

ICTR-00-56-T  
25-01-2005  
(18832-18829)

18832  
Mwanja



UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER II**

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

**Registrar:** Mr Adama Dieng

**Date:** 25 January 2005

**The PROSECUTOR**

v.

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

**Case No. ICTR-2000-56-T**

**DECISION ON DEFENCE REQUEST FOR LEAVE TO APPEAL AGAINST  
THE TRIAL CHAMBER'S DECISION  
OF 3 NOVEMBER 2004**

**The Office of the Prosecutor:**

Mr Ciré Aly Bâ  
Ms Ifeoma Ojemeni Okali  
Mr Segun Jegede  
Mr Alphonse Van  
Mr Moussa Sefon  
Mr Tambadou Abubacarr  
Ms Faria Rekkas (Case Manager)  
Ms Anne Pauline Bodley (Case Manager)

**Counsel for the Accused:**

Mr Gilles Saint-Laurent and Mr Ronnie Mac Donald for **Augustin Bizimungu**  
Mr Christopher Black for **Augustin Ndingiliyimana**  
Mr André Ferran and Ms Danielle Girard for **François-Xavier Nzuwonemeye**  
Mr Fabien Segatwa and Mr Didier Patry for **Innocent Sagahutu**

JUDICIAL RECORDS ARCHIVES  
ICTR

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*g. d. h.*

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),**

**SITTING** as Trial Chamber II composed of Judge Asoka De Silva, Presiding, Judge Taghrid Hikmet, and Judge Seon Ki Park (the "Chamber");

**BEING SEIZED** of the « *Requête de la Défence aux fins d'obtenir l'autorisation de la Chambre de première instance II d'interjeter appel contre sa décision en date du 3 novembre 2004* » filed on 10 November 2004 (the « Motion »);<sup>1</sup>

**CONSIDERING** the

- i. « *Observations du Procureur sur la demande en certification présentée de la défense d'Augustin Bizimungu aux fins d'obtenir l'autorisation d'interjeter appel contre la décision de la Chambre de première instance II en date du 3 Novembre 2004* » filed on 11 November 2004;<sup>2</sup>
- ii. « *Réplique aux observations du Procureur sur la demande de certification présentée par la défense de M. Augustin Bizimungu* » filed on 19 November 2004;<sup>3</sup>

**NOTING** the "Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials" of 3 November 2004 (the "Impugned Decision");

**CONSIDERING** the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 73(B);

**NOW DECIDES** the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73(A) of the Rules.

**SUBMISSIONS OF THE PARTIES**

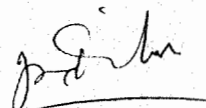
**The Defence**

1. The Defence recalls Rule 73(B) and submits that the Chamber's 3 November 2004 Decision involves an issue that would significantly affect the 'fair and expeditious conduct of the proceedings'.
2. The Defence refers to Article 20 (4) (A) on the rights of the accused to be promptly informed of the charges against him and asserts that at least, the Accused should have access to all statements made by Prosecution witnesses, as well as to the identities of those witnesses.

<sup>1</sup> Unofficial translation: "Defence Request for Leave to Appeal the Trial Chamber's 3 November 2004 Decision."

<sup>2</sup> Unofficial translation: "Prosecution's Observations on the Request for Leave to Appeal the Chamber's Decision of 3 November 2004."

<sup>3</sup> Unofficial translation: "Reply to Prosecution's Observations on the Request for Leave to Appeal the Chamber's Decision of 3 November 2004."



- 3. The Defence argues that in view of this right, protective measures for witnesses under Rule 69 are only to be granted in exceptional circumstances.
- 4. The Defence submits that the Trial Chamber made an error in balancing the time needed for the Defence to prepare its cross-examination with the need to protect witnesses. The Defence further submits that the issue at stake is not the Defence's right to prepare cross-examinations but its ability to counter the Prosecution case in its entirety. The Defence believes it is disadvantaged if it does not have access before trial to the charges and to the evidence supporting those charges.
- 5. The Defence further argues that its inability to understand the full case against the accused before the start of trial, and its inability to use the testimonies of later witnesses to undermine the credibility of earlier witnesses, may have an impact on the outcome of the trial.
- 6. The Defence argues that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

**Prosecution Response**

- 7. The Prosecution cites the Appeals Chamber Decision in *Karemera et al.* on the issue of interlocutory appeals. It states that an Appeal can only be made where:

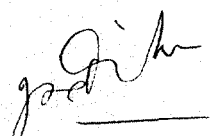
[T]he Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to a relevant consideration [...] If the Trial Chamber has properly exercised its discretion the Appeals Chamber may not intervene solely because it may have exercised the discretion differently.<sup>4</sup>

- 8. The Prosecution believes the Chamber has properly exercised its discretion in its 3 November 2004 Decision.

**The Defence Reply**

- 9. The Defence alleges that the Prosecution has not answered the Defence's arguments and that the arguments of the Prosecution are premature and quotes Trial Chamber II's Decision in the *Prosecutor v. Ntahobali and Nyiramasuhuko* of 18 March 2004 stating that "the submission of the ground of appeal in the Motion is irrelevant and premature. The only matter before the Trial Chamber at this stage of the proceedings is to determine whether the conditions for certification as provided under Rule 73(B) are met or not".
- 10. The Defence reiterates that the Motion for certification does not relate to protective measures for witnesses but to the fundamental procedural question of disclosure of the identity of all witnesses and of their unredacted statements.

<sup>4</sup> *Prosecutor v. Karemera et al.*, Decision on the Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, A.C., 19 December 2003.



**HAVING DELIBERATED**

## 11. The Chamber recalls Rule 73 (B) of the Rules:

Decision rendered on such motions [Rule 73] are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

12. The Chamber recalls the reasoning held by Trial Chamber II composed differently in the case of *The Prosecutor v. Pauline Nyiramasuhuko et al.*:

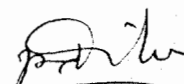
It should be emphasized that the situations which may warrant interlocutory appeals under Rule 73(B) must be exceptional indeed. This point is made clear by the conditions which must be satisfied before the Trial Chamber may consider granting certification.<sup>5</sup>

## 13. The Chamber considers that the arguments advanced by the Defence are either similar to those pleaded in "Bizimungu's Motion to Reconsider the 19 March 2004 Decision on Measures for the Protection of Victims and Witnesses" which led to the Impugned Decision, or that they relate to grounds of appeal which are irrelevant and premature.

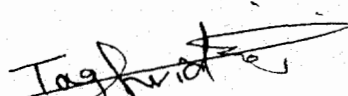
## 14. Therefore, the Chamber does not find that the conditions for certification under Rule 73(B) have been met and denies the Motion.

**FOR THE FOREGOING REASONS,****THE TRIAL CHAMBER DENIES the Defence Motion.**

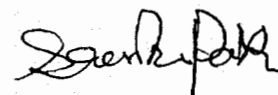
Arusha, 25 January 2005

  
Asoka De Silva

Presiding Judge

  
Taghrid Hikmet

Judge



Seon Ki Park

Judge



<sup>5</sup> *The Prosecutor v. Arsène Shalon Ntahobali and Pauline Nyiramasuhuko*, Case No ICTR-97-21-T, "Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ inadmissible'", 18 March 2004, para. 15.

