



UNITED NATIONS  
NATIONS UNIES

ICTR-00-56-T  
1-4-2005  
(19740 — 19735)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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OR: ENG

## TRIAL CHAMBER II

**Before:** Judge Asoka de Silva, Presiding  
Judge Taghrid Hikmet  
Judge Seon Ki Park

**Registrar:** Mr Adama Dieng

**Date:** 1 April 2005

The PROSECUTOR  
v.  
Augustin BIZIMUNGU  
Augustin NDINDILYIMANA  
François-Xavier NZUWONEMEYE  
Innocent SAGAHUTU  
Case No. ICTR-00-56-T

JUDICIAL RECORDS/ARCHIVES  
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### DECISION ON BIZIMUNGU'S URGENT MOTION PURSUANT TO RULE 73 TO DENY THE PROSECUTOR'S OBJECTION RAISED DURING THE 3 MARCH 2005 HEARING

#### Office of the Prosecutor:

Mr Ciré Aly Bâ  
Mr Alphonse Van  
Mr Ifeoma Ojemeni  
Mr Segun Jegede  
Mr Abudacarr Tambadou  
Mr Faria Rekkas (Case Manager)  
Mrs Anne Pauline Bodley (Case Manager)

#### Counsel for the Defence:

Mr Gilles St. Laurent and Mr Ronnie Mac Donald for Augustin Bizimungu  
Mr Christopher Black and Ms Tiphaine Dickson for Augustin Ndindiliyimana  
Mr André Ferran and Ms Danielle Girard for François-Xavier Nzuwonemeye  
Mr Fabien Segatwa and Mr Seydou Doumbia for Innocent Sagahutu

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

**SITTING** as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

**BEING SEISED OF** Bizimungu's Urgent Motion Pursuant Rule 73 to Deny the Prosecutor's Objection Raised During the 3 March 2005 Hearing filed on 3 March 2005 (the "Motion")<sup>1</sup>;

**HAVING RECEIVED AND CONSIDERED** the

- (i) Prosecutor's Response to Bizimungu's Urgent Motion Pursuant Rule 73 to Deny the Prosecutor's Objection Raised During the Audience on 3 March 2005 filed on 7 March 2005 (the "Response")<sup>2</sup>;
- (ii) Bizimungu's Reply to the Prosecutor's Response filed on 10 March 2005 (the "Reply")<sup>3</sup>;
- (iii) Ndindiliyimana's Motion in Support of General Bizimungu's Urgent Motion Requesting the Chamber to Deny Prosecutor's Objection Raised on March 3<sup>rd</sup> 2005, filed on 14 March 2005 (Ndindiliyimana's "Motion in Support")<sup>4</sup>;
- (iv) Prosecutor's Reply to Motion in Support of General Bizimungu's Urgent Motion Requesting the Chamber Deny (sic) Prosecutor's Objection Raised on March 3<sup>rd</sup>, 2005 filed on 16 March 2005 (the Prosecutor's "Rejoinder")<sup>5</sup>.

**CONSIDERING** the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules") in particular Rules 70 and 97 of the Rules;

**HEREBY DECIDES** the Motion on the basis of written briefs filed by the Parties pursuant to Rule 73 of the Rules.

## **SUBMISSIONS OF THE PARTIES**

### ***The Defence***

1. Pursuant to Rule 73, the Defence seeks that the Motion be heard orally, that the Prosecutor's objection raised on 3 March 2005 be denied and that Counsel be authorised to cross-examine Prosecution witnesses on the content of their interview by the Prosecution.
2. The Defence for Bizimungu recalls that during the 3 March 2005 hearing, the Prosecution objected to a question raised by the Defence for Bizimungu on the basis that the

<sup>1</sup> The Motion was originally filed in French: « *Requête urgente demandant à la Chambre de rejeter l'objection soulevée par le Procureur lors de l'audience du 3 mars 2005* ».

<sup>2</sup> The Reply was originally filed in French: « *Réponse du Procureur à la requête présentée par le Conseil d'Augustin Bizimungu, sollicitant le rejet de l'objection soulevée par l'accusation lors de l'audience de 3 mars 2005* ».

<sup>3</sup> The Response was originally filed in French : « *Réplique à la Réponse du Procureur à la requête présentée par le Conseil d'Augustin Bizimungu, sollicitant le rejet de l'objection soulevée par le Procureur lors de l'audience du 3 Mars 2005* ».

<sup>4</sup> The Motion was originally filed in English.

<sup>5</sup> The Reply was originally filed in English.



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information it sought to elicit was privileged. The Defence argues that there is no foundation in fact or in law that an interview between the Prosecution and a Witness is confidential.

3. The Defence argues that it has the right to cross-examine the witness on all matters that could affect the witness's credibility, bearing in mind that the right to cross-examination is the cornerstone of a plain and full defence as recognized in Articles 19 and 20(4) of the Statute and in Rule 90 of the Rules.

4. The Defence argues that the Prosecution's objection pursuant to Rule 97, aims at limiting the Defence's right to cross-examine Witness GFC on the content of the discussions he may have had with the Prosecution with regard to his extra judicial statements.

5. The Defence admits that there exists a privilege for all communications between lawyer and client that are not subject to disclosure, unless the client agrees to disclosure or has voluntarily disclosed the communication. However, the Defence argues that communications between the Prosecution and a witness are not of a confidential nature and that the relation between the two can never be considered as lawyer-client relation. Furthermore, the Defence argues that the witness is by no means a client of the Prosecution.

6. The Defence submits that when the Prosecution calls a witness, it has to be aware that the communication with the witness might be part of the cross-examination by the Defence.

#### ***The Prosecution***

7. The Prosecution opposes the Motion and submits that in an accusatory penal system, the Parties gather and evaluate the evidence before submitting it to the judges.

8. The Prosecution further submits that the Rules of Procedure and Evidence specify which documents have to be disclosed to the other Party and recalls that Rule 70(A) excludes some documents from disclosure or notification.

9. The Prosecution therefore argues that documents that should not be disclosed or notified do not have to be discussed.

10. The Prosecution submits that only verifiable facts can be cross-examined and Rule 90 of the Rules should not be used in support of a fishing expedition.

11. Finally, the Prosecution submits that it is up to the Party who seeks the amplification of cross-examination to show that this is in the interest of justice.

#### ***The Defence Reply***

12. The Defence for Bizimungu argues that the Prosecution has changed its argumentation by dropping its initial argument based on Rule 97(A) raised during the hearing on 3 March 2005.

13. The Defence for Bizimungu argues that for this reason, the Prosecution's response has to be rejected as it no longer represents the initial argumentation which was the basis for the Defence's Motion. The Prosecution is not allowed to bring up new arguments that were not made during the hearing.



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14. The Defence therefore asks the Chamber not to consider the Prosecution's new arguments.

15. The Defence submits that Rule 70 of the Rules is a specific exception to the Prosecution's obligation to disclose materials to the Defence.

16. The Defence further submits that as an exception to a general rule, Rule 70 (A) has to be restrictively interpreted.

17. The Defences submits that Rule 70(A) applies to reports, memoranda, or other internal documents but does not include the communications between the Prosecution and its witnesses.

18. The Defences argues that Rule 70(A) does not affect the Defence's right to cross-examine a witness about the meetings with the Prosecution and its witnesses.

19. The Defence submits that the credibility of a witness has to be evaluated on the totality of circumstances and therefore it is not only allowed but to wish that one part of the cross-examination allows the Chamber to evaluate those facts emanating from the witness' memory and those that come from perception or suggestion.

20. The Defence submits that the Prosecution and its assistants do not benefit from a special status in interviewing a witness merely by virtue of being Prosecutor or assistant, and that there is nothing to indicate that the right to full cross-examination should be limited for that reason alone.

21. The Defence argues that in the interest of justice, a doubtful practice by the Prosecution in meeting a witness several times within a brief period of time during the proceedings, should be brought to light for the sake of equity and transparency.

***Ndindiliyimana's Motion in Support***

22. Defence for Ndindiliyimana bases its motion mainly on the arguments brought forward by Defence for Bizimungu.

23. In addition, Defence for Ndindiliyimana argues that the scope of cross-examination, set out in Rule 90 of the Rules, explicitly includes the testing of a witness' credibility.

24. Defence for Ndindiliyimana further argues that questions posed with respect to preparatory meetings between the Prosecution and witnesses do not constitute any attempt to widen the scope of cross-examination, but rather fall into its traditional ambit, as reflected by practice before the Chambers both at the ICTR and ICTY, and as reflected by the Rules. This includes, for instance, questions designed to elicit the existence of advantages attached to a witness' testimony, or a potential modification of the witness's version of events.

***Prosecutor's Rejoinder***

25. The Prosecution argues that the Defence's submission that it has been the practice of both the ICTY and the ICTR to allow Defence counsel to cross-examine prosecution

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witnesses with respect to conversations they have had with Prosecutors is misconceived and totally misleading.

26. The Prosecution submits that cross-examination is governed exclusively by Rule 90 of the Rules.

27. The Prosecution argues that cross-examination of a Prosecution witness on the contents of discussions in pre-testimony meetings with the Prosecutor is allowed only in very exceptional circumstances.

## **DELIBERATIONS**

28. The Chamber recalls Rule 70(A) of the Rules which provides as follows:

Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.

29. The Chamber also recalls Rule 97 of the Rules which provides as follows:

All communications between lawyer and client shall be regarded as privileged, and consequently disclosure cannot be ordered, unless:

- (i) The client consents to such disclosure; or
- (ii) The client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

30. First, the Chamber notes that Rule 70(A) lists “reports, memoranda, or other internal documents” and exempts them from the Prosecutor’s disclosure obligation. It is the Chamber’s view that oral communications between Counsel and a witness in the course of preparing a witness for testimony fall outside the scope of documents protected under Rule 70(A). Indeed, oral communication can hardly qualify as “documents” within the context of that Rule.

31. The Chamber further concludes that a Prosecution witness is not a client of the Prosecutor, and therefore the privilege provided for under Rule 97, does not apply to the relationship between the Prosecution and its witnesses.

32. The Chamber also recalls Rule 90(G)(i) of the Rules which provides as follows:

Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness, and where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of the case.



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33. The Chamber notes under Rule 90(G) (i) the scope of cross-examination is limited to evidence given by the witness in chief, to the witness's credibility, or matters relevant to the case of the cross-examining party. Rule 90 (G) (iii) gives the Chamber discretion to permit inquiry into additional matters.

34. The Chamber notes that questions posed with respect to preparatory meetings between the Prosecution and witnesses could relate to the witness's credibility.

35. The Chamber however notes that a presumption exists that Counsel perform their duties in accordance with the ethical principles that govern the legal profession in their respective countries and that apply, *mutatis mutandis*, before the Tribunal. This includes Counsel's conduct during preparatory meetings with witnesses. Unless a party makes a specific allegation of misconduct on the part of Counsel, in which case the allegation must be substantiated, questions that generally tend to probe into the details of communication between a lawyer and a witness during pre-testimony preparations would, if allowed by the Chamber, render the presumption nugatory.

36. The Chamber also considered the Law Society's Rules of Professional Conduct and the Advocates' Society Principles of Civility for Advocates in Canada. Section 62 of the Advocates' Society Principles of Civility provides as follows:

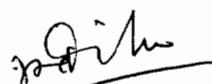
Judges are entitled to expect Counsel will treat the Court with candour, fairness and courtesy.

37. In the instant case, the Chamber notes that the Defence has not specifically alleged any misconduct on the part of Prosecuting Counsel. In the circumstances, the Chamber concludes that questions relating to pre-testimony meetings between the Prosecutor and witnesses, while permissible, must in the absence of any substantiated allegation of misconduct be limited to the number of such meetings, the dates of the meetings, and their duration.

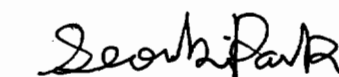
#### FOR THE ABOVE REASONS, THE CHAMBER

**GRANTS** the Motion in the following terms: the Defence can cross-examine a witness about pre-testimony meetings with the Prosecutor provided that such cross-examination is limited to the number of preparatory meetings, the dates of the meetings and the duration of the meetings.

Arusha, 1 April 2005

  
Asoka de Silva  
Presiding Judge

  
Taghrid Hikmet  
Judge

  
Seon Ki Park  
Judge

