



ICTR-04-81-1
08-11-2007

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

(1367-1365)

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TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 8 November 2007

THE PROSECUTOR

v.

Ephrem SETAKO

Case No. ICTR-04-81-I

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**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL THE
DECISION ON DEFENCE MOTIONS FOR RULE 68 DISCLOSURE**

The Prosecution
Ifema Ojemeni-Okali
Simba Mawere
Christiana Fomenky

The Defence
Stefan Kirsch

blm

1366

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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

BEING SEIZED OF the Defence's "Application for Certification to Appeal the Decision on Defence Motions for Rule 68 Disclosure", filed on 11 October 2007;

CONSIDERING the Prosecution Response, filed on 16 October 2007;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 5 October 2007, the Chamber denied the Defence's motion relating to the Prosecution's disclosure obligations under Rule 68 (A) of the Rules of Procedure and Evidence.¹ The Defence had requested disclosure of all statements and transcripts of witnesses whose statements were used to support the Indictment and the proposed amended Indictment. The Prosecution replied that it had already disclosed all relevant material in its possession pursuant to Rule 68 (A).

2. The Defence requests the Chamber to certify that decision for appeal for two reasons. First, the Chamber erred in deciding that the Defence had not established that the material in question was, in fact, exculpatory. Second, the Chamber erroneously stated that there was no basis to reject the Prosecution's assertion that statements to which the Defence referred in its motion either did not exist or were not in the possession of the Prosecution.

3. The Prosecution submits that the motion does not satisfy either of the two criteria required for certification to appeal under Rule 73 (B). The Defence arguments do not demonstrate how the non-disclosure of any prior statements of potential witnesses not included in the supporting material to the Amended Indictment or found not to be Rule 68 material constitutes an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Defence's arguments that an immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings are baseless.

DELIBERATIONS

4. Rule 73 (B) provides:

Decisions rendered on such motions are without interlocutory appeal 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.

¹ *Prosecutor v. Setako*, Decision on Defence Motions for Rule 68 Disclosure (TC), 5 October 2007.

6/11

5. The Defence has already been provided with a redacted form of all of the material submitted in support of confirmation of the amended indictment.² The Prosecution has not yet finalised its witness list, but as of 31 October 2007 has disclosed in redacted form all of the statements, including prior statements, of 21 of the witnesses it will call at trial.³ The Prosecution has no obligation to disclose witness statements, not included in the supporting material for the amended Indictment, of witnesses who will not be called by the Prosecution at trial, if such statements are not exculpatory within the meaning of Rule 68 (A).

6. Certification may also be appropriate where, in particular, "broad categories of evidence" are affected by a decision.⁴ The decision at issue here affects only a relatively narrow segment of material, the prior statements of potential Prosecution witnesses whose statements were included in the supporting material for the amended Indictment.

7. In light of the foregoing, no 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. The decision does not merit certification to the Appeals Chamber.

FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha, 8 November 2007


Erik Mase
Presiding Judge


Jai Ram Reddy
Judge


Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]



² *Prosecutor v. Setako*, Decision on the Prosecution's Request to Amend the Indictment (TC), 18 September 2007, para. 13; T. 12 July 2007 p. 15; T. 11 October 2007 pp. 3, 11. According to the Prosecution, redactions were originally required due to orders in other cases. 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.

³ The Prosecution used statements from these 21 witnesses in support of the amendment of the Indictment. The Chamber understands that one prior statement of one of those witnesses, Witness 006, remains to be disclosed to the Defence.

⁴ *Prosecutor v. Bagosora et al.*, Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements (TC), 22 May 2006, para. 5; *Bagosora et al.*, Certification of Appeal Concerning Access to Protected Defence Witness Information (TC), 29 July 2005, para. 2; *Bagosora et al.*, Decision on Prosecution Request for Certification of Appeal on Admission of Testimony of Witness DBY (TC), 2 October 2003, para. 4 ("Immediate resolution by the Appeals Chamber will ensure that a substantial category of potential evidence is being correctly evaluated under the Rules").