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(07-04-05)
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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: 7 April 2005

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The PROSECUTOR
v.
Augustin NDINDILYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU

Case No. ICTR-2000-56-T

DECISION ON BIZIMUNGU'S URGENT MOTION REQUESTING AN
ADJOURNMENT AND A REVIEW OF THE PROTECTIVE MEASURES GRANTED
TO PROSECUTION WITNESSES

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For Augustin Bizimungu:
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Mr Ronnie MacDonald
For Augustin Ndindilyimana:
Mr Christopher Black and
Ms Tiphaine Dickson
For François-Xavier Nzuwonemeye:
Mr André Ferran and
Ms Danielle Girard
For Innocent Sagahutu:
Mr Fabien Segatwa and
Mr Seydou Doumbia

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 SEIZED of:

i. Bizimungu’s « *Requête urgente demandant un ajournement et révision des mesures de protection accordées aux témoins de l’accusation* », ¹ filed on 24 March 2005 (“Bizimungu’s Motion”);

ii. « *Réponse de la Défense de François-Xavier Nzuwonemeye au soutien de la requête urgente d’Augustin Bizimungu demandant un ajournement et révision des mesures de protection accordées aux témoins de l’accusation* », ² filed on 24 March 2005 (“Nzuwonemeye’s Supporting Motion”);

iii. « *Réponse du Procureur à la requête présentée conjointement par les Conseils d’Augustin Bizimungu et de François-Xavier Nzuwonemeye, sollicitant un ajournement à deux mois et une révision des mesures de protection applicables aux témoins de l’accusation* », ³ filed on 29 March 2005 (the “Prosecutor’s Response”);

CONSIDERING the Statute of the Tribunal (the “Statute”), in particular Articles 19 and 20 of the Statute, and the Rules of Procedure and Evidence (the “Rules”), in particular Rule 73 of the Rules;

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

SUBMISSIONS OF THE PARTIES

Bizimungu’s Motion

1. The Defence for Augustin Bizimungu requests this Chamber, pursuant to Articles 19 and 20 of the Statute and Rule 73 of the Rules, to:
 - (i) Allow the Parties to plead the Motion orally;
 - (ii) Grant an adjournment of two months in order to allow the Defence to conduct the necessary investigations following the Prosecutor’s disclosure of the identities of witnesses to be called during the next session;
 - (iii) Review the 35-day deadline granted to the Prosecution for the disclosure of witnesses’ identities, and order the disclosure of the identities of all witnesses when this Chamber renders its decision.

¹ “Urgent Motion Requesting an Adjournment and a Review of the Protective Measures Granted to Prosecution Witnesses.”

² “François-Xavier Nzuwonemeye’s Response in Support of Augustin Bizimungu’s Urgent Motion Requesting an Adjournment and a Review of the Protective Measures Granted to Prosecution Witnesses.”

³ “The Prosecutor’s Response to the Motion Presented Jointly by Counsel for Augustin Bizimungu and François-Xavier Nzuwonemeye, Requesting an Adjournment of Two Months and a Review of the Protective Measures Granted to Prosecution Witnesses.”

2. The Defence recalls that in a Decision in September 2004, Trial Chamber II ordered the Prosecution to do whatever was necessary to obtain the judicial files of detained witnesses from the Rwandan authorities.
3. The Defence admits that the Prosecution did send a letter to the Rwandan authorities requesting the judicial files of nine Prosecution witnesses expected to testify during the September 2004 session, namely: AMW, ANA, ANH, ANI/KEI GAP, GFR, GFU, KJ and UB.
4. The Defence recalls that between September 2004 and January 2005, the Prosecutor transmitted to the Defence additional information regarding the following witnesses: ANA, ANI/KEI, GAP, GFA, GFB, GFC, GFU, GFV, UB and UMW. The Defence also acknowledges receiving other witnesses' judicial files and unredacted statements as recently as on 21 March 2005.
5. The Defence submits, however, that despite the Prosecution's efforts to obtain the judicial files of detained witnesses, the Rwandan judicial authorities have not been responsive.⁴ The Defence also cites oral directives of this Chamber requesting the Rwandan authorities to cooperate fully with this Tribunal.
6. Counsel for Bizimungu asserts, on his part, that he tried in vain during a mission to Rwanda in November 2004 to obtain copies of the judicial files of detained witnesses whose identities had been disclosed by the Prosecutor in September 2004, and that these problems are directly related to the flagrant lack of collaboration on the part of the Rwandan authorities.
7. The Defence maintains that it has also encountered problems related to the late translation of documents in Kinyarwanda; that most of the documents transmitted to the Defence had not been translated into either of the Tribunal's two working languages; and that although the Defence was able to obtain some translations, most of the time the translations were sent a few days, if not a few hours, before the witness's testimony.
8. The Defence argues that pleading the Motion orally will enable the Chamber to obtain simultaneous interpretation of the arguments presented and to render a decision without having to wait for the English translations to be transmitted by the Registry.
9. The Defence contends that it cannot determine whether it will need to conduct investigations in Rwanda on Prosecution witnesses until the Prosecution communicates the full identities and the unredacted statements of these witnesses to the Defence, and that the disclosure of the witnesses' identities is one of the essential elements that will enable the Defence to determine what kinds of investigations to conduct on the Prosecution witnesses and to gather any necessary information that was not communicated by the Prosecution.

⁴ Prosecutor's Response to an Order of Trial Chamber II dated 3 November 2004, "[Ordering] the Prosecution to inform the Chamber by 12 November 2004 of any developments regarding its undertaking to request judicial files of Prosecution witnesses from Rwandan authorities", 8 November 2004, pp. 4830bis – 4813bis.

10. Citing the Tribunal's jurisprudence in the *Kajelijeli* case, the Defence asserts that the transmission of the judicial files of a detained witness is the responsibility of the Party calling the witness in question⁵ and, therefore, that the Prosecution has a duty to obtain documents currently in the custody of the Rwandan authorities as well as to ensure their translation from Kinyarwanda into English and French.
11. The Defence maintains that an adjournment of two months is not an unreasonable delay, considering the fact that the Rwandan authorities have still not responded to the Prosecution's request of September 2004 and considering all the problems encountered during the present session with regard to having documents in Kinyarwanda translated into at least one of the Tribunal's two working languages.
12. The Defence further requests the Chamber to review its order of 3 November 2004 establishing a 35-day deadline for the disclosure of the identities of Prosecution witnesses, arguing that it is materially impossible in the present circumstances for it to conduct useful and efficient investigations within 35 days.
13. The Defence asserts that the disclosure of the identities of all witnesses in a more timely fashion would enable it to determine what investigations need to be undertaken and thus to limit the amount of travel and the costs associated with these investigations.
14. Pointing to the fundamental right of the Accused to a plain and full defence as well as to a fair and equitable trial, the Defence submits that the protective measures granted to Prosecution witnesses do not justify the restrictions imposed on the rights of the Accused.

Nzuwonemeye's Supporting Motion

15. The Defence for François-Xavier Nzuwonemeye supports all the arguments made by the Defence for Augustin Bizimungu, and agrees that the Defence cannot conduct a reasonable cross-examination or valid investigations without having in its possession the judicial files of detained witnesses.
16. However, the Defence would like to draw the Chamber's attention to some other cases at this Tribunal or the International Criminal Tribunal for the former Yugoslavia (ICTY) where the complete and unredacted statements as well as the identities of witnesses were communicated to the Defence before the start of trial.
17. The Defence points in particular to this Tribunal's practice in the *Casimir Bizimungu* case,⁶ which it believes greatly facilitates the smooth flow of the proceedings as well as the preparation of the Defence case.
18. The Defence submits that it would be appropriate for the Chamber to order the Prosecution to adopt the same approach both from a practical point of view and to the extent that this might enable the Defence to have a better appreciation of the Prosecution's evidence.

⁵ *The Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Decision on Juvénal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO, 2 November 2001, paragraph 20.

⁶ *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50 (also known as the 'Government II' case).

19. While the Defence understands that the Prosecution has legitimate reasons to worry about the safety of witnesses, it also points out that the various Defence teams are made up of professionals bound by their codes of conduct and ethics, that they are subject to strict background checks by the Registry, and that they are all aware of the risks involved in divulging the identities of witnesses.
20. The Defence maintains that there is no justification for such severe protective measures and believes that a 35-day deadline for the transmission of witnesses' identities and unredacted statements is unreasonable, does not allow the Defence to conduct effective and efficient investigations, and violates the right of the Accused to a speedy and equitable trial.
21. Finally, the Defence for Nzuwonemeye wishes to draw the Chamber's attention to a problem peculiar to it. That is the fact that although Lead Counsel Mr. Ferran officially announced his withdrawal from the case and ceased performing any tasks on the file on 8 March 2005, it was only on 21 March 2005 that the Registry received his letter of resignation. The Defence notes that it is only after the Registrar authorises Mr. Ferran's withdrawal that the Accused can appoint a new Lead Counsel.
22. As a consequence, the Defence asserts that its preparation time will be severely reduced since, for reasons of confidentiality, a new Lead Counsel cannot start working on a file until he or she is officially appointed. Since no one knows when Mr. Ferran's resignation will take effect or when the Registrar will appoint a new Lead Counsel, the Defence submits that an additional two months would be a reasonable amount of time for it to prepare.
23. For the above reasons, the Defence prays the Chamber to: i) grant Bizimungu's motion and issue an order adjourning the proceedings until 6 June 2005; ii) issue an order modifying the protective measures for Prosecution witnesses; and iii) order the Prosecution to immediately transmit to the Defence the identities and unredacted statements of all Prosecution witnesses.

The Prosecutor's Response

24. The Prosecution asserts that on 23 March 2005, the statements of all witnesses who will testify during the third session, scheduled for 9 May to 15 July 2005, were transmitted to the Defence.⁷
25. The Prosecution further asserts that only the judicial files of two witnesses, ADE and GFD, have not yet been transmitted to the Defence, and that these will be transmitted as soon as they are received from the Rwandan judicial authorities, who currently have them.
26. The Prosecution notes that since the Decision rendered by this Chamber on 3 November 2004⁸, no new circumstances have emerged.

⁷ Interoffice Memorandum dated 21 March 2005, from the Prosecutor to all the Accused and their Defence Counsel.

⁸ See Trial Chamber II, "Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials, 3 November 2004".

27. Finally, the Prosecution recalls its brief submitted on 28 September 2004⁹ in response to the earlier motion by the Defence for Augustin Bizimungu, dated 23 September 2004 and points out that the Chamber's Decision dated 3 November 2004 is hardly an isolated one.¹⁰
28. For these reasons, the Prosecution urges the Chamber to deny the motion presented jointly by Counsel for Augustin Bizimungu and François-Xavier Nzuwonemeye, requesting an adjournment of two months and a review of the protective measures granted to Prosecution witnesses.

HAVING DELIBERATED

29. The Chamber recalls Articles 19 (Commencement and Conduct of Trial Proceedings) and 20 (Rights of the Accused) of the Statute. The Chamber also recalls Rule 73 of the Rules detailing the structure of proceedings before Trial Chambers;
30. With respect to Bizimungu's request that the Motion be pleaded orally in order to avoid translation problems and save time, the Chamber notes that it does not see the need to hear the Parties on any further issues over and above the submissions made in the written pleadings. For that reason, the Chamber will decide the Motion solely on the basis of the written briefs filed.
31. Regarding the Defence prayer for adjournment of the proceedings and for review of the witness protection measures, the Chamber recalls its Decision of 3 November 2004, remains persuaded that the 35-day deadline it established for the disclosure of witness statements and identities is still adequate, and sees no reason to order a further adjournment of two months.
32. The Chamber also takes note of the Defence's acknowledgement that it has generally received communications from the Prosecution regarding unredacted witness statements and identities in a timely manner, and renews its call on the Rwandan authorities to comply with this Tribunal's requests regarding the disclosure of the judicial files of detained witnesses. The Chamber does not see any reason, at this point in time, to review the protective measures.
33. The Chamber also notes that the disclosure relates to identifying information regarding protected witnesses and that as far as the witnesses lined up for the next session are concerned, their identities have been fully disclosed by the Prosecution according to the Chamber's Decision. The only remaining issue to address is that of any other prior statement made by any of the witnesses, the disclosure of which is, at this stage, still hypothetical and the Chamber will be in a position to assess whether

⁹ « Mémoire du Procureur en réponse à la requête présentée par le Conseil d'Augustin Bizimungu aux fins de révision de la décision di 19 mars 2004 relative aux mesures de protection des témoins de l'accusation », filed on 28 September 2004.

¹⁰ See, for instance, *The Prosecutor v. Karamera et al.*, Case No. ICTR-98-44-R75, "Order on Protective Measures for Prosecution Witnesses," 10 December 2004, TC III; or *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, "Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses," 2 February 2005, TCII.

the Defence can plead an extension of time to conduct investigations as and when the situation arises.

34. Finally, as concerns Nzuwonemeye's complaint about the absence of a Lead Counsel for his Defence, the Chamber recalls that the Accused himself expressed the desire to proceed with Co-Counsel. In fact, on the day when Mr. Ferran announced his intention to withdraw, the Chamber questioned both the Accused and the Co-Counsel and they indicated that they were willing and able to proceed in Mr. Ferran's absence.¹¹ The Chamber can nevertheless urge the Registrar to urgently look into this matter so as to avoid any delay in the proceedings.

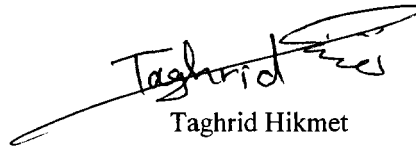
FOR THE FOREGOING REASONS,

THE TRIAL CHAMBER DENIES the Motion in its entirety.

Arusha, 7 April 2005


Asoka De Silva

Presiding Judge


Taghriddin Hikmet




Seon Ki Park

Judge

¹¹ English Transcript of the Proceedings, Tuesday, 8 March 2005, p. 8.