

680/H



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-00-55A-A

27 April 2007

(680/H - 676/H)

P.T.

IN THE APPEALS CHAMBER

Before:

Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar:

Mr. Adama Dieng

Decision of:

27 April 2007

ICTR Appeals Chamber
Date: 27 April 2007
Action: P.T.
Copied To: Concerned Judge
Parties, SCS, LRS, ALG,
LRS, Archive

THE PROSECUTOR

v.

Tharcisse MUVUNYI

Case No. ICTR-00-55A-A

Superville
2007 APR 30 1 A 10: 31
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Decision on a Request to Admit Additional Evidence

Office of the Prosecutor:

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Ms. Linda Bianchi
Mr. Renifa Madenga
Mr. François Nsanzuwera
Ms. Evelyn Kamau

Counsel for Tharcisse Muvunyi:

Mr. William E. Taylor
Ms. Abbe Jolles
Mr. Dorian Cotlar

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: *Patrice Tchuidimbo*
SIGNATURE: *[Signature]* DATE: *27/04/07*

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of a motion filed on 29 March 2007 by Mr. Tharcisse Muvunyi to admit additional evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules").¹ The Prosecution filed its response on 4 April 2007,² and Mr. Muvunyi filed his reply on 13 April 2007.³

Background

2. On 12 September 2006, Trial Chamber II convicted Mr. Muvunyi of three counts of genocide, direct and public incitement to commit genocide, and other inhumane acts as crimes against humanity, and sentenced him to twenty-five years' imprisonment.⁴ On 12 October 2006, Mr. Muvunyi filed a notice of appeal against his convictions and sentence.⁵ The Prosecution has also appealed against the Trial Judgement.⁶

3. The present Motion concerns one of the underlying factual findings supporting Mr. Muvunyi's conviction for direct and public incitement to commit genocide.⁷ In particular, the Trial Chamber found that, in April or May 1994, Mr. Muvunyi addressed Hutu members of the population in Gikonko where he blamed the *bourgmestre* for hiding a Tutsi man, named Vincent Nkurikiyinka, and made remarks understood by the population as a call to kill Tutsis.⁸ The Trial Chamber found that, after this speech, *Conseiller Gasana* led a group of attackers to capture and kill Vincent Nkurikiyinka.⁹ In making findings on Mr. Muvunyi's speech, the Trial Chamber relied solely on Prosecution Witness YAQ.¹⁰ To counter Witness YAQ's evidence on this point at trial,

¹ Accused Tharcisse Muvunyi's Motion to Take Testimony on Appeal Pursuant to Rule 115, 29 March 2007 ("Motion").

² Prosecution's Response to "Accused Tharcisse Muvunyi's Motion to Take Testimony on Appeal Pursuant to Rule 115", 4 April 2007 ("Response").

³ Accused Tharcisse Muvunyi's Reply to Prosecutor's Response to Motion to Take Testimony on Appeal Pursuant to Rule 115, 13 April 2007 ("Reply").

⁴ *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, Judgement and Sentence, 18 September 2006, paras. 531, 545 ("Trial Judgement"). The Trial Judgement was pronounced on 12 September 2006, and the written judgement was filed with the Registry on 18 September 2007.

⁵ Accused Tharcisse Muvunyi's Notice of Appeal, 12 October 2006, paras. 3-14 ("Muvunyi Notice of Appeal").

⁶ Prosecutor's Notice of Appeal and Motion for an Extension of Time within which to File Notice of Appeal, 17 October 2006.

⁷ Motion, paras. 4, 5, 8.

⁸ Trial Judgement, paras. 190, 507.

⁹ Trial Judgement, para. 190.

¹⁰ Trial Judgement, paras. 182-186, 189, 190. The Trial Chamber, however, found that aspects of Witness YAQ's evidence other than with respect to the speech were corroborated to some extent by Defence Witness M080, in particular relating to the specific attack against Vincent Nkurikiyinka. See Trial Judgement, para. 189.

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Mr. Muvunyi presented the evidence of Defence Witness M080 who testified that he did not hear about the meeting.¹¹

4. In the Motion, Mr. Muvunyi requests the Appeals Chamber to order the Prosecution to disclose the transcripts of Witnesses AND72 and AND14 given in the *Nyiramasuhuko et al.* case and to hear these witnesses.¹² Mr. Muvunyi submits that, in December 2006, Witnesses AND72 and AND14 testified in closed session "about the same matters on which the finding of the Trial Chamber was based in paragraph 190 of the Judgement", and that he learned of their evidence only in March 2007.¹³ Mr. Muvunyi complains that the Prosecution violated its obligations under Rule 68 of the Rules by not disclosing this evidence to him.¹⁴ Mr. Muvunyi argues that, if admitted, the evidence of Witnesses AND72 and AND14 will contradict the evidence of Witness YAQ and show that the witness was not truthful in attributing certain acts to him that were the basis of the Trial Chamber's findings.¹⁵ Although he has presumably not yet had access to the testimonies of Witnesses AND72 and AND14, Mr. Muvunyi contends that their evidence is relevant, credible, and could have been a decisive factor in making findings on this event.¹⁶

5. The Prosecution responds that Mr. Muvunyi has not satisfied the threshold requirements of Rule 115 and that he is using the Motion impermissibly as a tool to obtain the disclosure of closed-session transcripts.¹⁷ The Prosecution further notes that it has recently reviewed the transcripts of the testimonies of Witnesses AND72 and AND14 given in the *Nyiramasuhuko et al.* case and intends to disclose them.¹⁸ The Prosecution expressly makes no submission on whether this material would satisfy the requirements of Rule 115 of the Rules.¹⁹ Mr. Muvunyi replies that the Prosecution is asking the Appeals Chamber to dismiss the Motion on a "tortured technicality" and asserts that the Motion details the testimony to be presented.²⁰

Discussion

6. Rule 115 of the Rules provides a mechanism for admission of additional evidence on appeal where a party is in possession of material that was not before the court of first instance and which is

¹¹ Trial Judgement, paras. 187, 188.

¹² Motion, paras. 5, 7 (Relief Sought). In the Reply, Mr. Muvunyi requests that the hearing be held on or before 1 June 2007. Reply, para. 10.

¹³ Motion, para. 3.

¹⁴ Motion, paras. 7, 8bis.

¹⁵ Motion, paras. 5, 7, 8bis; Reply, para. 6.

¹⁶ Motion, paras. 7, 8.

¹⁷ Response, paras. 2, 3.

¹⁸ Response, para. 4.

¹⁹ Response, para. 9.

²⁰ Reply, paras. 3, 8.

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additional evidence of a fact or issue litigated at trial.²¹ According to Rule 115(A) of the Rules, a motion for additional evidence shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed. In addition, Rule 115(B) of the Rules provides that the additional evidence must not have been available at trial and must be relevant and credible. When determining the availability at trial, the Appeals Chamber will consider whether the party tendering the evidence has shown that it sought to make "appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence [...] before the Trial Chamber."²² Once it has been determined that the additional evidence meets these conditions, the Appeals Chamber will determine in accordance with Rule 115(B) of the Rules whether it could have been a decisive factor in reaching the decision at trial.

7. Furthermore, in accordance with established jurisprudence, where the evidence is relevant and credible, but was available at trial, or could have been discovered through the exercise of due diligence, the Appeals Chamber may still allow it to be admitted on appeal provided the moving party can establish that the exclusion of it *would* amount to a miscarriage of justice.²³ That is, it must be demonstrated that had the additional evidence been adduced at trial, it *would* have had an impact on the verdict.²⁴

8. The Appeals Chamber considers that Mr. Muvunyi has not satisfied the requirements of Rule 115 of the Rules in respect of the proposed additional evidence beyond identifying the relevant finding to which it is directed. A party seeking the admission of additional evidence on appeal must provide to the Appeals Chamber the evidence sought to be admitted to allow it to determine whether the evidence meets the requirements of Rule 115 of the Rules.²⁵ Mr. Muvunyi has not attached the relevant transcripts to his Motion, nor, contrary to his submissions, has he described the content of the proposed additional evidence in any detail which would allow the Appeals Chamber

²¹ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 4 ("*Nahimana et al.* Rule 115 Decision (8 December 2006)").

²² See *Nahimana et al.* Rule 115 Decision (8 December 2006), para. 5, quoting *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 9 (internal references omitted).

²³ *Nahimana et al.* Rule 115 Decision (8 December 2006), para. 6 (citing cases).

²⁴ *Nahimana et al.* Rule 115 Decision (8 December 2006), para. 6.

²⁵ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006, para. 18; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Hassan Ngeze's Motion for Leave to Present Additional Evidence, 14 February 2005, p. 3. See also *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, "Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to Be Taken Pursuant to Rule 94(B)", 8 May 2001, para. 5.

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to assess its credibility, relevance, or the impact it could or would have had on the specified finding made by the Trial Chamber. In this respect, it is not sufficient to simply assert without further explanation that the proposed evidence contradicts the testimony of Witness YAQ. In addition, Mr. Muvunyi has made no submissions on the availability of the proposed additional evidence at his trial and only notes when he became aware of it. Such cursory submissions do not permit the Appeals Chamber to properly assess whether the proposed additional evidence meets the criteria set out in Rule 115(B) of the Rules.

9. The Appeals Chamber notes that the Prosecution has agreed to disclose the relevant transcripts to Mr. Muvunyi. After reviewing these transcripts, and within the time-frame provided for in the Rules, Mr. Muvunyi may elect to file a new application for the admission of additional evidence, fully addressing each of the requirements set out in Rule 115 of the Rules.

Disposition

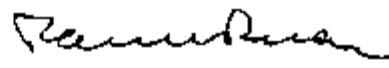
10. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion.

Done in English and French, the English version being authoritative.

Done this 27th day of April 2007,
At The Hague,
The Netherlands.



[Seal of the Tribunal]



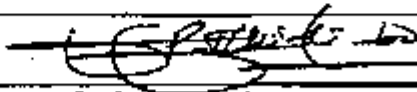
Judge Fausto Pocar
Presiding



**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

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**APPEALS CHAMBER - PROOF OF SERVICE
CHAMBRE D'APPEL - PREUVE DE NOTIFICATION**

27 April 2007	Case Name / <i>Affaire</i> : Tharcisse MUVUNYI Case No / <i>No. de l'affaire</i> : ICTR-00-55A-AR	THE PROSECUTOR v. Tharcisse MUVUNYI
To: A:	<p>JUDICIAL ARCHIVES - ARUSHA * Fax Number: 1795251</p> <p>APPEALS UNIT * Ms Félicité Talon,</p> <p>APPEALS CHAMBER * Judge / <i>Juge</i> Fausto Pocar, Presiding * Judge / <i>Juge</i> Mohamed Shahabuddeen * Judge / <i>Juge</i> Liu Daqun * Judge / <i>Juge</i> Theodor Meron * Judge / <i>Juge</i> Wolfgang Schomburg</p> <p>* Ms Catherine Marchi-Uhel * Mr Roman Boed * Concerned Associate Legal Officers * Mr Patou Fall</p> <p>DEFENSE * Accused / <i>accusé</i> : Mr. Tharcisse MUVUNYI (complete CMS4 Form)</p> <p>* Lead Counsel / <i>Conseil Principal</i>: William B. Taylor (name / nom) * In Arusha (complete CMS 2) <input type="checkbox"/> Fax Number: 1 832 812 1470 * E-mail: bli@williamtaylor.org</p> <p>* Co-Counsel / <i>Conseil Adjoint</i>: Mr. Cynthia J. Cline (name / nom) * In Arusha (complete CMS 2) <input type="checkbox"/> Fax Number: * E-mail:</p>	
From: De:	<input type="checkbox"/> Koffi Afande * Patrice Tchidimbo 	
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