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UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-00-55A-AR65

20th May 2009

{58/H – 55/H}

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Liu Daqun
Judge Theodor Meron
Judge Carmel Agius
Judge Iain Bonomy

Registrar: **Mr. Adama Dieng**

Decision of: **20 May 2009**

ICTR Appeals Chamber
Date: *20th May 2009*
Action: *R-Turno2*
Copied To: *Concerned Judges, SLO's, LO's, ALO's, Parties, CMS (Amaha), LSS.*

THE PROSECUTOR

v.

THARCISSE MUVUNYI

Case No. *ICTR-2000-55A-AR65*

DECISION ON APPEAL CONCERNING PROVISIONAL
RELEASE

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The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow

Counsel for Tharcisse Muvunyi:

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

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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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 an appeal by Tharcisse Muvunyi, filed on 14 April 2009,¹ against a decision of 3 April 2009 by Trial Chamber III ("Trial Chamber"), denying him provisional release.² The Prosecution has not responded.³

INTRODUCTION

2. On 29 August 2008, the Appeals Chamber reversed Mr. Muvunyi's convictions on three counts of genocide, direct and public incitement to commit genocide, and other inhumane acts as crimes against humanity as well as his sentence of 25 years of imprisonment entered by Trial Chamber II on 12 September 2006.⁴ It ordered a retrial limited to the allegation under Count 3 of the Indictment (direct and public incitement to commit genocide) related to a speech Mr. Muvunyi purportedly gave at the Gikore Trade Center.⁵ The Appeals Chamber further ordered Mr. Muvunyi to remain in the custody of the Tribunal pending his retrial.⁶

3. On 28 November 2008 and 14 January 2009, Mr. Muvunyi requested to be provisionally released to a "safe house" in Tanzania under the control of the Tribunal.⁷ The Presiding Judge of the Trial Chamber denied the request on 29 January 2009.⁸ In the decision, he noted that the Prosecution did not object to provisional release and that there was no risk that Mr. Muvunyi would flee.⁹ However, he reasoned that continued detention was "not disproportional and required by the interest of justice" in view of the severity of the remaining charge.¹⁰ He further noted that the Chamber was ready to start the proceedings.¹¹ On 9 February 2009, Mr. Muvunyi sought reconsideration of the decision by the full bench.¹²

¹ Accused Tharcisse Muvunyi's Appeal of the Trial Chamber's Denial of Provisional Release, 14 April 2009 ("Appeal").

² *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-R65, Decision on Defence Motion for Reconsideration of Decision Denying Provisional Release, 3 April 2009 ("Impugned Decision").

³ The Prosecution also did not oppose the motion before the Trial Chamber. See Impugned Decision, para. 7.

⁴ *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-2000-55A-A, Judgement, 29 August 2008 ("*Muvunyi Appeal Judgement*"), paras. 1, 3, 4, 171.

⁵ *Muvunyi Appeal Judgement*, paras. 148, 171.

⁶ *Muvunyi Appeal Judgement*, para. 171.

⁷ Impugned Decision, para. 4; *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-R65, Decision on Defence Motion for Provisional Release, 29 January 2009 ("Decision of 29 January 2009"), para. 3.

⁸ Decision of 29 January 2009, para. 5.

⁹ Decision of 29 January 2009, paras. 4, 5.

¹⁰ Decision of 29 January 2009, para. 5.

¹¹ Decision of 29 January 2009, para. 5.

¹² Impugned Decision, para. 5.

4. The Trial Chamber denied Mr. Muvunyi's request for reconsideration of the Decision of 29 January 2009 in the Impugned Decision.¹³ It reasoned that the proceedings were at an "extremely advanced stage of the trial – on the verge of beginning retrial" on a serious charge which could carry a sentence up to 25 years of imprisonment.¹⁴ In view of this and the fact that Mr. Muvunyi had already been detained for 8 years, it also considered that he was a flight risk, in particular recalling that he did not voluntarily surrender to the Tribunal.¹⁵ Furthermore, it noted that a "safe house" is not intended to detain occupants, but rather to protect them from outside threats.¹⁶ As such, "if [Mr. Muvunyi] were to be accommodated in a safe house with a view to his continued detention, it would not constitute a provisional release, but a variation of his detention which falls under the jurisdiction of the President of the Tribunal pursuant to Rule 64".¹⁷ Finally, the Trial Chamber noted that Mr. Muvunyi had merely averred and had not shown proof in his submissions that he would not be a flight risk or that the Tribunal could adequately guard him in a "safe house".¹⁸

5. Mr. Muvunyi contends that the Trial Chamber erred in denying him provisional release.¹⁹ In this respect, he notes that he has been held for nearly 9 years, the Prosecution does not oppose his release, and he is neither a flight risk, as the Presiding Judge originally noted in the Decision of 29 January 2009, nor does he pose a danger to anyone.²⁰ Consequently, he submits that there are no impediments to his release, and as such the Trial Chamber has acted unreasonably in denying his request.²¹

DISCUSSION

6. A decision on provisional release by a Trial Chamber under Rule 65 of the Rules of Procedure and Evidence of the Tribunal ("Rules") is discretionary.²² Accordingly, the relevant inquiry is whether the Trial Chamber correctly exercised its discretion in reaching that decision, not whether the Appeals Chamber agrees with it.²³ The Appeals Chamber will only overturn a Trial

¹³ Impugned Decision, para. 18.

¹⁴ Impugned Decision, para. 15.

¹⁵ Impugned Decision, para. 15.

¹⁶ Impugned Decision, para. 16.

¹⁷ Impugned Decision, para. 16.

¹⁸ Impugned Decision, para. 17.

¹⁹ Appeal, para. 6, p. 4.

²⁰ Appeal, para. 11.

²¹ Appeal, paras. 6, 11, p. 4.

²² *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR65, Decision on Matthieu Ndirumpatse's Appeal Against Trial Chamber's Decision Denying Provisional Release, 7 April 2009 ("*Karemera et al. Appeal Decision*"), para. 4. See also *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.11, Decision on Praljak's Appeal of the Trial Chamber's 2 December 2008 Decision on Provisional Release, 16 December 2008 ("*Prlić et al. Appeal Decision*"), para. 4.

²³ *Karemera et al. Appeal Decision*, para. 4; *Prlić et al. Appeal Decision*, para. 4.

Chamber's decision on provisional release where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.²⁴

7. Under Rule 65(B) of the Rules, a Trial Chamber may order provisional release only if it is satisfied that, if released, the accused will appear for trial and will not pose a danger to any victim, witness or other person and after giving the host country and the country to which the accused seeks to be released the opportunity to be heard.²⁵

8. The Appeals Chamber recalls that the relevant factors in considering a request for provisional release as well as the weight to be accorded to them depend upon the particular circumstances of each case.²⁶ A review of the Impugned Decision and the Decision of 29 January 2009 reflects that the fact that the commencement of Mr. Muvunyi's retrial is imminent on a serious charge of direct and public incitement to commit genocide was a key factor in denying provisional release.²⁷ The Appeals Chamber agrees that the advanced stage of Mr. Muvunyi's case, including the impending commencement of his retrial may constitute a reasonable basis to deny provisional release, in particular in the absence of any humanitarian reasons.²⁸ Mr. Muvunyi points to no error in the Trial Chamber's findings on this consideration. Consequently, the Appeals Chamber can identify no discernible error on the part of the Trial Chamber in denying provisional release on this basis. Therefore, the Appeals Chamber does not need to address Mr. Muvunyi's other arguments on appeal.

DISPOSITION


9. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appeal.

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

Done this 20th day of May 2009,
At The Hague,
The Netherlands.



[Seal of the Tribunal]


Judge Fausto Pocar
Presiding

²⁴ *Karemera et al.* Appeal Decision, para. 4; *Prlić et al.* Appeal Decision, para. 5.

²⁵ *Karemera et al.* Appeal Decision, para. 10; *Prlić et al.* Appeal Decision, para. 6.

²⁶ *Prlić et al.* Appeal Decision, para. 7.

²⁷ Impugned Decision, para. 15; Decision of 29 January 2009, para. 5. The trial is set to start on 18 June 2009. See T. 29 April 2009 p. 15. The trial was originally scheduled to start on 12 January 2009, but counsel for Mr. Muvunyi did not appear before the Trial Chamber at that time and instead sought to postpone its commencement. See Decision of 29 January 2009, para. 5.

²⁸ See, e.g., *Prlić et al.* Appeal Decision, para. 7 ("Moreover, an application for provisional release brought at a late stage of proceedings, and in particular after the close of the Prosecution case, should only be granted when serious and sufficiently compelling humanitarian reasons exist.").