UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 23 May 2007

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. ICTR-98-41-T

DECISION ON NTABAKUZE MOTION FOR CERTIFICATION CONCERNING EXCLUSION OF EVIDENCE

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

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 "Ntabakuze Motion for Certification to Appeal of the 17 April 2007 Trial Chamber Decision" etc., filed on 24 April 2007;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 29 June 2006, the Chamber rendered a decision on a Ntabakuze motion for exclusion of evidence outside the scope of the Indictment.[1] On 14 July 2006, the Chamber granted the Defence certification to appeal the decision.[2] The Appeals Chamber issued its decision on 18 September 2006, in which it instructed the Trial Chamber to reconsider its decision of 29 June 2006 on the basis of two points of law.[3] These included an analysis of whether the defects in the Indictment which had been cured by the Prosecution nonetheless prejudiced the right of the Accused to a fair trial by hindering the preparation of a proper defence.[4] On 17 April 2007, the Trial Chamber rendered a decision reconsidering its previous decision and affirming the decision.[5]

DELIBERATIONS

2. Pursuant to Rule 73 (B), certification may be granted if the challenged decision involves "an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

3. Certification is sought on the basis that the Chamber did not apply the required legal standard. In particular, the Defence argues that the Chamber did not consider whether the extent of the additional material facts had adversely impacted the Accused's ability to prepare his defence. This error of law warrants appellant intervention, as the issue may affect the outcome of the trial and the fairness of the proceedings. Further, an immediate resolution by the Appeals Chamber will materially advance the proceedings as it will prevent an erroneous trial judgement which might lead to a re-trial.

4. The Chamber recalls that in its decision of 17 April 2007, it examined "the totality of cured defects in the Indictment to determine their cumulative effect on the Accused's ability

[1] *Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006 (excluding three portions of testimony out of sixteen challenged categories of evidence).
[2] *Bagosora et al.*, Decision on Request for Certification of Decision on Exclusion of Evidence (TC), 14 July 2006 (limiting the scope of the appeal to certain legal propositions).
[3] *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.
[4] *Id.*, para. 26. The second point of law which required the Trial Chamber's reconsideration, according to the Appeals Chamber, was 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. *Id.*, paras. 45-47.
[5] *Bagosora et al.*, Decision Reconsidering Exclusion of Evidence following Appeals Chamber Decision (TC), 17 April 2007 ("Reconsideration Decision").

to prepare his defence".[6] The Chamber analysed the individual allegations which the Defence claimed were outside the Indictment.[7] It consequently disagreed with the Defence that 75% of the material facts were not in the Indictment. The Chamber observed that notice of certain facts had been provided in other pre-trial disclosures.[8] However, it found that the extent of alleged deficiencies in the Indictment, given the timing and means by which they were cured, did not render the trial unfair and did not materially prejudice the Accused.[9] The Chamber provided the underlying reasons for this determination in its decision.[10] Thus, it applied the very standard which the Defence argues should have been applied.

5. It is noted that the Defence correctly identified the Appeals Chamber's view that the accumulation of numerous material facts outside the Indictment reduces the clarity and relevancy of the Indictment and increases the risk of prejudice to the Defence. However, the Appeals Chamber also stated that these consequences may – not necessarily will – hinder the Accused's ability to prepare an adequate defence.[11] It remanded the matter to the Trial Chamber precisely for that determination. The Defence now seems to challenge the Chamber's manner of exercising its discretion. The Appeals Chamber has held that certification should not be ordinarily granted on questions of admissibility of evidence, but is rather the "absolute exception".[12] The Chamber finds no such exception in this case.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 23 May 2007

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

[Seal of the Tribunal]

[6] Reconsideration Decision, paras. 27-32.
[7] *Id.*, paras. 6-26.
[8] *Id.*, para. 28.
[9] *Id.*, para. 32.
[10] *See Id.*, para. 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. 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. 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. The final category of challenged evidence was found to be cured through disclosures sufficiently in advance of the witness' testimony." (Footnotes omitted).
[11] *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, para. 26.
[12] *Nyiramasuhuko et al*., Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5; *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 10.