



ICTR - 00 - 56-T
14 - 07 - 2006
(22730 - 22727)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

22730
PM

OR- ENG

TRIAL CHAMBER II

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

Registrar: Mr Adam Djeng

Date: 18 July 2006

The PROSECUTOR

Augustin BIZIMUNGU
Augustin NDINDILYIMANA
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU

Case No. ICTR-00-56-T

RECORDED
18 JULY 2006
A II 07

DECISION ON NDINDILYIMANA'S MOTION FOR CERTIFICATION TO
APPEAL THE CHAMBER'S DECISION DATED 15 JUNE 2006

Office of the Prosecutor:

Mr Ciro Aly Ba
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Counsel for the Defence:

Mr Gilles St-Laurant and Mr Roméo MacDonald for Augustin Bizimungu
Mr Christopher Black and Mr Patrick De Wolf for Augustin Ndindillyimana
Mr Charles Takyi and Ms Jamouli Rely for François-Xavier Nzuvonemeye
Mr Fabien Sugatwa and Ms Seydou Dounthia for Innocent Sagahutu

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");

NOTING that Judge Taghrid Hikmet, who is currently away from the seat of the Tribunal, has had the opportunity to read this Decision in draft, agrees with it, and has authorised the Presiding Judge to sign it on her behalf.

INTRODUCTION

The trial is proceeding on the basis of the amended Indictment of 23 August 2004. The Prosecution has already called 66 witnesses and is still continuing its case. Prior to the appearance of Prosecution Witness ANF (the Witness), the Defence for Ndindiliyimana filed a motion objecting to the admissibility of the anticipated evidence of the Witness on the basis that it related to material facts not pleaded in the Indictment.¹ In its Decision of 15 June 2006 (the "Impugned Decision"), the Chamber acknowledged that the Indictment was defective in respect of the facts contained in the Witness statement. Nonetheless, the Chamber found that the defects had been cured through subsequent disclosure, specifically the summary of the Witness proposed testimony as annexed to the Pre-Trial Brief and paragraphs 92 and 97 of the Pre-Trial Brief, which provided the necessary details to put the Accused on notice.² The Chamber further noted that such notice was given since 1 September 2004, more than 20 months prior to the expected testimony of the Witness, thus providing timely, clear and consistent information to enable the defence to fully prepare its case. The Chamber therefore denied the Defence Motion. On 22 June 2006, the Defence for Ndindiliyimana filed a Motion requesting for certification of appeal against the Impugned Decision.³ On 26 June 2006, the Prosecution filed its response.⁴

SUBMISSIONS OF THE PARTIES

The Defence

1. The Defence submits that the Impugned Decision raises a question that affects the fairness, progress and outcome of the proceedings and that a resolution by the Appeals Chamber would materially advance the proceedings as per Rule 73(B).
2. The Defence further submits that the Impugned Decision touches upon a fundamental problem since it allows the Prosecution to introduce into evidence material facts and

¹ The proposed testimony relates to events alleged to have occurred in Nyazo Commune and in the town of Nyanza and in which gendarmes allegedly were involved.

² See paras. 30-32 of the Impugned Decision.

³ «*Requête en certification d'appel contre la "Decision sur Ndindiliyimana's Extremely Urgent Motion to Prohibit the Prosecution from Leading Evidence on Important Material Facts not Pleaded in the Indictment through Witness ANF" du 15 Juin 2006»* ("Motion for Certification to Appeal against the 'Decision on Ndindiliyimana's Extremely Urgent Motion to Prohibit the Prosecution from Leading Evidence on Important Material Facts not Pleaded in the Indictment through Witness ANF' of 15 June 2006") (Unofficial Translation).

⁴ «*Observations du Procureur sur la Requête en certification d'appel introduite par le conseil d'Augustin Ndindiliyimana contre la décision de la Chambre de première instance II en date du 15 juin 2006 (admission du témoignage de ANF)*» ("The Prosecution's Observation on the Motion for Certification introduced by Counsel for Augustin Ndindiliyimana against the Decision of Trial Chamber II dated 15 June 2006 [Admissibility of ANF's Testimony])" (Unofficial Translation).



missions, gives and contained in the Indictment, bearing in mind that the latter is the only accusatory instrument against which the Accused has to defend himself." The Defence further submits that by the Impugned Decision, the Chamber indirectly allowed an amendment and an extension of the Indictment without having followed the procedure provided to that effect, in flagrant violation of the Statute, the Rules and the jurisprudence developed by the two *ad hoc* Tribunals.

3. The Defence contends that a favourable decision by the Appeals Chamber would save the Chamber time in two ways. Firstly, the Chamber will not have to spend several hours or days listening to the Witness testimony, and secondly, it will not have to spend several hours at a later stage of the proceedings analyzing the transcripts relating to that testimony in order to draw any legal or factual conclusions.

4. Finally, the Defence submits that an immediate resolution by the Appeals Chamber would materially advance the proceedings as it would reduce the number of potential Defence witnesses and the Defence itself would not need to oppose the allegations contained in the Witness statement.

The Prosecution

5. In its response, the Prosecution did not address any of the relevant issues raised by the Defence.⁴

DELIBERATIONS

6. 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 document involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, on the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

7. The Chamber recalls its previous Decisions in which it discussed the criteria for certification under Rule 73(B).⁵ In particular, the Chamber stresses 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.

⁴ In its Response of 26 June 2006, the Prosecution submits that the French version of its Pre-Trial Brief was disclosed to the Defence on 17 June 2004 and that it was the increased English version that was disclosed on 1 September 2004. The Prosecution further submits that that before the end of its case, it intends to call four more witnesses, including ASF. After having done so, the Prosecution will have called a total 70 out of 116 serial witnesses initially listed.

⁵ *The Prosecutor v. Augustin Nsimbiyimana, François Nsengimana, Innocent Nsengimana, ICTR-00-56-T, Decision Regarding ICTR-00-56-T, "Decision on Bemba's Request for Certification to Appeal the Oral Decision Dated 3 June 2005", para. 16; "Decision on Bemba's Request for Certification to Appeal the Oral Decision Dated 3 June 2005", 30 June 2006, para. 17; "Decision on Nsimbiyimana's Request for Certification to Appeal the Chamber's Decision Dated 21 September 2005", 26 October 2005, para. 2; "Decision on Bemba's Motion for Certification to Appeal the Chamber's Oral Decision of 2 February 2006 Admitting Part of Witness DPP's Confessional Statement into Evidence", 27 February 2006, para. 11.*



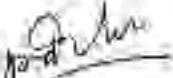
5. The Chamber is of the view that the admissibility of material facts not pleaded in the Indictment is an issue which would significantly affect the fairness and expeditious conduct of the proceedings.

9. However, the Chamber considers that the Appeals Chamber has already provided ample and clear directions as to how to address the issue of defective indictments and the possible remedies to cure such defects.⁷ In particular, the jurisprudence provides strong safeguards to ensure that an accused is not prejudiced by reliance on evidence adduced to sustain material facts for which he was not put on notice so as to prepare a proper defence.⁸ The Chamber is therefore of the opinion that an immediate resolution by the Appeals Chamber in the present case would not "materially advance the proceedings."

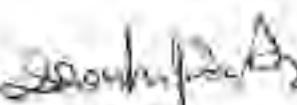
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion.

Arusha, 14 July 2006


Nwoka de Silva
Presiding Judge




Sean Ki Park
Judge

(Seal of the Tribunal)

⁷ See in particular *Prosecutor v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgement, 7 July 2006, para. 34-59. See also *The Prosecutor v. Ruzerwe et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001, para. 68-90; *The Prosecutor v. Théoneste Nshimirimana and Ferdinand Nshimirimana*, Cases No. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, para. 24; *The Prosecutor v. Théodore Nshimirimana*, Case No. IT-95-14-A, Judgement, 29 July 2004; *The Prosecutor v. Mihirakarizi Niyonzima and Pimari Muyinga*, Case No. IT-96-34-A, Judgement, 2 May 2006, para. 24; *The Prosecutor v. Niyonzima*, Case No. ICTR-98-14-T, Judgement, 9 July 2004, para. 197.

⁸ See in particular, *Le Procureur v. André Kiguru, Emmanuel Buramishe, Daniel Twagirimana, Alphonse Nsanzabana*, Arrêt, 7 juillet 2005, para. 129-163.