

ICTR-04-81-1
09-10-2007
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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(1327-1324)

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 9 October 2007

THE PROSECUTOR

v.

Ephrem SETAKO

Case No. ICTR-04-81-1

2007 OCT 9 AM 10:19
JURIST
Ephrem Setako
ICTR-04-81-1

DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL THE
DECISION ON AMENDMENT OF THE INDICTMENT

The Prosecution

Ifeoma Ojemeni-Okali
Simba Mawere
Christiana Fomenky

The Defence

Stefan Kirsch

Stefan Kirsch

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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 Defence's "Application for Certification to Appeal the Decision on the Prosecution's Request to Amend the Indictment", filed on 25 September 2007;

CONSIDERING the Prosecution Response, filed on 1 October 2007;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 18 September 2007, the Chamber granted in part the Prosecution request for leave to amend the Indictment.¹ In particular, the Chamber allowed the Prosecution to better articulate its theories of criminal responsibility, remove any factual allegations it no longer wished to pursue, and correct or supplement with additional detail any of the existing factual allegations. In addition, the Chamber permitted the Prosecution to add a number of new factual allegations. The Chamber denied, however, the Prosecution request to add two new counts of conspiracy to commit genocide and direct and public incitement to commit genocide.

2. The Defence requests the Chamber to certify that decision for appeal for three main reasons. First, the Chamber did not allow the Defence to inspect and respond to all the materials accompanying the proposed Amended Indictment, which, it is submitted, affects the Judges' partiality.² Second, in allowing the Prosecution to add a number of new factual allegations, the Chamber did not consider the Prosecution's lack of diligence as well as the possibility of unfair tactical advantage and delay.³ Third, the Chamber erred in not holding a new appearance because many of the new factual allegations constitute new charges.⁴

3. The Prosecution opposes the motion on the grounds that it does not satisfy either of the two prongs of the criteria required for certification to appeal under Rule 73 (B) of the Rules of Procedure and Evidence. In particular, the Prosecution asserts that *ex parte* communication of supporting material for a proposed amended indictment would not adversely affect the impartiality of professional Judges.⁵ The Prosecution further submits that the Chamber did, indeed, take into account the rights and needs of the Accused. It is argued that the factual allegations that have been added to the Indictment do not qualify as new counts or charges and thus necessitate no further appearance by the Accused.⁶

¹ *Prosecutor v. Setako*, Decision on the Prosecution's Request to Amend the Indictment (TC), 18 September 2007, para. 16 ("Decision").

² Motion, paras. 2, 5-8.

³ Motion, paras. 2, 9-13.

⁴ Motion, paras. 2, 14-16.

⁵ Response, para. 6.

⁶ Response, paras. 8-9.

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DELIBERATIONS

4. Rule 73 (B) provides:

Decisions rendered on such motions are without interlocutory appeals save with certification by the Trial Chamber, which may grant such certification if the decision involved 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.

5. The Defence has not identified any issue arising from the decision that would warrant certification. First, there is no requirement for the Prosecution to provide the Defence with all supporting material at the time confirmation of an indictment is sought. The process of confirming an indictment is normally *ex parte*, and it follows clearly from Rule 66 (A)(i) that the supporting material is disclosed to the Defence at a later time. In connection with this amendment, the Defence was provided with the supporting material in redacted form.⁷ It cannot be said, therefore, that any issue exists here that would affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor would resolution by the Appeals Chamber materially advance the proceedings.

6. Moreover, in its decision, the Chamber noted that the Prosecution added a number of new factual allegations.⁸ It also expressly noted the Prosecution's lack of diligence and the likely impact on the Defence.⁹ In addition, the Chamber explained that it would take these considerations into account in scheduling the trial and during the proceedings.¹⁰ The Chamber therefore did not, as the Defence suggests, overlook these relevant concerns. The fact that the Defence disagrees with the Chamber's discretionary decision to allow these amendments and the various modalities it proposed to deal with any possible prejudice is not a basis for granting certification to appeal the decision.

7. Finally, the Chamber recalls that the Accused has already pleaded not guilty to all of the counts in the Indictment. The new material facts added to the Indictment are pleaded in support of the existing charges.¹¹ The Chamber did not permit the Prosecution to add any new charges.¹² Therefore, in the view of the Chamber, a new appearance is not required simply to confirm the current plea. The Chamber is mindful that such appearances serve other functions.¹³ For example, the charges are read out against the accused, who have an opportunity to voice any complaints, and the Chamber will also ensure that their rights are being respected during detention. However, the Amended Indictment was recently filed in French, a language of the Accused, who is represented by counsel. Moreover, the Chamber has scheduled a status conference on 11 October 2007, where the Defence can raise any concerns.

⁷ Decision, para. 13; T. 12 July 2007 p. 15. According to the Prosecution, redactions were originally required due to orders in other cases (Response, para. 6). The request for witness protection measures in this case was made on 10 September and granted on 18 September 2007, the same day as the decision to amend the Indictment. *Setako*, Decision on the Prosecution Motion for Protective Measures (TC), 18 September 2007.

⁸ Decision, paras. 8, 13.

⁹ Decision, para. 9.

¹⁰ Decision, para. 14.

¹¹ *Prosecutor v. Muvunyi*, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005 (AC), 12 May 2005, para. 37.

¹² Decision, para. 12.


¹³ *André Rwamakuba v. the Prosecutor*, Decision on Appeal against Decision on Appropriate Remedy (AC), 13 September 2007, para. 28.

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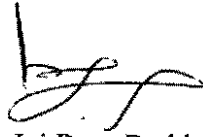
FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Defence Motion.


Arusha, 9 October 2007



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

