



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:** 17 September 2008

**The PROSECUTOR**

v.

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

*Case No. ICTR-00-56-T*

**DECISION ON NZUWONEMEYE AND NDINDILYIMANA'S MOTIONS FOR  
SPECIAL PROTECTIVE MEASURES**

*Rules 75 and 90 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. The Prosecution case was completed on 7 December 2006. The Defence for Nzuwonemeye is currently presenting its case. The Defence for Bizimungu and the Defence for Ndindiliyimana have completed the presentation of their cases, with the exception of a few outstanding witnesses to be called at a later date.

2. On 16 July 2007, the Chamber granted Nzuwonemeye's motion for reconsideration to hear Witnesses F10 and F11 via video-link after considering official communication from the French Government to the Registrar.<sup>1</sup> With similar communication from the French Government to the Registrar, on 17 July 2007, the Chamber granted a Motion from the Defence for Ndindiliyimana requesting that Witness CBP82 be heard via video-link.<sup>2</sup> The Defences for Ndindiliyimana and Nzuwonemeye now request that Witnesses F10, F11 and CBP82 be granted special protective measures as indicated by the French Government in their communication.<sup>3</sup>

## DELIBERATIONS

3. The special protective measures requested by the French Government are: 1) non-disclosure of the witness' identity, 2) closed session hearings, 3) restriction of cross-examination to questions asked in examination-in-chief which must be pre-approved by the French Government, 4) the presence of a representative of the Government of France in the proceedings who is authorized to assert a national security privilege, 5) the non-transmission of the testimony to the parties in another case.<sup>4</sup> The Prosecution does not contest requests 1, 2, and 4. Therefore the Chamber grants those requests in the interests of justice. The Chamber will now address requests 3 and 5, in turn.

### *a) Restriction of Cross-Examination*

4. The Defence for Nzuwonemeye argues that the protective measures requested are consistent with the Rules of Procedure and Evidence ("Rules"), because the Chamber can control the mode of questioning of witnesses for the purposes of witness protection.<sup>5</sup> It states that without these measures, the witnesses, all French officers, will not be permitted to testify in this case.<sup>6</sup> The Defence for Ndindiliyimana joined Nzuwonemeye's application and added that similar protective measures were adopted by the Trial Chamber in the *Military I* case.<sup>7</sup> The Prosecution objects to the Motions on the grounds that its right to cross-examine will be restricted to questions posed in examination-in-chief, which may limit its right to test the witness' credibility, in contravention of Rule 90 of the Rules.<sup>8</sup>

5. Article 20(4)(e) of the Statute of the Tribunal provides that as a minimum, an accused has the right "to examine, or have examined, the witnesses against him or her and to obtain

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<sup>1</sup> *Prosecutor v. Ndindiliyimana et. al.*, Decision on Nzuwonemeye's Request for Reconsideration of the Chamber's Decision Dated 9 June 2008 (TC), 16 July 2008.

<sup>2</sup> *Ndindiliyimana et.al.*, Decision on Ndindiliyimana's Urgent Application to Hear Witness [CBP82] via Video-Link (TC), 17 July 2008.

<sup>3</sup> T. 9 September 2008.

<sup>4</sup> *Note Verbale* (regarding request from Ndindiliyimana Defence), *Ambassade de France en Tanzanie*, dated 26 August 2008; *Note Verbale* (regarding request from Nzuwonemeye Defence), *Ambassade de France en Tanzanie*, dated 6 September 2008.

<sup>5</sup> T. 9 September 2008, pp. 2-3, 35-37 (closed session).

<sup>6</sup> T. 9 September 2008, p. 3 (closed session).

<sup>7</sup> T. 9 September 2008, p. 34 (open session), 37 (closed session).

<sup>8</sup> T. 9 September 2008, p. 35, 37-38 (closed session).

the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.” Rule 90(G) of the Rules limits a party’s cross-examination “to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness...” Rule 90(F) grants the Chamber the right to control the mode of witness interrogation. In addition, Rule 75 states that a Chamber may order appropriate measures to safeguard the privacy and security of the witnesses. The Chamber must therefore balance all of these concerns, while also taking into account the legitimate concerns of States that cooperate with the Tribunal for their own national security, and ultimately ensuring a fair trial. The deference to State interests, however, “does not go so far as to supersede a Trial Chamber’s authority to maintain control over the ... conduct of the trial.”<sup>9</sup>

6. Since the request comes from the Defence to hear the witnesses under the proposed protective measures, there can be no infringement of the rights of the Accused to examine witnesses against them.<sup>10</sup> Although the witness’ testimonies are conditioned on the Chamber’s granting of these protective measures, it appears from the submissions of Counsel and the representative of the Registrar that the French Government has been cooperating with the Tribunal in good faith and that its concerns are legitimate.<sup>11</sup> The Chamber has already determined that the witnesses’ proposed testimonies could be important to the Defence.<sup>12</sup> Consequently, if the Chamber does not grant the requested measures, it risks depriving the Defence of its right to adduce potentially important evidence in its defence.<sup>13</sup>

7. Even though the Prosecution contends that its right to cross-examine will be restricted, the Chamber notes that it is not deprived of the right to cross-examine these witnesses entirely.

8. After balancing all of the relevant factors in this issue, the Chamber finds that it will be in the interests of justice to restrict the cross-examinations of Witnesses F10, F11 and CBP82 to the subject-matter of the examination-in-chief. Furthermore, the Chamber is still in a position to exclude the testimonies at a later time should it find that the probative value of the evidence is substantially outweighed by the need to ensure a fair trial.<sup>14</sup> The Chamber therefore grants the Defence request for special protective measure 3.

#### *b) Restriction to Transmit Testimony to Parties in Other Cases*

9. The French Government requests that the testimony of these witnesses should not be transmitted to parties in another case. The Prosecution argues that since the Appeals Chamber considers the Office of the Prosecutor as one indivisible entity, it would be breaching the Tribunal’s own jurisprudence by restricting the use of the concerned testimonies to a specific trial team.<sup>15</sup>

10. The Chamber notes that the Office of the Prosecutor, as an extension of the

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<sup>9</sup> *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-AR73, Decision on Interlocutory Appeal Relating to the Testimony of Former United States Ambassador Robert Flaten (Confidential) (AC), 17 July 2007, para. 18. (“Bizimungu AC Decision”)

<sup>10</sup> *See Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Modalities for Presentation of a Witness (TC), 20 September 2006, para. 5.

<sup>11</sup> T. 9 September 2008, pp. 3-4 (closed session); *see also* Bizimungu AC Decision, para. 20.

<sup>12</sup> *Ndindiliyimana et al.*, Decision on Nzuwonemeye’s Request for Reconsideration of the Chamber’s Decision Dated 9 June 2008 (TC), 16 July 2008, para. 5; *Ndindiliyimana et al.*, Decision on Ndindiliyimana’s Urgent Application to Hear Witness [CBP82] via Video-Link (TC), 17 July 2008, para. 4

<sup>13</sup> *See* Bizimungu AC Decision, para. 21; *Bagosora et al.*, Modalities for Presentation of a Witness (TC), 20 September 2006, para. 5.

<sup>14</sup> Bizimungu AC Decision, para. 26.

<sup>15</sup> T. 9 September 2008, p. 37-38 (closed session).

Prosecutor himself, is indeed a whole, undivided unit and as such, it cannot be ordered to keep certain information within a specific trial team.<sup>16</sup> The Chamber, however, understands the French Government's request to be concerned with the transmission of the testimony to other Defence teams or other parties who would otherwise not have access to the closed session testimony. The Chamber recalls that as a practical matter, evidence heard in closed session is not accessible to anyone beyond the Prosecution and the Defence in the particular case without prior permission of the Chamber. As regards the Prosecution's disclosure obligations, the Chamber recalls that under Rule 66(C) and 68(D) the Prosecutor may request relief from its disclosure obligations if, by such disclosure, a State's security interests may be affected. The Chamber finds that the testimonies of Witnesses F10, F11 and CBP82 would certainly fall under this category. The Chamber therefore grants the request to restrict the transmission of the concerned testimony to parties other than the Parties in this case.

**FOR THE ABOVE REASONS, THE CHAMBER HEREBY**

**GRANTS** the Defence Motions for Special Protective Measures as requested by the French Government for the testimonies of Witnesses F10, F11, and CBP82.

Arusha, 17 September 2008, done in English.

Asoka de Silva

Taghrid Hikmet

Seon Ki Park

Presiding Judge

Judge

Judge

[Seal of the Tribunal]

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<sup>16</sup> *Bagosora et al.*, Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005, para. 43.