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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

20461
Mwanja

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 01 July 2005

The PROSECUTOR
v.
Augustin NDINDILYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU

Case No. ICTR-2000-56-T

JUDICIAL RECORDS/ARCHIVES
ICTR
2005 JUL - 1 P 1:34

**DECISION ON REQUEST FOR CERTIFICATION OF APPEAL FROM THE
DECISION OF TRIAL CHAMBER DATED JUNE 13, 2004 (sic) DISMISSING
APPLICANT'S REQUEST FOR A CITATION FOR CONTEMPT OF THE
JOURNALIST GATARE OF RADIO RWANDA FOR PUBLISHING THE NAMES
OF PROTECTED WITNESSES**

Prosecution Counsel

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for **A. Ndindiliyimana**
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for **A. Bizimungu**
Ms D. Girard
for **F-X. Nzuwonemeye**
Mr F. Segatwa & Mr S. Doumbia
for **I. 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 SEIZED of Augustin Nindiliyimana’s “Request for Certification of Appeal from the Decision of Trial Chamber dated June 13, 2004 (sic) Dismissing Applicant’s Request for a Citation for Contempt of the Journalist Gatere of Radio Rwanda for Publishing the Names of Protected Witnesses” filed on 20 June 2005 (the “Motion”);

HAVING RECEIVED the « *Observations du Procureur sur la requête aux fins de certification présentée par la défense d’Augustin Nindiliyimana (cf décision de la Chambre de première instance II en date du 13 juin 2005)* » filed on 21 June 2005 (the “Response”);

RECALLING the Chamber’s oral Decision of 13 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;

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

Nindiliyimana’s Motion

1. The Defence for Augustin Nindiliyimana requests the Chamber, pursuant to Rule 73(B) of the Rules, to grant certification of an appeal from the Impugned Decision.
2. The Defence submits that on 7 June 2005, Jean Gatere, a Radio Rwanda journalist based at the Tribunal, published the names of two protected witnesses who had testified for the Defence in the Military I trial, in violation of the Chamber’s order that the names of these witnesses be placed under seal and not made public. It asserts that Counsel for the Defence received a copy of the broadcast in print form on 9 June 2005 and made it available to the Chamber on the same day, prompting the issuance of an order for the journalist in question to be brought before the Chamber for a hearing on Monday, 13 June 2005.
3. The Defence also submits that the broadcast of the names of those protected witnesses endangers the lives of those witnesses and directly affects the fairness of the trial as other potential witnesses for the Defence can no longer have any confidence that their identities will be concealed and their persons protected if they come to the Tribunal to testify. It concludes that the ability of the Defence to make full answer and defence has been gravely if not irreparably impaired.
4. The Defence asserts that the contempt “was clearly deliberate” as the journalist involved “was following the proceedings” and “there is no doubt whatsoever that he was aware of that order and the protected status of those witnesses.” It maintains that



the journalist intentionally published the priests' names "in order to sabotage" Nindiliyimana's defence.¹

5. It is alleged in the Motion that three witnesses "who had previously agreed to testify for the defence" have since indicated that "due to the broadcast of the names of those protected defence witnesses, they no longer believe that they will be protected and now state that they are unwilling to testify under these circumstances."²
6. According to the Defence, it intended to call as witnesses the two persons whose names were revealed in the broadcast. However, the Defence maintains, since the safety of these witnesses can no longer be guaranteed, they will not be available to the Defence. The Defence also asserts in the Motion that this has seriously undermined Nindiliyimana's ability to defend the charges against him and has gravely undermined the integrity of the witness protection system.
7. The Defence submits that on the morning of Monday, 13 June 2005, the Chamber announced that it had considered the matter and determined that no contempt had been committed and that everyone was to blame, and so the matter was now closed.
8. The Defence alleges that it was clear that "everyone in the courtroom, that is the Registry, the Prosecution counsel and the Judges were aware of this action." It further alleges that it was "also clear that the journalist concerned was also aware of this as he neither appeared in the courtroom to answer his contempt nor dressed for such an appearance. Instead he appeared in the gallery in relaxed attire." It concludes that "all parties, except the defence, were notified over the weekend of the decision to close the matter without a hearing and that a series of talks had taken place between the judges, the journalist, the prosecution, Radio Rwanda in order to cover up this issue."³
9. The Defence asserts that the rules of natural justice demand that all issues regarding the fairness of a trial be held in open court, on the record, and with the opportunity to the parties concerned to be heard. It further asserts that the actions of the Chamber "in dealing with this matter privately, over the weekend, outside the courtroom, and without the knowledge or participation of the defence is an egregious violation of the principles of natural justice" and of Nindiliyimana's right to be heard.⁴
10. According to the Defence, whether the contempt was deliberate or inadvertent, the fact is that the names of the witnesses were revealed and certain steps should have been taken to protect the witnesses, including: i) an order that Radio Rwanda issue a retraction; ii) greater security under the witness protection program, such as regular reports on the security of these witnesses while they are in Rwanda; iii) the removal of the concerned journalist's press credentials and his expulsion from the Tribunal; and iv) the expulsion of Radio Rwanda or its parent company from the Tribunal.⁵
11. The Defence submits that the Chamber refused to take any of these measures, and that even though the security of these witnesses had been compromised by the broadcast

¹ Para. 5.

² Para. 6.

³ Para. 10.

⁴ Para. 11.

⁵ Para. 12.



of their names, "the Chamber refused to lift a finger to help them and instead added to the injury by doing nothing to rectify the situation." The Defence concludes that "[t]he Chamber itself then became a party to the contempt by excusing the violation of its own order."⁶

12. The Defence also accuses the Chamber of making a "lame attempt to excuse the contempt by taking the position that everyone was more or less to blame." According to the Defence, this was "not only a distortion of the facts" but it also "amounted to support for the revelation of the names by Radio Rwanda, and therefore amounted to an attack on the defence by the Judges of the Chamber itself, in violation of their requirement to be neutral, impartial and objective triers of fact."⁷
13. Finally, it is alleged in the Motion that "when defence counsel tried to object to this extralegal procedure, the Chamber made every attempt to silence him", denying Ndindiliyimana the right to be heard on a matter material to his defence and thus raising "the issue of an apprehension of bias by the judges of this Chamber."⁸

The Prosecutor's Response

14. The Prosecution submits that it was the Defence Counsel for Augustin Ndindiliyimana who violated the protective order of Trial Chamber I by using the transcripts of the testimony of Witnesses DH90 and DH91 during his cross-examination without first obtaining the permission of the Chamber before which those witnesses testified. The Prosecution urges the Defence Counsel to explain to the Chamber how he obtained those transcripts.
15. The Prosecution notes that to date, Augustin Ndindiliyimana's Defence Counsel has not yet submitted any list of its potential witnesses to the Chamber and that the Defence has never requested the Chamber to issue any protective order for its known or presumed witnesses.
16. Finally, the Prosecution points out that contrary to the assertions contained in the Defence Motion, the Prosecution was never informed of the Decision of 13 June 2005 prior to the announcement of the said Decision in open session.

HAVING DELIBERATED

17. The Chamber notes that on Monday, 6 June 2005, Prosecution Witness WG revealed the names of two persons in open session during his examination-in-chief. It is noted that the references in examination-in-chief contained no reference to the fact that the named persons had given evidence before the Tribunal. On Tuesday, 7 June 2005, during cross-examination, the persons' names were again mentioned in open session and the Chamber notes that the information that the named persons had given evidence before the Tribunal was volunteered by Counsel for Ndindiliyimana. Most of the references to the persons were made by Counsel for Ndindiliyimana by their nationality and function, but the names were mentioned by the witness under cross-examination and in due course the Chamber ordered the names to be redacted from

⁶ Para. 13.


⁷ Para. 14.

⁸ Paras. 15 and 16.



the record. It is noted that the date of earlier testimony and the pseudonyms used by both of the persons were revealed by Defence Counsel in open session.

18. On Thursday, 9 June 2005, Defence Counsel for the Accused Augustin Ndindiliyimana informed the Chamber that the names of the priests had been the subject of a broadcast on Radio Rwanda on 7 June 2005. Counsel presented a copy of the broadcast in print form, argued that this constituted a violation of the Chamber's order that the names be kept under seal, and urged that the journalist responsible, Jean Gatare, should be given a citation for contempt.
19. The Chamber then instructed the Registry to bring the said journalist before the Chamber on Monday, 13 June 2005.
20. Meanwhile, the Chamber reviewed the transcripts and minutes of the proceedings and came to the conclusion that by reporting the names of the two protected witnesses in question, the journalist had not violated the Chamber's order or Rule 77 (A)(ii), since the names of the witnesses before the other Trial Chamber were initially made public in open session and the Chamber's order to place the names under seal came a day later.
21. On Monday, 13 June 2005, the Chamber instructed the Registry to place the journalist in the public gallery and announced its Decision in open session. The Chamber stated that it had found that the mention of the names of the protected persons had been made in open court a considerable time prior to their being placed under seal. The Chamber stated that it had decided that all participants in the Chamber were to be blamed for not taking appropriate action at the appropriate time and that the Chamber was satisfied that there had been no violation of Rule 77 (A)(ii). The Chamber also reminded the Parties and the representatives of media organisations of their continuing obligation to respect the protective orders issued by the Tribunal.
22. The Chamber recalls Rule 73(B) of the Rules, which sets out the criteria for the certification of interlocutory appeals. The first criterion is fulfilled "if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial", while the second criterion is met if, "in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings."
23. The Chamber notes that the Defence Motion fails to satisfy either prong of the two-part test. The Chamber finds it regrettable that the names of these protected witnesses were mentioned at all in the broadcast, and that they were stated as having given evidence at the Tribunal, but the Chamber notes that it had already ordered that the names be placed under seal even before it was made aware of the broadcast. The Defence has not demonstrated that any appeal can now affect the fair and expeditious conduct of the proceedings or the outcome of the trial.
24. Secondly, the Defence has also failed to show how an immediate ruling on this issue by the Appeals Chamber might affect the proceedings in this case. In the Chamber's opinion, even if the Appeals Chamber were to order the implementation of the four



proposals advanced by the Defence,⁹ this would not materially advance the proceedings in this matter. Thus the Motion does not fulfil the criteria for certification.

25. The Chamber notes that Counsel claims in the Motion that this matter was decided “outside the judicial forum, in a backroom deal” to which Ndindiliyimana was not a party. He also alleges that “a series of talks had taken place” over the weekend involving “the Registry, the Prosecution counsel and the Judges” as well as “the journalist concerned” and even Radio Rwanda, and that it had been decided “to close the matter without a hearing” and “to cover up this issue.”
26. The Chamber additionally notes that Counsel charges the Chamber with “an egregious violation of the principles of natural justice” and accuses it of being “a party to the contempt by excusing the violation of its own order.” He further claims that the Chamber made a “lame attempt to excuse the contempt”, which amounted not only to “a distortion of the facts,” but also to “support for the revelation of the names” of the priests.
27. Finally, the Chamber notes that Counsel alleges in the Motion that “when defence counsel tried to object to this extralegal procedure, the Chamber made every attempt to silence him”, thus raising “the issue of an apprehension of bias by the judges of this Chamber.”
28. These are very serious allegations that remain unsubstantiated. Counsel is well aware of the facts in this matter and the sequence of events as set out in paragraphs 17 to 22 above.
29. The Chamber additionally finds that the language used in Defence Counsel’s Motion is offensive, abusive and lacking in the proper respect due to the Chamber. The Chamber issues a warning within the meaning of Rule 46 of the Rules of Procedure and Evidence to the Defence Counsel for Augustin Ndindiliyimana that should there be any repetition of this conduct, the Chamber will consider exercising the powers set out in Rule 46 to deal with misconduct of counsel.

FOR THE FOREGOING REASONS,
THE CHAMBER DENIES the Motion in its entirety; and
ISSUES A WARNING to Defence Counsel Christopher Black.

Arusha, 01 July 2005


Asoka De Silva

Presiding Judge




Seon Ki Park

Judge

⁹ Summarised in Paragraph 10 above.