



UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

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IV

ICTR-00-56-A

20th March 2012

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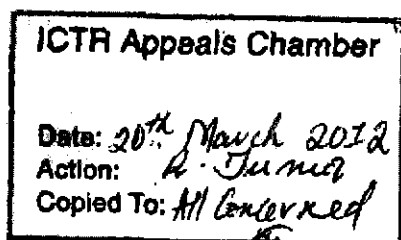
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IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Patrick Robinson
Judge Liu Daqun
Judge Andrésia Vaz
Judge Khalida Rachid Khan

Registrar: Mr. Adama Dieng

Decision of: 20 March 2012

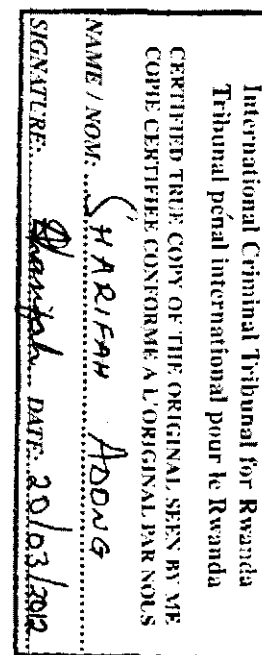


Augustin NDINDILYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU

v.

THE PROSECUTOR

Case No. ICTR-00-56-A



**DECISION ON REQUEST BY IBUKA AND SURVIVORS FUND (SURF)
FOR LEAVE TO FILE AMICI CURIAE SUBMISSIONS REGARDING
THE PROSECUTION'S SENTENCING APPEALS**

Applicants:

IBUKA

Survivors Fund (SURF)

Defence Counsel:

Christopher Black and Vincent Lurquin for Augustin Ndindiliyimana

Gilles St-Laurent for Augustin Bizimungu

Charles A. Taku and Beth S. Lyons for François-Xavier Nzuwonemeye

Fabien Segatwa and Scott Martin for Innocent Sagahutu

Office of the Prosecutor:

Hassan Bubacar Jallow

James J. Arguin

Abdoulaye Seye

Abubacarr Tambadou

Thembile M. Segoete

Florida Kabasinga

Takeh Sendze

Christiana Fomenky

Sunkarie Ballah-Conteh

Betty Mbabazi

Deo Mbuto

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seised of the "Request by IBUKA and Survivors Fund (SURF) for Leave to Make Submissions as *Amici Curiae* in Connection with the Prosecutor's Sentencing Appeals", filed on 19 January 2012 ("Request").

A. Procedural Background

2. On 17 May 2011, Trial Chamber II of the Tribunal ("Trial Chamber") convicted all four accused in the *Ndindiliyimana et al.* case.¹ The Trial Chamber sentenced Augustin Bizimungu to 30 years of imprisonment and François-Xavier Nzuwonemeye and Innocent Sagahutu to 20 years of imprisonment each.² It sentenced Augustin Ndindiliyimana to time served and ordered his immediate release.³

3. All parties appealed the Trial Judgement.⁴ Mr. Bizimungu, Mr. Nzuwonemeye, Mr. Sagahutu, and the Prosecution appealed against the sentences.⁵

4. On 19 January 2012, IBUKA and the Survivors Fund ("SURF") filed the Request, to which they attached their proposed *amici curiae* brief.⁶ All parties responded to the Request.⁷ IBUKA and SURF have not filed a reply.

¹ T. 17 May 2011 pp. 23-25. See also *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Judgement and Sentence, dated 17 May 2011 and filed on 17 June 2011 ("Trial Judgement"), paras. 71, 73, 75, 77, 2085, 2106-2108, 2119, 2120, 2128, 2152-2157, 2162, 2163.

² T. 17 May 2011 p. 26. See also Trial Judgement, paras. 79, 2266, 2268, 2269.

³ T. 17 May 2011 p. 26. See also Trial Judgement, paras. 79, 2267, 2272.

⁴ See Notice of Appeal on Behalf of Augustin Ndindiliyimana, Pursuant to Rule 108, 20 July 2011; Prosecutor's Notice of Appeal, 20 July 2011 ("Prosecution Notice of Appeal"); Notice of Appeal, 20 July 2011 (confidential, public redacted version filed on 9 August 2011) ("Nzuwonemeye Notice of Appeal"); *Acte d'appel amendé en vertu de l'article 24 du Statut et de l'article 108 du Règlement de procédure et de preuve*, 21 November 2011 (annexed to *Requête du Général Augustin Bizimungu en autorisation d'amender son acte d'appel conformément à l'article 108 du Règlement de procédure et de preuve*, 21 November 2011) ("Bizimungu Notice of Appeal"); *Acte d'appel d'Innocent Sagahutu*, 13 January 2012 ("Sagahutu Notice of Appeal"). See also Decision on Augustin Bizimungu's Motion for Leave to Amend his Notice of Appeal, 19 January 2012, para. 10 (accepting the Bizimungu Notice of Appeal as Mr. Bizimungu's operative notice of appeal). A corrigendum to the Nzuwonemeye Notice of Appeal was filed on 21 July 2011.

⁵ Nzuwonemeye Notice of Appeal, paras. 189-197, 199; Prosecution Notice of Appeal, paras. 27-31, 44-58; Sagahutu Notice of Appeal, paras. 92-98; Bizimungu Notice of Appeal, paras. 222-232, p. 67. See also Prosecution's Consolidated Appellant's Brief, 3 October 2011 ("Prosecution Appeal Brief"), paras. 214-323; *Mémoire d'appel du Général Augustin Bizimungu*, 23 January 2012, paras. 499-507, p. 120; Nzuwonemeye Appellant's Brief, 23 January 2012 (confidential), paras. 527-558, 562; Corrigendum to Nzuwonemeye Appellant's Brief, 1 February 2012 (confidential).

⁶ See Request, Brief for IBUKA and Survivors Fund (SURF) as *Amici Curiae* annexed thereto ("Annex").

⁷ See Prosecution's Submissions in Response to the "Request by IBUKA and Survivors Fund (SURF) for Leave to Make Submissions as *Amicus Curiae* in Connection with the Prosecutor's Sentencing Appeal", 23 January 2012

B. Submissions

5. IBUKA and SURF request leave to make submissions as *amici curiae* pursuant to Rule 74 of the Rules of Procedure and Evidence of the Tribunal ("Rules") in connection with the Prosecution's sentencing appeal.⁸ IBUKA and SURF submit that they are the leading victims' rights organizations in Rwanda and are uniquely positioned to assist the Appeals Chamber in understanding why the sentences imposed in this case should be set aside.⁹ In particular, they contend that the sentences imposed by the Trial Chamber do not further the primary sentencing goals of deterrence and retribution, that they "tolerate impunity", and that they demean the dignity of victims and survivors.¹⁰ IBUKA and SURF further submit that, had the victims been heard at the sentencing phase of the case, the victims could have, *inter alia*, assisted the Trial Chamber in better evaluating the gravity of the conduct at issue.¹¹ IBUKA and SURF underscore that they "seek only to have the victims' collective voice heard so that the Tribunal can fashion sentences that better reflect its mission of preventing impunity and its commitment to doing justice to the victims' memory",¹² and they urge the Appeals Chamber to "clarify the role that victims can and should play in the sentencing phase of trial".¹³ They also explain that they are raising these issues now in light of a recent judgement in which the Appeals Chamber "drastically reduced" the sentences imposed at trial.¹⁴

6. The Prosecution supports the Request and asserts, *inter alia*, that IBUKA and SURF can provide the Appeals Chamber with "invaluable information relevant in the assessment of the gravity of the crimes committed, including concrete details on their surrounding circumstances, as well as their consequences and continuing impact on the victims".¹⁵

("Prosecution Response"); Nzuwonemeye's Response to the Request by IBUKA and Survivors Fund (SURF) for Leave to Make Submissions as *Amici Curiae* in Connection with the Prosecutor's Sentencing Appeal, 23 January 2012 ("Nzuwonemeye Response"); Submissions of Augustin Ndindiliyimana to the Request by IBUKA and Survivor's Fund for Leave to Make Submissions as *Amici Curiae* in Connection with the Prosecutor's Sentencing Appeals, 24 January 2012 ("Ndindiliyimana Response"); *Réponse du Général Augustin Bizimungu à « Request by IBUKA and Survivors Fund (SURF) for Leave to Make Submissions as Amici Curiae in Connection with the Prosecutor's Sentencing Appeals »*, 30 January 2012 ("Bizimungu Response"); *Réponse d'Innocent Sagahutu à « Request by IBUKA and Survivors Fund (SURF) for Leave to Make Submissions as Amici Curiae in Connection with the Prosecutor's Sentencing Appeals »*, 30 January 2012 ("Sagahutu Response").

⁸ Request, paras. 1, 11.

⁹ Request, paras. 1, 3. See also Request, para. 5.

¹⁰ Request, para. 4.

¹¹ Request, para. 6.

¹² Request, para. 5.

¹³ Request, para. 7. See also Request, paras. 8, 9.

¹⁴ Request, para. 10, referring to *Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor*, Case No. ICTR-98-41-A, Judgement, 14 December 2011.

¹⁵ Prosecution Response, para. 3. See also Prosecution Response, paras. 1, 2, 4.

7. Mr. Nzuwonemeye, Mr. Ndindiliyimana, Mr. Bizimungu, and Mr. Sagahutu submit that the Request should be denied.¹⁶ Mr. Bizimungu and Mr. Sagahutu argue, *inter alia*, that while the Tribunal has traditionally permitted *amici curiae* to address questions of law, the Request is focused on questions of fact.¹⁷ In addition, Mr. Nzuwonemeye, Mr. Ndindiliyimana, and Mr. Sagahutu contend that IBUKA and SURF either seek to address issues already dealt with in the Prosecution Appeal Brief or raise arguments outside the scope of the Prosecution's appeal.¹⁸ Mr. Ndindiliyimana and Mr. Bizimungu also underscore that only the parties to a case have standing to address issues of guilt or innocence and sentencing.¹⁹ According to Mr. Nzuwonemeye, Mr. Bizimungu, and Mr. Sagahutu, the Request is not timely and will unduly delay the proceedings.²⁰ Mr. Nzuwonemeye, Mr. Ndindiliyimana, and Mr. Bizimungu add that the Request is brought in bad faith, with the intention of improperly influencing the outcome of the appeals in the Prosecution's favour, and that granting the Request would prejudice the Defence.²¹

8. Mr. Nzuwonemeye, Mr. Ndindiliyimana, Mr. Bizimungu, and Mr. Sagahutu further assert that IBUKA and SURF are not impartial, that they do not demonstrate that they have the necessary competence to assist the Appeals Chamber, and that they fail to show that they represent victims of the crimes for which convictions were entered in this case.²² Finally, Mr. Nzuwonemeye, Mr. Ndindiliyimana, Mr. Bizimungu, and Mr. Sagahutu emphasize that the Trial Chamber already considered the situation of victims in connection with sentencing, and that victims, including members of IBUKA, participated in the trial.²³

C. Applicable Law

9. In accordance with Rule 74 of the Rules, the Appeals Chamber "may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or

¹⁶ See Nzuwonemeye Response, paras. 2, 37(a); Ndindiliyimana Response, para. 8; Bizimungu Response, paras. 1 (Introduction), 19, p. 7; Sagahutu Response, para. 28. See also Bizimungu Response, para. 10; Sagahutu Response, para. 3.

¹⁷ Bizimungu Response, para. 12; Sagahutu Response, paras. 14-21. See also Bizimungu Response, para. 8.

¹⁸ Nzuwonemeye Response, paras. 10, 12, 13, 30, 34, 36; Ndindiliyimana Response, paras. 9, 24, 25, 30, 31; Sagahutu Response, para. 12.

¹⁹ Ndindiliyimana Response, paras. 11, 13, 33; Bizimungu Response, para. 13. See also Nzuwonemeye Response, paras. 15-19; Ndindiliyimana Response, para. 17; Sagahutu Response, para. 21.

²⁰ Nzuwonemeye Response, para. 3; Bizimungu Response, paras. 15, 18; Sagahutu Response, paras. 22-24. See also Ndindiliyimana Response, para. 31.

²¹ Nzuwonemeye Response, paras. 2, 30; Ndindiliyimana Response, paras. 9, 10, 12, 18-20, 24-28, 32, 35; Bizimungu Response, para. 14.

²² Nzuwonemeye Response, paras. 9, 11, 23, 29, 32, 33; Ndindiliyimana Response, para. 10; Bizimungu Response, paras. 11, 16; Sagahutu Response, paras. 6-9, 21.

²³ Nzuwonemeye Response, paras. 20, 21, 24-26; Ndindiliyimana Response, paras. 12, 15, 16, 23; Bizimungu Response, para. 14; Sagahutu Response, para. 11. Mr. Nzuwonemeye further contends that the proposed *amici curiae* brief contains evidence obtained in closed session, and urges the Appeals Chamber to order an investigation into a possible violation of the protective measures applicable to the witness concerned. See Nzuwonemeye Response, paras. 36, 37(b). See also Bizimungu Response, para. 17.

person to appear before it and make submissions on any issue specified by the Chamber".²⁴ The Appeals Chamber recalls that granting leave to make submissions under Rule 74 of the Rules is a matter that falls within its discretion.²⁵ The primary criterion in determining whether to grant leave to an *amicus curiae* to make submissions is whether they would assist the Appeals Chamber in its consideration of the matter before it.²⁶

D. Discussion

10. The Appeals Chamber considers that the Request does not propose to address any questions of law raised in the Prosecution's sentencing appeal. Rather, the Request advances arguments concerning the participation of victims in the sentencing process that are not at issue in the Prosecution's appeal.²⁷ The Request also seeks to introduce new information of a factual nature that was not before the Trial Chamber, and otherwise to address essentially the same issues already raised by the Prosecution in its appeal, including, in particular, issues relating to the Trial Chamber's assessment of the gravity of the crimes in imposing allegedly "inadequate sentences" which do not reflect the goals of sentencing.²⁸

11. The Appeals Chamber recalls that, in general, *amicus* submissions shall be limited to questions of law, and in any event may not include factual evidence relating to elements of a crime charged.²⁹ The Appeals Chamber also observes that submissions that would address essentially the same issues already raised by a party or submissions on matters beyond the scope of the issues on appeal do not tend to advance the Appeals Chamber's consideration of the case.³⁰ Accordingly, the

²⁴ See also *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on the Motion of the Association of Defence Attorneys in Arusha for Leave to File *Amicus Curiae* Submissions in Relation to Aloys Ntabakuze's Motion Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, 30 June 2010 ("Association of Defence Attorneys Decision"), p. 2134/H (Registry pagination); *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on the Request of the International Criminal Bar for Leave to File *Amicus Curiae* Submissions in Relation to Aloys Ntabakuze's Motion Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, 30 June 2010 ("International Criminal Bar Decision"), p. 2130/H (Registry pagination).

²⁵ Association of Defence Attorneys Decision, p. 2134/H (Registry pagination), and references cited therein; International Criminal Bar Decision, p. 2130/H (Registry pagination), and references cited therein.

²⁶ Association of Defence Attorneys Decision, p. 2134/H (Registry pagination), and references cited therein; International Criminal Bar Decision, p. 2130/H (Registry pagination), and references cited therein.

²⁷ See Prosecution Notice of Appeal, paras. 27-31, 44-58; Prosecution Appeal Brief, paras. 214-322.

²⁸ Request, para. 10. See also Request, paras. 4-7; Prosecution Appeal Brief, paras. 219-222, 224-249, 252-322.

²⁹ See, e.g., *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on David J. Scheffer's Application to File an *Amicus Curiae* Brief, 7 September 2010, p. 2, referring to Information Concerning the Submission of *Amicus Curiae* Briefs, IT/122, 27 March 1997, Article 5(b); *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Decision on Application for Leave to File *Amicus Curiae* Brief, 5 February 2010 ("Hartmann Decision"), para. 5, and references cited therein. The Appeals Chamber also recalls that the appellate process at the Tribunal is largely party-driven and that the Appeals Chamber will be assisted by submissions on issues of fact from the parties. See *Hartmann Decision*, para. 7.

³⁰ See, e.g., *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, Decision on Motion to Intervene and Statement of Interest by the Republic of Croatia, 8 February 2012, para. 21; *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on the Request of the Bar Human Rights Committee for Leave to Appear as *Amicus Curiae*, 24 March 2011, p. 3595/H (Registry pagination); Association of Defence Attorneys

Appeals Chamber is not satisfied that granting IBUKA and SURF leave to submit their proposed *amici curiae* brief is necessary for the proper determination of the Prosecution's sentencing appeal.³¹

E. Disposition

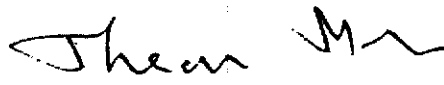
12. For the foregoing reasons, the Appeals Chamber **DENIES** the Request.

Done in English and French, the English version being authoritative.

Done this 20th day of March 2012,
At The Hague,
The Netherlands.



[Seal of the Tribunal]


Judge Theodor Meron
Presiding

Decision, pp. 2134/H, 2133/H (Registry pagination); International Criminal Bar Decision, p. 2130/H (Registry pagination).

³¹ With respect to Mr. Nzuwonemeye's call for an investigation, the Appeals Chamber does not consider that an investigation is warranted with regard to IBUKA's and SURF's citation of closed session testimony in their proposed *amici curiae* brief, as the same events are described in the Trial Judgement, supported by the same citation. Compare Request, Annex, para. 47, fn. 79, with Trial Judgement, para. 1229, fns. 2152, 2153.