



UNITED NATIONS
NATIONS UNIES

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09-06-05
(19811-19808)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

19811
Muzam

OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Silva, **Presiding**
Judge Taghriddin Hikmet
Judge Seon Ki Park

Registrar: Mr Adama Dieng

Date: 9 June 2005

2005 JUN - 9 P 3: 22
ICTR
JUDICIAL RECORDS ARCHIVES

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

**DECISION ON SAGAHUTU'S REQUEST FOR CERTIFICATION TO APPEAL
THE DECISION DATED 13 MAY 2005 DISMISSING APPLICANT'S REQUEST
FOR EXCLUSION OF WITNESSES LMC, DX, BB, GS, CJ, AND GFO**

Office of the Prosecutor:

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

Counsel for the Defence:

Mr Gilles St-Laurent and Mr Ronnie Mac Donald for **Augustin Bizimungu**
Mr Christopher Black and Ms Tiphaine Dickson for **Augustin Ndindiliyimana**
Ms Danielle Girard for **François-Xavier Nzuwonemeye**
Mr Fabien Segatwa and Mr Seydou Doumbia for **Innocent Sagahutu**

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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 SEISED OF Sagahutu’s « *Requête aux fins d’autorisation d’interjeter appel contre la décision du 13 mai 2005 rejetant la demande d’exclusion des témoins LMX, DX, BB, GS, CJ, GFO* », filed on 19 May 2005 (the “Motion”);

HAVING RECEIVED AND CONSIDERED the

- (i) « *Observations du Procureur sur la requête de la défense d’Innocent Sagahutu aux fins d’autorisation d’interjeter appel contre la décision du 13 mai 2005 rejetant la demande d’exclusion des témoins LMX, DX, BB, GS, CJ, GFO* », filed on 23 May 2005 (the “Response”)

RECALLING the Chamber’s “Decision on Sagahutu’s Motion for Exclusion of Witnesses LMC, DX, BB, GS, CJ, GFO”, rendered on 13 May 2005 (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) of the Rules;

HEREBY DECIDES the Motion on the basis of the written brief filed by the Parties pursuant to Rule 73(A) of the Rules.

SUBMISSIONS BY THE PARTIES

The Defence

1. The Defence requests for certification to appeal the Impugned Decision pursuant to Rule 73(B).
2. The Defence submits that the problem at hand, i.e. the request for exclusion of Witnesses LMC, DX, BB, GS, CJ, and GFO, started when the Prosecution on 22 July 2004 and in violation of Rule 50(A)(i) presented an amended Indictment before the Chamber rendered its decision on severance of the Co-Accused Major Protais Mpiranya on 20 August 2004. The Defence further submits that after the Chamber’s decision of 20 August 2004¹ declaring the Prosecution’s amended Indictment of 22 July 2004 null and void, the Prosecution presented an identical amended Indictment on 23 August 2004, disregarding the orders given by the Chamber in its decisions of 15 July 2004² and of 20 August 2004.
3. The Defence argues that as a consequence the Chamber is still working on the basis of the amended Indictment of 22 July 2004, which the Chamber itself declared null and void. The Defence submits that the problem would not have arisen, had the Prosecution amended the Indictment as instructed by the Chamber.

¹ *The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, Protais Mpiranya, François-Xavier Nzuwonemeye, Innocent Sagahutu*, ICTR-2000-56-I, Decision on the Prosecutor Motion on Severance (TC), 20 August 2004, para 15.

² *The Prosecutor v. Augustin Bizimungu*, ICTR-00-56-I, Decision on Bizimungu’s Preliminary Motion (TC), 15 July 2004.

4. The Defence therefore requests the Chamber to order the Prosecution to establish a new amended Indictment implementing the amendments proposed in the Chamber's Decision of 15 July 2004 and in its Decision on severance rendered on 20 August 2004.

5. The Defence argues that contrary to the Chamber's findings in the decision of 13 May 2005, the Chamber did not merely recommend that the Prosecution modify its witness list but *ordered* it to do so in the decision of 20 August 2004. As a consequence, the Defence further argues that it would only be reasonable to order the Prosecution to exclude witnesses LMC, DX, BB, GS, CJ, and GFO, whose testimony would unduly delay the proceedings.

6. The Defence submits that the decision rendered on 13 May 2005 risks compromising the fair and expeditious conduct of the proceedings and that a resolution by the Appeals Chamber could advance the proceedings. The Defence argues that even the Prosecution's request for severance of the formerly Co-Accused Major Mpiranya was based on the assumption that the severance would best respect the right of the other accused persons to be tried without undue delay.

7. Finally, the Defence argues that the Chamber cannot remind the Prosecution to avoid calling witnesses whose evidence would lead to needless consumption of time and at the same time dismiss the Defence Motion which has exactly the same objective.

8. The Defence therefore prays the Chamber to grant certification to appeal its Decision of 13 May 2005 dismissing the Defence request for exclusion of witnesses who would testify only against the former Accused Protais Mpiranya.

The Prosecution

9. In its Response, the Prosecution refers to Rule 89(C) of the Rules which stipulates that a Chamber may admit any relevant evidence which it deems to have probative value.

10. The Prosecution submits that whether a testimony is relevant or not is a result of the Chamber's sovereign appreciation of the evidence and not subject to any appeal at this early stage of the proceedings where the only issue at hand is the appearance of witnesses.

11. Furthermore, the Prosecution submits that paragraphs 3 and 17 of the amended Indictment of 23 August 2004 make it clear that General Augustin Bizimungu as Chief of Staff of the Rwandan Army exercised control over all soldiers of that army, including those in the Presidential Guard. Augustin Bizimungu's criminal responsibility for crimes committed by the Presidential Guard is referred to in paragraphs 59, 60, 68, 69, 70, 82 and 89.

12. In addition, the Prosecution submits that paragraph 22 of the amended Indictment of 23 August 2004 makes reference to Mpiranya as a co-conspirator to commit genocide, which the four accused persons are charged with.

13. In conclusion, the Prosecution prays the Chamber to dismiss the Defence request for certification to appeal.

DELIBERATIONS



14. As a preliminary matter, the Chamber would like to point out that this is neither the appropriate time nor the place to discuss the validity of the amended Indictment of 23 August 2004. The only issue before the Chamber is whether or not to grant certification to appeal the Impugned Decision under Rule 73(B).

15. The Chamber therefore recalls Rule 73(B) which reads as follows:

Decisions rendered on such motions 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.

16. The Chamber notes the principle that decisions rendered under Rule 73 are “without interlocutory appeal” and that certification to appeal is an exception to that general principle. Certification *may* be granted when the two criteria set out in Rule 73(B) are both satisfied. First, in order to exercise the discretion conferred to by Rule 73(B), the Chamber must be satisfied that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Second, the moving party must satisfy the Chamber that an immediate resolution by the Appeals Chamber on the issue may materially advance the proceedings.

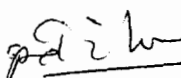
17. As regards the first criterion, namely the fact that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings, the Chamber notes that the Defence merely submitted that the Decision of 13 May 2005 “risks compromising the fair and expeditious conduct of the proceedings” without showing how this would take place. The Chamber is not satisfied that this is an adequate discharge of the Defence’s burden of proof.

18. Since the Defence has failed to satisfy the first condition for the exercise of the Chamber’s discretion to grant certification to appeal, it is not necessary for the Chamber to consider whether or not the second condition under Rule 73(B) has been satisfied.

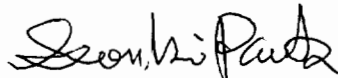
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha, 9 June 2005


Asoka de Silva
Presiding Judge


Taghiid Hikmet
Judge


Seon Ki Park
Judge

