



UNITED NATIONS  
NATIONS UNIES

ICTR-00-55A-PT  
17-06-2009  
(927-922)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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OR: ENG

**TRIAL CHAMBER III**

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

**Registrar:** Mr. Adama Dieng

**Date:** 17 June 2009

**THE PROSECUTION**

v.

**Tharcisse MUVUNYI**  
*Case No. ICTR-00-55A-PT*

JUDICIAL RECORDS ARCHIVE  
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**DECISION ON THE PROSECUTOR'S MOTION FOR RECONSIDERATION OF  
THE TRIAL CHAMBER'S ORDER TO COMPLY WITH THE SCHEDULING  
ORDER**

*Rule 54 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Charles Adeogun-Phillips  
Ibukunolu Alao Babajide

**Counsel for the Accused:**

William E. Taylor III  
Abbe Jolles

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## INTRODUCTION

1. On 29 April 2009, a status conference was held where the parties discussed and agreed upon deadlines for filing of motions and other pre-trial matters, as well as dates for the commencement of the retrial before this Chamber.<sup>1</sup>
2. On 8 May 2009, the Chamber issued a Scheduling Order confirming various deadlines for both the Prosecution and the Defence.<sup>2</sup>
3. On 22 May 2009, the Chamber issued a warning to the Senior Trial Attorney in this case because he did not comply with the deadline set by the Scheduling Order for filing a motion requesting the transfer of detained witnesses.<sup>3</sup>
4. On 26 May 2009, noting that the Prosecution had still not complied with other aspects of the Scheduling Order, the Chamber ordered the Prosecution to comply with the Scheduling Order and issued a warning to the Prosecutor pursuant to Rule 46 of the Rules of Procedure and Evidence.<sup>4</sup>
5. The Prosecution now moves the Chamber to reconsider the Order to Comply. In particular, the Prosecution requests the Chamber to (i) vacate its order to the Prosecution to file any preliminary motions, including any motion for protective measures, by 29 May 2009; (ii) vacate the order to the Prosecution to file a list of the exhibits it intends to use at trial, and to serve a copy of each of the said exhibits to the Defence and Chamber, by 29 May 2009; (iii) withdraw the warning pursuant to Rule 46 to the Prosecution to comply with orders of the Tribunal; and, (iv) withdraw the request to the Registry to serve the Order to Comply on the Prosecutor and the Senior Trial Attorney in person.<sup>5</sup>
6. The Defence has not responded to the Motion.

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<sup>1</sup> T. 29 April 2009.

<sup>2</sup> *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-PT ("*Muvunyi*"), Scheduling Order, 8 May 2009, p. 3 ("*Scheduling Order*").

<sup>3</sup> *Muvunyi*, Order for the Transfer of Prosecution Witnesses from Rwanda, 22 May 2009, para. 2 ("*Transfer Order*").

<sup>4</sup> *Muvunyi*, Order to Comply with Scheduling Order, 26 May 2009 ("*Order to Comply*").

<sup>5</sup> Prosecutor's Motion for Reconsideration of the Trial Chamber's Order to Comply with Scheduling Order Dated 26 May 2009, filed 29 May 2009 ("*Motion*").

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## DELIBERATIONS

7. The Chamber has the inherent power to reconsider its own decisions, but it is an exceptional remedy available only in particular circumstances. Reconsideration is permissible when: (i) a new fact has been discovered that was not known to the Chamber at the time it made its original decision; (ii) there has been a material change in circumstances since it made its original decision; or (iii) there is reason to believe that its original decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice thereby warranting the exceptional remedy of reconsideration.<sup>6</sup> The Prosecution's motion does not meet any of these criteria.

### *Preliminary Motions*

8. The Prosecution broadly argues that the Chamber's order to file any preliminary motions by 29 May 2009 was unnecessary because it had already complied with that order as of the date of the Order to Comply.

9. First, the Prosecution argues that the order in the Scheduling Order to file preliminary motions by 15 May 2009 could only relate to the timing of filing, rather than an order to actually file such motions.<sup>7</sup> The Chamber agrees with the Prosecution's assertion that the order to file *any* preliminary motions is not a requirement to file such motions, but rather is plainly directed at establishing deadlines for filing.

10. Second, the Prosecution claims it was unfairly penalized in the Order to Comply because it does not need to file a motion for protective measures, as suggested therein.<sup>8</sup> The Prosecution contends that no other application is required for protective measures because a decision issued in the original trial granting its request for protective measures for those witnesses named and any other witnesses covers all of its witnesses, including a "new" witness BZB who was not involved in the original proceedings.<sup>9</sup>

11. However, the Chamber has issued an Order concerning the protective status of the Prosecution witnesses, where it finds that the Prosecution was wrong in law in that

<sup>6</sup> *The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse, and Joseph Nzirorera*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Reconsideration of 2 December 2008 Decision, 27 February 2009, para. 2.

<sup>7</sup> Motion, para. 12.

<sup>8</sup> Motion, para. 17; Order to Comply, para. 4.

<sup>9</sup> Motion, para. 19; See *The Prosecutor v. Muvunyi and Others*, Case No. ICTR-2000-55-I, Decision on the Prosecutor's Motion for Order for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 25 April 2001.

conclusion.<sup>10</sup> The Prosecution did need to file a motion for protective measures, and failed to do so by the time allotted. Therefore, no reconsideration of that order is warranted.

12. Third, the Prosecution argues that it was unreasonable for the Chamber to issue a warning pursuant to Rule 46 to comply with the orders of the Chamber as a result of its failure to file a motion for the transfer of detained witnesses pursuant to Rule 90*bis* within the time mandated by the Scheduling Order.

13. The Prosecution acknowledges its tardiness in filing this motion on 21 May 2009, rather than by 15 May 2009 as ordered in the Scheduling Order, and attributes this delay to the Rwandan government.<sup>11</sup> The Prosecution states that it waited to file the motion until the receipt of the documents required by Rule 90*bis*.<sup>12</sup> In this regard, the Prosecution suggests that the more appropriate remedy for the late filing would be for the Chamber to deny the Prosecution the opportunity to rely on these witnesses as part of its case.<sup>13</sup>

14. The Chamber first notes that this warning was issued in the Transfer Order, which the Prosecution has not sought reconsideration of. In any event, the Chamber notes that the Prosecution plainly, and admittedly, violated the Scheduling Order. Any reasons for its failure to file on time should have been explained in the underlying motion, along with a request for leave to file out of time. There is therefore no basis whatsoever to reconsider the warning given in the Transfer Order.

#### *Exhibits*

15. The Prosecution claims that the finding in the Order to Comply that it failed to file a list of exhibits it intends to use at trial and to disclose those exhibits by the deadline imposed in the Scheduling Order was in error.<sup>14</sup> The Prosecution argues that the only exhibit it proposes to use in this case is the expert report listed in the Pre-Trial Brief.<sup>15</sup> As such, it had already complied with the order to file a list of exhibits at the time of the Scheduling Order and consequently the Order to Comply was redundant.

<sup>10</sup> *Muvunyi*, Order Regarding Protective Status of Witnesses, 29 May 2009, Disposition (“FINDS that Witness BZB is not subject to protective measures and therefore should Prosecution seek protective measures for this witness, it must file a motion justifying such relief.”).

<sup>11</sup> Motion paras. 23, 26.

<sup>12</sup> Motion para. 23.

<sup>13</sup> Motion para. 26.

<sup>14</sup> Motion para. 40; Order to Comply, para. 4.

<sup>15</sup> See Prosecutor's Pre-Trial Brief, 4 December 2008, para. 56; Prosecutor's Pre-Trial Brief, 4 May 2009, para. 56.

16. The Chamber notes, however, that the Prosecution acknowledges in the Motion that it in fact intends to rely on other exhibits.<sup>16</sup> Indeed, pursuant to a motion brought by the Prosecution,<sup>17</sup> four exhibits have been entered in these proceedings as Prosecution exhibits; namely, two expert reports,<sup>18</sup> transcripts of the expert's testimony in *Nyiramasuhuko et al.*,<sup>19</sup> and transcripts of the expert's testimony in the initial *Muvunyi* trial.<sup>20</sup> Evidently, therefore, the Prosecution did not serve a list of exhibits upon which it intends to rely by listing only one of these exhibits in its Pre-Trial Brief.

17. The Prosecution also argues that it served these exhibits on both the Defence and the Chamber because they were attached to its motion to have them admitted into evidence.<sup>21</sup> However, the Chamber notes that the Prosecution in fact did not attach all of the documents to this motion.<sup>22</sup>

18. The Prosecution has clearly failed to comply with the Chamber's order to provide a simple list enumerating the exhibits it intends to rely on. The Prosecution has not shown that the Chamber erred in ordering it to comply with the Scheduling Order in this respect, or in issuing a warning to comply with orders of the Chamber as a result of its failure to do so. No reconsideration of this aspect of the Order to Comply is warranted.

#### *Natural Justice and Due Process*

19. The Prosecution claims that a basis for its desire for the withdrawal of the Rule 46(A) warning in the Order to Comply is the lack of due process accorded by the Chamber when it failed to invite submissions on the alleged violations so that it would have had an opportunity to make representations.<sup>23</sup>

<sup>16</sup> Motion, paras. 32-33, 37-39.

<sup>17</sup> See *Muvunyi*, Decision Admitting the Expert Evidence of Évariste Ntakirutimana, 29 January 2009 ("Decision Admitting Expert Evidence").

<sup>18</sup> Exhibit P1-R(B) (English), Exhibit P1-R(A) (French); Exhibit P2-R(B) (English), Exhibit P2-R(A) (French).

<sup>19</sup> Exhibit P3-R(A) (English); Exhibit P3-R(B) (French).

<sup>20</sup> Exhibit P4-R(A) (English); Exhibit P4-R(B) (French).

<sup>21</sup> Motion, para. 39.

<sup>22</sup> *Muvunyi*, Decision Admitting the Expert Evidence, para. 5: "In [the motion brought on 4 December 2008], the Prosecutor attached only one of the two expert reports (Exhibit 159), the expert's *curriculum vitae* (Exhibit 157), and the transcripts of the cross-examination during the initial trial, while in footnote 1 he referred to all the documents admitted on 24 March 2005 [in the initial *Muvunyi* trial]. That was the confusion which, on 14 January 2009, the Chamber requested the Prosecutor to correct. However, in his filing of 15 January 2009, the Prosecutor again referred to all the same documents but attached only the second report (Exhibit 158)."

<sup>23</sup> Motion para. 45.

20. In the same vein, the Prosecution claims that the order of the Chamber warning an individual Counsel representing the Prosecutor is unlawful.<sup>24</sup> The Prosecution submits that it would have been proper for the Chamber to issue a warning to the Prosecutor who, in exercise of his discretion, may then commence disciplinary action against his agent or representative, *i.e.* the individual Prosecutor.<sup>25</sup>


21. The Chamber does not agree that the principles of natural justice or due process require that the Chamber invite submissions before issuing a warning pursuant to Rule 46. The plain language of the Rule does not require as such, as long as one of the enumerated criteria for issuing such a warning is met. The Prosecution has not cited any jurisprudence to support its argument and, in any event, the Chamber notes that the practice of the Tribunal indicates that submissions are not required in every instance.


22. The Chamber also finds that, based on the structure and the plain language of Rule 46, the Prosecution's submission that it was unlawful to sanction an individual counsel is unfounded. Rule 46(A) provides that the Chamber may sanction "a" counsel if "his" conduct meets the enumerated criteria, which is explicitly applicable to Counsel for the Prosecution. This language makes it clear that a warning, issued before sanctions are imposed, may be imposed on an individual counsel, including those from the Office of the Prosecutor, at the Chamber's discretion. The Prosecution therefore has not proven that reconsideration of the Order to Comply is warranted in this respect.

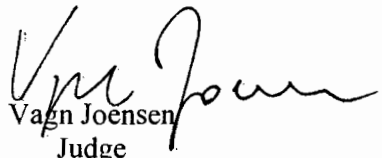
**FOR THESE REASONS, THE CHAMBER:**

**DENIES** the Prosecutor's Motion in its entirety.

Arusha, 17 June 2009, done in English.

  
Dennis C. M. Byron  
Presiding Judge

  
Gberdao Gustave Kam  
Judge

  
Vagn Joensen  
Judge



<sup>24</sup> Motion para. 42.

<sup>25</sup> Motion paras. 43-44.