



UNITED NATIONS  
NATIONS UNIES

ICTR-00-55A-T  
25-Nov.-2009  
(1097-1098)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

1097  
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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:** 25 November 2009

**THE PROSECUTOR**

v.

**Tharcisse MUVUNYI**

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

2009 NOV 25 P 4: 29  
JUDICIAL RECORDS ARCHIVES  
RECEIVED

**DECISION ON APPEALS CHAMBER REMAND OF DECISION DENYING THE  
MOTION FOR JUDGEMENT OF ACQUITTAL**

*Rules 98 bis, 54 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Charles Adeogun-Phillips  
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**Counsel for the Accused:**

William E. Taylor III  
Abbe Jolles

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## INTRODUCTION

1. On 18 August 2009, the Chamber denied Tharcisse Muvunyi's motion for judgement of acquittal pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence ("Rules"). The Chamber found that the Indictment was defective with respect to the date of the alleged culpable conduct, but that this defect had been cured by the Prosecution through the provision of adequate notice.<sup>1</sup> The Chamber granted Muvunyi's request for certification to appeal the Rule 98 *bis* Decision on 2 September 2009.<sup>2</sup>

2. On 11 November 2009, the Appeals Chamber granted Tharcisse Muvunyi's appeal in part, stated that the Indictment was not defective, and remanded the matter to the Chamber for further consideration in accordance with the provisions of Rule 98 *bis* and in light of its decision.<sup>3</sup> The Chamber ordered the parties to file supplemental submissions on 13 November 2009, which addressed the materiality of the discrepancy in the timeframe alleged in the Indictment and the evidence adduced by the Prosecution.<sup>4</sup>

3. The parties filed their supplemental submissions on 20 November 2009,<sup>5</sup> and Tharcisse Muvunyi filed a reply to the Prosecution's supplemental submissions on 22 November 2009.<sup>6</sup>

## DELIBERATION

### *Preliminary Issue*

4. As a preliminary issue, the Chamber notes that its Order for Supplementary Submissions did not envision any additional submissions beyond one additional submission from each of the parties.<sup>7</sup> Accordingly, the Chamber disregards Tharcisse Muvunyi's Reply to the Prosecutor's Supplemental Submissions.

### *Legal Standard*

5. 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

<sup>1</sup> *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T ("*Muvunyi*"), Decision on Motion for Judgement of Acquittal (TC), 18 August 2009 ("Rule 98 *bis* Decision").

<sup>2</sup> *Muvunyi*, Decision on Motion for Certification to Appeal: Decision Denying Motion for Judgement of Acquittal (TC), 2 September 2009.

<sup>3</sup> *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-AR98bis ("*Muvunyi Interlocutory Appeal*"), Decision on Appeal of Decision Denying the Motion for Judgement of Acquittal (AC), 11 November 2009 ("Remand Decision"); *Muvunyi Interlocutory Appeal*, Corrigendum to Decision on Appeal of Decision Denying the Motion for Judgement of Acquittal (AC), 12 November 2009.

<sup>4</sup> *Muvunyi*, Order for Supplemental Submissions (TC), 13 November 2009 ("Order for Supplemental Submissions").

<sup>5</sup> Accused Tharcisse Muvunyi's Additional Submissions Pursuant to his Motion for Acquittal Under Rule 98 *bis*, filed on 20 November 2009 ("*Muvunyi's Additional Submission*"); Prosecutor's Supplemental Submissions Pursuant to Trial Chamber III's Order dated 13 November 2009, filed on 20 November 2009.

<sup>6</sup> Accused Tharcisse Muvunyi's Reply to Prosecutor's Supplemental Submissions Pursuant to Trial Chamber III's Order Dated 13 November 2009, filed 22 November 2009 ("*Muvunyi's Reply to the Prosecutor's Supplemental Submissions*").

<sup>7</sup> See Order for Supplementary Submissions, para. 3.

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indictment, the Trial Chamber...shall order the entry of judgement of acquittal in respect of those counts.

6. 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.<sup>8</sup> The question for the Chamber, therefore, is not whether the trier would in 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.<sup>9</sup> 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.<sup>10</sup>

7. 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.<sup>11</sup> 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.<sup>12</sup>

#### *The Charge*

8. 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 *Préfet* of Butare *préfecture*, and other local authority figures, went to various communes all over Butare *préfecture* 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; ...

<sup>8</sup> *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-T, Decision on Motion for Acquittal Pursuant to Rule 98 *bis* (TC), 5 June 2009; *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgement (AC), 5 July 2001, para 37 ("*Jelisić Appeals Judgement*"): "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 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."

<sup>9</sup> *The Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-T, Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98 *bis* (TC), 22 May 2007, para. 3.

<sup>10</sup> *Jelisić Appeals Judgement*, para. 55.

<sup>11</sup> *Jelisić Appeals Judgement*, para. 56.

<sup>12</sup> *The Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze, and Anatole Nsengiyumva*, Case No. ICTR-98-41-T, Decision on Motions for Judgement of Acquittal (TC), 2 February 2005, para. 9.

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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. 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.<sup>13</sup>

9. The Prosecution adduced evidence from five 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.<sup>14</sup> However, the witnesses were unable to specify the exact date of the meeting and generally gave a range instead.<sup>15</sup>

10. The primary point raised by the Defence in support of its motion for judgement of acquittal was that the evidence of the Prosecution witnesses did not show that the meeting at the Gikore Centre occurred in early May as pleaded in the Indictment and that consequently, no conviction could be entered against the Accused.<sup>16</sup> 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 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.<sup>17</sup>

#### *Materiality of the Variance between the Pleadings and the Evidence*

11. The Chamber must now consider whether the variance between the date pleaded in the Indictment and the evidence set forth by the Prosecution is material enough to diminish the sufficiency of the Prosecution's evidence to a degree, which would support an acquittal under Rule 98 *bis*. It is well-settled that a date may be considered a material fact if it is necessary in order to inform a defendant clearly of the charges so that he may prepare his defence.<sup>18</sup> Thus, if a date is found to constitute a material fact, it must be pleaded with sufficient specificity.<sup>19</sup>

<sup>13</sup> Indictment, paras. 3.24, 3.25.

<sup>14</sup> 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.

<sup>15</sup> 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.").

<sup>16</sup> Accused Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98bis, filed 6 July 2009, paras. 6, 10-21 ("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, paras. 5-21 ("Reply").

<sup>17</sup> Prosecutor's Response to Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98bis, filed 9 July 2009, para. 26 ("Prosecution Response").

<sup>18</sup> *Emmanuel Ndinabahizi v. The Prosecutor*, Case No. ICTR-01-71-A, Judgement (AC), para. 19.

<sup>19</sup> *Id.*

12. Tharcisse Muvunyi claims that the disparity in dates is fatal to the Prosecution's case because there were several meetings and the date was necessary to discern one meeting from another.<sup>20</sup> Muvunyi asserts that the disparity in dates indicates that the meeting charged in the Indictment is different from the one for which the Prosecution offered evidence.<sup>21</sup>

13. However, the Chamber notes that during the retrial the Prosecution only sought to prove that the Accused committed direct and public incitement to commit genocide in relation to a single meeting at the Gikore Center. The Prosecution made no attempt to prove that more than one meeting took place at the Gikore Center involving the Accused and its evidence gives no indication to the contrary.<sup>22</sup> Therefore, the Chamber considers that the variance in dates can only become material if the Defence presents evidence that more than one meeting took place at the Gikore Center between early May 1994 and early June 1994.

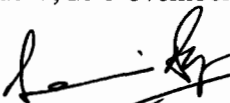
14. However, it is obvious that such an analysis cannot be conducted at the end of the Prosecution's case and before the opening of the Defence case, which is the moment during which a motion for judgement of acquittal under Rule 98 *bis* must be filed. Accordingly, the Trial Chamber denies Tharcisse Muvunyi's motion for judgement of acquittal because a final determination on the materiality of the variance between the date pleaded in the Indictment and the evidence set forth by the Prosecution can only be decided in light of the Defence's evidence.

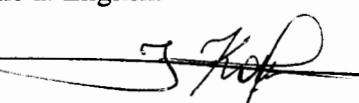
15. The Trial Chamber will consider these issues in its judgement in this case.

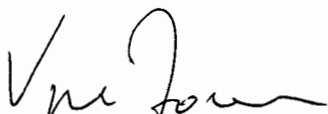
**FOR THESE REASONS, THE CHAMBER:**

**DENIES** Tharcisse Muvunyi's motion for judgement of acquittal.

Arusha, 25 November 2009, done in English.

  
Dennis C.M. Byron  
Presiding Judge

  
Gberdao Gustave Kam  
Judge

  
Vagn Joensen  
Judge



<sup>20</sup> Muvunyi's Additional Submission, para. 9.

<sup>21</sup> *Ibid* at para. 8.

<sup>22</sup> See, for example, The Prosecutor's Pre-Trial Brief, filed 4 May 2009, paras. 14-20 (referring to one meeting only); The Prosecutor's Closing Brief, filed 23 September 2009, paras. 10, 28, 29, 53, 56, 61, 62, 65, 66 (referring to one meeting only).