



UNITED NATIONS
NATIONS UNIES

ICTR-98-41-T
14-07-2006
(28991-28987)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

28991
S. MUSA

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 14 July 2006

JUDICIAL RECORDS ARCHIVES
2006 JUL 14 P 2:33

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

**DECISION ON REQUEST FOR CERTIFICATION OF DECISION ON EXCLUSION
OF EVIDENCE**

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence

Raphaël Constant
Allison Turner
Paul Skolnik
Frédéric Hivon
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

28990

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Ntabakuze "Motion for Certification", etc., filed on 6 July 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 29 June 2006, the Chamber granted in part a motion by the Ntabakuze Defence for the exclusion of seventeen categories of evidence.¹ The Chamber partially excluded three of the challenged categories, but denied the request for exclusion in respect of the remaining fourteen areas.² Ntabakuze now requests leave to file an interlocutory appeal from the decision.

DELIBERATIONS

2. Leave to file an interlocutory appeal of a decision may be granted under Rule 73 (B) where it "involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial" and where "immediate resolution may materially advance the proceedings".

(i) *Fair and Expeditious Conduct of Proceedings*

3. The Defence argues the fairness of the proceedings has been jeopardized because the Chamber has allowed the Prosecution "*ex post facto*, to amend its indictment, implicitly, as it went along with the presentation of its evidence".³ Although the Defence concedes in this request for certification that "it might have been possible to 'cure' the defect in the Indictment" to some extent, the Chamber has improperly permitted such curing in respect of the "vast majority of specific allegations of the against the Accused".⁴ In the absence of clear guidance in the Indictment as to the purpose for which material facts are presented, the Accused remains in doubt as to the nature of the charges against him. This uncertainty places the Accused in the position of being "guided more by intuition and guesswork than juridical decision-making" in the presentation of his Defence, and leads to an unfair and unfocused trial.⁵ This is said to interfere with both the fairness and expeditiousness of proceedings.

4. The Chamber disagrees that its decision authorizes *ex post facto* amendments of the Indictment. The question of proper notice of material facts is, however, of central importance to the fairness of trial proceedings. In light of the importance of the principles on which the decision is based, and the extent of the evidence whose exclusion is at stake,⁶ the Chamber is

¹ *Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006.

² The Chamber also observed that the Prosecution had conceded the partial exclusion of a fourth category. *Id.*, para. 25.

³ Motion, para. 6.

⁴ Motion, para. 7.

⁵ Motion, paras. 10-13, 18.

⁶ Certification may be appropriate where, in particular, "broad categories of evidence" are affected by a decision. *Bagosora et al.*, Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure

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convinced that the decision does involve an issue that would significantly affect the fair and expeditious conduct of proceedings.

(ii) *Materially Advance the Proceedings*

5. The Defence argues that the decision places it in the position of not clearly and unambiguously knowing the Prosecution case, or the purpose for which certain material facts have been presented. This is said to prejudice the Defence, and is likely to lead to an unfocused presentation of the Defence case. The prejudice arises immediately, during trial proceedings, and cannot be subsequently remedied. Similar motions by other Defence teams are also pending, and would be similarly benefited by immediate resolution by the Appeals Chamber. Any convictions based on this improperly admitted evidence would risk re-trial – a risk which can be obviated by an interlocutory appeal.⁷ Furthermore, the Defence asserts that there is serious doubt as to the correctness of the legal principle applied by the Chamber, resolution of which would allow the remainder of the trial to proceed on a correct legal footing.⁸

6. Some of the evidence which the Chamber has declined to exclude may form the basis of specific and distinct factual findings which could be quashed on a final appeal if the evidence is found to have been improperly considered.⁹ On the other hand, some of the evidence may be considered together with other evidence, whose admissibility has not been challenged, to nourish broader factual findings. The Chamber accepts that if it were to base a conviction partly on evidence which is found on a subsequent appeal to have been inadmissible, and partly on admissible evidence, then finding an appropriate remedy at that stage might pose significant difficulties for the Appeals Chamber. In light of the complexity and importance of the issues involved, clarification of the principles applicable to this type of motion would materially advance the proceedings.

(iii) *Precise Scope of Questions Certified*

7. In light of the detailed factual questions involved in assessing each of the seventeen categories of evidence, the Chamber declines to certify the decision in its entirety. As the Appeals Chamber has stated, matters of admissibility of evidence are primarily for the trier of fact to determine, and should not be certified for interlocutory appeal.¹⁰ On the other hand, the legal principles by which the Trial Chamber has been guided are an appropriate matter for the Appeals Chamber. Accordingly, the Chamber will certify the legal propositions in paragraph 10 of its decision, which reads as follows:

of Defence Witness Statements (TC), 17 March 2006; *Bagosora et al.*, Certification of Appeal Concerning Access to Protected Defence Witness Information (TC), 29 July 2005, para. 2.

⁷ Motion, para. 16.

⁸ Motion, paras. 17-24.

⁹ *Niyitegeka*, Judgement (AC), paras. 235, 247, 248; *Ntakirutimana*, Judgement (TC), paras. 71, 79, 81, 85, 88, 91, 99, 112, 115.

¹⁰ *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5 ("It is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of the trial; it is not for the Appeals Chamber to assume this responsibility. As the Appeals Chamber previously underscored, certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence. Consequently, as the matters in the Appeal are clearly for the Trial Chamber, as trier of fact, to determine in the exercise of its discretion, in the view of the Appeals Chamber, it does not justify such an exception and should not have been certified") (citations omitted).

8/6

28988

The Chamber's approach in the sections which follow may be summarized as follows. Where a material fact cannot be reasonably related to the Indictment, then it shall be excluded. Where the material fact is relevant only to a vague or general allegation in the Indictment, then the Chamber will consider whether notice of the material fact was given in the Pre-Trial Brief or the opening statement, so as to cure the vagueness of the Indictment. Material facts which concern the actions of the Accused personally are scrutinized more closely than general allegations of criminal conduct. Other forms of disclosure, such as witness statements or potential exhibits, are generally insufficient to put the Defence on reasonable notice. The Chamber recognizes two exceptions to this principle: first, where the Prosecution filed a motion for the addition of a witness, which was subsequently granted by the Chamber, and which stated the material facts on which the witness would testify (Witness AAA); second, where a lengthy adjournment was ordered by the Chamber for the express purpose of allowing the Defence to meet newly discovered material facts (Witness DBQ).¹¹

Certification is also appropriate in respect of the standard for determining whether an objection has been made, as set out in paragraph 7 of the decision. The Appeals Chamber may, of course, consider it necessary to evaluate these propositions in light of other portions of the decision; but these propositions of law are the matters certified for interlocutory appeal under Rule 73 (B).

8. The Defence argues that the Chamber failed to consider the "Defence Reply to the Prosecutor's Annex", filed on 29 May 2006 ("the Reply"). This is not correct. The Chamber did, in fact, take into account the Reply to the Prosecutor's Annex, as is clearly demonstrated by the Chamber's extensive analysis of whether "curing" is open to a trial chamber, or whether it is reserved the Appeals Chamber.¹² That argument is to be found only in the Reply, not the original motion.¹³ The failure to mention the Reply in the preamble of the decision was a simple oversight. In any event, as the consideration of replies is purely discretionary, failure to consider such a submission does not constitute an error of law or fact.

¹¹ *Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006, para. 10. The Chamber possesses a discretion under Rule 73 (B) to certify only a portion of a decision for interlocutory appeal: *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004 para. 7; *Karmera et al.*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2006, para. 13.

¹² *Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006, para. 3.

¹³ Reply, para. 16. Indeed, the original motion implicitly accepts that curing in some degree is, indeed, open to a Trial Chamber. Ntabakuze Defence Motion for the Exclusion of Evidence, etc., filed on 28 March 2006, paras. 23-29.

6h


28987

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part;

CERTIFIES for interlocutory appeal the propositions of law articulated in paragraphs 7 and 10 of the “Decision on Ntabakuze Motion for Exclusion of Evidence”, filed on 29 June 2006.

Arusha, 14 July 2006


Erik Møse
Presiding Judge


Jai Ram Reddy
Judge


Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

