



UNITED NATIONS
NATIONS UNIES

ICTR-00-56-T
13-06-05
(19818 — 19814)

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Mwamp

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 10 June 2005

JURISDICTION
ICTR
2005 JUN 13 P 2:33

The PROSECUTOR

v.

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

Case No. ICTR-2000-56-T

**DECISION ON BIZIMUNGU'S MOTION FOR CERTIFICATION OF APPEAL
FROM THE TRIAL CHAMBER'S ORAL DECISION OF 10 MAY 2005**

Prosecution Counsel

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

Defence Counsel

Mr G. St-Laurent & Mr R. MacDonald
for **A. Bizimungu**
Mr C. Black & Ms T. Dickson
for **A. Ndindiliyimana**
Ms D. Girard
for **F-X. Nzuwonemeye**
Mr F. Segatwa & Mr S. Doumbia
for **I. 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 SEIZED of Bizimungu’s « *Requête de la Défense aux fins d’obtenir l’autorisation de la Chambre de première instance II d’interjeter appel contre sa décision orale du 10 mai 2005* » filed on 17 May 2005 (the “Motion”);

HAVING RECEIVED the « *Observations du Procureur sur la requête de la défense d’Augustin Bizimungu aux fins d’obtenir l’autorisation de la Chambre de première instance II d’interjeter appel contre sa décision orale du 10 mai 2005* » filed on 23 May 2005 (the “Response”);

RECALLING the Chamber’s Oral Decision of 10 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;

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

SUBMISSIONS OF THE PARTIES

Background

1. On 9 May 2005, the Defence for Augustin Bizimungu filed a Motion praying the Chamber to:
 - i. Exclude the testimonies of Prosecution Witnesses GFD, GFV and AOE;
 - ii. Order an adjournment of the present session due to the Defence’s inability to conduct valid cross-examinations; or
 - iii. Postpone the testimonies of Witnesses GFD, GFV and AOE until the Defence could conclude its investigations.¹
2. Following oral arguments in open court on 10 May 2005, the Chamber deliberated and rendered a Decision denying the Motion.

Bizimungu’s Motion

3. The Defence for Augustin Bizimungu requests the Chamber, pursuant to Rule 73 (B) of the Rules, to certify an appeal from the Impugned Decision.
4. The Defence submits that from August 2002 when Augustin Bizimungu was arrested in Angola to the present, it has encountered considerable difficulty obtaining appropriate information and documentation regarding detained witnesses from the Prosecution and from the Rwandan authorities. The Motion contains a chronological listing of the problems encountered.

¹ *Le Procureur c. Augustin Bizimungu*, Affaire No. ICTR-00-56-T, « Requête urgente demandant un ajournement », 9 mai 2005.

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5. The Defence also asserts that even when the judicial files of detained witnesses are disclosed by the Prosecution, such documents are either not disclosed in a timely fashion or are in Kinyarwanda without being translated into English or French, the Tribunal's working languages.
6. The Defence further asserts that the issues at stake include the fundamental right of the Accused to a full and plain defence, the timely disclosure of witness statements by the Prosecution, as well as the Defence's capacity to prepare an adequate response to the thesis propounded by the Prosecution before the Tribunal.
7. The Defence submits that pursuant to Rule 73 (B) of the Rules, this decision involves issues that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and that an immediate resolution of this matter by the Appeals Chamber may materially advance the proceedings.
8. Finally, the Defence maintains that it is important for the Appeals Chamber to resolve this matter now, as the same questions are likely to arise whenever a detained witness is called upon to testify.

The Prosecutor's Response

9. The Prosecution submits that Rule 90 (F) of the Rules grants the Trial Chamber the power to control the interrogation of witnesses, and that in the exercise of its discretion, the Chamber may decide how to allocate time to the Parties for the examination of witnesses.
10. The Prosecution further submits that in the case of Witness GFD, the Prosecution was required to conduct the examination-in-chief for two hours on Tuesday, 10 May 2005, while the Defence was granted six additional days to prepare and was allowed to start its cross-examination on Monday, 16 May 2005 and to continue for eighteen hours.
11. Finally the Prosecution asserts that the Chamber has fully respected the rights of the Accused, urges the Chamber to deny the Defence Motion, and provides three decisions from various Trial Chambers to support such an outcome.²

HAVING DELIBERATED

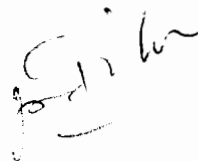
12. The Chamber recalls Rule 73 (B) of the Rules, which establishes a two-pronged test for the certification of interlocutory appeals. In the first instance, the Chamber *may* grant certification "if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial." The

² *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, "Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68", TCI, 4 October 2004; *The Prosecutor v. Casimir Bizimungu et al*, Case No. ICTR-99-50-T, "Decision on Jérôme-Clément Bicamumpaka's Motion for Judicial Notice of a Rwandan Judgement of 8 December 2000 and in the Alternative for an Order to Disclose Exculpatory Evidence", TCII, 15 December 2004; and *The Prosecutor v. Athanase Seromba*, Case No. ICTR-01-66-T, TCIII, « *Décision relative à la requête de la défense aux fins de communication de pièces et de suspension du procès* », 13 December 2004.

second criterion is met if, “in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

13. The Chamber also recalls Rule 90 (F) of the Rules, which grants it the power to exercise control over the mode and order of interrogating witnesses and presenting evidence, with a view to effectively ascertaining the truth and avoiding needless consumption of time.
14. The Chamber notes that subsequent to its directives in the Impugned Decision, Witnesses GFD and GFV have already testified in this matter. In the case of GFD, the Chamber allowed the Defence a period of six days between the conclusion of the examination-in-chief and the commencement of the cross-examination to complete its preparations.
15. The Chamber further recalls that when Mr. St-Laurent was appointed as Lead Counsel for the Accused Augustin Bizimungu, he was granted an adjournment of three months from October 2004 to January 2005 to prepare and familiarise himself with the case. During that time, the new Defence Counsel was expected to conduct his investigations and fully prepare his case.
16. Contrary to the claims of the Defence, the Chamber observes that granting a request for an adjournment each time a new witness is called upon to testify, or certifying a motion for interlocutory appeal whenever such a request is denied, would significantly impair the expeditious conduct of the proceedings. The Chamber is also satisfied that the denial of the Defence application is not likely to affect the outcome of the trial because the Chamber is willing to invoke other procedural steps in the course of the trial in order to ensure full respect for the rights of the Accused to a full and complete cross-examination. Such steps might include, for example, re-calling the witnesses for further cross-examination.
17. Furthermore, since the Prosecution’s examination-in-chief of each witness is based on documents and statements that have previously been disclosed to the Defence, and the Defence has the opportunity to cross-examine each witness on the basis of the same documents, the level of prejudice to the Defence is minimized considerably. The Chamber is not persuaded that a decision by the Appeals Chamber on this issue could significantly affect the outcome of the trial. Therefore, the Motion fails to meet the first prong of the certification test.
18. With respect to the Defence claim that the Prosecution has either failed to disclose the entire judicial files of detained witnesses, or has not disclosed them in a timely manner, the Chamber notes that there is no obligation on the part of the Prosecution to disclose documents that are not in its possession. As the Appeals Chamber pointed out in the *Kajelijeli* case, “the Defence must first establish that the evidence was in the possession of the Prosecution, and then must present a *prima facie* case which would make probable the exculpatory nature of the materials sought.”³
19. The Chamber is of the view that the root cause of the problems outlined in the Defence Motion is the inability or unwillingness of the Rwandan judicial authorities

³ *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 262.



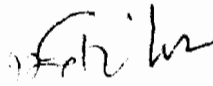
to transmit the judicial files of detained witnesses in a timely manner or to facilitate the conduct of investigations. This may have hampered the Defence's ability to properly cross-examine Prosecution witnesses. However, in the opinion of the Trial Chamber, this is not a matter that can be resolved by the Appeals Chamber through an interlocutory appeal. Thus, the Motion fails to satisfy the second criterion for certification.

20. In conclusion, the Chamber is minded to inform the Defence that, under the appropriate circumstances and with adequate information, the Chamber or the Prosecution can be persuaded to make further direct requests to the Rwandan authorities for the disclosure of the judicial files of potential witnesses.

FOR THE FOREGOING REASONS,

THE CHAMBER DENIES the Motion in its entirety.

Arusha, 10 June 2005


Asoka De Silva

Presiding Judge


Taghrid Hikmet




Seon Ki Park

Judge