



UNITED NATIONS  
NATIONS UNIES

**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

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**TRIAL CHAMBER I**

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

**Registrar:** Adama Dieng

**Date:** 17 June 2008

**THE PROSECUTOR**

**v.**

**Ephrem SETAKO**

*Case No. ICTR-04-81-I*

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**DECISION ON DEFENCE MOTION FOR RECONSIDERATION OR  
CERTIFICATION TO APPEAL THE CHAMBER'S DECISION ON DEFENCE  
REQUESTS TO LIFT CONFIDENTIALITY OF FILINGS**

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**The Prosecution**

Ifeoma Ojemeni-Okali  
Simba Mawere  
Christiana Fomenky

**The Defence**

Lennox Hinds  
Cainnech Lussiaà-Berdou

## **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 motion for reconsideration or certification to appeal, filed on 12 November 2007;

**HEREBY DECIDES** the motion.

### **INTRODUCTION**

1. After filing its request of 15 June 2007 to amend the indictment, the Prosecution submitted *ex parte* an annotated amended indictment to facilitate the Chamber's consideration.<sup>1</sup> On 20 June 2007, the Defence requested a stay of the deadline to respond until the Prosecution disclosed the annotated amended indictment.<sup>2</sup> The Chamber denied the Defence motion for a stay on 22 June 2007 and deferred its decision on whether the Defence was entitled to the annotated amended indictment.<sup>3</sup>

2. On 18 September 2007, the Chamber decided the Prosecution request of 15 June to amend the indictment, but did not consider it necessary at the time to address the Defence motion for disclosure of the annotated indictment.<sup>4</sup> During a status conference held on 11 October 2007, the Defence again raised the issue of the disclosure of the annotated indictment.<sup>5</sup> On 7 November 2007, the Chamber considered the requests made by the Defence in its motion of 20 June 2007, which it had deferred. The Chamber decided that the Prosecution had complied with its disclosure obligations under Rule 66 (A)(i), thereby effectively denying the Defence request for disclosure of the annotated indictment.<sup>6</sup>

3. On 12 November 2007, the Defence filed the present motion for reconsideration or certification to appeal the denial of its request for disclosure of the amended indictment.<sup>7</sup> The Defence refers to Rule 66 (A)(i), which requires the disclosure of "supporting material which accompanied the indictment when confirmation was sought".<sup>8</sup> The Prosecution did not file a response.

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<sup>1</sup> Prosecutor's Motion for Leave to Amend the Indictment, 15 June 2007. *See also* T. 12 July 2007 p. 6 (noting that the annotated amended indictment was provided to the Chamber on 21 June 2007).

<sup>2</sup> Urgent Defence Motion for Stay of Deadline to Respond and Other Relief, 20 June 2007, paras. 16-20. The request for postponement was also based on other reasons.

<sup>3</sup> *Setako*, Decision on Defence Motions Relating to Prosecution Request to Amend the Indictment (TC), 22 June 2007, para. 8.

<sup>4</sup> *Setako*, Decision on Prosecution's Request to Amend the Indictment (TC), 18 September 2007.

<sup>5</sup> T. 11 October 2007 p. 9.

<sup>6</sup> *Setako*, Decision on Defence Requests to Lift Confidentiality of Filings (TC), 7 November 2007, para. 4.

<sup>7</sup> Motion for Reconsideration/Application for Certification to Appeal Decision on Defence Requests to Lift Confidentiality of Filings, 12 November 2007 ("Defence Motion").

<sup>8</sup> Defence Motion, paras. 8-12.

## **DELIBERATIONS**

4. After the filing of the motion for reconsideration or certification, the Registrar assigned a new Lead Counsel for the Defence, who indicated that the disclosure of the annotated amended indictment was not of major significance.<sup>9</sup> However, as the motion has not been withdrawn, the Chamber will rule on the matter.

### *(i) Reconsideration*

5. Reconsideration is an exceptional measure available only in particular circumstances, in particular where there has been a change in circumstances or where the Chamber has been persuaded that its previous decision was erroneous and caused prejudice.<sup>10</sup> The Defence motion contains arguments previously presented to the Chamber.<sup>11</sup> It does not point to any changed circumstances or highlight specific prejudice arising from the non-disclosure of the annotated indictment. Furthermore, the Defence was provided with all supporting witness statements used in the confirmation process.

6. An annotated indictment is simply a listing of which of the disclosed statements the Chamber should review in assessing a given allegation during the confirmation process. It contains no substantive information beyond the witness statements themselves, but is simply aimed at facilitating the Chamber's task. The Chamber cannot identify any prejudice to the Defence.<sup>12</sup> Accordingly, it declines to reconsider its decision of 7 November 2007.

### *(ii) Certification*

7. Pursuant to Rule 73 (B), certification to appeal may be granted "if the 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".

8. According to the motion, non-disclosure of the annotated indictment impacts on the fair conduct of the proceedings, which if not immediately resolved may place the results of the trial in jeopardy.<sup>13</sup> The Chamber does not agree. As noted above, there is no

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<sup>9</sup> Decision on Withdrawal of the Assignment of Mr. Stefan Kirsch, Lead Counsel for the Accused Ephrem Setako (Registrar), 15 November 2007. *See also* T. 14 December 2007 pp. 4-5, 12 (status conference: "From my standpoint, I really don't care. If I have the old indictment and the new indictment, I can figure it out. Okay? So the fact that the Prosecutor provided an *ex parte* document to the Chambers to facilitate the Chambers easily dealing with that is of no real moment to us that would serve as an impediment to us going forward. If I have the old document and the new document, I can figure out what the -- what the annotations would be. And so I can say to my learned friend, if she would like to provide us with a copy, that's fine. If not, we'll move forward. It's not a major issue."); T. 20 March 2008 p. 4 (status conference: "Your Honour, when I was here back in December, I indicated that, as far as I was concerned, it was not of any major significance to me as I viewed the case. And today I have no different view at that point, and that is one of the reasons why I have not moved forward.").

<sup>10</sup> *Prosecutor v. Zdravko Mucić et al.*, Judgement on Sentence Appeal (AC), 8 June 2003, para. 49. *See also The Prosecutor v. Theoneste Bagosora et al.*, Decision Reconsidering Exclusion of Evidence Related to Accused Kabiligi (TC), 23 April 2007, para. 3.

<sup>11</sup> Defence Motion, paras. 8-12.

<sup>12</sup> *See also* Defence Counsel's statements quoted above in footnote 9.

<sup>13</sup> Defence Motion, para. 18.

possible prejudice from the non-disclosure of the annotated indictment. The decision therefore does not significantly affect the fairness of the proceedings or require immediate resolution by the Appeals Chamber.

**FOR THE FOREGOING REASONS, THE CHAMBER**

**DENIES** the motion.

Arusha, 17 June 2008

Erik Møse  
Presiding Judge

Jai Ram Reddy  
Judge

Sergei Alekseevich Egorov  
Judge

**[Seal of the Tribunal]**