

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

ICTR-00-55A-R68

24-04-2009

(707-704)

OR: ENG

TRIAL CHAMBER III

**Before Judges:** Dennis C. M. Byron, Presiding  
Vagn Joensen  
Gberdao Gustave Kam

**Registrar:** Adama Dieng

**Date:** 24 April 2009

THE PROSECUTOR

v.

Tharcisse MUVUNYI

*Case No. ICTR-00-55A-R68*

JUDICIAL RECORDS/ARCHIVES  
UNHCR  
2009 APR 24 11 P 9-35

DECISION ON DEFENCE MOTION FOR DISMISSAL AS THE  
REMEDY FOR ALLEGED RULE 68 DISCLOSURE VIOLATIONS

*Rule 68 of the Rules of Procedure and Evidence*

**Prosecution Counsel:**  
Mr. Charles Adeogun-Phillips  
Mr. Ibukunolu Babajide

**Defence Counsel:**  
Mr. William E. Taylor III  
Ms. Abbe Jolles

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**Rule 68 of the Rules**

5. Rule 68(A) imposes an obligation on the Prosecution to disclose to the defence, as soon as practicable, any material which, in the actual knowledge of the Prosecution, may suggest the innocence or mitigate the guilt of an accused, or affect the credibility of the evidence led by the Prosecution in that particular case. If an accused wishes to show that the Prosecution is in breach of its disclosure obligation, he or she must: (1) identify specifically the material sought; (2) present a *prima facie* showing of its probable exculpatory nature; and (3) prove that the material requested is in the custody or under the control of the Prosecution.<sup>4</sup>

6. The Defence submits that, during the trial of *Nyiramasuhuko et al.*, on 21 April 2004, the Prosecutor offered evidence on the same matter that is the subject of this retrial that is inconsistent with the Prosecutor's theory in this case, and that this evidence was not disclosed until 15 January 2009. It also claims that in April 2007, while Muvunyi's appeal was pending, Witness AND 59 gave testimony in both open and closed session about the Gikore meeting which was not consistent with Prosecution evidence against Muvunyi.<sup>5</sup> The Defence lastly submits that Mr. Reyntjens, an expert witness in that same case, provided testimony which exculpated Muvunyi.<sup>6</sup>

7. The Chamber finds that the Defence arguments are too vague to substantiate the *prima facie* exculpatory nature of the evidence in question. The Defence does not identify the April 2004 evidence in *Nyiramasuhuko et al.* except to say that it is inconsistent with the Prosecution's theory in this case. With relation to the April 2007 witness statements, the Defence fails to sufficiently articulate a basis as to what was said and why it is exculpatory in relation to the Accused.

8. Next, the Chamber notes that some of the evidence in question was given in closed-session and is therefore subject to protective measures. If the Defence believes that it has not been provided all exculpatory material after reviewing disclosure by the Prosecution, and then seeks to substantiate a claim of Rule 68 violation, it should first seek access to that material pursuant to the provisions of Rule 75(G).

9. Based upon the Defence arguments outlined herein, the Chamber does not have sufficient basis to find that the Prosecution has violated Rule 68, and accordingly it cannot

<sup>4</sup> *The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse, and Joseph Nzirorera*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Decision on Joseph Nzirorera's 19th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Jean-Marie Vianney Mudahinyuka (TC), 9 February 2009, para. 6.

<sup>5</sup> Motion, para. 6.

<sup>6</sup> Motion, para. 7.

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## INTRODUCTION

1. On 2 February 2000, an indictment was confirmed against Tharcisse Muvunyi and two other military officers. After his arrest, on 11 December 2003, his case was severed, and a separate indictment filed on 23 December 2003. The Trial Chamber rendered its Judgement on 12 September 2006, convicting Muvunyi for Counts 1 (Genocide), 3 (Direct and Public Incitement to Commit Genocide) and 5 (Other inhumane acts). He was sentenced to twenty-five years imprisonment. On 29 August 2008, the Appeals Chamber delivered its judgement granting all grounds of appeal and reversing the convictions, except with relation to Count 3. On Count 3, the Appeals Chamber ordered a retrial pursuant to Rule 118(C) of the Rules, limited to the allegation of participation in the meeting at Gikore Trade Center in May 1994.
2. The Defence now alleges that the Prosecutor failed to disclose exculpatory evidence and requests the dismissal of the remaining charge as remedy to the material prejudice suffered by the Accused.<sup>1</sup>
3. The Prosecution opposes the motion.<sup>2</sup>

## DELIBERATIONS

### *Preliminary Matter*

4. The Prosecution filed its response on 11 March 2009. Since 10 March 2009 was a public holiday, the Prosecutor argues that he was not time barred to respond to the Defence Motion. Additionally, he argues that the loss of function of the ICTR email services prevented him from responding in a timely manner.<sup>3</sup> The Chamber recalls the provision of Rule 7ter(B) which reads as follows: “Where a time limit is expressed in days, only ordinary calendar days shall be counted. Weekdays, Saturdays, Sundays and public holidays shall be counted as days. However, should the time limit expire on a Saturday, Sunday or public holiday, the time limit shall automatically be extended to the subsequent working day.” Accordingly, the Chamber finds that the Prosecution Response was timely filed.

<sup>1</sup> Accused Tharcisse Muvunyi’s Motion For Dismissal, filed on 5 March 2009 (“Motion”); Accused’s Reply to the Prosecutor’s Response to Accused Tharcisse Muvunyi’s Motion for Dismissal, filed on 13 March 2009 (“Reply”).

<sup>2</sup> Prosecutor’s Reply to Tharcisse Muvunyi’s Motion for Dismissal, filed on 10 March 2009 (“Prosecution Response”).

<sup>3</sup> Prosecution Response, para. 4.

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consider the proposed remedy of dismissal of the remaining count of the indictment at this stage of the proceedings.

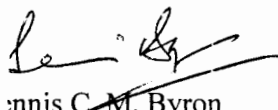
***Abuse of Process Doctrine***

10. The Chamber believes that the Defence has failed to show how this re-trial is a violation of the Accused's rights. The Accused's rights have been adequately considered and protected by the Appeals Chamber in its reversal of all charges except the remaining one.

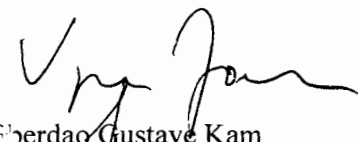
**FOR THESE REASONS, THE CHAMBER**

**DENIES** the Defence motion in its entirety;

Arusha 24 April 2009, done in English.

  
Dennis C. M. Byron  
Presiding Judge

  
Vagn Joensen  
Judge

  
Gberdao Gustave Kam  
Judge

