ICTR-98-41-T
17-04-2007
(34730-34721)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

34730

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 17 April 2007

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. ICTR-98-41-T

DECISION RECONSIDERING EXCLUSION OF EVIDENCE FOLLOWING APPEALS CHAMBER DECISION

The Prosecution
Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid
Kartik Murukutla

The Defence
Raphaël Constant
Allison Turner
Paul Skolnik
Frédéric Hivon
Peter Erlinder
Marc Nerenberg
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

34729

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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

BEING SEIZED OF the Appeals Chamber "Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence", rendered on 18 September 2006;

CONSIDERING the Ntabakuze Defence "Submissions Regarding the Application of the Appeals Chamber's 18 September 2006 Decision", etc., concerning exclusion of evidence, filed on 5 October 2006, and its Addendum, filed on 11 October 2006;

HEREBY RECONSIDERS its earlier decision.

INTRODUCTION

1. On 29 June 2006, the Chamber rendered a decision on a Ntabakuze motion for the exclusion of evidence outside the scope of the Indictment. It excluded three portions of testimony out of sixteen challenged categories of evidence.[1]

2. The Ntabakuze Defence requested certification of the decision.[2] The Chamber granted the request but limited the scope of the appeal to the legal propositions contained in paragraphs 7 and 10 of its decision.[3] The Appeals Chamber issued its decision on 18 September 2006, allowing the interlocutory appeal in part and instructing the Trial Chamber to reconsider its decision of 29 June 2006 on the basis of two specific points.[4] The Trial Chamber invited the parties to make written submissions on the remaining issues.[5] The Ntabakuze Defence filed its submissions on 5 October 2006.[6] The Prosecution has not made any submissions.

DELIBERATIONS

(i) The Appeals Chamber's Instructions

3. In its decision, the Appeals Chamber found that the Trial Chamber was aware of the applicable legal principles for the exclusion of evidence but had erred on two points.[7] First,

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[1] *Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006 (hereinafter "Trial Chamber Decision"). The categories were listed from (a) to (p) in section (ii) of the decision (paras. 11 to 60).

[2] Ntabakuze Motion for Certification of the "Decision on Ntabakuze Motion for Exclusion of Evidence" of 29 June 2006, Pursuant to Rule 73 (*B*), filed on 6 July 2006.

[3] *Bagosora et al.*, Decision on Request for Certification of Decision on Exclusion of Evidence (TC), 14 July 2006.

[4] *Bagosora et al.*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), 18 September 2006 (hereinafter "Appeals Chamber Decision").

[5] T. 19 September 2006 p. 3.

[6] Ntabakuze Submissions Regarding the Application of the Appeals Chamber's 18 September 2006 Decision on Questions of Law Related to the Exclusion of Evidence, filed on 5 October 2006 (hereinafter "Ntabakuze Submissions"). The Submissions include a Chart of Allegations, which consists of a summary of each challenged witness' testimony and references to the Defence objections to the testimony.

[7] Appeals Chamber Decision, paras. 19, 24-26, 45-48.

the Trial Chamber had failed to consider whether the defects in the Indictment which had been cured by the Prosecution nonetheless prejudiced the Accused's right to a fair trial by hindering the preparation of a proper defence.[8] Second, the Appeals Chamber instructed the Trial Chamber to reconsider whether the burden of proof had been appropriately placed on the Defence in instances where the Defence had not made a contemporaneous objection concerning lack of notice to the evidence at the time it was introduced.[9] The Chamber will consider these two issues separately.

(ii) Appropriate Burden of Proof to Establish Prejudice

4. The Chamber will first reassess its findings as to the timing of objections to challenged evidence and the resulting burden of proof to establish prejudice to the Accused. The Appeals Chamber summarized the legal situation as follows:

> 45. Accordingly, when an objection based on lack of notice is raised at trial (albeit later than at the time the evidence was adduced), the Trial Chamber should determine whether the objection was so untimely as to consider that the burden of proof has shifted from the Prosecution to the Defence in demonstrating whether the accused's ability to defend himself has been materially impaired. In doing so, the Trial Chamber should take into account factors such as whether the Defence has provided a reasonable explanation for its failure to raise its objection at the time the evidence was introduced and whether the Defence has shown that the objection was raised as soon as possible thereafter.
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> 46. In summary, objections based on lack of notice should be specific and timely. The Appeals Chamber agrees with the Prosecution that blanket objections that "the entire indictment is defective" are insufficiently specific. As to timeliness, the objection should be raised at the pre-trial stage (for instance in a motion challenging the indictment) or at the time the evidence of a new material fact is introduced. However, an objection raised later at trial will not automatically lead to a shift in the burden of proof: the Trial Chamber must consider relevant factors, such as whether the Defence provided a reasonable explanation for its failure to raise the objection earlier in the trial.
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> 47. The Appeals Chamber finds that the statements made by the Trial Chamber at paragraph 7 of the Impugned Decision must be corrected to the extent explained above. As a consequence, the Trial Chamber should reconsider the Impugned Decision on this basis. This reconsideration will be limited to the instances where the Trial Chamber found that the objection had not been raised at the time the evidence was introduced and therefore concluded that the burden of proof had shifted to the Defence.

5. In its original decision, the Trial Chamber found that the Ntabakuze Defence failed to raise a contemporaneous objection for lack of notice in relation to portions of eight categories of evidence and consequently bore the burden of proof.[10] The Chamber held that the Defence discharged its burden in two of these instances and excluded the evidence.[11] The remaining six portions of testimony were found to be admissible. In its consideration of the burden of proof, the Chamber only deems it necessary to consider those six instances in which it placed the burden on the Defence and declined to exclude the evidence.

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[8] Appeals Chamber Decision, para. 26.
[9] Appeals Chamber Decision, paras. 45-47.
[10] Trial Chamber Decision, paras. 11, 25, 31, 38, 43, 48, 54-56, 60.
[11] Trial Chamber Decision, paras. 31 (Witness XAB's testimony of rape committed by Para-commando soldiers at Sobolirwa on or before 12 April 1994), 60 (Witness DCH's testimony that the Accused participated in five meetings with *Interahamwe* leaders in Kabuga).

34727

(a) Death Squads: AMASASU and Related Organizations

6. The Trial Chamber found that the Defence failed to raise a contemporaneous objection to the testimony of Witnesses DCH, XAQ, and ZF concerning the Accused's alleged involvement in death squads and the AMASASU in 1992 and 1993.[12]

7. In its submissions, the Defence takes issue with the Chamber's finding that any defect in the Indictment had been cured by the Supporting Material and notes that it objected to the testimony of Witness XAQ as falling outside the scope of the Indictment in its Motion for Judgement of Acquittal on 21 October 2004.[13] Although not identified by the Defence, the Chamber also notes that the Defence objected to the testimony of Witnesses DCH and ZF on similar grounds in its 98 *bis* Motion.[14] The Chamber finds that the Defence could have objected to such testimony about the AMASASU and death squads earlier in the case, but it nonetheless deems the objections to lack of notice in the Defence's 98 *bis* Motion sufficient to place the burden of proof on the Prosecution.

8. Even with the burden properly placed on the Prosecution, the Chamber still finds that any defect in the Indictment, which only makes reference to Hutu extremist groups, composed of prominent civilian and military leaders, that worked on a strategy to eliminate the Tutsi and political opponents, has been cured through the Supporting Material accompanying the Indictment, which was filed on 3 August 1998, and the Prosecution Pre-trial Brief, which was filed on 21 January 2002. As it stated in its original decision:

> This document [the Supporting Material] does not constitute a massive disclosure and would have provided the Defence with a clear indication of the material facts which it would present in relation to each paragraph of the Indictment. In relation to paragraph 1.12, an expert witness is quoted as saying that "one notes in particular [within the armed forces] the creation of the AMASASU in January 1993 which demanded the establishment of a cleansed army and the elimination of all RPF allies".[15]

9. The Prosecution Pre-trial Brief also provided notice to the Accused of this material fact. Witness XAQ was anticipated to testify to soldiers' participation in "death squads" in Kigali, and Witness GS would expressly testify that Ntabakuze was a member of such "death squads".[16] Moreover, the list of Prosecution exhibits contained a reference to death squads and the AMASASU.[17]

10. Consequently, on the basis of paragraphs 1.13 to 1.16 of the Indictment, the Supporting Material to the Indictment, and the Prosecution Pre-trial Brief, the Chamber finds

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[12] Trial Chamber Decision, section (a), paras. 11-14. Witness DCH testified on 18, 22-25, 28-30 June 2004, Witness XAQ on 23-24 February 2004, and Witness ZF on 26-28 November 2002 and 2-5 December 2002.
[13] Ntabakuze Submissions, paras. 55-56 and Chart of Allegations (p. 5). *See also* Ntabakuze Defence Motion for Judgement of Acquittal Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence, filed on 21 October 2004, para. 183 (hereinafter "98 *bis* Motion").
[14] 98 *bis* Motion, paras. 180, 182.
[15] Trial Chamber Decision, para. 13 (citing p. 13 of the Supporting Material and the expert report of André Guichaoua). The Chamber notes that the summary for Expert Reyntjens, listed in support of paragraph 5.32 of the Indictment, makes reference to "death squads". Supporting Material, pp. 70-72.
[16] Prosecution Pre-trial Brief, Annex A, pp. 81, 143.
[17] Prosecution Pre-trial Brief, Annex A, Registry Pagination No. 6461 (document entitled "A.M.A.S.A.S.U. Alliance des Militaires Agacés par les Séculaires Actes Sournois des Unaristes: Naissance et raisons d'être des AMASASU).

that the Accused was reasonably informed that this material fact was part of the case against him and that the testimony of these three witnesses is admissible.

(b) Failure to Punish a Subordinate for Killing a Tutsi Soldier

11. The Chamber found that the Defence failed to raise a contemporaneous objection to the testimony of Witnesses DBN, XAP, LN, and XAB relating to the Accused's failure to punish his subordinate, Second Lieutenant Sylvestre Nzabonariba, for killing a Tutsi soldier.[18]

12. The Defence argues that it objected to Witness LN's testimony about this incident at the time he testified and that it challenged Witness XAP's testimony as falling outside the scope of the Indictment in its 98 *bis* Motion.[19] The Chamber notes that the objection during Witness LN's testimony was premised on the length and detail provided by the witness for the incident rather than actual lack of notice.[20]

13. In response to the Defence request for exclusion, the Prosecution submitted that the Nzabonariba incident does not constitute a material fact because it was tendered to prove criminal conduct by Para-commando soldiers and not by the Accused himself.[21] The Chamber finds that the allegations are not material facts but instead constitute evidence to prove material facts which are contained in the Indictment.[22] Thus, no curing was necessary. As stated in its original decision, the evidence is admissible to show criminal conduct by the Para-commando soldiers but is inadmissible to prove specific orders by or knowledge of the Accused.[23]

(c) ETO Refugees at Sonatube Intersection

14. The Chamber found that the Defence failed to raise a contemporaneous objection to the testimony of Witnesses Alison Des Forges, Georges Ruggiu, AFJ, and AR that Para-commando soldiers at Sonatube intersection re-directed, in the presence of the Accused, refugees who were fleeing from the *Ecole Technique Officielle* ("ETO") towards Nyanza, where they were massacred.[24]

15. In its submissions, the Defence argues that the allegations are a direct attempt to link the Accused to the actions of his subordinates to establish command responsibility and thus

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[18] Trial Chamber Decision, section (f), paras. 23-25. Witness DBN testified on 31 March 2004 and 1, 5, and 6 April 2004, Witness XAP on 11 and 15 December 2003, Witness LN on 30 and 31 March 2004 and 1 April 2004, and Witness XAB on 6 and 7 April 2004.

[19] Ntabakuze Submissions, Chart of Allegations (p. 10). *See also* 98 *bis* Motion of 21 October 2004, para. 188.

[20] T. 30 March 2004 p. 67 (Mr. Tremblay: "Mr. President, in the statement of the witness, Witness LN, the incident being testified to by the witness at present, that incident covers five lines, not more than five lines. And the time devoted to the examination-in-chief is totally disproportionate to the five lines that appear in the statement.").

[21] Part III Annex to Prosecutor's Response to "Ntabakuze Defence Motion for the Exclusion of Evidence", etc., filed on 12 May 2006, paras. 61-66.

[22] *See Kupreškić et al.*, Judgement (AC), 23 October 2001, para. 88 ("In the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven.").

[23] Trial Chamber Decision, para. 25.

[24] Trial Chamber Decision, section (i), paras. 36-38. Alision Des Forges testified on 2-5, 9-12, 16-20, 23-26 September 2002 and 18-22, 25-26 November 2002, Georges Ruggiu on 16 and 17 June 2003, Witness AFJ on 8 June 2004, and Witness AR on 30 September and 1 October 2003.

must be mentioned in the Indictment. It further submits that paragraph 6.37 of the Indictment, which describes the alleged incident, did not provide notice to the Accused because it only referenced soldiers, including the Presidential Guard and the Interahamwe, and not the Para-commando Battalion.[25] Moreover, the Defence maintains that it made contemporaneous objections to the testimony of Des Forges and Witness AFJ in relation to this incident and that it objected to the their testimony as well as that of Ruggiu as being outside the scope of the Indictment in its 98 *bis* Motion.[26]

16. The record shows that none of the objections made by the Defence during the testimony of Witnesses AFJ or AR about the Sonatube incident were based on lack of notice.[27] However, the Defence made an objection founded on lack of notice during the testimony of both Des Forges and Ruggiu.[28] The Defence then raised the issue again in its 98 *bis* Motion in relation to the testimony of Des Forges, Ruggiu, and Witness AFJ.[29] Consequently, despite the Defence's failure to object contemporaneously on the record during the testimony of Witnesses AFJ or AR, the Chamber nonetheless finds that the burden of proof should have been placed on the Prosecution.

17. In the Chamber's view, the Prosecution has discharged its burden in proving that any defect in the Indictment relating to this incident was cured by timely and adequate notice through the Prosecution Pre-trial Brief. As the Chamber previously found in its original decision:

> 37. Paragraph 6.19 of the Indictment states that Para-commandos in Kigali "set up roadblocks, reinforced with armoured vehicles, on the major roads, controlling people's movements". Paragraph 6.34 refers to Kigali as the place where the "elite units of the Rwandan Army were based" and that, consequently, "several of the military and civilian figures who had planned and organized the massacres played a leading role in carrying out the massacres in Kigali". Paragraph 6.37 alleges that on 11 April, "soldiers, including elements of the Presidential Guard, and *Interahamwe* rounded up a group of refugees [from ETO] and moved them to Nyanza", where they were massacred. The summary of Witness XAB's testimony in the Pre-Trial Brief says that he was "told by elements of CRAP that they had taken part in massacres at the Ecole Technique Officielle".
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> 38. Although the Indictment is perhaps not as crystalline as it could be in relation to this event, the Chamber finds that the notice provided by the Indictment and Pre-Trial Brief was sufficient. Paragraph 6.37 does not mention Para-commando soldiers by name, but the reference to "soldiers" includes Para-commandos. The inclusive reference to Presidential Guard soldiers does not exclude Para-commando soldiers, particularly in light of other paragraphs of the Indictment, including paragraph 6.19, which indicate clearly that the Para-commandos were in Kigali at this time, and that they committed crimes. The reference in the Pre-Trial Brief would have made it clear that the "soldiers" in paragraph 6.37 of the Indictment included Para-commandos.

18. On the basis of the Indictment and the Prosecution Pre-trial Brief, the Chamber finds that the Defence was in a reasonable position to understand the material facts contained in paragraph 6.37 of the Indictment and that the testimony of these witnesses is admissible.

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[25] Ntabakuze Submissions, paras. 80-86.
[26] Ntabakuze Submissions, Chart of Allegations p. 13.
[27] T. 8 June 2004, pp. 81-90 (Witness AFJ). T. 30 September 2003 pp. 90-92, T. 1 October 2003 pp. 5-9 (Witness AR).
[28] T. 18 September 2002, p. 55 (Alison Des Forges), T. 16 June 2003, pp. 55-59 (Ruggiu).
[29] 98 *bis* Motion of 21 October 2004, paras. 192-194.

(d) Ntabakuze Ordering Killings at Kabusunzu Followed by Para-commandos Loading Bodies onto Truck

19. The Chamber found that, during the testimony of Witness DBN, the Defence failed to raise a contemporaneous objection based on lack of notice.[30] In Kabusunzu, the witness allegedly saw the Accused order that a group of three Tutsis be taken away and killed and also observed a group of Para-commando soldiers loading approximately fifteen bodies onto a truck in the presence of the Accused.[31]

20. The Defence asserts that it made a contemporaneous objection to Witness DBN's testimony about the Kabusunzu incidents and that it also challenged his testimony as to these allegations in its 98 *bis* Motion.[32] The Chamber notes that the Defence made numerous objections during Witness DBN's testimony relating to meetings held by the Accused and the events following the shooting down of President Habyarimana's plane on 6 April 1994. However, the Chamber finds no objection for lack of notice as to these particular incidents, which occurred in late April 1994, and notes that the Defence questioned the witness about these incidents on cross-examination.[33] Moreover, these specific allegations were disclosed to the Defence in the Prosecution's will-say statement for the witness on 13 December 2003, the date upon which the Prosecution became aware of the purported testimony, and more than three months before the testimony in late March 2004.[34] The Chamber sees no justifiable reason for failing to object to this incriminating testimony until the Defence Rule 98 *bis* Motion of 21 October 2004, seven months after the witness testified. Consequently, the Chamber finds that the burden was appropriately placed on the Defence.

21. While the Chamber recalls that mere service of witness statements is insufficient to provide notice to the Accused, it notes that not only was Witness DBN's witness statement disclosed to the Ntabakuze Defence nearly four years before he testified but also that a will-say statement was disclosed several months before his testimony. Furthermore, as initially found by the Trial Chamber, the Pre-Defence Brief provided summaries of at least seven witnesses who directly contradict the allegation that Para-commando soldiers engaged in criminal conduct.[35] In light of these facts, the Chamber maintains its original conclusion, finding that the Defence has not shown that its preparations were materially impaired.

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[30] The Chamber will not reassess its admission of Witness AAA's testimony since the burden of proof was not placed on the Accused.

[31] Trial Chamber Decision, section (k), paras. 42-43. Witness DBN testified on 31 March 2004 and 1, 5, and 6 April 2004.

[32] Ntabakuze Submissions, paras. 90-91 and Chart of Allegations p. 15.

[33] Witness DBN testified on 31 March 2004 and 1, 5, and 6 April 2004. See T. 1 April 2004 pp. 66-69 (Prosecution examination-in-chief), T. 5 April 2004 pp. 58-65 (Ntabakuze Defence cross-examination). The Chamber also notes that the Defence's reference to paragraphs 149-150 of its 98 *bis* Motion is incorrect and that the Defence actually addressed the testimony of Witness DBN as being outside the scope of the Indictment in paragraphs 211-212.

[34] Exhibit D. NT 51A, admitted into evidence on 5 April 2004. The Chamber notes that Witness DBN's statements do not mention this event, but the Prosecution explained in its will-say statement that the witness first mentioned these incidents at Kabusunzu during his preparation to testify before the Tribunal on 13 December 2003.

[35] Trial Chamber Decision, para. 43, fn. 69 (Statements of Witnesses DH-63, DH-66, DH-67, DH-68, DK-12, DK-39, and DK-120).

34723

(e) Kabgayi

22. The Chamber held that the Defence failed to raise a contemporaneous objection concerning lack of notice during Witness XXY's testimony that the Accused had refugees killed at Kabgayi Hospital and that he sent Para-commando soldiers to reinforce *Interahamwe* at Gitarama, Kibuye, and Ngororero.[36]

23. In its submissions, the Defence argues that it did object in a timely manner through its 98 *bis* Motion and that the Prosecution therefore bears the burden of proof on this issue.[37] The Chamber disagrees. Notice of this material fact was conveyed to the Accused through the Prosecution Pre-trial Brief, wherein the summary for Witness XAI indicated that he would testify that the Accused told soldiers to kill Tutsis at Kabgayi Hospital.[38] Moreover, Witness XAI had testified to these facts before the Chamber in September 2003, and the Defence made no objection on the record.[39] Consequently, any defect in the Indictment as to the Accused's involvement in killings at Kabgayi Hospital had been cured through the Prosecution Pre-trial Brief, and the Defence should have objected when Witness XXY testified in June 2004.[40]

24. As to Witness XXY's testimony that the Accused sent Para-commando soldiers to Gitarama, Kibuye, and Ngororero to reinforce Interahamwe in killing Tutsis, the Chamber considers the Defence objection in its 98 *bis* Motion – nearly four months later – untimely insofar as the highly incriminating testimony of the witness should have led the Defence to object on the record when he testified. As this was not done, the Defence bears the burden of proof and has not made the requisite showing of prejudice. The evidence is therefore admissible.

(f) Distribution of Weapons to Gasana

25. The Chamber found that the Defence failed to raise a contemporaneous objection for lack of notice during the testimony of Witness DCH, who allegedly observed the Accused distribute weapons to Gasana and Mwongereza for use in an attack on Ruhanga Church.[41]

26. The Defence submits that it made a timely objection through its Addendum to its Exclusion Motion, filed on 7 April 2006.[42] The Chamber finds this objection insufficient in light of the highly incriminating nature of Witness DCH's testimony in June 2004 regarding

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[36] Trial Chamber Decision, section (m), paras. 46-49. Witness XXY testified on 10-11, 14 and 30 June 2004 and 1 July 2004.

[37] Ntabakuze Submissions, paras. 95-96 and Chart of Allegations pp. 15-16.

[38] Prosecution Pre-trial Brief, filed on 21 January 2002, Annex A, p. 140 ("At Kabgayi (Gitarama), witness heard Major Ntabakuze, accompanied by Major Anne Marie, telling soldiers from his escort to use the Interhamwe to kill the Tutsi at the hospital."). The Chamber does not deem it necessary to re-evaluate the admissibility of Witness XAI's testimony since the burden of proof was not placed on the Accused. However, Witness XAI's summary in the Pre-Trial Brief is relevant to the Chamber's analysis of whether the testimony of Witness XXY on these events should be admissible.

[39] T. 8 September 2003, p. 54.

[40] The witness testified on 10, 11, and 30 June 2004 and 1 July 2004.

[41] Trial Chamber Decision, section (o), paras. 52-56. Witness DCH testified on 18, 22-25, 28-30 June 2004. The Chamber will not reassess its findings as to Witnesses XAB, DB, XAP, XAQ, and XAI as the burden of proof was not placed on the Accused. The Chamber placed the burden of proof on the Defence in connection with allegations by Witness DCH that the Accused distributed weapons to Maga and Gasana. The Chamber found that the Defence discharged its burden in relation the first event but not the second.

[42] Ntabakuze Submissions, para. 101 and Chart of Allegations p. 16.

this incident. The Defence should have objected to this evidence earlier and thus bears the burden of proof. It has failed to demonstrate that it did not have reasonable notice of the allegations or that its preparations were materially impaired. Consequently, the evidence is admissible.

(iii) Cumulative Effect of Cured Defects in the Indictment

27. The Chamber will now look at the totality of cured defects in the Indictment to determine their cumulative effect on the Accused's ability to prepare his defence.[43] The Appeals Chamber found:

> 26. The Appeals Chamber agrees that when the indictment suffers from numerous defects, there may still be a risk of prejudice to the accused even if the defects are found to be cured by post-indictment submissions. In particular, the accumulation of a large number of material facts not pled in the indictment reduces the clarity and relevancy of that indictment, which may have an impact on the ability of the accused to know the case he or she has to meet for purposes of preparing an adequate defence. Further, while the addition of a few material facts may not prejudice the Defence in the preparation of its case, the addition of numerous material facts increases the risk of prejudice as the Defence may not have sufficient time and resources to investigate properly all the new material facts. Thus, where a Trial Chamber considers that a defective indictment has been subsequently cured by the Prosecution, it should further consider whether the extent of the defects in the indictment materially prejudice an accused's right to a fair trial by hindering the preparation of a proper defence. The Appeals Chamber finds that the Trial Chamber failed to do so in the Impugned Decision and therefore, instructs the Trial Chamber to reconsider the Impugned Decision on this basis.

28. The Defence asserts that 75% of the allegations against the Accused fall outside the Indictment and have consequently left the Defence guessing at the evidence it had to meet until the close of the Prosecution case.[44] It argues that "no remedy short of exclusion can restore the Accused to the position he should have been in had the Prosecution done what it should have done in the first place …".[45] The Chamber does not agree with the Defence that 75% of the allegations against the Accused are outside the scope of the Indictment.

29. As stated by the Appeals Chamber, fairness is crucial in determining whether the Defence has been materially prejudiced in preparing its case. The question is whether the Accused was in a position to know and understand the allegations against him such that he could prepare a proper defence. The Chamber must determine, in particular, whether a large number of material facts were not pled in the Indictment and whether these defects, even if subsequently cured, prejudiced the Accused's right to a fair trial.[46]

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[43] Subsequent to the Trial Chamber Decision, the Appeals Chamber rendered judgment in the *Ntagerura et al.* case and held that the Chamber has an obligation to determine whether a vague provision in the Indictment has been cured by timely, clear, and consistent information from the Prosecution. *Ntagerura et al.*, Judgment (AC), 7 July 2006, para. 65. The Chamber implicitly did so in making its findings on the impugned evidence, wherein it held that defects had not been cured by proper notice in three instances. Trial Chamber Decision, paras. 31, 54-55, 60.

[44] Ntabakuze Submissions, paras. 16-19, 22-24, 33. The Defence arrives at the number of 75% through its Chart of Allegations, which purportedly contains all allegations against the Accused. The Defence argues that 83 allegations have been made against the Accused and that 63 of these allegations fall outside the scope of the Indictment and have required curing by the Prosecution.

[45] Ntabakuze Submissions, para. 37.

[46] Appeals Chamber Decision, paras. 26, 30 (referencing *Kupreškić et al.* Appeals Chamber Judgement).

30. The Chamber recalls that the Prosecution filed the Supporting Material on 3 August 1998 and the Amended Indictment on 13 August 1999. Trial proceedings began on 2 April 2002 and were then suspended until September 2002. Although thirty-two trial days were held during 2002, the trial did not build real momentum until proceedings resumed before Trial Chamber I in June 2003. The Prosecution closed its case on 14 October 2004, after presenting 82 witnesses. The Defence thereafter commenced its case on 11 April 2005 and finished on 18 January 2007, after offering testimony by 160 witnesses.

31. In ten of the sixteen categories of challenged evidence, notice was provided through the Indictment; the Supporting Material; the Prosecution Pre-trial Brief, filed on 21 January 2002; and/or the Prosecution's opening statement on 2 April 2002.[47] The Chamber finds that any curing of defects in the Indictment through notice of new material facts which occurred prior to or at the commencement of trial was sufficient to inform the Accused of the allegations against him such that he could prepare a proper defence. This occurred three and a half years before the Defence would even begin presentation of its case. During the course of the Prosecution case, three other categories of evidence were found to have been cured through motions addressing proposed Prosecution witnesses and through an adjournment to allow the Defence to prepare.[48] Two categories were found either not to constitute new material facts or to be issues of relevance and not claims of lack of notice by the Defence.[49] The final category of challenged evidence was found to be cured through disclosures sufficiently in advance of the witness' testimony.[50]

32. Consequently, the Chamber finds that the number of alleged deficiencies in the Indictment and the timing and means by which they were cured – most often well in advance of trial and years before the Defence began the presentation of its case -- did not render the trial unfair and did not materially prejudice the Accused. The Chamber reiterates that the admission of evidence is not to be confused with the ultimate weight to be accorded to the evidence.[51]

FOR THE ABOVE REASONS, THE CHAMBER

AFFIRMS its decision of 29 June 2006.

Arusha, 17 April 2007

Erik Møse	Jai Ram Reddy	Sergei Alekseevich Egorov
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

[47] These categories are sections (a)-(e), (i)-(j), (m), and (o)-(p) of the Trial Chamber Decision.
[48] These categories are sections (g)-(h) and (l) of the Trial Chamber Decision.
[49] These categories are sections (f) and (n) of the Trial Chamber Decision.
[50] This category is section (k) of the Trial Chamber Decision.
[51] *Nyiramasuhuko*, Decision on Pauline Nyiramasuhoko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, paras. 6-7. *See also Bagosora et al.*, Decision on Ntabakuze Motions to Admit Documents Under Rule 92 bis (TC), 12 April 2007, para. 9; *Bagosora et al.*, Decision on Bagosora Motion to Exclude Photocopies of Agenda (TC), 11 April 2007, para. 6.

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	☐ Chief, CMS J.-P. Fomété	☐ Deputy Chief, CMS M. Diop	☐ Chief, JPU, CMS M. Diop	☐ Appeals Chamber / The Hague R. Muzigo-Morrison K. K. A. Afande
From:	☒ Chamber I **Judge Mose** **Judge Reddy** **Judge Egorov** (names)	☐ Defence (names)	☐ Prosecutor's Office (names)	☐ Other: (names)

Case Name:	The Prosecutor vs. **BAGOSORA ET AL.**	**Case Number:**	ICTR-98-41-T
Dates:	Transmitted: **17 APRIL 2007**	Document's date: **17 APRIL 2007**	
No. of Pages:	**10**	**Original Language:** ☒ English ☐ French ☐ Kinyarwanda	
Title of Document:	**DECISION RECONSIDERING EXCLUSION OF EVIDENCE FOLLOWING APPEALS CHAMBER *DECISION***		

Classification Level:
☐ Strictly Confidential / Under Seal
☐ Confidential
☒ Public

TRIM Document Type:

☐ Indictment	☐ Warrant	☐ Correspondence	☐ Submission from non-parties
☒ Decision	☐ Affidavit	☐ Notice of Appeal	☐ Submission from parties
☐ Disclosure	☐ Order	☐ Appeal Book	☐ Accused particulars
☐ Judgement	☐ Motion	☐ Book of Authorities	

II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

CMS SHALL take necessary action regarding translation.

☒ Filing Party hereby submits only the original, and **will not submit** any translated version.

☐ Reference material is provided in annex to facilitate translation.

Target Language(s):
☐ English ☒ French ☐ Kinyarwanda

CMS SHALL NOT take any action regarding translation

☐ Filing Party hereby submits **BOTH the original and the translated version** for filing, as follows:

Original	in	☐ English	☐ French	☐ Kinyarwanda
Translation	in	☐ English	☐ French	☐ Kinyarwanda

CMS SHALL NOT take any action regarding translation.

☐ Filing Party **will be submitting the translated version(s)** in due course in the following language(s):
☐ English ☐ French ☐ Kinyarwanda

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☐ **The OTP** is overseeing translation.
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III - TRANSLATION PRIORITISATION (For Official use ONLY)

☐ Top priority	**COMMENTS**	☐ Required date:
☐ Urgent		☐ Hearing date:
☐ Normal		☐ Other deadlines: