefore the Chamber denies Kanyabashi's Motions for addition of witnesses.
34. Moreover, there was no need for example, for Kanyabashi's Defence to file the Third Motion. A notice of reduction of witnesses would have sufficed in view of the previous standing Orders directing the Defence to reduce its witness list. The Chamber nevertheless notes and accepts the reduction of nine witnesses referred to in the Third Motion. The Chamber also notes and accepts the previous deletion of 12 and 61 witnesses in the Kanyabashi response to the 13 December Order and the First Motion respectively.
35. That said, the Chamber is still of the view that an excessive number of witnesses remains on Kanyabashi's list. From an examination of the will-says attached to the Pre-Defence Brief, the Chamber finds for example that 15 witnesses envisaged to testify about Kanyabashi's character is excessive.<sup>26</sup> Similarly, five witnesses to testify about people alleged to have hidden in Kanyabashi's house between April and July 1994<sup>27</sup> and six witnesses to testify on the alleged attack on the dispensary in Matyazo *secteur* in April 1994 are excessive.<sup>28</sup>
36. With regard to Ndayambaje's Motion, the Chamber considers that the Defence for Ndayambaje has had ample time to investigate its case, should have complied with the Chamber's previous Orders and therefore denies the Motion. Even assuming that investigations were still under way, this is no justification for failure to comply with the Chamber's Orders. The Defence for Ndayambaje should have reduced its list of 49 witnesses, which, the Chamber considers to be excessive.
37. Finally the Chamber urges the Defence teams for Kanyabashi and Ndayambaje to bear in mind that none of the first three Defence teams have called more than 26 witnesses. The Chamber does not expect any of the Defence teams to call more than thirty witnesses.
38. Accordingly, the Chamber orders the Defence teams for Kanyabashi and Ndayambaje to reduce their witness lists to a maximum of 30 witnesses each, and to file their amended lists by 05 April 2007.

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<sup>26</sup> These are D-2-YYYY, D-2-6-K, D-2-9-B, D-2-13-D, D-2-13-F, D-2-13-K, D-2-13-O, D-2-13-U, D-2-14-V, D-2-15-N, D-9-O, D-9-U, D-20-H, D-21-B, D-22-B.

<sup>27</sup> These are D-1-O, D-2-QQQQ, D-20-H, D-20-J, D-21-B.

<sup>28</sup> These are D-2-QQQQ, D-2-14-T, D-2-14-V, D-8-N, D-9-U, D-2-18-O.



**FOR THE ABOVE REASONS, THE CHAMBER**

**NOTES and ACCEPTS** the deletion of nine witnesses from Kanyabashi's witness list;

**DENIES** Kanyabashi and Ndayambaje's Motions;

**ORDERS** the Defences for Kanyabashi and Ndayambaje to file by 05 April 2007 their revised lists of witnesses containing not more than 30 witnesses each.

**ORDERS** both Defences to refrain from filing any further motion for variation of their witness lists until full compliance with the present Decision.

Arusha, 21 March 2007

William H. Sekule  
Presiding Judge

Arlette Ramaroson  
Judge

Solomy Balungi Bossa  
Judge

[Seal of the Tribunal]