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(1238/A-1230/A)

1238/A

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

UNITED NATIONS
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APPEALS CHAMBER

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

Registrar: Mr. Adama Dieng

Date filed: 14 May 2008

THE PROSECUTOR

v.

Tharcisse MUVUNYI

Case No. ICTR-2000-55A

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"

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A. Response to Application

1. On 5 May 2008, Tharcisse Muvunyi filed an application to have the Appeals Chamber consider the ICTY case of *Prosecutor v. Hadzihasanovic and Kubura*[1] in his appeal and asks the Appeals Chamber, on the strength of that case, to acquit Muvunyi of the convictions entered under Counts 1 and V and reduce his sentence to one of five years and order his immediate release (the "Application").

2. The Application ought to be dismissed as:

- The *Hadzihasanovic* Judgement does not offer new jurisprudence that would affect the findings made in Muvunyi's case;
- The issue of the adequacy of measures taken to prevent or punish crimes of subordinates is not engaged in Muvunyi's case; and,
- The Trial Chamber's findings regarding Muvunyi's effective control over his subordinates is not affected by the *Hadzihasanovic* Judgement.

i) The Hadzihasanovic Judgement Does Not Present New Law

3. The underlying premise of the Application is entirely misconceived. Muvunyi claims to bring this Application "because this decision contains relevant new authority."[2] Muvunyi further claims that "the Hadzihasanovic opinion addresses the question of what constitutes adequate punishment and prevention by a commanding officer and what constitutes effective control."[3]

4. From the outset, Muvunyi fails to indicate how the jurisprudence discussed in the *Hadzihasanovic* Judgement is "new" or how it differs with pre-existing jurisprudence. More importantly, Muvunyi fails to substantiate how the jurisprudence as enunciated in the *Hadzihasanovic* Judgement differs from the jurisprudence considered by the Trial Chamber in his case. Additionally, Muvunyi fails to relate this "new authority" to an actual legal error made by the Trial Chamber in its judgement. In these ways, the Application is completely without merit and ought to be dismissed.

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[1] IT-01-47-A.
[2] Application, para. 1.
[3] Application, para. 2.

5. To the contrary of what is suggested in the Application, the *Hadzihasanovic* Judgement does not claim to make new law or to change pre-existing jurisprudence. For example, it does not set out a new standard of what would be deemed to be "adequate" measures to prevent or punish crimes by subordinates. In dealing with this issue, the Appeals Chamber recalled its earlier jurisprudence that, "the assessment of whether a superior fulfilled his duty to prevent or punish has to be made on a case-by-case basis, so as to take into account the "circumstances surrounding each particular situation". As the Appeals Chamber previously held, "what constitutes necessary and reasonable measures is not a matter of substantive law but of evidence".[4]

6. Therefore, the *Hadzihasanovic* Judgement reiterates and applies existing jurisprudence that establishes that each case must be decided on the facts of that particular case.

7. In the Application, Muvunyi attempts to take factual conclusions made by the Appeals Chamber in the *Hadzihasanovic* Judgement and apply those findings to his case. However, this is not an acceptable, nor persuasive, manner of argument. One accused cannot take the factual findings made in a case against a different accused, and claim that the same decisions ought to be reached in his case. Each determination is case-specific.

8. This is particularly so in this instance as these two cases are factually distinct. The factual findings made in the *Hadzihasanovic* case with respect to both effective control and necessary measures are not at all relevant to Muvunyi's case, as will be discussed in more detail below.

ii) Issue of the Adequacy of Measures taken to Prevent or Punish is not relevant

9. The question of the adequacy of measures taken by a superior to prevent or punish crimes committed by subordinates was never an issue in Muvunyi's trial. An issue on the *Hadzihasanovic* appeal was whether the disciplinary measures alone, as opposed to criminal sanctions, were adequate to discharge the duty to punish under Article 7(3) of

[4] *Hadzihasanovic*, Appeal Judgement, para. 151, citing *Blaškić* Appeal Judgement, 72; *Halilović* Appeal Judgement, paras 63-64 [internal footnotes omitted]. *See* also *Hadzihasanovic*, Appeal Judgement, para. 33.

the ICTY Statute.[5] The point of distinction is that Hadzihasanovic had taken *some* measures to punish perpetrators.

10. Conversely, Muvunyi did not claim at trial or on appeal that he took any measures to prevent crimes or punish soldiers. Similarly, Muvunyi points to no evidence led by him to show that he took any measures at all to prevent or punish the on-going crimes committed by his subordinates in and around Butare. Muvunyi's main defence was that he was not the top commander at ESO camp and that he did not have effective control over the soldiers of the camp. The question of the adequacy of measures taken by a superior is therefore not relevant. The law as pronounced in *Hadzihasanovic* on this particular issue, whatever it is, is therefore not applicable to this case.

11. Furthermore, even if the law in *Hadzihasanovic* were applicable, it must be pointed out that this is the first time that Muvunyi is raising the issue on appeal relating to the adequacy of measures taken to prevent or punish. He did not previously argue on his appeal that he was not in a position to take such measures as he did not know the identity of the perpetrators. Contrary to established jurisprudence, Muvunyi has not sought leave to amend his grounds of appeal, nor has he shown good cause to allow such amendment.[6] The Appeals Chamber ought not consider this submission further.

12. In any event, Muvunyi's arguments are flawed. Muvunyi seems to try to make the *Hadzihasanovic* Judgement relevant to his case by linking it to comments made by the Trial Chamber in its Sentencing Judgement. In paragraph 4 of the Application, Muvunyi wrongly claims that the Trial Chamber "conceded the possibility that he (Muvunyi) may have found it impossible to control his subordinates." The Trial Chamber made no such concession. Muvunyi's interpretation given to the Trial Chamber's comment is a complete misreading of it. The Trial Chamber did not, in any way, concede that Muvunyi "was in practice powerless."[7]

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[5] *Hadzihasanovic*, Appeal Judgement, paras. 32-33.
[6] *Prosecutor v. Muvunyi*, "Decision on the Prosecutor's Motion to Expunge a Submission from the Record", 25 April 2008, para. 7.
[7] Application, para. 4.

13. In fact, when read in its proper context, the Trial Chamber is saying the opposite. This statement made by the Trial Chamber appears in the sentencing part of the Judgement and is not a factual finding. In this context, the Trial Chamber is noting, in relation to sentence, that, even *if* Muvunyi found it impossible to rein in those subordinates, "sitting on his hands" was not an excuse, and not an acceptable choice, on the part of Muvunyi. The Trial Chamber noted that, at the very least, Muvunyi could have reported his subordinates up the chain of command, which he did not. The Trial Chamber here is accepting the most extreme situation, putting Muvunyi's case at its hypothetical best position and found that, even if this were true, at the very least, there was something Muvunyi could have done but did not do. Therefore, Muvunyi's reading of this as a concession of powerlessness is erroneous.

14. Then, at paragraphs 7, 8, 10, 11 and 12 of the Application, Muvunyi argues that he could not have punished any soldiers because no evidence was led on the identity of specific perpetrators at the roadblocks or at the various attacks. He claims that "Hadzihasanovic makes clear that, at a minimum, before the adequacy of punishment can be determined, the actual perpetrators must be identified."[8]

15. Muvunyi relies on paragraphs 163 and 293 of the *Hadzihasanovic* Judgement in support of the contention that the identity of perpetrators must be made before the adequacy of the punishment or prevention can be assessed.[9] Neither of these paragraphs in *Hadzihasanovic* support this claim. Paragraph 293 cannot stand for the proposition that "perpetrators must be explicitly identified for a Commander to be held responsible for their bad acts and subsequent discipline", as claimed by Muvunyi.[10] This part of the *Hadzihasanovic* Judgement affirms the Trial Chamber's conclusions that Hadzihasanovic did not know, or have reason to know, of the perpetration of acts of wanton destruction by his subordinates because the relevant report did not identify the perpetrators and other *battalions* were involved in the destructive acts. This paragraph does not relate the identity of the perpetrators to whether the accused meted out adequate punishment but to the knowledge component of Article 6(3).

[8] Application, para. 8.
[9] See Application, paras. 11 and 12.
[10] Application, para. 12.

16. Similarly, paragraph 163 of the *Hadzihasanovic* Judgement also deals with whether Hadzihasanovic had knowledge of, or had reason to know of, acts of cruel treatment in the Bugojno Detention Facilities. The Appeals Chamber found that he did not have the requisite knowledge under Article 7(3) which would trigger his responsibility to prevent or punish the acts of mistreatment committed at the Detention Facilities.

17. Muvunyi here conflates and confuses the concept of having knowledge of, or having reason to have knowledge of, crimes committed by subordinates with having knowledge of the identity of specific perpetrators for the purpose of preventing crimes from taking place or punishing that person or persons for crimes committed.

18. As such, those sections of the *Hadzihasanovic* Judgement relied on by Muvunyi have no bearing on either the factual or legal findings in his case. There is, therefore, no reason for the Appeals Chamber to consider that Judgement in its deliberations of Muvunyi's appeal.

iii) The Hadzihasanovic Judgement does not affect the Trial Chamber's Findings on the Issue of Effective Control

19. Muvunyi also attempts to relate findings made by the *Hadzihasanovic* Judgement to the issue of effective control in his Application. It should be pointed out that Muvunyi made vigorous arguments on appeal challenging both the legal and factual findings made by the Trial Chamber concerning his effective control over ESO soldiers. Grounds 3 and 12 of Muvunyi's Appeal both dealt at length with the Trial Chamber's findings that he possessed effective control over the perpetrators of the crimes.

20. This "new authority" in the *Hadzihasanovic* Judgement does not add anything to the submissions already made by Muvunyi in this regard. In fact, in paragraphs 5 and 6 of the Application, Muvunyi simply reargues issues already raised in his appeal. The law referred to from the *Hadzihasanovic* case in paragraphs 5 and 6 of the Application is very basic law in relation to 6(3) authority to the effect that "the Prosecution [i]s required to prove beyond a reasonable doubt that Hadzihasanovic had the material ability to prevent or punish the criminal conduct of its members." This is not new law. The Appeals

Chamber in *Hadzihasanovic* actually refers to the earlier case of *Celebici*,[11] which case is relied upon by the *Muvunyi* Trial Chamber in its findings dealing with effective control.[12]

21. Muvunyi does, however, impermissibly raise an additional new argument in relation to the issue of effective control. Muvunyi argues that the Trial Chamber erred since "Tharcisse Muvunyi's *effective control* cannot be established by process of elimination just as Hadzihasanovic's could not be."[13] This is once again a new argument raised by Muvunyi for the first time after the close of the appeal hearing. Muvunyi has not previously taken the position that the Trial Chamber had erred for the reason that it had come to its conclusion that Muvunyi was the commander of ESO camp by process of elimination. As such, this argument ought not be considered as it is an impermissible attempt to raise a new ground of appeal without seeking the proper leave to amend the grounds of appeal.[14]

22. In any event, this argument is left completely unsubstantiated and ought to be disregarded. In the *Hadzihasanovic* Judgement, the Appeals Chamber's discussion of the "process of elimination" in paragraph 217 was such that the Appeals Chamber considered whether the fact that there was no other authority over the *El Mujahedin* was an appropriate indicia of effective control. The Appeals Chamber indicated that this type of factor was likely not relevant as an indicator of effective control.

23. Muvunyi fails to point to a specific instance where the Trial Chamber reasoned through such a "process of elimination" or where the Trial Chamber found that Muvunyi must be the commander since there was no other authority over the ESO soldiers. Muvunyi does not, and cannot, point to, or refer to, any finding in the Trial Judgement where this line of reasoning was undertaken.

24. Importantly, the Trial Chamber in Muvunyi did not engage in any sort of reasoning by "process of elimination." To the contrary, the Trial Chamber delineated

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[11] See *Hadzihasanovic*, Appeal Judgement, para. 231.
[12] See Trial Judgement, para. 51.
[13] Application, para. 3.
[14] *Prosecutor v. Muvunyi*, "Decision on the Prosecutor's Motion to Expunge a Submission from the Record", 25 April 2008, para. 7. *Prosecutor v. Muvunyi*, "Decision on the Prosecutor's Motion to Expunge a Submission from the Record", 25 April 2008, para. 7.

specific *positive* evidence as to why it found Muvunyi had effective control over the ESO soldiers, including:

- First, the Trial Chamber studied the order of command at ESO camp and found that, on 6 April 1994, Muvunyi was the second most senior officer in ESO. On the basis of Law No. 23/1986 On the Establishment and Organization of ESO, Muvunyi assumed the position of ESO Commander after his superior officer, Marcel Gatsinzi was appointed Interim Chief of Staff on 7 April 1994.[15]

- Second, the Trial Chamber relied on the evidence of numerous witnesses, including the evidence of Witnesses KAL, YAA and NN, who were soldiers attached to ESO at various times between April and June 1994. Based on the testimony of all these witnesses, the Trial Chamber concluded that Muvunyi exercised the powers of the office of ESO.[16]

25. The Trial Chamber then concluded that Muvunyi had effective control over the actions of ESO soldiers.[17] Therefore, there is nothing in the Trial Chamber's reasoning that exhibits that the Trial Chamber impermissibly reasoned through a "process of elimination" that Muvunyi must have had effective control because there was no other authority over the soldiers.

26. Therefore, it is clear that, in its Judgement, the Trial Chamber took account of the proper law in the context of the factual scenario, and the legal issues, before it. The *Hadzihasanovic* Judgement, while the most recent pronouncement on issues dealing with superior-subordinate liability, does not offer "new authority" such as to put the Trial Chamber's findings at risk or to justify allowing Muvunyi to introduce new arguments on appeal at this late stage.

[15] Trial Judgement, paras. 50 and 57.
[16] Trial Judgement, para. 50.
[17] Trial Judgement, para. 57.

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B. Relief Sought

27. The Prosecutor therefore requests the Appeals Chamber to dismiss the Application in its entirety.

Dated this 14th day of May 2008

~~Linda Bianchi~~ Neville Weston
Appeals Counsel

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