Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

1253/H

IN THE APPEALS CHAMBER

ICTR-00-55A-A
19th June 2008
{1253/H – 1250/H}

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Adama Dieng**

Decision of: **18 June 2008**

THE PROSECUTOR

v.

Tharcisse MUVUNYI

Case No. ICTR-00-55A-A

Decision on Muvunyi's Request for Consideration of Post-Hearing Submissions

Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Alex Obote Odora
Mr. Neville Weston
Ms. Linda Bianchi
Ms. Renifa Madenga
Mr. François Nsanzuwera
Ms. Evelyn Kamau

Counsel for Tharcisse Muvunyi:

Mr. William E. Taylor III
Ms. Abbe Jolles

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 the "Request for Permission to File and Allow Response to Post Oral Argument Request that the Appeals Chamber Consider the Case of Prosecutor v. Enver Hasanovic [*sic*] IT-01-47-A and Acquit Tharcisse Muvunyi" ("Motion") filed by Tharcisse Muvunyi ("Muvunyi") on 5 May 2008. The Prosecution responded to the Motion on 14 May 2008.[1] Muvunyi filed his reply, and a request for permission to file the reply late, on 28 May 2008.[2] The Prosecution filed a motion to expunge the late reply from the record on 6 June 2008.[3] Muvunyi has not filed any response to this motion.

BACKGROUND

2. The Appeals Chamber is seized of appeals by Muvunyi and the Prosecution against the Judgement and Sentence rendered by Trial Chamber II of the Tribunal on 12 September 2006 in the case of *The Prosecutor v. Tharcisse Muvunyi*. Oral submissions regarding these appeals were heard on 13 March 2008 ("Appeals Hearing"). In the Motion, Muvunyi requests that the Appeals Chamber consider the Appeal Judgement in *Prosecutor v. Hadžihasanović*,[4] rendered on 22 April 2008, as it represents new authority on superior responsibility that is applicable in assessing Muvunyi's liability.[5]

DISCUSSION

3. As a preliminary matter, the Appeals Chamber must determine whether to grant Muvunyi's request for permission to file his Reply late. Counsel for Muvunyi submits that she was out of the country when the Response was filed, and that she was therefore unable to file the Reply in time.[6]

[1] *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-A, Prosecutor's Response to "Accused Tharcisse Muvunyi's Request for Permission to File and Allow Response to Post Oral Argument Request that the Appeals Chamber Consider the Case of Prosecutor v. Enver Hadzihasanovic IT-01-47-A and acquit Tharcisse Muvunyi", 14 May 2008 ("Response").
[2] *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-A, Accused Tharcisse Muvunyi's Reply to OTP Response to Post Oral Argument Request that the Appeals Chamber Consider the Case of Prosecutor v. Enver Hadzihasanovic IT-01-47-A and Acquit Tharcisse Muvunyi and Request for Permission to Late File, 28 May 2008 ("Reply").
[3] *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-A, Prosecutor's Motion to Expunge from the Record "Accused Tharcisse Muvunyi's Reply to OTP Response to Post Oral Argument Request that the Appeals Chamber Consider the Case of Prosecutor v. Enver Hadzihasanovic IT-01-47-A and Acquit Tharcisse Muvunyi and Request for Permission to Late File", 6 June 2008 ("Motion to Expunge").
[4] *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-A, Judgement, 22 April 2008 ("*Hadžihasanović* Appeal Judgement").
[5] Motion, para. 2.
[6] Reply, para. 2.

The Prosecution submits that the late Reply should be expunged from the record as good cause has not been shown for its late filing.[7]

4. Under Rule 116(A) of the Rules, the Appeals Chamber may grant a motion for extension of time if good cause is shown, and it may also "recognize, as validly done any act done after the expiry of a time limit".[8] The Appeals Chamber recalls that Counsel is under an obligation to give absolute priority to observing the time limits prescribed in the Rules, and to remain apprised of filings and to respond in a timely manner regardless of location.[9] It has held previously, for example, that the unavailability of Counsel to perform these obligations due to a holiday schedule does not amount to good cause within the meaning of Rule 116 of the Rules.[10] The Appeals Chamber therefore rejects Muvunyi's request to accept the late Reply and will not consider the submissions contained therein.

5. In the Motion, Muvunyi submits that the Appeals Chamber should consider the *Hadžihasanović* Appeal Judgement as it represents new authority on the question of what constitutes adequate punishment and prevention by a commanding officer and what constitutes effective control, which are both relevant to assessing Muvunyi's liability.[11] The Prosecution responds that the Motion should be dismissed because the *Hadžihasanović* Appeal Judgement does not offer new jurisprudence that would affect the findings made by the Trial Chamber in Muvunyi's case.[12] It further argues that the issue of the adequacy of measures taken to prevent or punish crimes of subordinates is not pertinent to Muvunyi's case,[13] and that the Trial Chamber's findings regarding Muvunyi's effective control over his subordinates are not affected by the *Hadžihasanović* Appeal Judgement.[14]

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[7] Motion to Expunge, paras. 1-7.
[8] *See* Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005, para. 5. *See also The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Order Concerning the Filing of the Notice of Appeal, 22 March 2007, p. 3; *Mikaeli Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Order Concerning the Filing of the Notice of Appeal, 22 February 2006, p. 3.
[9] *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Motion for Clarification and Guidance Following the Decision of the Appeals Chamber dated 16 June 2006 in *Prosecutor v. Karamera et al.* Case and Prosecutor's Motion to Object to the Late Filing of Jean-Bosco Barayagwiza's Reply, 8 December 2006 ("*Barayagwiza* Decision of 8 December 2006"), para. 3; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Clarification of Time Limits and on Appellant Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 6 September 2005 ("*Barayagwiza* Decision of 6 September 2005"), p. 5; *Mikaeli Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Decision on Appellant's Motion for Extension of Time to File a Brief in Reply and Postponement of a Status Conference, 21 June 2006, p. 3.
[10] *Barayagwiza* Decision of 8 December 2006, para. 3; *Barayagwiza* Decision of 6 September 2005, p. 5.
[11] Motion, para. 2.
[12] Response, paras. 3-8.
[13] Response, paras. 9-18.
[14] Response, paras. 19-26.

6. The Appeals Chamber may consider post-hearing submissions if they relate to a variation of the grounds of appeal[15] or if it has made a specific request to the parties for further information.[16] Muvunyi argues that a new jurisprudential development demands that the Appeals Chamber consider his post-hearing submissions. The Appeals Chamber notes that in preparing a Judgement, it considers all relevant jurisprudence, including decisions issued after the hearing of an appeal. If additional submissions from the parties on the *Hadžihasanović* Appeal Judgement had been necessary for a fair determination of the appeal in this case, the Appeals Chamber would have requested Counsel to provide further submissions. The Appeals Chamber has not done so.

DISPOSITION

For the foregoing reasons, the Appeals Chamber,

GRANTS the Prosecution's Motion to Expunge;

DISMISSES the request for permission for late filing of Muvunyi's Reply; and

DISMISSES the Motion.

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

Judge Fausto Pocar
Presiding

Dated this 18th day of June 2008,
at The Hague, The Netherlands.

[Seal of the Tribunal]

[15] Rules, Rule 108. *See also The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-A, Decision on the Prosecutor's Motion to Expunge a Submission from the Record, 25 April 2008, para. 7; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief, 17 August 2006, para. 9; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-T, Decision on the Prosecutor's Motion to Pursue the Oral Request for the Appeals Chamber to Disregard Certain Arguments Made by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 5 March 2007, para. 13; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Decision on Mladen Naletilić's Motion for Leave to File Pre-Submission Brief, 13 October 2005, pp. 2-3.

[16] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Decision on Defence Filings Subsequent to the Close of the Appeal Hearing, 5 May 2000, p. 3.

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International Criminal Tribunal for Rwanda
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REGISTRY AT THE HAGUE
Churchillplein 1, 2517 JW The Hague, The Netherlands
Tel: + 31 (0) 70 512-8225 / 8237 Fax : + 31 (0) 70 512 -8932

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DEFENSE
- Accused / *accusé* : Mr. Tarcisse MUVUNYI (complete CMS4 Form)

- Lead Counsel / *Conseil Principal*: Willian E. Taylor *(name / nom)*
- In Arusha (complete CMS 2) ☐ Fax Number: 1 832 912 1470
- E-mail: bill@williamtaylor.org

- Co-Counsel / *Conseil Adjoint*: Mr. Cynthia J. Cline *(name / nom)*
- In Arusha *(complete CMS 2)* ☐ Fax Number:
- E-mail:

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