



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER II

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

Registrar: Adama Dieng

Date: 9 September 2008

The PROSECUTOR

v.

**Augustin NDINDILYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU**

Case No. ICTR-00-56-T

**DECISION ON NZUWONEMEYE'S VERY URGENT SECOND MOTION TO VARY
HIS WITNESS LIST**

Rule 73ter (E) of the Rules of Procedure and Evidence

Office of the Prosecutor:

Mr Alphonse Van
Mr Moussa Sefon
Mr Segun Jegede
Mr Lloyd Strickland
Mr Abubacarr Tambadou
Ms Felistas Mushi
Ms Faria Rekkas
Ms Marlize Keefer

Counsel for the Defence:

Mr Gilles St-Laurent and Mr. Benoît Henry **for Augustin Bizimungu**
Mr Christopher Black and Mr Vincent Lurquin **for Augustin Ndindiliyimana**
Mr Charles Taku and Ms Beth Lyons **for François-Xavier Nzuwonemeye**
Mr Fabien Segatwa and Mr Seydou Doumbia **for Innocent Sagahutu**

INTRODUCTION

1. On 23 June 2008, the Defence for Nzuwonemeye started the presentation of its case and called 15 witnesses. Four Defence witnesses had previously been called as "common witnesses" during trial sessions in 2007. On 27 August 2008, the Defence filed this motion¹ to vary its witness list, asking for the replacement of Witness STH with Witness TCB1 and offering the withdrawal of six other witnesses. The Defence submits that in July 2008, it learned that Witness STH would not be available to testify during the September session. The Defence states that it confirmed the unavailability of Witness STH, and on 23 July 2008, submitted another list of 15 witnesses, excluding Witness STH. Meanwhile, the Defence submits that it discovered the existence of another Witness TCB1, who proposes to testify regarding the issues Witness STH was to address.

DELIBERATIONS

2. Rule 73ter (E) permits the Defence, after its case has started, to request the Chamber for leave to vary its decision as to which witnesses it intends to call, if it considers it to be in the interests of justice. In a case with multiple accused, the Defence case as a whole effectively starts with the presentation of the defence of the first accused.²

3. The jurisprudence stipulates that the evaluation of the interests of justice requires a close examination of each witness and his or her proposed testimony, including: the sufficiency and time of disclosure of the witness' information, the materiality and probative value in relation to existing witnesses and allegations in the indictment, the potential for cross-examination, as well as the justification provided by the Defence. Additional factors to be considered include: the complexity of the case, the potential prejudice to the opposing party, and the creation of delays in the proceedings.³

4. The Chamber has reviewed the proposed testimony of Witness TCB1, who is intended as a replacement for the currently unavailable Witness STH. Witness TCB1 was a technical telecommunications specialist with the Rwandan Armed Forces (RAF) in 1994. He proposes to testify about the organization, operation, and hierarchical structure of the communications systems used by the RAF, with a focus on radio communications. Witness TCB1 will provide testimony about the functioning of communications systems, the various levels of accessibility to radio messages and the routing of communications during the relevant time period, particularly as related to the Reconnaissance Battalion.

5. The Chamber finds that Witness TCB1 could be important to refute the allegations against the Accused Nzuwonemeye in paragraphs 22-25, 38, 103-104 and 106-107 of the Amended Indictment of 23 August 2004. Additionally, due to the timely submission of this motion upon discovery of the witness, the Prosecution will not suffer any prejudice with the authorized changes. Furthermore, the testimony will not delay the proceedings. The Chamber finds it therefore in the interests of justice to allow the replacement of the witness.

¹ Nzuwonemeye Defence [*sic*] Very Urgent Second Motion To Vary The Witness List, filed on 27 August 2008.

² *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Alphonse Nteziryayo's Motion to Modify His Witness List (TC), 14 July 2006, para. 24.

³ *Prosecutor v. Ndindiliyimana et al.*, Decision on Sagahutu's Motion to Vary his Witness List (TC), 26 May 2008, para. 5; *Prosecutor v. Ndindiliyimana et al.*, Decision on Augustin Bizimungu's Motion to Vary his Witness List (TC), 24 October 2007, para. 3; *Prosecutor v. Ndindiliyimana et al.*, Decision on Nzuwonemeye's Motion to Request to Vary his Witness List (TC), 31 January 2008, para. 3; *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-T, Decision on the Defence Motions for Additional Time to Disclose Witness' Identifying Information, to Vary its Witness List and for Video-Link Testimony and on the Prosecution's Motion for Sanctions (TC), 11 September 2007, para. 10. (All citations omitted).

6. In the interest of judicial economy, the Chamber grants the Defence request to withdraw six witnesses, namely NU6, EGN, S2, YKP, REO and F11.

FOR THE ABOVE REASONS, THE CHAMBER HEREBY

GRANTS the Defence request to replace Witness STH with Witness TCB1;

GRANTS the Defence request to withdraw Witnesses NU6, EGN, S2, YKP, REO and F11 from its witness list.

Arusha, 9 September 2008, done in English.

(for)
Asoka de Silva

Presiding Judge
(absent at the time of
signature

Taghrid Hikmet

Judge

[Seal of the Tribunal]

Seon Ki Park

Judge