ICTR-00-55-T
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(978-970)

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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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: 18 August 2009

THE PROSECUTOR

v.

Tharcisse MUVUNYI

Case No. ICTR-00-55A-T

DECISION ON MOTION FOR JUDGEMENT OF ACQUITTAL

Rule 98bis 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

INTRODUCTION

1. On 12 September 2006, Trial Chamber II rendered a Judgement convicting Tharcisse Muvunyi for genocide (Count 1), direct and public incitement to commit genocide (Count 3) and other inhumane acts (Count 5).[1] On 29 August 2008, the Appeals Chamber delivered its judgement granting all grounds of appeal and reversing the convictions. On Count 3, the Appeals Chamber ordered a retrial of the allegation concerning Muvunyi's alleged speech at the Gikore Centre as set out in paragraphs 3.24 and 3.25 of the Indictment.[2]

2. At the close of the Prosecution's case on his retrial for direct and public incitement to commit genocide, Tharcisse Muvunyi moves for judgement of acquittal, pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence ("Rules"), on the ground that while the Indictment alleges culpable conduct in early May 1994, the evidence adduced addressed activities in late May or early June.[3] The Defence contends that this is a fatal variance and amounts to a failure to lead evidence on an essential element of the offence charged against him. The Prosecution rejects the argument and seeks the dismissal of the Motion in its entirety.[4]

DELIBERATIONS

Legal Principles

3. Rule 98 *bis* provides:

> If after the close of the case for the prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment, the Trial Chamber...shall order the entry of judgement of acquittal in respect of those counts.

4. The cardinal test under Rule 98 *bis* is whether there is sufficient evidence upon which a reasonable trier of fact *could*, if the evidence is believed, find the accused guilty of the crime charged.[5] The question for the Chamber, therefore, is not whether the trier *would* in

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[1] *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T ("*Muvunyi*"), Judgement and Sentence, 12 September 2006.

[2] *Muvunyi*, Judgement (AC), 29 August 2008, para. 148.

[3] Accused Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98bis, filed 6 July 2009 ("Motion"); Accused Tharcisse Muvunyi's Reply to Prosecutor's Response to Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98bis, filed 10 July 2009 ("Reply").

[4] Prosecutor's Response to Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98*bis*, filed 9 July 2009 ("Prosecution Response").

[5] *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-T, Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, 5 June 2009; *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A ("*Jelisić*"), Judgement (AC), 5 July 2001, para 37: "The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond a reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether

fact arrive at a conviction beyond reasonable doubt in relation to the Prosecution evidence (if accepted) but whether the trier *could.* Under Rule 98 *bis,* the Chamber will assess the Prosecution evidence as a whole, and make any reasonable inferences.[6] The Chamber shall assume the evidence to be reliable and credible unless convincing arguments have been raised that it is obviously unbelievable, such that no reasonable trier of fact could rely upon it.[7]

5. In sum, a Trial Chamber should only uphold a motion for acquittal if it is entitled to conclude that no reasonable trier of fact could find the evidence sufficient to sustain a conviction beyond reasonable doubt.[8] This will only be the case when there is no evidence whatsoever which is probative of one or more of the required elements of a crime charged, or where the only such evidence is incapable of belief.[9]

The Charge

6. The sole count at issue in the present proceedings charges Tharcisse Muvunyi with individual responsibility, pursuant to Article 6 (1) of the Statute, for having committed Direct and Public Incitement to Commit Genocide:

> 3.24 During the events referred to in this indictment, Lieutenant Colonel **MUVUNYI**, in the company of the chairman of the civil defence program for Butare who later became the *Prefet* of Butare *préfecture*, and other local authority figures, went to various communes all over Butare *prefecture* purportedly to sensitize the local population to defend the country, but actually to incite them to perpetrate massacres against the Tutsis. These sensitization meetings took place in diverse locations throughout Butare *préfecture*, such as:
>
> ...
>
> *-at the Gikore Center sometime in early May 1994; ...*
>
> 3.25. At the meetings referred to in paragraph 3.24 above, which were attended almost exclusively by Hutus, Lieutenant Colonel *MUVUNYI*, in conjunction with these local authority figures, publicly expressed virulent anti-Tutsi sentiments, which they communicated to the local population and militiamen in traditional proverbs.

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the trier would in fact arrive at a conviction beyond a reasonable doubt on the prosecution evidence (if accepted) but whether it could. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond a reasonable doubt and yet, even if no defense evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond a reasonable doubt."

[6] *The Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-T, Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98 *bis*, 22 May 2007, para. 3; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T ("*Bagosora et al.*"), Decision on Motions for Judgement of Acquittal, 2 February 2005, para. 11.

[7] *Jelisić*, Judgement (AC), para. 55; *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23-T, Decision on Motion for Acquittal, 3 July 2000, para. 4.

[8] *Jelisić*, Judgement (AC), para. 56; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98*bis*, 21 June 2004, para. 17.

[9] *Bagosora et al.*, Decision on Motions for Judgement of Acquittal, para. 9.

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> The people understood these proverbs to mean exterminating the Tutsis and the meeting nearly always resulted in the massacre of Tutsis who were living in the commune or who had taken refuge in the commune.

7. The Prosecution adduced evidence from 5 witnesses who testified that they attended a public meeting at the Gikore Centre and heard Tharcisse Muvunyi speak. There was testimony that Muvunyi encouraged the crowd to kill Tutsis, and that after the meetings there were massacres of Tutsis.[10]

8. The witnesses were unable to specify the exact date of the meeting, but generally gave a range instead.[11] The Defence cross-examined the witnesses on this issue, and questioned several regarding the alleged attendance of Alphonse Nteziryayo at the meeting, who was described as attending in the capacity of *préfet* of Butare. Counsel for the Defence suggested that since the appointment as *préfet* occurred in mid-June the witnesses could not be believed or they were testifying about a different meeting to that plead in the Indictment.[12]

9. The primary point raised by the Defence in support of its Motion was that the evidence of the Prosecution witnesses did not show that the meeting at the Gikore Centre occurred in early May as plead in the Indictment and that consequently, no conviction could be entered against the Accused.[13] The Defence also argues that there is no evidence that Tharcisse Muvunyi attended the Gikore meeting in the company of the chairman of the civil defence programme for Butare who later became *préfet* of Butare.[14] The Chamber notes, however, that there is evidence that *could* support this allegation,[15] and therefore it rejects this aspect of the Motion.

10. It is not disputed that there was a variance between the pleading and the evidence regarding the date of the Gikore meeting. The Prosecution acknowledges that paragraph 3.24

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[10] Witness FBX, T. 17 June 2009 pp. 5-7, 9-11; Witness AMJ, T. 18 June 2009, pp. 22-28; Witness CCP, T. 18 June 2009 pp. 60-63; Witness YAI, T. 19 June 2009 pp. 25-26; Witness CCS, T. 22 June 2009 pp. 10-11.

[11] *See* Witness FBX, T. 17 June 2009 p. 6 (meeting in "mid-May"); Witness AMJ, T. 18 June 2009 pp. 22 ("It was in May 1994 between the 22nd and the 24th of May 1994"), 55; Witness CCP, T. 18 June 2009 p. 60 ("if it was not in May, then it would have been in June"); Witness CCS, T. 22 June 2009 p. 9 ("in the middle of May -- well, in any event, it was in May, towards the middle.").

[12] *See* Witness FBX, T. 18 June 2009 p. 6 ("if it was true or a fact that Nteziryayo was made *préfet* of Butare June 17th, the meeting that you allude to happening in your community must have taken place sometime after May 17th; isn't that the case -- or June 17th, I'm sorry, June 17th; isn't that the case?"); Witness AMJ, T. 18 June 2009 p. 55 ("it has been established as a historical fact or otherwise that Alphonse Nteziryayo was made the *préfet* of Butare June 17th, 1994, wouldn't it be a fact that if you did, in fact, attend a meeting where he was the prefect, it would have been in -- after June 17th, 1994 and not in May, as you've testified?").

[13] Motion, paras. 6, 10-21; Reply, paras. 5-21.

[14] Reply, paras. 4-6, 10.

[15] *See* Witness FBX, T. 17 June 2009 p. 7; Witness AMJ, T. 18 June 2009 p. 22; Witness CCP, T. 18 June 2009 p. 63; Witness CCS, T. 22 June 2009 p. 10.

of the Indictment pleads the relevant timeframe incorrectly as it should have alleged that the meeting occurred in late May or early June 1994, rather than early May.[16] The Chamber does not accept the Prosecution's argument, however, that the date on which the alleged criminal act is alleged to have taken place is not an element of the offence which it must prove.[17]

11. The Chamber notes that the Indictment alleges that Tharcisse Muvunyi gave a speech at the Gikore Centre on only one occasion. The Prosecution's allegation is about a particular event, rather than a more generic series of speeches or meetings. After careful consideration, the Chamber finds that because the evidence led at trial by the Prosecution differs from the Indictment with respect to the date of the meeting, this renders the Indictment defective with respect to that material fact, rather than supporting the conclusion that the Prosecution evidence is unrelated to this allegation.[18]

12. The Defence submits that it would be inconsistent with settled jurisprudence for the Chamber to consider whether this defect has been cured by the Prosecution and that it is bound to determine the Motion on the pleadings and evidence as adduced.[19] The Chamber recalls the jurisprudence which holds that the analysis under Rule 98 *bis* does not call for a review of the Indictment, and that the Chamber is not mandated to consider whether the Defence had insufficient notice of charges or whether there are other legal defects in an Indictment which could lead to an acquittal.[20] However, the Chamber finds that the particular

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16 Prosecution Response, para. 26.

17 Prosecution Response, para. 11; See *The Prosecutor v. Radoslav Brdjanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, para. 19 March 2004, para. 5: "The elements of a crime are those facts which the Prosecution must prove to establish that the conduct of the perpetrator constituted the crime alleged."

18 *Muvunyi*, Judgement (AC). para. 18: "Defects in an indictment may come to light during the proceedings because the evidence turns out differently than expected"; *The Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A (*"Kupreškić et al."*), Judgement (AC), 23 October 2001, para. 92: "There are, of course, instances in criminal trials where the evidence turns out differently than expected."

19 Motion, paras. 6-7, 13; Reply, paras. 10, 12-13, 16-20.

20 *See Bagosora et al.*, Decision on Motions for Judgement of Acquittal, 2 February 2005, para. 7: "The Chamber is not mandated to consider whether the Defence has had insufficient notice of charges to sustain a conviction, or whether there are other legal defects in an Indictment which could lead to acquittal."; *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-T (*"Ntagerura et al."*), Separate and Concurring Decision of Judge Williams on Imanishimwe's Defence Motion for Judgement of Acquittal on Count of Conspiracy to Commit Genocide Pursuant to Rule 98 bis, 13 March 2002, para. 6: the Rule 98 *bis* analysis "does not amount to a further review of the Indictment, but is rather a contextual examination of the Prosecutor's evidence.... [T]his is not the appropriate time to challenge defects in the Indictment."; *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Decision on the Defence Motion for a Judgment of Acquittal in Respect of Laurent Semanza After Quashing the Counts Contained in the Third Amended Indictment (Article 98*Bis* of the Rules of Procedure and Evidence) and Decision on the Prosecutor's Urgent Motion for Suspension of Time-Limit for Response to the Defence Motion for a Judgment of Acquittal, 27 September 2001, para. 18: "Pleas for quashing the indictment cannot be raised under Rule 98*bis*. Whatever defects the Defence perceived in the form of the indictment, such as its claim that the charges in the indictment are vague or in contradiction to the indictment and the supporting materials, were to be raised under Rule 72 within the time limits prescribed therein. It is wholly unacceptable to raise such matters half-way through the trial."; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Defence Motions for Acquittal Under Rule 98 *bis*,

circumstances of this case require it to determine whether the Prosecution evidence that the meeting at the Gikore Centre occurred in late May or early June 1994 could support a conviction on the Indictment which alleges that it occurred in early May. In particular, if the defect in the Indictment has not been cured by the Prosecution, it would be fatal to the Prosecution as the charge, and indeed the case, would be dismissed.

13. The Chamber also notes that this is not the first time that the Defence has taken issue with the pleading of the time-frame of the meeting at the Gikore Centre. On appeal, the Defence contended that paragraph 3.24 of the Indictment did not adequately plead the date of the Gikore meeting.[21] The Appeals Chamber rejected the contention that the Indictment was vague, holding that Tharcisse Muvunyi "would have known that he was being charged with inciting genocide at the Gikore Centre in 'early May 1994'."[22] It is not clear, however, whether the Appeals Chamber considered whether the Indictment was defective because the evidence led in the first trial, and indeed the finding made by the Trial Chamber in its Judgement, concerned a later or broader date than "early May 1994." For this reason, the Chamber will assess whether or not the defect regarding the time-frame of the meeting has been cured by the Prosecution, as it claims.[23]

Defect in the Indictment

14. Articles 20 (4)(a) and 20 (4)(b) of the Statute, in conjunction with Articles 20 (2) and 17 (4) of the Statute and Rule 47 (C) of the Rules, express the Prosecution's obligation to plead the charges against an accused and the material facts supporting those charges with sufficient precision in an indictment so as to provide notice to the accused of the charges against him or her. No conviction against the accused can be entered on the basis of material facts omitted from the indictment or pleaded with insufficient specificity, unless the Prosecution has cured the defect in the indictment by provision to the accused of "timely, clear and consistent information detailing the factual basis underpinning the charges against him or her."[24] What is required is notice that the material fact will be relied upon as part of

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16 December 2004, paras. 73-35: "requests made by the Defence...related only to the form or to the alleged defects of the Amended Indictments ... are therefore beyond the scope of Rule 98*bis.*"

[21] *Muvunyi*, Judgement (AC), para. 138; *See also* Accused Tharcisse Muvunyi's Brief on Appeal, filed 13 March 2007, paras. 87-88, arguing that paragraph 3.24 of the Indictment "failed to set out any date for which the alleged conduct took place."

[22] *Muvunyi*, Judgement (AC), para. 140.

[23] Prosecution Response, paras. 27-37.

[24] *Kupreškić et al.*, Judgement (AC), paras. 88-90, 114; *Muvunyi*, Judgement (AC), paras. 18-20; *Bagosora et al.*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), 18 September 2006, para. 17. *See also Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement (AC), 28 February 2005,

the Prosecution case, and how. The essential question is whether the Defence has had reasonable notice of, and a reasonable opportunity to investigate and confront, the Prosecution case.[25] However, the Appeals Chamber has warned that such "curing" is likely to occur only in a limited number of cases and is not without limits.[26]

15. The Pre-Trial Brief filed by the Prosecution prior to Tharcisse Muvunyi's first trial indicated that the meeting in Gikore occurred "sometime in May 1994".[27] The summary of Witness CCP's anticipated testimony attached to the Pre-Trial brief states that he "attended a meeting in May or June in Gikore" at which Muvunyi spoke. During the first trial, two Prosecution witnesses testified about the Gikore meeting, providing timeframes of the end of May and May or June 1994.[28] The Defence adduced evidence about a public meeting at Gikore *secteur* on 23 or 24 May 1994 where Muvunyi spoke, although not in an inflammatory manner.[29] Based on the evidence, the Trial Chamber concluded that the meeting occurred in Gikore "in May 1994."[30]

16. In the retrial, the Prosecution Pre-Trial Brief, first served on 4 December 2008 and therefore about 6 months before the trial, alleges that the "meeting at the Gikore centre was held between the middle and the end of May 1994".[31] The summaries of anticipated witness testimony attached to the Prosecution Pre-Trial Brief indicate that: Witness CCP attended a meeting in Gikore during May or June 1994; Witness CCS heard Tharcisse Muvunyi speak at two meetings in Gikore, one in late April and another three or four weeks later; Witness AMJ was present at a meeting in Gikore in May 1994; Witness FBX was present at a meeting in Gikore *secteur* in May 1994; Witness YAI attended a meeting in Butare *préfecture* in May 1994; and Witness BZB attended a meeting at the Gikore trade centre around the beginning of May 1994.

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paras. 27-33; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004, paras. 193-197; *Ntagerura et al.*, Judgement (AC), paras. 21-30; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, ("*Naletilić and Martinović*"), Judgement (AC), 3 May 2006, para. 23.

25 *Prosecutor v. Balgoje Simič*, Case No. IT-95-9-A, Judgement (AC), 28 November 2006, para. 24; *The Prosecutor v. André Ntakirutimana et al.*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006, paras. 27-28; *Naletilić and Martinović*, Judgement (AC), para. 27.

26 *Kupreskic et al.*, Judgement (AC), para. 114; *Bagosora et al.*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), paras. 21 and 26.

27 Prosecutor's Pre-Trial Brief, filed 25 January 2005, para. 53

28 *Muvunyi*, Judgement and Sentence, paras. 191 (Witness YAI "attended a 'security' meeting at the market square of the Gikore Trade Centre towards the end of May 1994") and 195 (Witness CCP "first met the Accused at a meeting held in Gikore in May or June 1994").

29 *Muvunyi*, Judgement and Sentence, para. 202 (Defence Witness M078).

30 *Muvunyi*, Judgement and Sentence, para. 211.

31 The Prosecutor's Pre-Trial Brief, filed 4 December 2008, para. 14.

17. In his opening statement, the Prosecution stated that Tharcisse Muvunyi attended a meeting at the Gikore Centre "one afternoon towards the end of May 1994".[32] As noted above, the Prosecution witnesses gave evidence that the meeting occurred in mid to late May or June 1994 and the Defence ably cross-examined the Prosecution witnesses on this aspect of their testimony.

18. The Chamber notes that the Defence has not made submissions concerning whether and when it was provided with notice, nor regarding any prejudice. However, Tharcisse Muvunyi has clearly been alive to this problem for some time, as evidenced by the fact that in his appeal, he raised the issue of the adequacy of the pleading of the date of the Gikore meeting. In light of the circumstances and history of this case, the Chamber finds that it is not prejudicial to determine the matter without further submissions from the Defence.

19. Based on the above review, the Chamber finds that as early as prior to the first trial, Tharcisse Muvunyi would have been aware that the Prosecution was asserting a different time-frame for the date of the alleged Gikore meeting than that indicated in paragraph 3.24 of the Indictment. At least since receipt of the Prosecution Pre-Trial Brief in the current proceedings, Muvunyi would have been aware that the Prosecution was asserting that the Gikore meeting occurred in mid to late May 1994. The Chamber is satisfied that the Prosecution provided Muvunyi with clear, timely and consistent notice that it was alleging that the Gikore meeting occurred in mid to late May 1994, rather than early May. The Chamber further finds that Muvunyi has not been materially prejudiced as a result of this defect, as he has been aware of it for an extended period of time, and has been given an adequate opportunity to prepare his defence in response.

Sufficiency of Evidence

20. Turning to the Rule 98 *bis* matter, the Chamber recalls that all that is required of the Prosecution to withstand a motion for judgment of acquittal is evidence which, if believed, is capable of sustaining a finding of guilt beyond reasonable doubt. As noted above, the Prosecution adduced evidence that Tharcisse Muvunyi attended a meeting at the Gikore Centre in mid to late May 1994, where he spoke and encouraged the crowd to kill Tutsi.[33] The Chamber finds that this evidence, if believed, could lead a reasonable trier of fact to find

[32] T. 17 June 2009 p. 2.

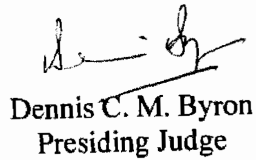
[33] Witness FBX, T. 17 June 2009 pp. 5-7, 9-11; Witness AMJ, T. 18 June 2009 pp. 22-28; Witness CCP, T. 18 June 2009 pp 60-63; Witness YAI, T. 19 June 2009 pp. 25-26; Witness CCS, T. 22 June 2009 pp. 10-11.

Muvunyi guilty beyond reasonable doubt for direct and public incitement to commit genocide.

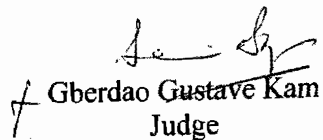
FOR THESE REASONS, THE CHAMBER:

DENIES the Defence Motion in its entirety.

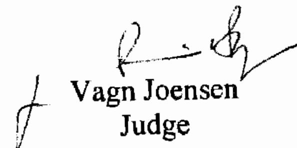
Arusha, 18 August 2009, done in English.



Dennis C. M. Byron
Presiding Judge



Gberdao Gustave Kam
Judge



Vagn Joensen
Judge

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