



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

22113
Mwanja

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 13 March 2006

ICTR-00-56-T
13 - 03 - 2006
(22113 - 22110)

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

Case No. ICTR-00-56-T

**DECISION ON BIZIMUNGU'S MOTION FOR CERTIFICATION OF APPEAL
AGAINST THE DECISION OF 2 DECEMBER 2005 ON THE ADMISSIBILITY OF
THE TESTIMONY OF WITNESS AOF**

Prosecution Counsel

Mr Ciré Aly Bâ
Mr Moussa Sefon
Mr Segun Jegede
Mr Abubacar Tambadou
Ms. Alayne Frankson-Wallace
Ms. Felistas Mushi
Ms Faria Rekkas
Ms Anne Bodley

Defence Counsel

For A. Ndingilyimana
Mr Christopher Black
For A. Bizimungu
Mr Gilles St-Laurent & Mr Ronnie MacDonald
For F-X. Nzuwonemeye
Mr Charles Taku & Mr. Hamuli Rety
For I. Sagahutu
Mr Fabien Segatwa & Mr Seydou Doumbia

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 Augustin Bizimungu’s « *Requête de la Défense afin de certifier l’appel de la décision rendue le 2 décembre 2005 sur l’admissibilité du témoignage du Témoin AOF (article 73 (B) Règlement de procédure et de preuve)* »,¹ filed on 7 December 2005 (“the Motion”);

NOTING THAT the Prosecution has not filed a response;

RECALLING its “Decision on Bizimungu’s Motion in Opposition to the Admissibility of the Testimony of Witness AOF” filed on 2 December 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 Defence for Bizimungu pursuant to Rule 73(A) of the Rules.

SUBMISSIONS OF THE DEFENCE

1. The Defence for Augustin Bizimungu requests the Chamber to grant certification of appeal against the Decision of 2 December 2005 on the admissibility of Prosecution Witness AOF’s proposed testimony.
2. The Defence submits that the Decision in question substantially affects the fairness of the proceedings and the outcome of the trial, and that the Chamber should not have declared the proposed testimony of Witness AOF admissible.
3. The Defence further submits that although in the Decision of 2 December 2005 the Chamber recognised that AOF’s proposed testimony relates to new facts not alleged in the Indictment, the Chamber still rejected the Defence arguments, relying instead on the Appeals Chamber’s 2004 decision in the *Ntakirutimana* case holding that the Prosecution may cure defects in the Indictment through subsequent communications. According to the Defence, this reasoning runs counter to the position enunciated by the Appeals Chamber in the cases of *Ntagerura et al* and *Nahimana et al*.
4. The Defence asserts that if the Prosecution had had sufficient evidence to charge Bizimungu with the acts alleged by AOF, those allegations would have been included in the Indictment, as were those indicated at paragraph 29 of the Indictment. The Defence further asserts that the Prosecution is attempting to cure defects in the Indictment by using a scheme of deliberate conduct to make up for the inadequacies in its choice of charges to include in the Indictment.

¹ “Defence Motion for Certification of Appeal against the Decision of 2 December 2005 on the Admissibility of the Testimony of Witness AOF (pursuant to Rule 73 (B) of the Rules of Procedure and Evidence).” (Unofficial Translation)

5. The Defence refers to an oral decision by the *Ntagerura* Trial Chamber stating that the Prosecution cannot be allowed to present evidence of crimes that are not charged in the Indictment. According to the Defence, that reasoning should be applied *mutatis mutandis* to the instant case and only the charges appearing at paragraph 29 of the Indictment should be retained. The Defence also refers to concurring decisions by the Trial and Appeals Chambers in the matter of *The Prosecutor v. Tharcisse Muvunyi* according to which statements referring to already existing charges are admissible, but those creating new charges are not.

DELIBERATIONS

6. The Chamber recalls Rule 73 (B) of the Rules under which a Trial Chamber may grant certification for an interlocutory appeal if 1) the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and 2) in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
7. The Chamber further recalls that its Decision of 2 December 2005 was divided into two parts, reflecting the two primary arguments advanced by the Defence. In the first part, after considering the Defence proposition that Witness AOF's proposed testimony contained allegations that did not appear in the Indictment, the Chamber concluded that those allegations were not new charges but merely new material facts underpinning already-existing charges. In the second part, the Chamber agreed with the Defence that an Accused person cannot be convicted on the basis of allegations falling outside the Tribunal's temporal jurisdiction, but observed that such allegations could nonetheless be admitted into evidence, among other reasons, for the purpose of proving a pattern of conduct that extended into the period of the Tribunal's temporal jurisdiction.
8. The Chamber notes that the Defence has repeatedly challenged the proposed testimony of Prosecution witnesses on the grounds that the allegations about which such witnesses would testify were not contained in the Indictment. In each case, the Chamber has stated that the admissibility of the evidence would be determined during the course of the witness's testimony while the weight to be attached thereto would be decided at the conclusion of the proceedings.
9. Similarly, in the instant situation, the Chamber is of the view that the Defence Motion for certification is premature, as Prosecution Witness AOF is yet to testify. The Chamber notes that it was only on Monday, 27 February 2006 that the Prosecution filed a notice indicating the points of the Indictment to which Witness AOF will testify.² At this point in the proceedings, it is not known whether the witness will attempt to introduce testimony about any allegations not contained in the Indictment. It would therefore not be proper for the Chamber to render a ruling on the admissibility of the witness's testimony without having heard it first.
10. Furthermore, in the Chamber's view, the issues involved here have not yet risen to such a level that they would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Consequently, the Chamber concludes that the Defence has failed to satisfy the first condition for the certification of an interlocutory

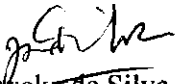
² The Prosecution asserts in the notice that Witness AOF will testify to the allegations contained in the following paragraphs of the Indictment: 2, 3, 17, 21, 22, 23, 24, 25, 27, 59, 61, 68, 69 and 70.

appeal. Having made such a determination, the Chamber need not consider the second criterion for certification.

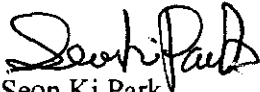
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion for certification of appeal.

Arusha, 13 March 2006


Asoka de Silva
Presiding Judge


Taghrid Hikmet
Judge


Seon Ki Park
Judge

