



UNITED NATIONS  
NATIONS UNIES

ICTR-00-56-T  
20-02-2009  
(28325-28322)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

28325  
PM

OR: ENG

**TRIAL CHAMBER II**

**Before** Asoka de Silva, Presiding  
**Judges:**

Taghrid Hikmet  
Seon Ki Park

**Registrar:** Adama Dieng

**Date:** 20 February 2009

JUDICIAL RECORDS/ARCHIVES  
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**The PROSECUTOR**

v.

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

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

**DECISION ON THE PROSECUTION MOTION TO CALL REBUTTAL  
EVIDENCE**

**Office of the Prosecution:**

Mr Alphonse Van  
Mr Moussa Sefon  
Mr Lloyd Strickland  
Mr Abubacarr Tambadou  
Ms Faria Rekkas

**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 29 December 2008, the Prosecution filed a Motion seeking leave to call rebuttal evidence.<sup>1</sup> The Prosecution submits that on 6, 7 and 8 October 2008, the Accused Nzuwonemeye testified for the first time regarding a telephone call that he had received during the night of 6 April 1994 from a Colonel of the Rwandan Army who worked at the Army Headquarters. The Prosecution submits that on 15 December 2008, the Colonel referred to in Nzuwonemeye's evidence gave a statement to judicial police authorities in Belgium in which he denied placing a telephone call to Nzuwonemeye on 6 April 1994.<sup>2</sup>

2. The Prosecution therefore seeks to call the said Colonel to rebut Nzuwonemeye's evidence and argues that the rebuttal evidence is both pertinent and probative of the charges in the Indictment. The Defence opposes the Prosecution request.<sup>3</sup>

## DELIBERATIONS

3. Rule 85 provides the order of presentation of evidence before the Trial Chamber. However, it does not entitle the Prosecution to call evidence in rebuttal. On the contrary, the Chamber enjoys a wide discretion in determining whether to grant leave to call rebuttal evidence. In exercising that discretion, the Chamber will consider whether to limit or exclude rebuttal evidence so as to ensure the fairness of the trial and avoid needless consumption of time.<sup>4</sup>

4. The Chamber recalls that the purpose of rebuttal evidence is to afford the Prosecution an opportunity to refute evidence of a new matter arising in the course of the Defence case that was not reasonably foreseeable.<sup>5</sup> However, rebuttal evidence must not be used by the Prosecution to re-open or perfect its case.<sup>6</sup> Rebuttal evidence must have significant probative value on a central issue in the case and must not be cumulative.<sup>7</sup> The Chamber will not grant leave to call evidence in rebuttal where the Prosecution seeks to use such evidence to challenge the credibility of a Defence witness or other collateral matters in a case.<sup>8</sup>

<sup>1</sup> *Requête du Procureur aux fins d'être autorisé à appeler un témoin en réplique à un point de la déposition de l'accusé Francoise-Xavier Nzuwonemeye des (sic) 6, 7, et 8 Octobre 2008*, filed on 29 December 2008 ("Prosecution Motion")

<sup>2</sup> Annex 1 to the Prosecution Motion.

<sup>3</sup> Nzuwonemeye Response to the Prosecution's Motion filed 29 December 2008 to call a Witness to Rebut a Point in the Accused's Testimony on 6, 7, 8 October 2008, filed on 2 January 2009 ("Defence Response").

<sup>4</sup> *The Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-T, Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rules 54, 73, and 85(A) (iii) of the Rules of Procedure and Evidence (TC), 21 May 2003, para 31 ["Ntagerura Decision"].

<sup>5</sup> *Ibid.*, See also *The Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence and the Prosecutor's Supplementary Motion for Leave to Call Rebuttal Evidence, 27 March 2002, para. 3; *The Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Decision on the Prosecution's Alternative request to Reopen the Prosecution's Case (TC), 19 August 1998, para. 23.

<sup>6</sup> *Ntagerura Decision*, para. 32.

<sup>7</sup> *The Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Decision of 9 May 2003 on the Prosecutor's Application for Rebuttal Witnesses as Corrected According to the Order of 13 May 2003 (TC), 13 May 2003, para. 44.

<sup>8</sup> *Ibid.*, para. 51; *Ntagerura Decision* para. 33

5. The Chamber notes that the Prosecution seeks to call a former Colonel of the Rwandan army to refute Nzuwonemeye's evidence that the said Colonel gave him instructions on the night of 6 April 1994 to defend strategic points in Kigali and to remove armoured cars from the residence and office of the President to be used for that purpose. The Prosecution adds that when it presented its case, it could not have reasonably foreseen that Nzuwonemeye or any other Defence witness would testify that the said Colonel gave instructions to Nzuwonemeye to deploy armoured vehicles from the Reconnaissance Battalion at certain strategic locations in Kigali. The Prosecution argues that it was only during the course of Nzuwonemeye's testimony that it learnt for the first time about the evidence relating to the telephone call allegedly placed by the said Colonel.

6. The Defence submits that the Prosecution motion should be denied because it seeks to challenge the credibility of the Accused through rebuttal evidence. The Defence further submits that this would impermissibly allow the Prosecution to split its case, and that the proposed rebuttal evidence is neither pertinent nor probative. The Defence adds that since the said Colonel had been on the Prosecution's list of witnesses but was not called to testify, the Prosecution cannot claim that the Colonel's denial of Nzuwonemeye's evidence concerning the phone call is a new element which justifies calling rebuttal evidence.

7. The Chamber notes that the deployment of armoured vehicles belonging to the Reconnaissance battalion on the 6-7 April 1994 is not a new issue in this trial. It is specifically pleaded in paragraph 34 of the Indictment and several Prosecution witnesses have given evidence on that allegation.<sup>9</sup>

8. The Chamber must therefore determine whether Nzuwonemeye's evidence that he received instructions by telephone from a senior military officer to deploy armoured vehicles to certain strategic locations in Kigali, and the latter's alleged denial of the evidence, provides a sufficient legal basis to allow the Prosecution to call rebuttal evidence. Considering all the circumstances including the fact that several witnesses have already testified on this issue, the Chamber finds that Nzuwonemeye's evidence on the alleged telephone call does not raise a new element, and is collateral to the main issue in paragraph 34 of the Indictment i.e. whether Nzuwonemeye deployed armoured vehicles on 7 April 1994 to furtherance of the killing of civilians in Kigali. The Chamber finds that even if it were to hear evidence from the said Colonel that he did not place the alleged telephone call to Nzuwonemeye on the night of 6 April 1994, such evidence would only challenge Nzuwonemeye's credibility rather than address the central issue in paragraph 34 of the Indictment. As stated above, the Chamber finds that it is not permissible to call rebuttal evidence solely to challenge the credibility of Defence evidence.

#### **FOR THE ABOVE REASONS THE CHAMBER**

**DENIES** the Prosecution Motion.

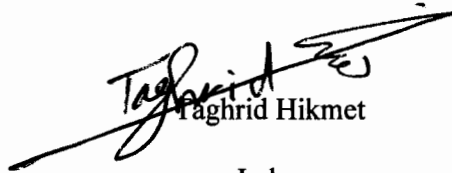
<sup>9</sup> See among others the evidence of Prosecution Witness ALN, T. 30 September 2004, p. 34; Prosecution Witness ANK/XAF, T. 1 September 2005, p. 4; Prosecution Witness AP, T. 7 September 2005, p. 78; Prosecution Witness DA, T. 18 January 2005, pp. 66, 72-73; Prosecution Witness DCK, T. 9 March 2005, p. 5; and Prosecution Witness HP, T. 9 May 2005, pp. 18-19.



Arusha, 20 February 2009, done in English.

  
Asoka de Silva

Presiding Judge

  
Taghriddin Hikmet

Judge

  
Seon Ki Park

Judge

[Seal of the Tribunal]

