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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: 7 May 2008

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The PROSECUTOR v. Joseph KANYABASHI

Case No. ICTR-96-15-T

Joint Case No. ICTR-98-42-T

**DECISION ON KANYABASHI'S MOTION FOR ADDITIONAL PROTECTIVE
MEASURES FOR WITNESS D-2-21-T**

Office of the Prosecutor

Ms. Holo Makwaia
Ms. Adelaide Whest
Mr. Cheikh Tidiane Mara
Ms. Alihea Alexis Windsor
Mr. Fergal Gaynor
Ms. Madeleine Schwarz
Ms. Astou Mbow, *Case Manager*
Ms. Alison McFarlane, *Case Manager*

Counsel for Kanyabashi

Mr. Michel Marchand
Ms. Simone Santerre

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Arlette Ramaroson and Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the:

"Requête de Joseph Kanyabashi aux fins d'ordonner des mesures spéciales de protection concernant le témoin D-2-21-T," filed confidentially on 21 April 2008 ("Kanyabashi's Motion");

CONSIDERING the:

- i. "Prosecutor's Response to *'Requête de Joseph Kanyabashi aux fins d'ordonner des mesures spéciales de protection concernant le témoin D-2-21-T'*", filed confidentially on 23 April 2008 ("Prosecution's Response");
- ii. *Réponse de Arsène Shalom Ntahobali à la 'Requête de Joseph Kanyabashi aux fins d'ordonner des mesures spéciales de protection concernant le témoin D-2-21-T'*", filed confidentially on 24 April 2008 (Ntahobali's Response);
- iii. *Réplique de Joseph Kanyabashi aux réponses du Procureur et de Ntahobali à sa Requête aux fins d'ordonner des mesures spéciales de protection concernant le témoin D-2-21-T'*, filed confidentially on 28 April 2008 (Kanyabashi's Reply);

NOTING the "Decision on Kanyabashi's three Motions to Vary His List of Witnesses and to Admit Written Statements Under Rule 92 bis", of 24 April 2008 in which the Chamber allowed the addition of Witness D-2-21-T to Kanyabashi's witness list.

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") in particular Rules 69 and 75;

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

INTRODUCTION

1. On 25 November 1997, the Chamber granted protective measures for Kanyabashi's Defence witnesses under Rule 75.¹

2. On 21 April 2008, the Defence for Kanyabashi filed a Motion for additional protective measures for Witness D-2-21-T. Five Annexes are attached to the Motion.²

¹ *The Prosecutor v. Kanyabashi*, ICTR-96-15-T, Decision on Protective Measures for Defence Witnesses and their Families (IC), 25 November 1997.

² Article by André Guichaoua published in *Revue Eins – Entwicklungspolitik Information Nord-Süd*, on 4 April 2007 (Annex 1); The *amicus curiae* brief of Human Rights Watch in opposition to the Rule 11 bis transfer submitted in the trial against Kayishema on 3 January 2008 (Annex 2); Extracts of Alison Des Forges' testimony during the trial against Ruzahwa on 6 March 2007 (Annex 3) an article by Joseph Ngarambe in the *Association internationale de recherche sur les crimes contre l'humanité et les génocides*, pages 6-12 (Annex 4)



3. On 24 April 2008, the Chamber granted the addition of Witness D-2-21-T to Kanyabashi's witness list, as requested in Kanyabashi's Motion of 10 April 2008.
4. The Chamber notes that Ntahobali's Response was filed after the three-day time-frame as instructed by the Chamber on 21 April 2008 without good cause being demonstrated; therefore, it will not be considered

SUBMISSIONS OF THE PARTIES

Kanyabashi's Motion

5. The Defence for Kanyabashi submits that Witness D-2-21-T is particularly vulnerable and it is the interests of justice to grant him maximal protection. Referring to Article 21 of the Statute and Rules 69 (A), (C) and 75 (A), the Defence submits that Witness D-2-21-T is a key witness expected to testify about the alleged fabrication of false evidence by several Prosecution witnesses in a particular context.
6. The Defence submits that there exist objective reasons for the witness' fears. It asserts that Expert Witnesses André Guichaoua confirmed that the Rwandan state systematically discriminated against the opposition, including arbitrary imprisonment (Annex I). Expert Witness Filip Reyntjens also underlined that the Rwandan government possessed overall control over Rwanda and its inhabitants; that it was dangerous to testify for the Defence and that the Rwandan authorities were well aware of the identity of those witnesses. The Defence also refers to the Human Rights Watch Brief of January 2008 (Annex II) stating that in several cases, witnesses who testified for the Defence before the ICTR were arrested upon their return to Rwanda. It was known in their community that the witnesses had testified before the ICTR, despite the fact that they were protected witnesses.
7. The Defence relies on the testimony of Alison Des Forges who stated that she had been criticised and threatened by the Rwandan authorities after testifying in favour of a priest accused of genocide. Des Forges also testified to the reluctance of witnesses living in Rwanda to give evidence fearing oppressions by the accused, their friends or families (Annex III). The Defence finally refers to Joseph Ngarambe's article (Annex IV) relating to the role of the Rwandan government, when *Ibuka* suspended its co-operation with the ICTR in January 2002.
8. The Defence submits that Kanyabashi's Defence Witnesses D-2-16-P, D-2-5-I and D-2-14-D have also experienced negative consequences after their testimony. Other witnesses have refused to testify because they were afraid of the consequences.
9. The Defence requests the Chamber to grant the following additional protective measures for Witness D-2-21-T:
 - i. To authorize the Defence to disclose the identity of D-2-21-T only ten days before the witness' testimony. The Defence asserts that on various occasions, the ICTR and the

and the list of recipients of the Registry's e-mail communicating the confidential Motion of the Defence of 10 April 2008 (Annex 5).



International Criminal Tribunal for former Yugoslavia (ICTY) have granted such requests.³

- ii. To prohibit the Registry and the Parties from communicating the identity of Witness D-2-21-T via internet. The Defence submits that most materials are disclosed via internet without using specific security measures. Annex V demonstrates that confidential documents relating to a witness' identity are often transmitted to up to 60 persons.
- iii. To order that a single hard copy of the witness' personal particulars be provided to each Judge and to each Party.
- iv. To prohibit all Parties from making inquiries revealing information which could explicitly or implicitly lead to the conclusion that D-2-21-T has provided information as stated in his will say or that he is a witness called before the ICTR.
- v. To order WVSS (Witnesses and Victims Support Section) not to communicate Witness D-2-21-T's personal particulars to the Rwandan Authorities. Witness D-2-21-T already possesses his travel documents and wishes to travel to Arusha by his own means. Therefore a communication with the Rwandan authorities is not required.

10. Alternatively, the Defence requests the Chamber to order *proprio motu* additional protective measures which it deems adequate.

Prosecution's Response

11. The Prosecution opposes the Motion and submits that the Defence for Kanyabashi has failed to set forth witness-specific information warranting the protective measures sought. The Motion provides only general information but does not specify why the threat pertaining to Witness D-2-21-T is of such an unusually high level; nor does it adduce any evidence in support of its allegations regarding D-2-21-T's situation and his participation in specific meetings.

12. The Prosecution submits that as Witness D-2-21-T's will say contains serious allegations against several Prosecution witnesses, ten days is too short to diligently investigate the credibility of D-2-21-T; this measure may therefore significantly prejudice the Prosecution.

13. The Prosecution submits that protective measures relating to the manner of pre-testimony investigations are unnecessary because the Prosecution conducts inquiries relating to protected Defence witnesses in a diligent manner so as not to reveal that they are potential witnesses before the Tribunal.

14. The Prosecution submits that the Defence has failed to give reasons sufficient to justify measures concerning the electronic communication of the witness' identity; and that the order restricting the electronic and paper distribution of the witness's identity or evidence would unfairly impede the Prosecution in the discharge of its duty under Rule 68.⁴

³ The Defence refers among others to: *The Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, *Ordonnance aux fins de retarder la divulgation de déclarations préalables et de prendre des mesures de protection* (TC), 19 March 1999; *The Prosecutor v. Renzaho*, Case No. ICTR-99-52-1, *Decision on Hassan Ngeze's Urgent Motion to Order for Protective Measures for Defence Witnesses and Co-operation and Judicial Assistance from States* (TC), 23 September 2002, para. 7.

⁴ The Prosecution refers to *The Prosecution v. Boskoski and Tarculovski*, *Decision on Prosecution's Motion for Protective Measures for Victims and Witnesses*, Case No. IT-04-82-PT, 20 June 2005.



15. Finally, with regard to the Defence's request to prohibit the transmission of the witness's identity by WVSS to the Rwandan authorities, the Prosecution observes that while such an order might be appropriate in extraordinary circumstances, the Motion does not detail witness-specific information or evidence in support of its request.

Kanyabashi's Reply

16. The Defence submits that its request to delay the disclosure of the witness' identity to 10 days before the witness' testimony would give the Parties sufficient time for their investigations. Witness D-2-21-T' will say has already been disclosed and it allows the Parties to commence their investigations; the identity of the witness is only an additional element.

17. The Defence states that its request to restrict the Parties investigations is a necessary measure which does not prejudice the Prosecution or the other Parties. The Defence further asserts that such measure was not explicitly ordered in the Chamber's Decision of 25 November 1997.

18. The Defence contends that the prohibition of electronic communication of the witness' personal particulars should not hinder the Prosecution in discharging its obligations under Rule 68. The Defence furthermore refers to a text, provided in the electronic encyclopaedia *Wikipedia*, about the risks of electronic communications, annexed to Kanyabashi' Reply.

DELIBERATIONS

19. Pursuant to Article 21 of the Statute and under Rule 75 (A), the Chamber may order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused. Specific protective measures may be provided under "exceptional circumstances" such as the witness' "particular vulnerability" due to his position as an insider in "the higher echelons of authority" or as a key witness.⁵

20. The Chamber notes the Defence's submission regarding Witness D-2-21-T's fear for his safety due to his status and the fact that he is expected to contradict several Prosecution witnesses and allege fabrication of evidence. After having examined the information contained in the Defence's submissions and the documents attached to the Motion, the Chamber accepts the objective justification of the Witness' fears.

21. Recalling that Witness D-2-21-T already enjoys several protective measures⁶ and that specific protective measures are provided under "exceptional circumstances" only, the Chamber will now consider if the additional requested protective measures are strictly necessary or if the existing less restrictive measures can secure the required protection.

⁵ *The Prosecutor v. Nahimana*, Case No. ICTR- 99-53-I, Decision on the Prosecutor's Application to Add Witness X to its list of Witnesses and for Protective Measures, (TC) 14 September 2001, para.12.

⁶ *The Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, Decision on Protective Measures for Defence Witnesses and their Families (TC), 25 November 1997.

(i) Delayed Disclosure of the Witness' Identity

22. The Defence requests that Witness D-2-21-T's name be disclosed only ten days before his testimony. The Chamber notes that in the ICTR jurisprudence, the time frame between disclosure of the witness' identity and the witness' appearance before the Court varies between ten and 30 days.⁷ In the instant case, the Chamber recalls that disclosure has been ordered 21 days before the expected testimony on 18 October 2004.⁸

23. Recalling the need to balance the witness's safety with the other Parties' rights when ordering protective measures,⁹ the Chamber considers that Witness D-2-21-T's situation requires specific protective measures. Nevertheless, ten days is too restricted a time frame. It may impede the other Parties' investigations and prejudice the Prosecution considering that Witness D-2-21-T's expected testimony appears to contain serious allegations against several Prosecution witnesses. The Chamber is of the view that the period of 14 days adequately balances the need for witness protection and the right of the other Parties to prepare their cross-examination.

24. Therefore, the Chamber grants a variation of the disclosure deadline in respect of Witness D-2-21-T's identifying material 14 days before the Witness's expected testimony.

(ii) Prohibition of communication of the witness' identity via e-mail; Disclosure by way of providing a single copy to each of the Judges and to each Party

25. The Chamber notes that the Defence requests a prohibition of communication via internet of the witness' identity and to order its disclosure by way of providing a single hard copy to each of the Judges and to each Party. Considering Witness D-2-21-T's high vulnerability, utmost caution is required in communicating the Witness' identity. In the particular circumstances of this case, the Chamber considers that communicating the Witness's identifying material via e-mail may not ensure the intended limited circulation. Therefore, the Chamber deems the communication of the witness' personal particular by way of providing a single copy to each of the Judges and to each Party to be a necessary measure.

26. The Chamber has noted the Prosecution's concerns in that respect and it recalls that under Rule 75 (F) (ii), protective measures shall not prevent the Prosecution from discharging any disclosure obligation in other proceedings provided the Prosecution notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in these proceedings. The Chamber considers therefore that the protective measures requested would not hinder the Prosecution from meeting its disclosure obligations under Rule 68 (A) and (B).

⁷ *The Prosecutor v. Renzaho*, Case No. ICTR-97-31-T, Decision on Defence request for special protective measures for Witness HIN (TC), 14 June 2007, para. 3; *The Prosecutor v. Niyitegeka*, Case No. ICTR 96-14-1, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, 12 July 2000, paras. 15, 16; *The Prosecutor v. Ngeze*, Case No. ICTR-99-52-T, Decision on Hassan Ngeze's Urgent Motion for Orders for Protective Measures for Defence Witnesses and Co-operation on Judicial Assistance from States, (TC) 23 September 2002, para. 7; *The Prosecutor v. Simba*, Case No. ICTR-01-76-1, Decision on Defence Request for Protection of Witnesses", 25 August 2004.

⁸ T. 18 October 2004, p. 20.

⁹ See for example *The Prosecutor v. Simba*, Case No. ICTR-01-76-1, Decision on Defence Request for Protection of Witnesses", 25 August 2004, para. 5; *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeals of Decisions on Witness Protection Orders, 6 October 2005, para 3.

27. Accordingly, the Chamber grants the Defence requests in that respect.

(iii) Restrictions during investigations

28. The Chamber notes the Defence's request to prohibit the Prosecution and other Parties from conducting their investigations by revealing directly or indirectly information which could lead to the conclusion that Witness D-2-21-T has provided information as stated in his will say or that he is a witness called before the ICTR.

29. The Chamber assumes that the Prosecution and the other Parties will make every effort to conduct their investigations in a discreet manner and protect the Witness. Therefore the Chamber sees no reason for any specific order beyond the orders of 25 November 1997.¹⁰ For these reasons, the Chamber denies this request. Nevertheless, the Chamber reminds the Prosecution and the other Parties to undertake all necessary steps to protect the witness' identity during their investigations and to avoid any express or implicit suggestion that the person is a potential witness before this Tribunal.

(iv) No communication of Witness's D-2-21-T's personal particulars by WVSS to the Rwandan Authorities.

30. The Chamber recalls the Defence's request to order the WVSS not to communicate Witness D-2-21-T's personal particulars to the Rwandan authorities. The Chamber notes the Defence's submission that Witness D-2-21-T is already in possession of the necessary travel documents planning to come to Arusha by his own means and that therefore a communication with the Rwandan authorities is not required.¹¹ From this the Chamber concludes that the Defence undertakes the responsibility to ensure the Witness' journey to and from Arusha without involving WVSS. Under those particular circumstances, the Chamber considers that there is indeed no need to communicate Witness D-2-21-T's identity to the Rwandan authorities. Therefore, the Chamber grants the request of the Defence in this respect.

FOR THE ABOVE REASONS, THE TRIBUNAL

ORDERS that Witness D-2-21-T's identity shall be disclosed 14 days before the Witness is called to testify;

ORDERS the Registry and all Parties not to communicate Witness D-2-21-T's identity by way of e-mail;

DIRECTS the Registry to communicate Witness D-2-21-T's identity by way of providing each Judge and each of the Party with a single sealed hard paper copy;

ORDERS the WVSS not to communicate Witness D-2-21-T's identity to the Rwandan authorities;

DENIES the Motion in all other respects.

¹⁰ The Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, Decision on Protective Measures for Defence Witnesses and their Families (TC), 25 November 1997.

¹¹ The Motion, para. 49.



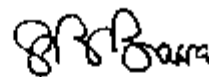
Arusha, 7 May 2008



William H. Sekule
Presiding Judge



Arlette Ramaroson
Judge



Solomy Balungi Bossa
Judge

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