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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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Mwamp

OR: ENG

TRIAL CHAMBER II

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

Registrar: Adama Dieng

Date: 16 February 2009

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

JUDICIAL DEPARTMENT
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DECISION ON NZUWONEMEYE'S MOTION FOR RECONSIDERATION

Office of the Prosecution:

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Mr Charles Taku and Ms Beth Lyons for **François-Xavier Nzuwonemeye**
Mr Fabien Segatwa and Mr Seydou Doumbia for **Innocent Sagahutu**

INTRODUCTION

1. On 22 September 2008, the Trial Chamber found that the Prosecution had violated its Rule 68 disclosure obligations in respect to several documents containing exculpatory material ("Disclosure Decision").¹ Consequently, the Chamber ordered the Prosecutor to immediately disclose to the Defence in un-redacted format all the documents listed in confidential annexes 2 and 3 attached to the aforesaid Decision. The Chamber also ruled that the Defence teams could, if they wish, file Motions to recall identified Prosecution Witnesses for further cross-examination on the basis of the exculpatory material or seek leave to call additional Defence witnesses.²

2. On October 6, 2008, the Defence team for Nzuwonemeye filed a motion requesting the Chamber to allow the recall of a large number of Prosecution witnesses and to allow additional witnesses to testify on behalf of the Defence. In the alternative, Nzuwonemeye requests that relevant exculpatory statements be admitted into evidence.³ On 13 October 2008, the Prosecution filed a response to the Defence motion.⁴ Nzuwonemeye filed a reply to the Prosecutor's Response.⁵ On 4 December 2008, the Chamber granted Nzuwonemeye's Motion in part and ordered that certain Prosecution Witnesses could be recalled for further cross-examination and additional witnesses be called for the Defence so as to remedy the Prosecution's violation. (the "Impugned Decision").⁶

3. On 19 December 2008, the Defence for Nzuwonemeye filed a motion to reconsider portions of the Impugned Decision. The Defence submits that (1) the Chamber's methodology for determining whether there is good cause to warrant the recall of the identified Prosecution witnesses is erroneously based on statements obtained by the Prosecution, (2) the Chamber's reliance on a series of Decisions from other Trial Chambers whose factual predicates are different from the case at hand is misplaced⁷ and (3) that the Chamber erred in its construction and application of the law with respect to

¹ *Prosecutor v. Ndingilimimana et al*, Case No. ICTR-00-56-T, Decision on the Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68 (TC), 22 September 2008 ("Disclosure Decision").

² *Ibid.*

³ Nzuwonemeye Confidential Defence Motion, in Compliance with the Trial Chamber's Order in its Decision, 22 September 2008 on Prosecutor's Violations of Rule 68 Disclosure Obligations, To Recall Prosecution Witnesses and Add Potential Defence Witnesses and Motion for Reconsideration of the Ruling on the "Belgian File," filed on 6 October 2008 ("Nzuwonemeye's Motion").

⁴ The Prosecutor's Consolidated Response to Motions filed by Accused Francois-Xavier Nzuwonemeye, Augustin Ndingilimimana and Augustin Bizimungu, in Compliance with the Trial Chamber's Order in the "Decision on Defence Motions Alleging Violations of the Prosecutor's Disclosure Obligations Pursuant to Rule 68" filed on 13 October 2008 ("Bizimungu Motion").

⁵ Nzuwonemeye Defence Reply to: The Prosecutor's Consolidated Response to Motions filed by Accused Francois-Xavier Nzuwonemeye, Augustin Ndingilimimana and Augustin Bizimungu, in Compliance with the Trial Chamber's Order in the "Decision on Defence Motions Alleging Violations of the Prosecutor's Disclosure Obligations Pursuant to Rule 68" filed on 17 October 2008 ("Nzuwonemeye Reply").

⁶ *Prosecutor v. Ndingilimimana et al*, Case No. ICTR-00-56-T, Decision on Ndingilimimana's Motion to Recall Identified Prosecution Witnesses and to Call Additional Defence Witnesses (TC) 4 December 2008.

⁷ The Decisions referred to in the Defence motion are *The Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, Decision on Defence Motion to Recall Prosecution Witness AOB for Cross-Examination (TC), 19 September 2005, para 2 (internal citations omitted); *Bagosora et al.*, Decision on Nsengiyumva Motions to Call Doctors and to Recall Eight Witnesses (TC), 19 April 2007, para. 16 ; *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Recall Prosecution Witness Ahmed Mbonnyunkiza (TC), 25 September 2007, para. 5.



Rule 68 violations. The Defence therefore requests the Chamber to reconsider its rejection of the request to recall Prosecution Witnesses ZA, DAR, DA, Dr. Alison Des Forges, AWC, DY, ANK/XAF and HP; and also its denial of the request to add potential Defence Witnesses ANI, NB, PCK, LR, JCU, Antoine Nyetera, ANU, JG, JDT, IB and CG as potential Defence Witnesses. In the alternative, the Defence requests the admission of the recently disclosed exculpatory statements of ANI, NB, PCK, LR, JG, JDT, IB, CG and portions of the statements made by JCU and Antoine Nyetera. The Defence also reserved the right to make arguments pertaining to Witness ANU upon receipt of an official transcript; correction to a translation error with respect to CN's statement and the opportunity to respond to a paragraph focusing on Witness CR.⁸

4. On 24 December 2008, the Prosecutor filed a response to Nzuwonemeye's Motion in which it submitted that the legal grounds upon which the Defence based its motion for reconsideration are erroneous. The Prosecutor further stated that the Defence inappropriately raised a new issue in a motion for reconsideration of the Chamber's Recall Decision i.e. that the Prosecutor did not disclose a second statement made by Witness ANU whereby the Defence did not receive an official translation. The Prosecution maintains that this issue should not be raised in a motion for reconsideration. The Prosecutor requests the Chamber to permit him to put questions to prosecution witnesses who will be recalled pursuant to the Chamber Decision and to cross-examine all additional Defence Witnesses.⁹

5. On 28 December 2009, the Prosecutor submitted a Corrigendum to his 24 December 2009 Response.¹⁰

DELIBERATIONS

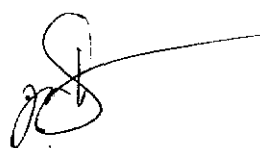
6. The Chamber notes that the Defence motion is unnecessarily long and repetitive. The Chamber reminds Counsel to avoid this manner of pleading in the future.

7. The Chamber recalls that a Trial Chamber has the inherent power to reverse or revise a prior decision when (i) a new fact has been discovered that was not known to the Chamber at the time it made its original decision; (ii) where there has been a material change in the circumstances since the Chamber made its original decision; or (iii) where there is reason to believe that the Chamber's original Decision was erroneous or

⁸ Nzuwonemeye Confidential Defence Motion for Reconsideration of Portions of Decision on Nzuwonemeye's and Bizimungu's Motions to Recall Identified Prosecution Witnesses and to call Additional Witnesses, 4 December 2008," filed on 19 December 2008 ("Nzuwonemeye's Reconsideration Motion").

⁹ *Réponse du Procureur à "Nzuwonemeye Motion For Reconsideration of Portions of Decision on Nzuwonemeye's And Bizimungu's Motions To Recall Identified Prosecution Witnesses and to Call Additional Witnesses, 4 December 2008" et Demande Reconventionnelle Du Procureur Aux Fins De Voir Completer La Même Décision du 4 Decembre 2008*, filed on 24 December 2008 ("Prosecutor's Response").

¹⁰ *Corrigendum a La Réponse Du Procureur a "Nzuwonemeye Motion for Reconsideration of Portions of Decision On Nzuwonemeye's and Bizimungu's Motion to Recall Identified Prosecution Witnesses and to call Additional Witnesses", 4 December 2008] et "Demande Reconventionnelle Du Procureur Aux Fins De Voir Completer La Même Décision Du 4 Decembre 2008,"* filed on 28 December 2008 (Prosecutor's Corrigendum).



constituted an abuse of power on the part of the Chamber, resulting in an injustice.¹¹ Reconsideration is an exceptional measure, and the requesting Party has the duty to demonstrate that special circumstances exist that might affect the Chamber's original Decision.

8. The Defence submits that the Chamber erred by denying its request to call some of the identified Prosecution witnesses and the addition of new witnesses in its decision of 4 December 2008, the Chamber practically re-evaluated its decision of 22 September 2008 in which the Chamber permitted the Defence to seek to recall prosecution witnesses or additional defence witnesses based on the exculpatory material. The Defence has misconstrued the Chamber's 22 September Decision. The Chamber did not order any remedial measures in its Disclosure Decision. The Chamber only ruled that the Defence teams could, if they wished, file Motions to recall identified Prosecution Witnesses for further cross-examination or seek leave to call additional Defence witnesses on the basis of the exculpatory material.¹² Moreover, in its Decision of 4 December 2008, the Chamber held that "the fact that it found the Prosecution to have breached its Rule 68 disclosure obligation does not mean that the Chamber will automatically grant the Accused persons the remedies they request."¹³ At no point did the Chamber find or suggest that the Defence would have an automatic right to recall certain Prosecution witnesses and call additional Defence witnesses. The Defence submission is accordingly dismissed.

9. The Defence submits that the Chamber erred by relying on a number of Decisions by other Trial Chambers on the issue of recalling witnesses since the factual predicates underlying those Decisions differ markedly from the facts of the Impugned Decision.¹⁴ The Chamber notes that the Defence has not demonstrated any legal error in the Chamber's application of the legal standards for recall identified in those Decisions. The Chamber therefore finds that the Defence has not demonstrated any basis to warrant reconsideration.

10. The Defence further submits that the criteria for determining good cause for recall of Prosecution witnesses do not apply in contexts where the Prosecutor was found to have breached his obligation to disclose exculpatory material. The Chamber notes that underpinning the Defence submission is the flawed supposition that a finding of a violation by the Prosecutor of his Rule 68 disclosure obligation amounts to a good cause to warrant the recall of Prosecution witnesses. The Chamber notes that the submission is not supported by either the Rules or the jurisprudence of the Tribunal. According to the

¹¹ See *Karemera et al.*, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses (TC), 29 August 2006, para. 8; *Bizimungu et al.*, Decision on Casimir Bizimungu's Motion in Reconsideration of the Trial Chamber's Decision dated February 8, 2007, in Relation to Condition (B) Requested by the United States Government (TC), 26 April 2007, para. 7.

¹² *Ndindiliyimana et al.*, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68 (TC), 22 September 2008, Paras. 61-64

¹³ *Ndindiliyimana et al.* Decision on Nzuwonemeye and Bizimungu's motions to recall identified Prosecution witnesses and to call additional witnesses, dated 4 December 2008, para. 7

¹⁴ *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Motion to Recall Prosecution Witness AOB for Cross-Examination (TC), 19 September 2005, para 2; *Bagosora et al.*, Decision on Nsengiyumva Motions to Call Doctors and to Recall Eight Witnesses (TC), 19 April 2007, para. 16; *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Recall Prosecution Witness Ahmed Mbonnyunkiza (TC), 25 September 2007, para. 5

established jurisprudence of the Tribunal, recall of witnesses is an exceptional measure that will only be granted where a party seeking the recall demonstrates good cause. Like other remedies, the grant of recall is a matter falling within the Trial Chamber's discretion which must be exercised judiciously taking into account a variety of circumstances.

11. The Defence submits that the Chamber erred in basing its determination of whether recall was warranted on the disclosed exculpatory statements. The Defence adds that it is unfair and prejudicial for the Chamber to base its findings on recall on the statements alone since the Defence had no control over how the statements were taken and recorded. The Defence adds that it cannot be blamed for the inadequacies of the statements gathered by the Office of the Prosecution. In its impugned Decision, the Chamber closely appraised the disclosed exculpatory statements in light of the testimony elicited from Prosecution witnesses who were identified for recall in order to determine whether there was good cause to warrant their recall. The Chamber finds that the Defence has failed to establish good grounds for reconsideration of its Decision.

12. The Defence submits that the Chamber erred by denying the recall of Prosecution Witnesses DCK and ANK in order to cross-examine them further with CR's exculpatory statement pertaining to the killing of the members of the Belgian contingent of the UNAMIR force at Camp Kigali. The Defence further contends that the fact that CR's statement was based on hearsay information should not have precluded the Chamber from recalling the said Prosecution witnesses in order to cross-examine them with his statement. The Chamber is not satisfied that this submission satisfies the criteria for reconsideration articulated above.

13. The Defence submits that the Chamber erred in finding that the Belgian files were reasonably accessible to the Defence. The Defence further contends that the fact that the materials were disclosed to it does not diminish the obligation of the Prosecutor to disclose exculpatory material pursuant to Rule 68. The Chamber is not satisfied that this raises a new argument for the purposes of reconsideration. The Chamber therefore denies the Defence submission.

14. The Defence submits that the Chamber erred by denying the recall of Prosecution Witnesses ZA and DAR in order to cross-examine them further on the basis of the statement given by AN1. The Defence further avers that the ambiguities in AN1's statement could have been addressed if AN1 was called as an additional Defence witness and therefore it was erroneous to deny the Defence submission on the ground that AN1's statement was brief and lacked detail. The Chamber reminds the Defence that the admission of evidence and determination of the weight to be accorded to it fall squarely within the discretion of the Trial Chamber. The Defence has provided no reason to warrant reconsideration of the Chamber's Decision that confronting Prosecution Witnesses with AN1's statement or calling him as an additional witness will not provide any useful information to the Chamber. The Chamber therefore denies the Defence request in this regard.

15. The Defence submits that the Chamber's denial of the request to recall Prosecution Witnesses DA and AWC in order to confront them with CN's statement is erroneous since it ignores the fact that CN stated that soldiers of the RECCE battalion were not involved in the murder of Prime Minister Agathe. The Chamber notes that




contrary to the averment of the Defence, CN merely stated that he was not aware that soldiers of the RECCE battalion were involved in the murder of the Prime minister but he later found that the late Prime Minister was killed by soldiers of the Presidential guard unit and soldiers from Camp Kigali. The Chamber therefore is not satisfied that the Defence has established any reason for it to reconsider its prior Decision in this respect.

16. The Defence further contends that the Chamber erred in its decision denying the request to recall Prosecution Witness ANK/XAF in order to confront him with CN's statement. The Chamber notes that the Defence has not demonstrated any grounds for the Chamber to reconsider its prior Decision and therefore rejects the Defence submission.

17. The Defence submits that the Chamber erred in its denial of the request to recall Witness DA in order to cross-examine him further on the basis of the PCK's statement. The Defence submits that whether PCK's statement suggests that members of the Presidential Guards were exclusively responsible for such crimes is an issue that should be explored in cross-examination of the Prosecution witnesses identified for recall and the Chamber therefore erred by making that determination prematurely on the basis of an analysis of PCK's statement. The Chamber notes that the Defence has misconstrued its Decision. The Chamber did not deny the recall of Witness DA on the ground that PCK's statement attributes responsibility for the killings of opposition politicians exclusively to the Presidential Guards. Rather, the Chamber found that PCK's statement did not contradict material aspects of Witness DA's testimony and therefore recalling that witness would not yield any useful evidence for the Chamber. The Chamber therefore finds that the Defence has not demonstrated a good reason for reconsideration.

18. The Defence further submits that the Chamber erred in relying on PCK's statement in order to assess its context. The Chamber did not rely on PCK's statement to determine the context of his statement. The Chamber only reasoned that PCK's statement when read in its totality, does not suggest that he attributed the responsibility for the killings of the opposition politicians exclusively to the Presidential Guards and therefore his statement does not discount the possible involvement of RECCE soldiers in the alleged crimes. The Chamber finds that the Defence has not raised plausible arguments that might warrant the reconsideration of its decision.

19. The Defence contends that the Chamber erred in denying it the opportunity to cross-examine Prosecution witnesses Alison des Forges, DY, ALN, and HP on the basis of the statement of PCK and for its denial to allow the Defence to call PCK as an additional witness. The Defence did not make any submission in respect of Witness DY. With respect to the other witnesses, the Defence avers that PCK's statement that he did not believe Nzuwonemeye was an extremist, contradicts witness Des Forges testimony. It also asserts that the Chamber applied a standard of "exclusivity of culpability" in denying the recall of Witness ALN for cross-examination on PCK's statement, and finally, that with respect to Witness HP, it was premature for the Chamber to have held that recalling this witness will not shed more light on the killing of the opposition politicians. The Defence submits that even assuming the Chamber has heard sufficient evidence on the killing of the politicians, the credibility of that evidence should have been tested by confronting HP with the disclosed statement of PCK. The Chamber is not satisfied that the Defence submissions show that it abused its exercise of discretion in these instances and therefore no ground for reconsideration has been shown.



20. The Defence contends that the Chamber erred in its denial of the request to add PCK as a potential witness for the Defence. The Defence avers that the fact that the Chamber had heard a considerable amount of evidence on the ENI report should not be a reason to reject a request to call PCK as an additional witness. The Chamber finds that the Defence submission does not address the standards for reconsideration and is accordingly dismissed.

21. The Defence submits that the Chamber erred in denying the recall of witnesses ANK/XAF, ALN and AWC for further cross examination on the basis of NB's statement. The Chamber notes that apart from a mere assertion that NB's statement is important in determining the credibility of the aforesaid Prosecution witnesses, the Defence makes no attempt whatsoever to establish that the Chamber erred or abused its discretion in rejecting the request to recall the aforesaid Prosecution witnesses. The Defence submission is accordingly dismissed.

22. The Defence requests the Chamber to reconsider its refusal to recall Prosecution witnesses ZA, DAR, DA, Alison Des Forges, AWC, DY, ANK/XAF and HP in order to cross-examine them further on the basis of JVN's statement. The Defence submits that the Chamber's Decision on recall should have been based on the need to test the credibility of the evidence of these witnesses, rather than the amount of evidence it has already heard. The Chamber finds that the mere assertion by the Defence that the Chamber should have applied a different standard in exercising its discretionary power to recall witnesses for further cross-examination does not address why the initial exercise of discretion was improper so as to warrant reconsideration. The Defence submission is therefore denied.

23. The Defence contends that the Chamber erred in denying its request to add JCU as a potential witness since it acknowledged in its Disclosure Decision that JCU might have information on the killings attributed to the Accused. The Chamber notes that apart from regurgitating its earlier submissions, the Defence has not attempted to advance any reasons that might lead the Chamber to reconsider its decision pertaining to JCU. The Defence request for reconsideration is therefore denied.

24. The Defence further submits that the Chamber erred in its decision not to allow the recall of Defence witness Antoine Nyetera. The Defence contends that contrary to the Chamber's finding, the evidence given by Nyetera in June 2007 contains only a single reference to the murder of Kavuraganda and does not advert to the murder of Lando Ndasingwa at all. Therefore, the Defence objects to the Trial Chamber's decision with respect to Witness Nyetera since it is based on the assumption that the exculpatory information contained in Nyetera's statement has already been covered in his testimony before the Chamber. The Chamber recalls its finding that Witness Nyetera had referred at length to the activities of the RPF in Kigali and therefore recalling the witness in order to testify on the same issues will be an unnecessary duplication of evidence.

25. The Chamber notes that contrary to the Defence averment that Nyetera's testimony contained a single reference to Kavuraganda, a careful review of that testimony reveals that he referred to Kavuraganda on more than one occasion.¹⁵ The Chamber concedes that Witness Nyetera did not testify about the killing of Lando Ndasingwa by

¹⁵ See Transcripts of 4 June 2007, pp, 25, 50. Transcripts of 5 June 2007, p.50

RPF technicians. However, the Chamber notes that the reference to Ndasingwa's murder in Nyetera's statement is devoid of detail such as how he arrived at the conclusion that Ndasingwa was assassinated by RPF operatives. Furthermore, the Chamber notes that it has already heard a substantial amount of evidence about the murdering of Lando Ndasingwa and therefore no discernible evidential value will accrue from hearing witness Nyetera on the alleged criminal activities of the RPF in Kigali. The Chamber finds that the Defence has not shown good reason to warrant reconsideration of its refusal to call Witness Nyetera for additional testimony on these issues.

26. The Defence alleges that a second ANU statement in Kinyarwanda was not disclosed to it until 26 September 2008. The Chamber finds that this matter is inappropriately raised in a motion for reconsideration since it was not ruled upon in the Impugned Decision.

27. The Defence also submits that the Chamber erred in rejecting the Defence request to admit into evidence the recently disclosed exculpatory statements. The Defence argues that the admission of these statements should not be viewed as "mooted" by the fact that the Chamber allowed other remedial measures such as recall of Prosecution witnesses and addition of new witnesses. The Defence adds that these are not exclusive remedies. The Chamber recalls that the determination of a suitable remedy for the Prosecution's violation of his Rule 68 obligation is a matter that falls within the Chamber's inherent power and responsibility to secure justice and ensure a fair trial for the Accused.¹⁶ For the foregoing reasons, the Chamber finds that the Defence has not satisfied the requirements for reconsideration.

28. The Chamber concedes the Defence submission that there was a translation error in its Impugned Decision of a portion of CN's statement which referred to an order issued by a named captain that armored vehicles should be dispatched to reinforce guards at the "Presidential residence".¹⁷ The Chamber notes that the correct translation of CN's statement suggests that the reference is to the office of the President rather than his residence. The Chamber finds that it erred in translating that particular segment of CN's statement and it therefore corrects the error accordingly.

¹⁶ See Decision on Defence Motions Alleging Violations of the Prosecutor's Disclosure Obligations Pursuant to Rule 68(TC), 22 September 2008, para. 61

¹⁷ See Impugned Decision, para. 16

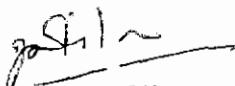


THEREFORE THE CHAMBER

GRANTS in part the Defence Motion as it relates to the translation error in paragraph 27 above and orders that its Decision of 4 December 2008 be read with the necessary correction;

DENIES the Motion in all other respects.

Arusha, 16 February 2009, done in English


Asoka de Silva

Presiding Judge


Taghrid Hikmet

Judge

[Seal of the Tribunal]


Seon Ki Park

Judge