



UNITED NATIONS  
NATIONS UNIES

ICTR-00-56-T  
31-01-2007  
(63702-63699)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

63702  
PM

OR: ENG

TRIAL CHAMBER II

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

**Registrar:** Mr Adama Dieng

**Date:** 31 January 2007

JUDICIAL RECORDS ARCHIVES  
2007 JAN 31 P 4:42

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

DECISION ON NZUWONEMEYE'S *EX PARTE* AND CONFIDENTIAL MOTION  
FOR RESTITUTION AND OTHER APPROPRIATE RELIEF

**Office of the Prosecutor:**

Mr Ciré Aly Bâ  
Mr Moussa Sefon  
Mr Segun Jegede  
Mr. Lloyd Strickland  
Mr Abubacarr Tambadou  
Ms Felistas Mushi  
Ms Faria Rekkas  
Ms Anne Pauline Bodley

**Counsel for the Defence:**

Mr Gilles St-Laurent and Mr Ronnie MacDonald for Augustin Bizimungu  
Mr Christopher Black and Mr Patrick De Wolf for Augustin Ndindiliyimana  
Mr Charles Taku for François-Xavier Nzuwonemeye  
Mr Fabien Segatwa and Mr Seydou Doumbia for Innocent Sagahutu

*Paul*

## INTRODUCTION

1. On 18 May 2006, the Defence for François-Xavier Nzuwonemeye filed a Motion requesting the cooperation of the Kingdom of Belgium in facilitating the Defence to meet and interview two potential Defence witnesses (the witnesses) about their role as United Nations Assistance Mission for Rwanda (UNAMIR) soldiers in 1994.<sup>1</sup> The Chamber granted the request on 7 June 2006.<sup>2</sup> The interviews were conducted on 8 and 9 November 2006.

2. On 20 December 2006, the Registry served on the Chamber, the Prosecution, the four Defence teams and the Accused a bundle of documents relating to the interviews of the two witnesses which it had earlier received from the Belgian authorities. Among other things, the documents contained the detailed list of questions submitted by Nzuwonemeye's Defence and the transcripts of the answers given by the witnesses during the interviews held in Belgium.

3. On 11 January 2007, the Defence for Nzuwonemeye filed this Motion. On 23 January 2007, the Registry filed its submission pursuant to Rule 33(B) of the Rules.

## SUBMISSIONS

4. The Defence submits that the improper disclosure of the confidential documents to the other parties in these proceedings violates the right of the Accused to a fair trial, compromises the integrity of the proceedings and violates the principle of equality of arms. The Defence adds that this disclosure unveils its strategy and thereby denies it a fair chance to present its case to the Trial Chamber.

5. The Defence therefore requests the Chamber to conduct an investigation into the circumstances of the disclosure, to stay the proceedings pending the outcome of the investigation, to order that all recipients of the said documents return them to the Registry and undertake not to make any use of them at any stage of the proceedings. Finally, the Defence also requests the Chamber to terminate the proceedings against the Accused and order his immediate release because the prejudice caused to his case is irreparable and amounts to an abuse of process.

6. In its submission, the Registry acknowledges that the said confidential documents were disclosed to all the Parties and the Chamber, but adds that this disclosure was done inadvertently because the Registry Officer in charge at the material time was misled by the subject heading of the documents.<sup>3</sup> The Registry further expressed its deep regret at this inadvertence and indicates that adequate and appropriate measures will be taken to avoid a recurrence of this type of incident in future.

---

<sup>1</sup> "Nzuwonemeye's Motion for Request of Cooperation from the Government of Belgium Pursuant to Article 28 of the Statute" filed on 18 May 2006.

<sup>2</sup> "Decision on Nzuwonemeye's Motion Requesting Cooperation from the Government of Belgium Pursuant to Article 28 of the Statute", 7 June 2006.

<sup>3</sup> "Registrar's Submission under Rule 33(B) of the Rules on Nzuwonemeye's *Ex Parte* and Confidential Motion for Restitution of all Documents Disclosed by the Registry and Other Appropriate Relief" 23 January 2007, para. 6, where it is stated that the subject heading transmission from Belgium was "A Request for Cooperation of the International Criminal Tribunal for Rwanda" or "*Commission Rogatoire* Emanating from the Office of the Prosecutor".



## DELIBERATIONS

### *i) Requests to Conduct an Investigation and to Stay Proceedings*

7. The Chamber is satisfied with the Registry's explanation and believes that at no time was there a deliberate attempt to violate the rights of the Accused or to interfere with the preparation or presentation of the Defence case. Nonetheless, the Chamber urges the Registry to be more prudent in the exercise of its functions so as to avoid such situations from arising in the future. Having considered all the submissions, the Chamber deems it unnecessary to order or conduct any further investigations. Consequently the Chamber sees no reason to stay the proceedings.

### *ii) Requests to Collect all Printed and Electronic Copies of the Documents and to Forbid their use in the Proceedings*

8. The Chamber notes that the Registry has requested all recipients of the 20 December 2006 disclosure to return the documents to the Registry and to refrain from making any use of them whatsoever.<sup>4</sup> This is consistent with one of the reliefs sought by the Defence. The Chamber therefore orders all recipients of the documents disclosed by the Registry on 20 December 2006 containing interview questions and transcripts of answers given by the witnesses, to return them to the Registry, to delete all such documents from their electronic mail folders and not to make any use thereof without the prior approval of the Chamber.

### *iii) Requests to Terminate the Proceedings against Major Nzuwonemeye and to Order his Immediate Release*

9. The Chamber notes the jurisprudence of the *ad hoc*-Tribunals concerning the 'abuse of process' doctrine.<sup>5</sup> In the *Barayagwiza* case, the Appeals Chamber confirmed that the abuse of process doctrine may be relied on in different situations, including where pre-trial impropriety or misconduct were such that proceeding with the trial would contravene the court's sense of justice.<sup>6</sup> In deciding that issue, the Chamber must weigh the competing interests of the fair and expeditious administration of justice against the existence of material prejudice to the Accused.

10. The Chamber agrees that the disclosure of the said documents could be prejudicial to the Accused. However, the Chamber finds that in the instant case, no material prejudice has in fact been demonstrated, particularly at this stage of the proceedings where the Prosecutor has already closed its case and there is no indication that he intends to reopen it as a result of information contained in the disclosed documents. Similarly, there is nothing to show that any of the other Co-Accused is, at this stage, taking advantage of the discovery of the facts in the documents to shift their case. In any case, such a course of action is prohibited by the Chamber's order contained in paragraph 8 above.

11. The Chamber notes that the existence of potential prejudice is not enough to prevent the Defence from properly conducting its case, or to deny the Accused a fair trial. In other

<sup>4</sup> Registrar's Submission, *supra*, para. 7

<sup>5</sup> *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision (AC), 3 November 1999 (Barayagwiza Appeals Chamber Decision of 3 November 1999); *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Consideration) (AC), 31 March 2000; *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, Decision on Defence Motion for a Stay of Proceedings and Abuse of Process, 20 February 2004 (TC); *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002; *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003  
6 *Barayagwiza Appeals Chamber Decision of 3 November 1999*, par. 77

<sup>3</sup>  
Paul

words, the potential prejudice to the Accused does not offend the Court's sense of justice so as to warrant a discontinuation of the proceedings. In these circumstances, the Chamber concludes that a termination of the proceedings against the Accused would be a disproportionate and inappropriate remedy.

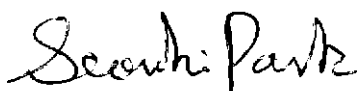

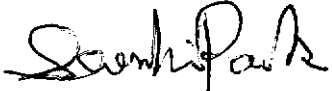
**FOR THE ABOVE REASONS, THE CHAMBER**

**GRANTS** the Defence Motion in part:

**ORDERS** all recipients of the confidential documents disclosed by the Registry on 20 December 2006 to return them to the Registry;

**FURTHER ORDERS** all recipients not to make electronic or hard copies of the said documents and not to use them for any purpose in these proceedings without the prior approval of the Chamber;

**DENIES** the Motion in all other respects.

Arusha, 31 January 2007, done in English.		
		
Read and Approved by Asoka de Silva	Read and Approved by Taghrid Hikmet	Seon ki Park
Presiding Judge	Judge	Judge
(absent at the time of the signature)	(absent at the time of the signature)	(and on Behalf of Judges de Silva and Hikmet)
	[Seal of the Tribunal]	



4  
Park



## TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

**COURT MANAGEMENT SECTION**  
(Art. 27 of the Directive for the Registry)

### I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

<b>To:</b>	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input checked="" type="checkbox"/> Trial Chamber II R. N. Kouambo	<input type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Appeals Chamber / Arusha F. A. Talon
	<input type="checkbox"/> Chief, CMS J.-P. Fomété	<input type="checkbox"/> Deputy Chief, CMS M. Diop	<input type="checkbox"/> Chief, JPU, CMS K. K. A. Afande	<input type="checkbox"/> Appeals Chamber / The Hague R. Burriss
<b>From:</b>	<input checked="" type="checkbox"/> Chamber <b>Bruno Zehnder</b> <small>(names)</small>	<input type="checkbox"/> Defence <small>(names)</small>	<input type="checkbox"/> Prosecutor's Office <small>(names)</small>	<input type="checkbox"/> Other: <small>(names)</small>
<b>Case Name:</b>	The Prosecutor vs. <b>A. Ndindiliyimana et al.</b>		<b>Case Number:</b> ICTR-00-56-T	
<b>Dates:</b>	Transmitted: <b>31 January 2007</b>		Document's date: <b>31 January 2007</b>	
<b>No. of Pages:</b>	<b>4</b>	<b>Original Language:</b>	<input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda	
<b>Title of Document:</b>	<b>DECISION ON NZUWONEMEYE'S EX PARTE AND CONFIDENTIAL MOTION FOR RESTITUTION AND OTHER APPROPRIATE RELIEF</b>			
<b>Classification Level:</b>	<b>TRIM Document Type:</b>			
<input type="checkbox"/> Strictly Confidential / Under Seal	<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence	<input type="checkbox"/> Submission from non-parties
<input type="checkbox"/> Confidential	<input checked="" type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Notice of Appeal	<input type="checkbox"/> Submission from parties
<input checked="" type="checkbox"/> Public	<input type="checkbox"/> Disclosure	<input type="checkbox"/> Order	<input type="checkbox"/> Appeal Book	<input type="checkbox"/> Accused particulars
	<input type="checkbox"/> Judgement	<input type="checkbox"/> Motion	<input type="checkbox"/> Book of Authorities	

### II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

**CMS SHALL** take necessary action regarding translation.

Filing Party hereby submits only the original, and **will not submit** any translated version.

Reference material is provided in annex to facilitate translation.

Target Language(s):

English                                       French                                       Kinyarwanda

**CMS SHALL NOT** take any action regarding translation.

Filing Party hereby submits **BOTH the original and the translated version** for filing, as follows:

Original	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda
Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

**CMS SHALL NOT** take any action regarding translation.

Filing Party **will be submitting the translated version(s)** in due course in the following language(s):

English                                       French                                       Kinyarwanda

**KINDLY FILL IN THE BOXES BELOW**

<input type="checkbox"/> <b>The OTP</b> is over-seeing translation. The document is submitted for translation to: <input type="checkbox"/> The Language Services Section of the ICTR / Arusha. <input type="checkbox"/> The Language Services Section of the ICTR / The Hague. <input type="checkbox"/> An accredited service for translation; see details below: Name of contact person: Name of service: Address: E-mail / Tel. / Fax:	<input type="checkbox"/> <b>DEFENCE</b> is over-seeing translation. The document is submitted to an accredited service for translation (fees will be submitted to DCD/MS): Name of contact person: Name of service: Address: E-mail / Tel. / Fax:
--	--

### III - TRANSLATION PRIORITISATION (For Official use ONLY)

<input type="checkbox"/> Top priority	<b>COMMENTS</b>	<input type="checkbox"/> Required date:
<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input checked="" type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines:

2007 JAN 31 1 P 4 42  
 JUDICIAL RECORDS ARCHIVES  
 RECEIVED