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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-00-55A-A
25 April 2008
{1224/H - 1220}

IN THE APPEALS CHAMBER

Before:

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

Registrar:

Mr. Adama Dieng

Decision of:

25 April 2008

ICTR Appeals Chamber
Date: 25 April 2008
Action: R.J.
Copied To: Conceded Judges,
SLO, L.O., Ad.O, Lou, L.S, CMS/
TRAU

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THE PROSECUTOR

v.

Tharcisse MUVUNYI

Case No. ICTR-00-55A-A

Decision on the Prosecutor's Motion to Expunge a Submission from the Record

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

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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SIGNATURE: *[Signature]* DATE: 25 April 2008

Counsel for Tharcisse Muvunyi:

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

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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 the "Motion to Expunge from the Record 'Accused Tharcisse Muvunyi's Submission in Clarification to Issues Raised by the Appeals Chamber During Oral Arguments'" ("Motion") filed by the Prosecution on 3 April 2008. Tharcisse Muvunyi ("Muvunyi") responded to the Motion on 8 April 2008,¹ and the Prosecution filed its reply on 11 April 2008.²

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"). On 25 March 2008, Muvunyi filed a "Submission in Clarification to Issues Raised by the Appeals Chamber during Oral Arguments" ("Submissions"). In its Motion, the Prosecution objects to the filing of the Submissions on the basis that they have not been filed pursuant to the Rules of Procedure and Evidence of the Tribunal ("Rules") and that they are therefore not properly part of the record.³

DISCUSSION

3. The Submissions relate to two issues: (i) a response to a question raised by one of the Judges about whether the omission of a certain fact from the Indictment rendered it defective for lack of notice,⁴ and (ii) mitigating factors in sentencing.⁵ The Prosecution argues that the Submissions go beyond the scope of the existing grounds of appeal and constitute new grounds of appeal.⁶ The Prosecution submits therefore that, pursuant to Rule 108 of the Rules, the Appeals Chamber can only consider the Submissions upon a showing of good cause, a requirement that Muvunyi has not

¹ *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-A, Accused Tharcisse Muvunyi's Reply [sic] to Prosecution's Motion to Expunge Accused Tharcisse Muvunyi's Submission in Clarification to Issues Raised by the Appeals Chamber during Oral Arguments, 8 April 2008 ("Response").

² *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-A, Prosecutor's Reply to "Accused Tharcisse Muvunyi's Reply to Prosecutor's Motion to Expunge Accused Tharcisse Muvunyi's Submission in Clarification to Issues Raised by the Appeals Chamber during Oral Arguments", 11 April 2008 ("Reply").

³ Motion, para. 1.

⁴ Submissions, paras. 1-2.

⁵ Submissions, para. 3.

⁶ Motion, para. 2.

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1222/H

met.⁷ The Prosecution argues that, in any event, even if the Submissions do not constitute new grounds of appeal, there is no provision in the Rules for the filing of additional or "clarifying" responses to questions raised by a Judge during the hearing of an appeal.⁸ Muvunyi responds that the Submissions do not raise new matters, but simply clarify an issue raised by the Appeals Chamber during the Appeals Hearing, and that, in any event, a clarification to a question posed by the Appeals Chamber constitutes good cause.⁹

4. In the Submissions, Muvunyi argues that the Indictment is defective because it fails to mention a specific aspect of Muvunyi's conduct that the Trial Chamber found relevant in establishing Muvunyi's criminal responsibility for aiding and abetting genocide.¹⁰ In his Appeal Brief, Muvunyi objected that the Indictment was defective with respect to the incident that formed the basis of this conviction,¹¹ but did not specifically object to the fact that this particular conduct was not mentioned in the Indictment. During the Appeals Hearing, one of the Judges asked both the Defence and the Prosecution whether the failure of the Indictment to mention this aspect of Muvunyi's conduct rendered it defective because it did not give Muvunyi adequate notice.¹² In responding to this question, Counsel for Muvunyi did not address the issue of notice directly, but instead challenged the Trial Chamber's findings about this incident.¹³

5. In the Appeals Chamber's view, Muvunyi's submission in this respect does not constitute an attempt to vary the grounds of appeal pursuant to Rule 108 of the Rules, but is instead an attempt to clarify and expand upon an existing ground of appeal based on the question raised by a Judge during the Appeals Hearing. The Appeals Chamber further notes that, if it had considered that additional submissions were necessary for the fair determination of the appeal, it would have asked Counsel to provide further submissions on that question. However, in the absence of a specific request by the Appeals Chamber or prior leave granted by it, there is no provision in the Rules under which a party may make written submissions after the hearing of the appeal for the purpose of clarifying issues raised during the hearing. Counsel for Muvunyi had the opportunity of addressing this issue during the Appeals Hearing in response to the question, but did not do so. The Appeals Chamber did not request further submissions nor did Counsel for Muvunyi seek leave to

⁷ Motion, paras. 4-5, referring to *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, 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 ("*Barayagwiza Decision of 5 March 2007*"), para. 13.

⁸ Reply, para. 6.

⁹ Response, paras. 4-5.

¹⁰ Submissions, paras. 1-2.

¹¹ *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A, Accused Tharcisse Muvunyi's Brief on Appeal, 13 March 2007 ("*Muvunyi Appeal Brief*"), para. 53.

¹² AT, 13 March 2008 pp. 21, 59.

1221/H

make additional submissions on this point.¹⁴ The Appeals Chamber is therefore satisfied that this submission should not be considered further.

6. In his Submissions, Muvunyi also challenges the Prosecution's claim that there was no mitigating evidence and that the Trial Chamber was correct in finding that Muvunyi provided assistance only to those under attack who were family and friends, by referring to the evidence of two witnesses who testified that he had provided assistance to people he did not know.¹⁵ Muvunyi has not previously raised this issue¹⁶ nor was it raised during the Appeals Hearing by the Judges or either of the parties. In the Appeals Chamber's view, this therefore constitutes a new submission going beyond the existing grounds of appeal.

7. The Appeals Chamber recalls that pursuant to Rule 108 of the Rules, the Appeals Chamber "may, on good cause being shown by motion, authorise a variation of the grounds of appeal". Such requests must be made "as soon as possible after identifying the new alleged error"¹⁷ of the Trial Chamber, and must "at least, explain precisely what amendments are sought and why, with respect to each such amendment, the 'good cause' requirement of Rule 108 [of the Rules] is satisfied".¹⁸ In the present case, the Appeals Chamber is not convinced that Muvunyi has properly sought leave to amend his grounds of appeal, nor that he has shown good cause. The Appeals Chamber is therefore satisfied that this submission should not be considered further.

¹³ AT. 13 March 2008 p. 21.

¹⁴ The situation in the present case therefore differs from that in *Prosecutor v. Anto Furundžija*, where a Judge asked Counsel for Anto Furundžija a question during the appeals hearing about a finding in a specific case. Counsel indicated that he would "be glad to go back to it and check it for you" (*Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, AT. 2 March 2000 p. 189). In that case, the Appeals Chamber admitted a document filed by Anto Furundžija subsequent to the hearing on the basis that the Judge's "request for information during oral hearings constitutes good cause for its admission". *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.

¹⁵ Submissions, para. 3.

¹⁶ In his Appeal Brief, Muvunyi challenged the factual finding that he had assisted the Bicumba family and also argued that since this finding underpins his conviction under Article 6(1) of the Statute of the Tribunal ("Statute") for aiding and abetting the attack at *Groupe Scolaire*, it was impermissibly used in aggravation (Muvunyi Appeal Brief, para. 114). Muvunyi also did not address this issue in his Response Brief to the Prosecutor's appeal on sentence.

¹⁷ *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 ("Barayagwiza Decision of 17 August 2006"), para. 9; *Barayagwiza Decision of 5 March 2007*, para. 13. See also *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.

¹⁸ *Barayagwiza Decision of 17 August 2006*, para. 9; *Barayagwiza Decision of 5 March 2007*, para. 13; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Dragan Jokić's Request to Amend Notice of Appeal, 14 October 2005, para. 7. See also *Practice Direction on Formal Requirements for Appeals from Judgement*, 4 July 2005, paras. 2-3.

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DISPOSITION

For the foregoing reasons, the Appeals Chamber,

GRANTS the Motion; and

DISMISSES Muvunyi's Submissions.

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



Judge Fausto Pocar
Presiding

Dated this 25th day of April 2008,
at The Hague, The Netherlands.



[Seal of the Appeals Chamber]

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To: A:	JUDICIAL ARCHIVES - ARUSHA ✖ Fax Number: 1795251 APPEALS UNIT ✖ Ms Félicité Talon, APPEALS CHAMBER ✖ Judge / Juge Fausto Pocar, Presiding ✖ Judge / Juge Mohamed Shahabuddeen ✖ Judge / Juge Liu Daqun ✖ Judge / Juge Theodor Meron ✖ Judge / Juge Wolfgang Schomburg ✖ Ms Catherine Marchi-Uhel ✖ Mr Roman Boed ✖ Concerned Associate Legal Officers ✖ Mr Fatou Fall DEFENSE ✖ Accused / <i>accusé</i> : Mr. Tharcisse MUVUNYI (complete CMS4 Form) ✖ Lead Counsel / <i>Conseil Principal</i> : William E. Taylor (name / nom) ✖ In Arusha (complete CMS 2) <input type="checkbox"/> Fax Number: 1 832 912 1470 ✖ E-mail: bill@williamtaylor.org ✖ Co-Counsel / <i>Conseil Adjoint</i> : Mr. Cynthia J. Cline (name / nom) ✖ In Arusha (complete CMS 2) <input type="checkbox"/> Fax Number: ✖ E-mail:	
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