

10972-98-41-T  
10-07-2008  
(39789-39782)



**International Criminal Tribunal for Rwanda**  
**Tribunal pénal international pour le Rwanda**

39789

S. Nussa

**IN TRIAL CHAMBER I**

**Before:** Judge Erik MØSE, President  
Judge Jai Ram REDDY  
Judge Sergei Alekseevich EGOROV

**Registrar:** Adama Dieng

**Date:** Orig- 10/07/08

**THE PROSECUTOR**  
v.  
**Théoneste BAGOSORA**  
**Gratien KABILIGI**  
**Anatole NSENGIYUMVA**  
**Aloys NTABAKUZE**

JUDICIAL RECORDS/ARCHIVES  
2008 JUL 10 P 3:54

*Case No: ICTR-98-41-T*

**MOTION for application of the July 3, 2008 ICTY Appeals Chamber *Oric* Decision to “command responsibility” issues pending before the Chamber**

**Counsel for the Prosecution**  
Barbara MULVANEY  
Drew WHITE  
Christine GRAHAM  
Rashid RASHID

**Counsel for Ntabakuze**  
Peter ERLINDER

**Other Defence Counsel**  
Raphaël CONSTANT  
Paul SKOLNIK  
Kennedy OGETTO

**INTRODUCTION:****Summary of the July 3, 2008 ICTY Appeals Chamber Decision: *Prosecutor v. Oric***

1. On July 3, 2008, the ICTY Appeals Chamber found ICTY Accused Naser Oric *not guilty* of “command responsibility” for crimes committed against Serbs in Srebrenica, due to the OTP failure to provide the Chambers with evidence to support two necessary elements of the offense: (1) the existence of a superior-subordinate relationship; (2) (a) that the superior knew or had reason to know that his subordinate was about to commit or crime or had done so; and (b) that the superior failed to take adequate steps to prevent or punish his subordinate.

2. According to the most recent jurisprudence of the ICTY Appeals Chamber in the *Oric* Decision, a conviction cannot be sustained if the OTP has failed to provide:

(a) the identity of at least one specific person, allegedly under the Accused’s (Naser Oric’s) command, *who had committed crimes*,

“The Chamber did not identify any member of the Military Police other than Krdzic who took part in the commission of the crimes for which Naser Oric was found responsible, not even by a mere reference to their membership in the Military Police...the Trial Chamber eventually identified only Atif Krdzic as Naser Oric’s culpable subordinate”<sup>1</sup>

(b) whether the Accused (Naser Oric) knew, or had reason to know, of crimes by a subordinate and failed to respond appropriately.

“...[T]he Trial Chamber made no explicit finding on whether he knew or had reason to know of Atif Krdzic alleged criminal responsibility for the mistreatment of Serb detainees..”

3. In the July 3, 2008 *Oric* Decision, the Appeals Chamber makes clear that a Trial Chamber’s failure to support its finding of guilt with proper factual findings, or if the OTP fails to present evidence of the essential elements of “command responsibility,” the result *must be* the *acquittal* of the Accused.

“...[T]he Trial Chamber’s failure to make a finding on whether the Accused [Naser Oric] knew or had reason to know that Atif Krdzic was about to or had engaged in criminal activity constitutes an *error of law*.”  
(emphasis added)

---

<sup>1</sup> Language adopted from the unofficial summary of the *Oric* Decision

4. Since the Judgement in *this* case will be evaluated by the Appeals Chamber, at least in part, under the “command responsibility” jurisprudence in the *Oric* Decision, judicial economy and prudence suggest that the Chamber consider the impact of the *Oric* jurisprudence on the findings and Judgement in this case *before* it reaches the Appeals Chamber, which is in the interest of all concerned.

5. As has been noted previously, Appellate Rules 115 and 120 impose a responsibility on the parties to put issues before the Trial Chambers, before raising them on appeal and, in some instances, failure to raise an issue or fact that was known to a party at trial can be interpreted as “waiver.”

***Proposed Application of the Oric Decision to the case at bar.***

6. The Ntabakuze Final Trial Brief discusses the law of “command responsibility” in paragraphs 67 to 84 and that survey of the jurisprudence will not be repeated here. However, the pre-*Oric* jurisprudence, cited in the Ntabakuze Brief, does not address the threshold evidence required of the prosecution and the necessary factual findings by the Chamber, to establish “command responsibility,” and this issue is the specific focus of the *Oric* Decision<sup>2</sup> and particularly instructive in this case.

7. The Chambers will recall that there is *no evidence* before the Chamber in the OTP case against Major Ntabakuze that *any named or identified* alleged-member of the Para-commandos was convicted of *any* crimes in Rwanda, *or any other jurisdiction*. Without proof beyond a reasonable doubt that named or identified Para-commandos committed crimes of *some* sort, under *Oric*, there is insufficient evidence for this Chamber to hold Major Ntabakuze liable for crimes committed by others pursuant to his “command

---

<sup>2</sup> Ntabakuze Brief, Para. 67. It is an established principle of international customary law, applicable to both international and internal armed conflicts that superiors can be held to individual criminal responsibility for failure to prevent or to punish crimes committed by subordinates. The elements that must be satisfied in order to invoke individual criminal responsibility are:

- (i) the existence of a superior-subordinate relationship;
- (ii) that the superior knew or had reason to know that the criminal act was about to be or had been committed; and
- (iii) that the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.<sup>2</sup>

responsibility,” under any reasonable construction of the evidence. The Prosecution has failed to meet its burden of producing evidence to support a judgement *ab initio*.

8. The Chambers will also recall that there is not a *single* UNAMIR report of crimes committed by Para-commandos, or even in the area controlled by the Para-commandos between the Airport and UNAMIR Headquarters in Kigali until the Para-commandos left Kigali of May 22, 1994. Numerous UNAMIR interactions with the Airport between April 6 and May 22 would certainly have produced *some* mention of crimes in UN files....if such crimes had occurred. Gen. Dallaire testified that he had no reports of crimes having been committed in the area near the airport or in the vicinity of Camp Kanombe.

9. As pointed out in the Ntabakuze Brief, *all* Prosecution “Para-commando” witnesses ostensibly testifying *against* Ntabakuze, *admitted* under oath that they were *not aware* of *any* crimes of committed by specific Para-commandos and it was, therefore, *impossible* for *any* Prosecution witness to testify that Major Ntabakuze had been informed of crimes which have never been alleged to exist, and certainly remain un-proved “beyond a reasonable doubt” as required by the *Oric* jurisprudence.

10. The specific state of the OTP evidence was discussed in the Ntabakuze Brief at Paragraph 505 as follows:

.....24 May - 15 July, 1994

....However, several Prosecution witnesses who were members of the Para Commandos, many of whom testified they were Tutsi, stated unequivocally that:

- Each remained with the Para Commandos during the entire war until the Battalion entered the Congo;
- At least one Prosecution witness, XAB, testified that he was not even aware of any rumours that Para Commandos committed crimes during this period;
- No Prosecution witness, who actually *was* a member of the Para Commandos, whether Hutu or Tutsi, or a member of the RPF, could point to even *one* member of the Battalion under the command of Major Ntabakuze who has been charged, much less convicted, of crimes by the current Rwandan Government.<sup>3</sup>

---

<sup>3</sup> Ntabakuze Brief, para. 505

11. In logical anticipation of the jurisprudence described in *Oric*, the Brief raised the question at Paragraph 506, as follows:

Perhaps the most important undisputed fact that the Chamber must consider when assessing alleged crimes to be charged to Major Ntabakuze is that, not only have *soldiers under his command not been convicted of crimes* committed under his command, but *his commanding officers*, such as Colonel Muberuka, Colonel Gatsinzi and others, also *have not either been charged or prosecuted for crimes* committed by soldiers under their command, - including Major Ntabakuze. (emphasis added). These undisputed facts raise a fundamental jurisprudential question that this Chamber will have to answer:

*Is it possible, under the law, to convict a military commander of crimes committed by those under his command, when neither those he commanded, nor any of his superior officers, have been convicted of having committed any crimes at all? And, if so, [of] what crime would that [commander] be [guilty]?<sup>4</sup>(emphasis added).*

12. It is submitted that the *Oric* Decision answers this question in the only manner possible: a commander cannot be convicted of crimes of subordinates without proof beyond a reasonable doubt that at least some of the commander's subordinates had committed crimes. Failure of evidence in this regard requires that the Chamber acquit Major Ntabakuze of all offenses relying in any way on the concept of "command responsibility" given the *Oric* Decision, and the state of the evidence at the close of the OTP case.

13. Should the Chambers require, this foregoing brief outline of the *Oric* jurisprudence can be expanded and more fully developed by the parties, should the Chamber favour having the parties brief and argue the issue.

***The Chamber's consideration of facts and jurisprudence arising during deliberations.***

15. The Appeals Chamber jurisprudence, as well as that of the International Criminal Court, have changed markedly during the past year this case has been under deliberation pending judgement by the Chambers, and this recent jurisprudence has clarified and better-defined international "Fair Trial" principles in:

---

<sup>4</sup> Ntabakuze Brief, Para 506.

(a) the November 2007 Nahimana Decision of the ICTR Appeals Chamber, requiring the OTP and Chamber to *exclude* evidence not related to offenses in the indictment... BEFORE the Defence is required to respond to the Prosecutor's case (the *Nahimana Decision*, cited the September 2006 *Ntabakuze Appeals Chamber Decision* requiring the OTP to amend the indictment or *exclude* evidence of other crimes. The Chambers received the Ntabakuze *post-Nahimana* suggested exclusions on February 27, 2008 and has not ruled).

(b) the June 13, 2008 ICC Lubanga Decision, the case requiring "disclosure, or Chambers approval, to justify non-disclosure.;"...or dismiss charges; and,

(c) the July 3, 2008 ICTY Appeals Chambers Oric Decision, the most recent case outlining the necessary proof for the existence of the element of "command responsibility," *which must be proved beyond a reasonable doubt*.

16. Because this new jurisprudence substantially changes, at least: the procedures and arguments required by the Parties (such as excluding evidence from the Prosecution case that alleged crimes not mentioned in the Indictment, i.e. *Nahimana*); as well as, the procedures and standards to be applied by the Chambers in dismissing counts for lack of OTP disclosure (i.e. *Lubanga*); or, failure of proof of "command responsibility" for specifically alleged offenses (i.e. *Oric*). It is submitted that *both* the Parties and the Chambers must be in substantial doubt as to the application of this jurisprudence to a case in progress, such as this one.

17. It is submitted that going forward to judgement in this case, *without* attempting to resolve these new issues at the trial level, is to virtually guarantee an appeal by either the OTP or the Defence. It is in the interest of all parties to decide the merits of this case based on the standards of proof and procedural standards necessary to guarantee a fair trial, as presently understood at the ICTY, ICTR and ICC.

18. This is the situation facing the Defence, regarding the recently clarified "fair trial" issues:

(a) The Chambers or OTP have not removed from consideration, crimes not mentioned in the indictment, as required in the November 28, 2007 *Nahimana Decision*. This means the Defence still does not know, at this late date, the exact OTP case against

which it must defend. Should the Chambers apply *Nahimana*, and require the OTP to drop evidence of cases not mentioned in the indictment, the Defence would have notice of the case it must meet, with *other* arguments or evidence;<sup>5</sup>

(b) ICC *Lubanga* jurisprudence of June 13, 2008 requires the dismissal of remaining charges (i.e. mentioned in the indictment) in the event that exculpatory materials were not disclosed to the Defence by the OTP, or disclosed to the Chamber for ruling on disclosure.

(c) There is much evidence in the public record, which have become available after this case was brief, including books by for ICTR officials Hartmann, Del Ponte, Mogalu, and affidavits of former OTP investigator Hourigan and Deme, as well as admissions by current Prosecutor Jallow before the Security Council indicating that the OTP has not disclosed known RPF crimes to the detriment of the Defence's ability to put on its own case<sup>6</sup>;

(d) "Command responsibility" convictions can only be sustained if the elements of the offence can be attributed to a superior officer only upon the proof of knowledge and actual command control over perpetrators, cannot be sustained in this case following the ICTY Appeals Chamber *Oric* Decision.

19. All of the foregoing jurisprudential and factual issues have arisen *after* this case was briefed by the parties, and bear directly on the fairness of *these* trial proceedings, upon which the Appeal Chamber must eventually rule by applying the *Nahimana*, *Lubanga* and *Oric's* new jurisprudence, of which this Chamber might be mindful in determining the factual additions to be made to the record, as well as, the jurisprudence to be applied in reaching its Judgement.

---

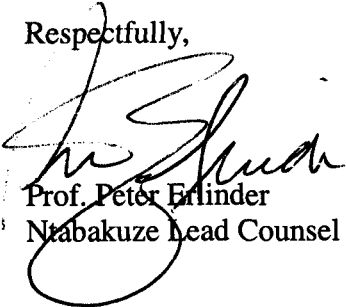
<sup>5</sup> The Addendum to Ntabakuze Final Brief (*Nahimana* Pre-judgement Jurisprudence) of 2/27/08 for "Stay of Proceedings Pending OTP Compliance...with the *Nahimana*." On June 13, 2008, a similar Motion for Suspension pending receipt of disclosure was filed. Neither have been ruled upon by the Chamber.

<sup>6</sup> The OTP admission that it has withheld exculpatory materials from the Defence and the Chambers, in apparent contravention of the "*Lubanga* disclosure principles," exposes any Judgement of the Trial Court to jeopardy on Appeal. On July 1, 2007, the Ntabakuze Defence filed a Motion to Add the Indictment issued February 8, 2008 of members of the RPF, the Bruguiere Indictment of November 2006 has already been admitted into the record, as corroboration of the Dfence's "alternative explanation of events" in Rwanda.

39782

WHEREFORE, the Ntabakuze Defence Moves this Honorable Court to apply the jurisprudence of the July 3, 2008 *Oric* Decision to eliminate "command responsibility" liability in this case and/or, for re-briefing, or other method favored by the Chamber, which will clarify the Chamber's position with respect to the application of changing jurisprudence and new facts that have come to light during the Chamber's deliberations in anticipation of a Judgement.

Respectfully,



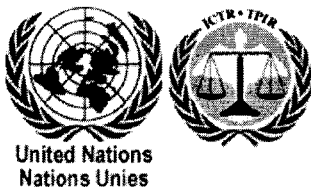
Prof. Peter Erlinder  
Ntabakuze Lead Counsel

July 10, 2008

Annex:

ICTY Appeals Decision of July 3, 2008 in *Prosecutor v. Oric*. (to be published electronically as soon as available)





# TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

**COURT MANAGEMENT SECTION**  
(Art. 27 of the Directive for the Registry)

## I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

<b>To:</b>	<input checked="" type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Appeals Chamber / Arusha F. A. Talon
	<input type="checkbox"/> Chief, CMS J.-P. Fomété	<input type="checkbox"/> Deputy Chief, CMS M. Diop	<input type="checkbox"/> Chief, JPU, CMS M. Diop	<input type="checkbox"/> Appeals Chamber / The Hague R. Muzigo-Morrison K. K. A. Afande
<b>From:</b>	<input type="checkbox"/> Chamber (names)	<input checked="" type="checkbox"/> Defence Peter Erlinder (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
<b>Case Name:</b>	The Prosecutor vs. <b>NTABAKUZE</b>		<b>Case Number:</b> ICTR-98-41-T	
<b>Dates:</b>	Transmitted: <b>10 July 2008</b>		Document's date: <b>10 July 2008</b>	
<b>No. of Pages:</b>	<b>8</b>	<b>Original Language:</b> <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda		
<b>Title of Document:</b>	<b>Motion for application of the July 3, 2008 ICTR Appeals Chamber Oric Decision to "command responsibility" issues pending before the Chamber</b>			
<b>Classification Level:</b>		<b>TRIM Document Type:</b>		
<input type="checkbox"/> Ex-Parte		<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence
<input type="checkbox"/> Strictly Confidential / Under Seal		<input type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Notice of Appeal
<input type="checkbox"/> Confidential		<input type="checkbox"/> Disclosure	<input type="checkbox"/> Order	<input type="checkbox"/> Appeal Book
<input checked="" type="checkbox"/> Public		<input type="checkbox"/> Judgement	<input type="checkbox"/> Motion	<input type="checkbox"/> Book of Authorities
		<input type="checkbox"/> Submission from non-parties	<input type="checkbox"/> Submission from parties	
		<input type="checkbox"/> Accused particulars		

## II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

**CMS SHALL** take necessary action regarding translation.

Filing Party hereby submits only the original, and **will not submit** any translated version.

Reference material is provided in annex to facilitate translation. (*ANNEX - ELECTRONIC*)

Target Language(s):

English  French  Kinyarwanda

**CMS SHALL NOT** take any action regarding translation.

Filing Party hereby submits **BOTH the original and the translated version** for filing, as follows:

Original	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda
Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

**CMS SHALL NOT** take any action regarding translation.

Filing Party **will be submitting the translated version(s)** in due course in the following language(s):

English  French  Kinyarwanda

**KINDLY FILL IN THE BOXES BELOW**

<input type="checkbox"/> <b>The OTP</b> is overseeing translation. The document is submitted for translation to: <input type="checkbox"/> The Language Services Section of the ICTR / Arusha. <input type="checkbox"/> The Language Services Section of the ICTR / The Hague. <input type="checkbox"/> An accredited service for translation; see details below: Name of contact person: Name of service: Address: E-mail / Tel. / Fax:	<input type="checkbox"/> <b>DEFENCE</b> is overseeing translation. The document is submitted to an accredited service for translation (fees will be submitted to DCDMS): Name of contact person: Name of service: Address: E-mail / Tel. / Fax:
---	--

## III - TRANSLATION PRIORITISATION (For Official use ONLY)

<input type="checkbox"/> Top priority	<b>COMMENTS</b>	<input type="checkbox"/> Required date:
<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines:

JUDICIAL RECORDS ARCHIVES  
 2008 JUL 10 P 3 31