

VIII. CONCLUSION ON EVIDENCE

2196. Given the Trial Chamber's 17 April 2007 *Decision Reconsidering Exclusion of Evidence Following Appeals Chamber Decision*, in which the Chamber upheld its own earlier Decision not to exclude the vast majority of the evidence presented in this trial which, we continue to maintain, is nowhere mentioned in the Indictment, the Defence for Ntabakuze maintains its position that such evidence, even though admitted, can not legitimately sustain a conviction of Major Ntabakuze. It must necessarily have been admitted for some other purpose than to be considered as facts and circumstances upon which to arrive at a decision of guilt.

2197. We draw the Chamber's attention the following formulation of this principle in the case of *Ntagerura, Bagambiki & Imanishwe*.²⁴⁴⁰

It is a fundamental principle of criminal law that an accused is tried and a judgement is rendered only on the basis of charges contained in a judicially controlled indictment. This principle forms part of the right of an accused to a fair trial and is enshrined in Article 20(4)(a) of the Statute and forms the basis of Rule 47(C) of the Rules. The general acceptance of this principle is further demonstrated by its inclusion in Article 74(2) of the Statute of the International Criminal Court which explicitly states:

The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at trial. [Emphasis added].

2198. It is submitted that the vast majority of the allegations concerning Major Ntabakuze that can be found in the evidence of this present trial '*exceed the facts and circumstances* described in the charges and any amendments to the charges' and thus, cannot form the basis of conviction. Bearing in mind that the Defence objected to the inclusion in the prosecutor's Pre-Trial materials of large numbers of allegations not mentioned in the Indictment, at which time the Trial Chamber said that it could not dictate to the Prosecutor what to include or not include in the Pre-Trial materials, the Defence was reassured by the Chamber that, nevertheless:

It is also clear that pre-trial documents cannot add new charges beyond those included in the indictments or serve to unilaterally amend the indictments. [Emphasis added]²⁴⁴¹

²⁴⁴⁰ *Prosecutor v. Ntagerura, Bagambiki & Imanishwe*, ICTR-99-46-T ; *DECISION ON DEFENCE MOTION TO EXCLUDE EVIDENCE*, 22 March 2002, at paragraph 5.

²⁴⁴¹ *Bagosora et al*, 'Decision on Defence Motions of Nsengiyumva, Kabiligi, and Ntabakuze Challenging the Prosecutor's Pre-Trial Brief and on the Prosecutor's Counter-Motion' of 23 May 2002, at paragraph 15.

2199. It is submitted that Ntabakuze Defence, in light of the fundamental principle of criminal law that an accused is tried and a judgement is rendered *only* on the basis of charges contained in a judicially controlled indictment, and that a decision should therefore *not exceed the facts and circumstances described in the charges and any amendments* to the charges as found in that *judicially controlled indictment*, and in light of the Trial Chamber's clear pronouncement that pre-trial documents *cannot serve to unilaterally amend the indictment*, has always conducted this trial on the basis that the allegations not mentioned in the Indictment *cannot* form the basis for conviction.
2200. We maintain that position. It is the *only* position that is sustained by both logic and the fundamental principles of justice. It is submitted that the Chamber's various Decisions to "cure" the massively defective Indictment by admitting vast quantities of evidence, not mentioned in the Indictment, *cannot* have served to permit the Prosecution to unilaterally amend the Indictment on the basis of supposedly timely disclosure. Whether the timely disclosure of previously undisclosed evidence may be fairly considered by the Chamber is a separate juridical question from the use to which the Prosecution intends to put that evidence. Amending a vague indictment is a juridical act initiated by the Prosecution and ratified by the Chamber and the jurisprudence before the ICTR and ICTY establishes that informal "curing" of an Indictment through mere introduction of evidence should be an exception. But the exception has become the rule before this Trial Chamber. For example, the vague allegations in paragraph 6.36 of the Indictment are said to have been "cured" by introduction of facts of more than ten different incidents, occurring at more than ten different locations, at more than ten different times, which alleged totally different material facts in terms of circumstances, time, places, participants and victims.²⁴⁴² This is not "curing" of paragraph 6.36, it is a re-writing of paragraph 6.36 more than eleven different times. Thus, in the absence of amendment of the Indictment in which the Prosecution informs the Chamber and the Defence as to the nature of the offense(s) which it intends to prove, *based on* all of the material facts and circumstances that have been admitted into evidence, these material facts and circumstances are *still* absent from the Indictment, itself. Thus none of these facts and circumstances can legitimately form the basis for conviction under that unamended Indictment. To convict on the basis of facts and circumstances outside the parameters of the Indictment would not only be illegitimate but would be bad law, bad precedent, and a miscarriage of justice.

²⁴⁴² Some of the incidents that the Prosecution alleges are encompassed in paragraph 6.36 include: Akajagali, Centre Christus, Remera, Kabeza, Kabeza 1, Kabuga, Kicukiro & Sahara, Ruhanga, IAMSEA, Masaka, Kabusunzu incidents.

2201. On the other hand, as demonstrated *supra*, in our discussions of each of the individual allegations against Major Ntabakuze, irregardless of their presence in or absence from the Indictment, none of them were proved beyond a reasonable doubt. The Prosecution has the burden of proving its case beyond a reasonable doubt. The Defence has no such burden. It is the responsibility of the Defence to raise a reasonable doubt about the Prosecution evidence, should such a doubt exist. In the preceding detailed analysis, we have demonstrated that such a reasonable doubt does indeed subsist for each and every allegation that the Prosecution has leveled against Major Ntabakuze. He can not be convicted of any charge for which such a reasonable doubt exists. Therefore, it falls to the Chamber, after its careful deliberations on the matters we have raised herein, to acquit Major Ntabakuze of all the charges against him, and to release him forthwith.