



UNITED NATIONS
NATIONS UNIES

ICTR-00-56-T
30-06-2005
(20455-20451)

20455
Mushamp

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 30 June 2005

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

**DECISION ON BIZIMUNGU'S REQUEST FOR CERTIFICATION TO APPEAL
THE ORAL DECISION DATED 8 JUNE 2005**

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 MacDonald for **Augustin Bizimungu**
Mr Christopher Black and Ms Tiphaine Dickson for **Augustin Ndindilyimana**
Ms Danielle Girard for **François-Xavier Nzuwonemeye**
Mr Fabien Segatwa and Mr Seydou Doumbia for **Innocent Sagahutu**

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding and Judge Seon Ki Park under Rule 15*bis* (the “Chamber”);

BEING SEISED OF Bizimungu’s «*Requête de la Défense aux fins d’obtenir l’autorisation de la Chambre de première instance d’interjeter appel contre sa décision orale du 8 juin*», filed on 15 June 2005 (the “Motion”);

HAVING RECEIVED AND CONSIDERED the

- (i) «*Observations du Procureur sur la Requête de la Défense d’Augustin Bizimungu aux fins d’obtenir l’autorisation de la Chambre de première instance d’interjeter appel contre sa décision orale du 8 juin*», filed on 16 June 2005 (the “Response”)

RECALLING the Chamber’s oral Decision rendered on 8 June 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 briefs 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 Impugned Decision raises a question that affects both the fairness and the progress and outcome of the proceedings.
3. Concerning the admissibility of events of 1994, the Defence argues that there is no legal basis upon which to admit evidence to prove the element of *mens rea* after having established that the relevant events were not pleaded in the Indictment.
4. The Defence submits that if a material fact is an essential part of the crime alleged this fact has to be pleaded in the Indictment.
5. Consequently, the Defence argues that the admission of facts not pleaded in the Indictment to prove the element of *mens rea* renders the Indictment “unacceptably imprecise.”¹ The Defence further argues that this affects the right of the Accused to prepare his defence and the fairness, progress and outcome of the proceedings, given the fact that the Defence will know in detail of the evidence against Augustin Bizimungu only when the Prosecutor has finished his case.

¹ Para 11 of the Motion.

6. Concerning the facts relating to 1993, the Defence submits that, once the Chamber concludes that its temporal jurisdiction does not extend to events that took place in 1993, the Chamber should have declared inadmissible evidence of events in 1993 related to conspiracy to commit genocide.

7. The Defence argues that the exception contained in Rule 93 allowing the Chamber to hear evidence concerning conspiracy to commit genocide only applies if the criteria set out by Trial Chamber I in the *Bagosora*² case are strictly met and the decision does not cause prejudice to the Accused.

8. With respect to the second criterion of Rule 73(B), the Defence submits that a resolution by the Appeals Chamber would materially advance the proceedings, since a decision may not only influence the ongoing deliberations of the Trial Chamber, but once and for all establish clear and precise rules concerning the admissibility of evidence not pleaded in the Indictment and evidence relating to events prior to 1994.

9. The Defence therefore prays the Chamber to grant certification to appeal its oral Decision of 8 June 2005.

The Prosecution

10. The Prosecution submits that with respect to evidence on events prior to 1994, the Chamber should refer to the Decision of Trial Chamber II rendered in the present case on 15 July 2004³ in which the Chamber adhered to a ruling in the *Kabiligi and Ntabakuze* case. In that later Decision, the Chamber stated that "... conspiracy is a continuing crime, the events that took place outside the period of the Statute can be taken into account if it can be shown that the conspiracy continued into the relevant period of the Statute."⁴

11. The Prosecution submits that no appeal was made against the Decision of 15 July 2004 and that the ruling therefore is legally binding. Consequently, the Prosecution argues it is allowed to lead evidence on events prior to 1994 concerning the crime of conspiracy to commit genocide if this evidence leads inexorably to the genocide of 1994.

12. Concerning *mens rea*, the Prosecution submits that intention is a mental factor and not a material fact, which is required for the crime of genocide but which, contrary to the *actus reus*, does not have to be pleaded as a material fact in the Indictment.

13. The Prosecution submits that *mens rea* is mostly inferred from the circumstances of the case and can be deduced from the sum of the criminal acts.

² *The Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva*, ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY (TC), 18 September 2003, para. 4-39.

³ *The Prosecutor v. Augustin Bizimungu*, ICTR-00-56-I, Decision on Bizimungu's Preliminary Motion (TC), 15 July 2004, para. 30-35.

⁴ *The Prosecutor v. Kabiligi and Ntabakuze*, ICTR-96-34-I, Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment Void *ab initio*, 13 April 2000, para. 39.

14. The Prosecutions further submits that material facts can both be used to prove the commission of an alleged crime and to infer the existence of *mens rea*.

15. The Prosecution argues that the Defence suggestion that the Indictment is imprecise for lacking the notion of *mens rea* is ill-founded and, in conclusion, prays the Chamber to dismiss the Defence request for certification to appeal.

DELIBERATIONS

16. The Chamber 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.

17. The Chamber refers to its discussion of the criteria for certification under Rule 73(B) in its “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” rendered on 9 June 2005.⁵ In particular, the Chamber recalls the principle that decisions under Rule 73 are “without interlocutory appeal” and that certification to appeal is an exception that the Chamber may grant, if the two criteria under Rule 73(B) are satisfied.

18. The Chamber notes that the admissibility of Witness AOE’s evidence, in particular evidence including material facts not pleaded in the Indictment and evidence of events of 1993 arguably affect the “fair and expeditious conduct of the proceedings”. The Chamber underscores that timely and clear notice to the Accused of the allegations against him is a cornerstone of the right of the Accused to a fair trial.

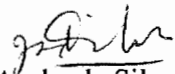
19. The Chamber however is of the opinion that certification in the present case would not “materially advance the proceedings.” The Chamber has already heard Witness AOE’s evidence and ruled on what part of the evidence is admissible. Furthermore, the Chamber would like to emphasize that both the progress and the fairness of the proceedings have been respected in its oral decision of 8 June 2005 by excluding Witness AOE’s testimony relating to events not pleaded in the amended Indictment of 23 August 2004 and by declaring that, at a later stage, evidence relating to events in 1993 and the charge of conspiracy to commit genocide will be taken into consideration “only if the Prosecution establishes the existence of a conspiracy in 1994.”

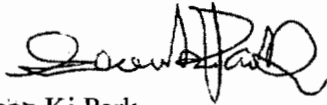
FOR THE ABOVE REASONS, THE CHAMBER

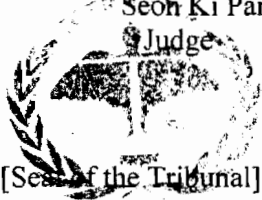
DENIES the Defence Motion.

⁵ *The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu*, ICTR-00-56-T, Decision on Sagahutu’s Request for Certification to Appeal (TC), 9 June 2005, para. 16. 17.

Arusha, 30 June 2005


Asoka de Silva
Presiding Judge



Seon Ki Park
Judge

[Seal of the Tribunal]