



UNITED NATIONS
NATIONS UNIES

ICTR-00-56-T
24-11-2005
(21945 — 21940)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

21945 *smm/eg*

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 24 November 2005

The PROSECUTOR

v.

Augustin BIZIMUNGU
Augustin NDINDILYIMANA
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU

Case No. ICTR-00-56-T

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**DECISION ON BIZIMUNGU'S MOTION IN OPPOSITION TO THE
ADMISSIBILITY OF THE TESTIMONIES OF WITNESSES LMC, DX/ANM, BB,
GS, CJ/ANL AND GFO AND FOR RECONSIDERATION OF THE CHAMBER'S
DECISION OF 13 MAY 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
Ms Anne Pauline Bodley

Counsel for the Defence:

Mr Gilles St-Laurent and Mr Ronnie MacDonald for Augustin Bizimungu
Mr Christopher Black for Augustin Ndindilyimana
Mr Charles Taku 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 SEIZED OF the Accused Bizimungu's « *Requête s'opposant à la recevabilité de la déposition des témoins LMC, DX/ANM, BB, GS, CJ/ANL et GFO* »,¹ filed on 9 November 2005 (the "Motion");

HAVING RECEIVED AND CONSIDERED the

- (i) « *Réponse du Procureur à la Requête déposée par le Conseil d'Augustin Bizimungu s'opposant à la recevabilité de la déposition des témoins LMC, ANM/DX, BB, GS, ANL/CJ et GFO* »,² filed on 11 November 2005 (the "Response");
- (ii) « *Réplique de la Défense d'Augustin Bizimungu à la Réponse du Procureur à la Requête déposée par le Conseil d'Augustin Bizimungu s'opposant à la recevabilité de la déposition des témoins LMC, ANM/DX, BB, GS, ANL/CJ et GFO* »,³ filed on 16 November 2005 (the "Reply");

RECALLING its Decision of 13 May 2005 concerning the issue of exclusion of the testimony of Witnesses LMC, DX, BB, GS, CJ and GFO;⁴

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules");

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

SUBMISSIONS BY THE PARTIES

The Defence

1. The Defence for Bizimungu requests the Chamber to reconsider its Decision of 13 May 2005, in which the Chamber denied the Sagahutu Defence's request for an order that the Prosecution exclude witnesses LMC, DX, BB, GS, CJ and GFO from its witness list.

2. The Defence for Bizimungu submits that neither the statements of witnesses LMC, DX, BB, GS, CJ and GFO nor the summaries of their proposed testimony, refer to the accused Bizimungu.

¹ "Motion in Opposition to the Admissibility of the Testimonies of Witnesses LMC, DX/ANM, BB, GS, CJ/ANL and GFO." (Unofficial translation.)

² "The Prosecutor's Response to the Motion filed by Counsel for Augustin Bizimungu in Opposition to the Admissibility of the Testimonies of Witnesses LMC, DX/ANM, BB, GS, CJ/ANL and GFO." (Unofficial translation.)

³ "The Defence's Reply to 'The Prosecutor's Response to the Motion in Opposition to the Admissibility of the Testimonies of Witnesses LMC, DX/ANM, BB, GS, CJ/ANL and GFO'." (Unofficial translation.)

⁴ *The Prosecutor v. Augustin Ndingiyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye and Innocent Sagahutu*, ICTR-00-56-T, Trial Chamber II, "Decision on Sagahutu's Motion for exclusion of Witnesses LMC, DX, BB, GS, CJ, GFO" rendered on 13 May 2005.



3. The Defence further submits that the first time it received any indication that the witnesses in question, who were originally listed to testify against the formerly co-Accused Mpiranya, would now testify against the Accused Bizimungu, was in the Prosecution's response to Sagahutu's Motion.
4. The Defence argues that the introduction of their testimony constitutes a new fact, of which it has not been informed in a timely, clear and consistent manner, and that this violates the right of the Accused to a fair trial.
5. The Defence further submits that contrary to the Prosecution suggestion, the testimonies of Witnesses LMC, DX, BB, GS, CJ and GFO cannot go to proof of the count of conspiracy to commit genocide, nor to Bizimungu's superior responsibility.
6. The Defence argues that the fact that both the formerly co-Accused Mpiranya and the Accused Bizimungu held high positions in the Rwandan Armed Forces, does not prove a conspiracy and does not entail their individual criminal responsibility under the Statute.
7. The Defence submits that the Prosecution has already indicated the 15 witnesses who will testify to Bizimungu's superior responsibility and the addition of another six witnesses would, contrary to Rule 90(F)(ii), lead to needless consumption of time.
8. Finally, the Defence submits that the paragraphs of the Amended Indictment of 23 August 2004, that relate to Bizimungu's superior responsibility are not pleaded with the necessary specificity. Referring to a recent Decision in the *Bagosora* case,⁵ the Defence argues that it is not possible, through general references, to know with certainty the identity of the subordinates over whom the Accused had effective control and whose acts entail the Accused's responsibility.⁶

The Prosecution

9. The Prosecution asks the Chamber to dismiss the Defence Motion as ill-founded.
10. The Prosecution submits that Witnesses LMC, ANM/DX, BB and ANL/CJ will all testify to facts pleaded in the Indictment, in particular to events contained in paragraphs 48-50. Witness GS will testify to paragraphs 22-25 and paragraph 27 of the Indictment. Witness GFO forms part of the group of 30 witnesses that will be withdrawn from the Prosecution's initial witness list.
11. The Prosecution submits that all of the Defence teams have been in possession of the Indictment and the witness statements for at least two years. The Prosecution further submits that the witness summaries prepared by the Prosecution, optional under Rule 73 *bis* (B), are not a substitute for the written statements.
12. The Prosecution further submits in relation to the crime of conspiracy to commit genocide that the different actors involved in the crime have to be considered as accomplices. They share the same intent and their respective acts, although often different in nature, aim at the same objective: to accomplish the genocide.

⁵ *The Prosecutor v. Bagosora et al.*, "Decision on Kabiligi's Request for Particulars of the Amended Indictment" rendered on 27 September 2005, paras. 12-13.

⁶ Para. 43 of the Motion.



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13. Finally, the Prosecution submits that if the Defence is of the opinion that the Prosecution has not been able to prove the count of conspiracy to commit genocide, it can make an appropriate submission in a Motion under Rule 98*bis* of the Rules at the end of the Prosecution case.

Defence Reply

14. The Defence for Bizimungu takes note of the Prosecution's announcement that Witness GFO is one of the 30 witnesses who will be dropped from the Prosecution's initial witness list and submits that, at this stage of the proceedings, the Prosecution should announce its final witness list to the Chamber and to the Defence teams.

15. The Defence submits that the Prosecution did not respond to the arguments brought forward by the Defence. The Defence further submits that the paragraphs in the Amended Indictment to which the Prosecution refers in its response, do not provide clear information that the witnesses in question will testify against Augustin Bizimungu.

16. The Defence submits that it is unfair that Bizimungu is informed in a piecemeal manner by the Prosecution that the witnesses in question will testify against him. The Defence argues that this procedure is contrary to Article 20(4) of the Statute and violates the fundamental rights of the Accused.

17. Finally, the Defence submits that the events upon which Witnesses LMC, DX, BB, GS, CJ will testify fall into a time period, in which Marcel Gatsinzi and not Augustin Bizimungu was Chief of Staff of the Rwandan Army, and that the former had effective control over Major Mpiranya and the soldiers of the presidential guard.

DELIBERATIONS

18. The Chamber has previously ruled that in order for a motion for reconsideration to succeed, the moving party has to demonstrate the discovery of a new fact, which, had it been known by the Chamber at the time, would not have allowed it to render the decision; or that there has been a material change in circumstances; or finally, that the previous decision was erroneous and therefore prejudicial to either party.⁷

19. Furthermore, the Chamber takes note of the Decision of 2 November 2005 in the Rwamakuba case, where Trial Chamber III ruled that "a Trial Chamber has an inherent power to reconsider its own decisions in exceptional circumstances where (i) a clear error of reasoning in the previous decision has been demonstrated and (ii) the decision sought to be reconsidered has led to an injustice."⁸

⁷ *The Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-T, Trial Chamber II, "Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials" rendered on 3 November 2004, para. 21; "Decision on Nzuwonemeye's Motion for Reconsideration of the Chamber's Oral Decision of 14 September 2005 on Admissibility of Witness XXO's Testimony in the Military I case in Evidence," rendered on 10 October 2005, para. 11.

⁸ *The Prosecutor v. André Rwamakuba*, ICTR-98-44C-T, Trial Chamber III, "Decision on Prosecution Motion for Variation, or in Alternative Reconsideration of the Decision on Protective Measures for Defence Witnesses" rendered on 2 November 2005, para. 4.



20. The Chamber recalls that on 13 May 2005, it denied the request by the Defence for Sagahutu to order the Prosecution to exclude Witnesses LMC, DX, BB, GS, CJ and GFO from its witness list. After examining the Amended Indictment of 23 August 2004, the Pre-Trial Brief and the witness summaries annexed to it, as well as the redacted statements, the Chamber concluded that it was premature to exclude the testimonies of Witnesses LMC, DX, BB, GS, CJ and GFO based solely on the Defence's submission that they were originally listed to testify against the formerly co-Accused Mpiranya.⁹

21. In the same decision the Chamber reminded the Prosecution of its obligation to call only those witnesses who are necessary to prove the counts in the Indictment against the Accused persons and to avoid calling witnesses whose evidence is not probative and may lead to needless consumption of time and resources.¹⁰ On 9 June 2005, the Defence's request for certification to appeal the Chamber's Decision of 13 May 2005 was denied.¹¹

22. The Chamber takes note of the Defence's submission that the testimonies of Witnesses LMC, DX, BB, GS, CJ and GFO cannot go to proof of the count of conspiracy to commit genocide and to Bizimungu's superior responsibility. The Chamber would like to draw the Defence's attention to the fact that it has previously ruled that all admissible evidence will be assessed, and appropriate weight will be attached to it at a later stage in the proceedings.¹² If the Defence is of the opinion that certain evidence is not probative of any of the counts in the Amended Indictment, it may *at a later stage* make an appropriate application either under Rule 98*bis* or in its final submissions.

23. The Chamber takes further note of the Defence's assertion that the paragraphs in the Indictment relating to Bizimungu's superior responsibility are vague. The Chamber fails to see the relevance of this submission in relation to the motion for reconsideration of its Decision of 13 May 2005.

24. Finally, the Chamber takes note of the Defence's assertion that to allow witnesses LMC, DX, BB, GS, CJ and GFO to testify would be prejudicial to the Accused Bizimungu. The Chamber notes, however, that according to the Defence's submission, the alleged prejudice does not result from the Chamber's Decision of 13 May 2005 but rather from the Prosecution's response to the Sagahutu Motion. In light of the Chamber's reminder to the Prosecution "to present only those witnesses who are necessary to prove the counts in the Indictment against the Accused persons"¹³ and in light of its recent ruling that the Defence may raise any objections concerning the admissibility of evidence "during the course of the witness's testimony",¹⁴ the Chamber considers that this submission lacks merit.

⁹ Para. 16.

¹⁰ *Ibid.*

¹¹ *The Prosecutor v. Augustin Ndingiyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye and Innocent Sagahutu*, ICTR-00-56-T, Trial Chamber II, "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.

¹² *The Prosecutor v. Augustin Ndingiyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye and Innocent Sagahutu*, ICTR-00-56-T, Trial Chamber II, "Decision on Bizimungu's Motion to Exclude the Testimony of Witness TN" rendered on 28 October 2005, para. 7; "Decision on Bizimungu's Motion to Exclude the Testimony of Witness AP" rendered on 28 October 2005, para. 33.

¹³ Para. 16 of the Chamber's Decision of 13 May 2005.

¹⁴ *The Prosecutor v. Augustin Ndingiyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye and Innocent Sagahutu*, ICTR-00-56-T, Trial Chamber II, "Decision on Ndingiyimana's Request for Certification to Appeal the Chamber's Decision Dated 21 September 2005" rendered on 26 October 2005, para. 12

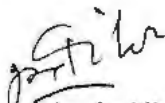
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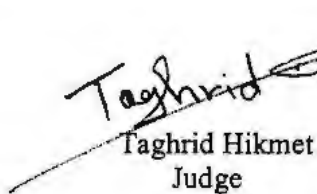
25. The Chamber notes that despite its length, the Motion contains no submissions concerning the criteria for reconsideration as established by the jurisprudence of the Tribunal. The Chamber also notes that the Defence's submissions on probative value and on specificity are irrelevant to the issue of reconsideration. In light of the above, the Chamber issues a warning to Defence counsel for Bizimungu under Rule 46 of the Rules. In addition, the Chamber instructs the Defence to limit itself in future applications to the relevant issues in order to avoid needless consumption of the Court's time.

FOR THE ABOVE REASONS, THE CHAMBER

DISMISSES the Defence Motion in its entirety.

Arusha, 24 November 2005


Asoka de Silva
Presiding Judge


Taghrid Hikmet
Judge


Seon Ki Park
Judge

