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IVAL

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

IN TRIAL CHAMBER I

Before: The Honourable Mr. Justice Erik MØSE, President
The Honourable Mr. Justice Jai Ram REDDY
The Honourable Mr. Justice Sergei Alekseievich EGOROV

Registrar: Mr. Adama Dieng

Filing Date: 11 September 2008

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

Case No: ICTR-98-41-T

MOTION FOR:
(A)APPLICATION OF THE *NAHIMANA, ORIC* AND *MUVUNYI* JURISPRUDENCE TO THE FACTS OF THIS CASE TO DISMISS FACTUAL ALLEGATIONS OUTSIDE THE INDICTMENT; (B) A "NOT GUILTY" FINDING ON ALL PENDING COUNTS; OR, (C) FOR BRIEFING AND ARGUMENTATION OF APPLICATION OF RECENT APPEALS CHAMBER JURISPRUDENCE TO THIS CASE, *PRIOR TO JUDGMENT BEING ENTERED BY THE CHAMBER.*

Counsel for the Prosecution
Ms. Barbara MULVANEY
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Counsel for Aloys NTABAKUZE
Mr. Peter ERLINDER

Other Defence Counsel
Me. Raphaël CONSTANT
Me. Paul SKOLNIK
Mr. Kennedy OGETTO

INTRODUCTION

1. As the Chamber is aware, after the Chamber denied the Natabakuze *98 bis Motion* and *Motion to Exclude Evidence, en toto*, the Appeals Chamber issued the *September 18, 2006 Appeals Chamber Decision on the Ntabakuze Interlocutory Appeal*, which established the standard to be applied by the Trial Chamber in excluding allegations and evidence outside the OTP indictment.

2. The Chamber invited the Ntabakuze Defence to submit argument regarding the application of the *Decision on Ntabakuze's Intlocutory Appeal* to the evidence and allegations in the case at bar. The submissions by the Ntabakuze Defence were *again* rejected by the Chamber *en toto,* and the OTP was permitted to file a Final Brief that ranged widely over evidence and allegations that were not included in the Kabiligi/Ntabakuze Indictment and, it is submitted, failed to apply the standard required by the Appeals Chamber, regarding the relationship between the face of the Indictment and the factual allegations to which the Defence is properly obligated to respond.

3. As a result, the Ntabakuze Defence was obligated to submit a Final Brief that responded to each factual allegation, or potential factual allegation, that might be implied by the evidence put before the Chamber, irrespective of its relationship to the Indictment, because the Chamber *failed* to require that the OTP Final Trial Brief reflect the limiting requirements described by the Appeal Chamber *September 18, 2006 Decision*.

4. Subsequent to the filing of the Ntbakuze Final Brief, and oral argument before the Chamber in June 2007, the Appeals Chamber has further clarified the application of its *September 18, 2006 Decision* in the *Nahimana Appeal Judgment* and the *Oric Naser Appeal Judgment* which were the subject of previous Motions[1] regarding the application of evolving Appeals Chamber jurisprudence to the Military-1 case.

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[1] *See*, Addendum to Ntabakuze Final Brief (*Nahimana Appeal Judgment* Jurisprudence) filed on 27 February 2008 and Motion for Application of the July 3, 2008 ICTY Appeals Chamber *Oric Decision* to "Command responsibility" issues pending before the Chamber, filed on 10 July 2008, neither of which have occasioned a ruling or proposed hearing by the Chamber, thus far..

5. The Chamber has failed to respond to either of these Motions with either ruling or a proposed procedure to regularize the litigation of the clarified jurisprudence. The parties have not been permitted an opportunity to respond to any questions the Chamber might have with respect to the application of the *Nahimana* and *Oric* Judgments to the facts in this case, nor has the Chamber given any indication that it agrees that this jurisprudence is even applicable to its deliberations and/or how it might apply to the factual allegations currently under deliberation by the Chamber.

6. On August 29, 2008, the Appeals Chamber issued a third judgment that bears directly upon the deliberations of this Trial Chamber, *Prosecutor v. Muvunyi*. This Motion is occasioned by the previous lack of response from the Trial Chamber regarding the application of evolving jurisprudence to this case, as it might or might not, be applicable to this case.

7. While there is no Rule that *specifically* addresses the procedure to be followed when dispositive Appellate Chamber jurisprudence is announced *after* Trial Briefs have been submitted and *prior* to a Trial Chamber Judgment, there can be no dispute that such jurisprudence *must* govern any judgment issued the Chamber in this case, which also implies that the parties must be provided an opportunity to brief and argue the impact and implications of the evolving jurisprudence.

8. The *Muvunyi Appeal Judgment* expands upon the *Nahimana* Jurisprudence in establishing mandatory standards that complete and strengthen the arguments developed in the *Ntabakuze Defence Final Trial Brief*, which were first established in paragraph 30 of the 18 September 2006 *Decision on Ntabakuze's Interlocutory Appeal* in this case.

9. In light of the application of the 18 September 2006 *Ntabakuze Interlocutory Decision* by the Appeals Chamber in both *Nahimana* and *Muvunyi*, it appears that this Chamber misapplied the announced standard in failing to exclude factual allegations regarding crimes not specifically mentioned in the Indictment. Thus, the OTP case presently before this Chamber, to which the Defence has been obligated to respond, is vastly expanded beyond its legally permissible scope.

10. The simple, undeniable fact is that the Defence Final Brief, and oral argument in May-June 2007, is completely based upon the Chamber's erroneous application of the *September 18, 2006 Appeals Decision* which has been overtaken the clarified Appeals Chamber jurisprudence in *Nahimana, Oric* and *Muvunyi,* and has been rendered legally inadequate, by the passage of time.

11. Moreover, it is now plain that the Chamber has not only misapplied the *September 18, 2006 Decision*, but the deliberations by the Chamber are continuing despite:

    (a) the failure of the Chamber to require the OTP conform the allegations its Brief to the current Appeals Chamber jurisprudence, which denies the Defence proper notice with respect to the factual allegations to which respond;

    (b) the failure of the Chamber to provide the Defence the opportunity to challenged the scope of the OTP allegations, in light of the Indictment and current jurisprudence;

    (c) the failure of the Chamber to determine the proper scope of the factual allegations in the Final Brief to which the Defence must respond;

    (d) the failure of the Chamber to require formal amendment of Trial Briefs and new oral argument in the light of the new Appeals Chamber jurisprudence, despite the May 2007 Defence Final Brief and oral argument being predicated upon the Chamber's apparent misapplication of the *September 18, 2006 Appeals Decision* regarding the scope of the factual allegations to which the Defence must respond;

    (e) the failure of the Chamber to require the parties to formally respond in any fashion regarding the proper impact and scope of the factual allegations, the form of the Indictment or the quality of the evidence required for conviction, under the present state of the Appeals Chamber jurisprudence.

12. The Ntabakuze Defence submits that, under these circumstance, *any* Judgment of conviction rendered by this Chamber on this record is, and must be, a *nullity* before the law, which must be subject to reversal on appeal in the mode of the *Muvunyi Judgment*, at the least. The Ntabakuze Defence urgently submits that it is in the interests of all that the Chamber remedy this impossible situation as soon as possible, consistent with the current Appeals Chamber jurisprudence.

13. The jurisprudence provided by the recent *Muvunyi Appeal Judgment*, in addition to the *Nahimana and Oric Jurisprudence* appears to require the dismissal of nearly *all* claims against Major Ntabakuze. It is applicable in the following areas:

(A) The treatment of material facts not pleaded in the Indictment as per the *Ntabakuze Interlocutory Decision*, as well as the *Nahimana* and *Muvunyi Judgments*.

(B) Command responsibility, as per *Oric* and *Muvumyi Judgments*:

(1) The failure to plead, or prove, that the Accused knew or should have known were about to be committed, or had been committed, by his subordinates;

(2) The failure to adduce proof for the existence of the element of "command responsibility".

(C) Uncorroborated hearsay is, *ipso facto*, insufficient to sustain a conviction beyond a reasonable doubt, as per the *Muvunyi Judgment*.

(A) MATERIAL FACTS NOT PLEADED IN THE INDICTMENT

14. Concerning the material facts not pleaded in the Indictment, the Appeals Chamber held consistently that *"It is to be assumed that an Accused will prepare his defence on the basis of material facts contained in the Indictment* ***not on the basis of all the material disclosed to him that may support any number of charges, or expand the scope of existing charges***"[2].

15. The *Muvunyi* Appeals Chamber quoted paragraph 30 of the *18 September 2006 Decision on Ntabakuze's Interlocutory Appeal* in order to emphasize that the cure of the Indictment is not without limits, that "the new material fact" should not lead to a "radical transformation" of the Prosecution's case against the accused and that "if the new material facts are such that they could, on their own, support separate charges, the Prosecution should seek leave from the Trial Chamber to amend the Indictment".[3]

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[2] *Muvunyi Appeal Judgment*, para 30, 100 and 166.

[3] *Muvunyi Appeal Judgment*, para 20 and 165. "Muvunyi Appeal Chamber Judgment, para 20, 100 and 165" instead of 30, 100, and 166.

16. The appeal Chamber found that the "curing" (*sic*) of the *Muvunyi* Indictment by the Prosecution was a *de facto* amendment of the Indictment instead of clear and consistent notice adding specificity to a vague paragraph of the Indictment.

17. Because of the failure by the Prosecutor to plead material facts in the Indictment, the Appeals Chamber found the *Muvunyi* Indictment defective and granted his Grounds of appeal 1, 2, 5 and 6[4]. The Appeals Chamber also granted his Grounds 9, 10, 11 and 13 on the basis that the "*Prosecutor's failure to expressly state that a paragraph in the indictment supports a particular count in the indictment is indicative that the allegation is not charged as a crime*"[5].

18. The Appeals Chamber granted Muvunyi Ground 1 of Appeal concerning "the Attack at the Butare University Hospital". The Appeals Chamber held that:

> Muvunyi's arguments focus primarily on the notice provided by the Indictment of the material facts related to his role in the crime as well as the criminal acts of the principal perpetrators. In. this respect the Appeals Chamber observes that paragraph 3.29 of the Indictment clearly alleges a specific attack on wounded refugees at the Butare University Hospital around 15 April 1994 where Muvunyi and a section of soldiers allegedly separated and killed Tutsi refugees. In contrast the evidence which underpins Muvunyi's conviction in relation to paragraph 3 29 refers to an event sometime after 20 April 1994 wherein ESO Camps soldiers – in the absence of Muvunyi – participated in the abduction of Tutsis from the hospital and their subsequent killing elsewhere. *The variances between the Indictment and the evidence with respect to the dates of the attack, the soldiers' conduct during the attack, and Muvunyi's presence and participation in the attack reflect that paragraph 3.29 of the Indictment alleges a different criminal event than the one for which he was convicted.* As a result the Appeals Chamber finds that Muvunyi did not have adequate notice of the material facts giving rise to superior responsibility for the abductions and killings at the Butare University Hospital after 20 April 1994.This conclusion is reinforced as discussed below, by the Pre-Trial Brief and the Prosecution's attempt to amend paragraph 3.29 of the Indictment at the outset of trial. (emphasis added)

19. The Appeals Chamber *Muvunyi Judgment* supports the Ntabakuze Defense arguments developed in its Final Trial Brief about:

> (8.) Allegation of physical presence at a general Assemby on 6 April, or 7 April 1994 and physical committing criminal acts, by uttering orders to harm civilians.

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[4] *See*, respectively and particularly para 27 to 32, 41 to 47, 94 to 101 and 108 to 113 of the *Muvunyi* Judgment

[5] *Muvunyi Judgment*, para 156 to 158

20. As in *Muvunyi* case, the Ntabakuze/Kabiligi Indictment charges Ntabakuze with being present at a meeting allegedly held on *April 8, 1994* but the OTP evidence adduced was totally different, and did not mention a "general assembly" meeting on April 8, at all. Prosecution witnesses made contradictory allegations concerning one or more alleged General Assemblies of Para-Commandos occurring during the night of April 6 and April 7, at which Major Ntabakuze was physically present. Prosecution witnesses gave wildly differing versions of when, where and how the meeting, or meetings took place; who attended the meeting or meetings, and whether Major Ntabakuze made incriminating statements or issued orders to kill civilians, questions of witness credibility aside, the OTP led *no evidence* to support the allegation pleaded clearly in the indictment

21. In relation to the failure by the Prosecutor to plead material facts in the indictment and in connection to an attack at the Mukura forest (Ground 5), the Appeals Chamber held, for example:

> Bearing in mind the principles of notice previously articulated in this Judgement, the Appeals Chamber considers that Muvunyi could not have known, on the basis of the Indictment alone, that he was being charged in connection with the attack at the Mukura forest because this attack is not mentioned in the indictment. While in certain circumstances, the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates of the commission of the crimes, this is not the case with respect to this attack. If the Prosecution had intended to establish Muvunyi's liability for the Mukura forest attack, both the occurrence of this attack and the details of his liability should have been pleaded in the Indictment.[6] [footnotes omitted]

22. This jurisprudence confirms the Ntabakuze Defense arguments, which were upheld by the Appeals Chamber in paragraph 30 of the 18 September 2006 *Decision on Ntabakuze's Interlocutory Appeal* in its Final Trial Brief about the following allegations not pleaded in the Indictment: (1.) Allegations about Arrest of people in 1990, (4.) Allegations about death squads, (5.) Allegations about meetings before 6 April 1994, (8.) General Assembly, (9.) Meeting between Bagosora, Ntabakuze and other officers, (10.) Akajagali incident, (12.) Centre Christus killing, (14.) Nzabonariba incident, (16.) Remera and environs, (17.) Distribution of weapons, (18.) Allegation about Kabeza, (19.) Allegations about

[6] *Muvunyi Judgment*, para 94

Kabeza I, (20.). Allegations about Kabuga, (21.) Allegations about Sonatube, (22). Nyabyenda incident, (23). Allegations about Kicukiro and Sahara, (24.) Allegations about Ruhanga, (25.) Allegations about IAMSEA, (26.) Utterance over the dead body of PM Agathe, (27.) Allegations about Masaka, (28.) Allegations about Kabgayi, (29.) Allegations about Kabusunzu, (30.) Allegation about Nyakabanda, (31.) Allegations about Rwampara, (32.) Allegations about Rape, (33.) Allegations about Gitarama-Kibuye-Ngororero and (34) Guerrilla warfare.

23. All of the foregoing allegations should properly have been dismissed before the Defence was required to reply in its Final Trial Brief, earlier motions to dismiss are renewed now in light of the *Nahimana* and *Muvunyi* jurisprudence, which is binding upon this Chamber.

24. The opinion of the Appeals Chamber in *Muvunyi Judgment* about the Events at various roadblocks (Ground 6) supports the Ntabakuze Defense arguments developed in its Final Trial Brief about paragraph 6.36 of the Ntabakuze/Kabiligi Indictment. Indeed, the Appeals Chamber held that:

> Even *accepting* the Prosecution's argument that the indictment, when read as a whole, connects Muvunyi and ESO Camp soldiers to the events at roadblocks, there remains a fundamental problem with the Indictment in this respect: *it does not allege that ESO Camp soldiers engaged in killings at roadblocks*. Indeed, paragraph 3.47 of the indictment, cited in the Prosecution Response Brief in support of this argument *refers only to beatings*. This is significant because although the Trial Chamber made factual findings on beatings and other mistreatment in connection with Muvunyi's conviction for other inhumane acts as a crime against humanity, *his conviction for genocide rests on the role of ESO Camp soldiers in killing Tutsi civilians at roadblocks, not beating them.*[7] [footnotes omitted, emphasis added]

25. The Appeals Chamber granted Muvunyi's Ground 6 of appeal and dismissed his conviction for genocide because it was of the view that: killing Tutsi at roadblocks is different from beating them....*particularly* with respect to his responsibility for the horrific crime of "genocide"! Similarly in this case Paragraph 6.36 alleges that elements of the Para Commando Battalion were allegedly involved *only* in murder of "*political opponents*...in Kigali" (i.e. certain acts against certain victims in a certain place), the Trial Chamber could not admit allegations involving elements of the Para Commando Battalion in killing of *Tutsi civilians* at all, and particularly

[7] *Muvunyi Judgment*, para 109

killings that allegedly took place in other places, at other times...based on paragraph 6.36 of the Ntabakuze/Kabiligi Indictment. Those allegations are: Akajagali incident, (12.) Centre Christus killing, (16.) Remera and environs, (18.) Allegation about Kabeza, (20.). Allegations about Kabuga, (24.) Allegations about Ruhanga, (25.) Allegations about IAMSEA, (27.) Allegations about Masaka, (29.) Allegations about Kabusunzu...unless we are to understand that "Kigali" does not mean Kigali-ville...but also all of Kigali Rural, without any specificity...at all.

26. The Appeals Chamber granted the *Muvunyi* Grounds of Appeal 9, 10, 11 and 13 on the basis that the Prosecutor's failure to *expressly state* that a paragraph in the Indictment *supports a particular count* in the Indictment is indicative that the allegation is not charged as a crime:

> As noted above, the indictment does not list paragraph 3.47 in support of any count. The Appeals Chamber has previously observed in this case that *the Prosecution's failure to expressly state that a paragraph in the indictment supports a particular count in the indictment is indicative that the allegation is not charged as a crime....* The *omission* of a count or charge from an indictment *cannot be cured* by the provision of timely, clear, and consistent information.[8] [footnotes omitted]

27. Assuming, *arguendo*, that paragraph 6.36 of the Ntabakuze/Kabiligi Indictment was valid, which is not[9], the Trial Chamber may not admit accept allegations involving Ntabakuze, personally, on the basis that those allegations had a link with paragraph 6.36 of the Ntabakuze/Kabiligi Indictment *when this paragraph is pleaded only under command responsibility* (Article 6 (3) of the ICTR Statute) NOT individual responsibility.

28. Indeed, the name of Ntabakuze is not mentioned in paragraph 6.36 of the Indictment. Therefore, when the Chamber admitted those allegations, it modified automatically the mode of participation of the Accused (from responsibility as superior to individual responsibility) which is a radical transformation of the case against Ntabakuze outside the provision of Article 50 of the Rules. Those allegations are: (10.) Akajagali incident with respect to DBQ allegations, (18.)

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[8] *Muvunyi Appeal Judgment*, para 156

[9] See the Ntabakuze Defense arguments in para 2449 of the *Ntabakuze Defense Final Brief* and para 9 of the *Addendum to Ntabakuze Final Brief* (*Nahimana* Appeal Judgment Jurisprudence) filed on 27 February 2008.

Allegation about Kabeza with regard to witness AH, (20.) Allegations about Kabuga, (24.) Allegations about Ruhanga, (25.) Allegations about IAMSEA, and (29.) Allegations about Kabusunzu.

29. The Appeals Chamber also granted *Muvunyi's* Ground 2 (an attack to the Benebikira Convent) on the basis that "*the indictment is defective because it does not identify ESO camp soldiers among the perpetrators of the attack at the Benebikira Convent*".[10] The Appeals Chamber held that "*this defect is significant because the role played by ESO camp soldiers in this attack is the sole basis of Muvunyi's convictions related to this attack. Moreover, this is not a case where the indictment identified the alleged perpetrators in a general manner. Rather, the perpetrators of the attack are specifically identified in paragraph 3.27 of the Indictment as soldiers from the Ngoma camp.*"[11]

30. This jurisprudence supports and completes the Ntabakuze Defense arguments developed in the *Ntabakuze Defense Final Trial Brief* and based upon paragraph 30 of the 18 September 2006 *Decision on Ntabakuze's Interlocutory Appeal* with respect to Sonatube incident and Rwampara incident.

31. Indeed, with regard to Sonatube incident, the Trial Chamber admitted this allegation on the basis that it is linked to paragraph 6.37 of the Indictment, but the Sonatube incident is mentioned *nowhere* in that paragraph and the perpetrators *are identified* in that paragraph as elements of the Presidential guard and Interahamwe, NOT the Para Commando Battalion. The paragraph alleges that Bagosora was also present.

32. There is no mention of *any* elements of the Para Commando Battalion nor of Ntabakuze's presence in that paragraph.

33. Concerning Saint-André College-Rwampara incident, there is no mention of elements of the Para Commando Battalion nor of Ntabakuze in paragraph 6.38 of the Ntabakuze/Kabiligi Indictment related to Saint-André. Instead it is the name of

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[10] *Muvunyi Appeal Judgment*, para 40

[11] *Muvunyi Appeal Judgment*, para 41

Kabiligi which is mentioned. Therefore, no *legitimate* conviction can result from these allegations, with respect to Major Ntabakuze.

(B) PLEADING AND PROOF OF COMMAND RESPONSIBILITY

34. The Appeals Chamber held that, "If the Prosecution intends to rely on the theory of superior responsibility to hold an accused criminally responsible for a crime under Article 6(3) of the Statute, the Indictment should plead the following:

> (1) that the accused is the superior of subordinates sufficiently identified, over whom he had effective control - in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible;
>
> (2) the criminal conduct of those others for whom he is alleged to be responsible;
>
> (3) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates and
>
> (4) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[12] [footnotes omitted]

The Appeals Chamber added that "*An indictment lacking this precision is defective; however, the defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charge.*"

22. However, the Appeals Chamber *specifically quoted* paragraph 30 of the *18 September 2006 Decision on Ntabakuze's Interlocutory Appeal* to emphasize that the "cure" of the Indictment is *not without limits*, that "the new material fact" should not lead to a "radical transformation" of the Prosecution's case against the accused, and that, "if the new material facts are such that they could, on their own, support separate charges, the Prosecution should seek leave from the Trial Chamber to amend the Indictment."

The Prosecutor failed to request, and the Trial Chamber did not grant, such an amendment in this case and it was error on the part of the Trial Chamber to fail to

[12] *Muvunyi Appeal Judgment*, para 19

strike all evidence of crimes not specifically alleged in the Indictment, even before the Defense was obliged to respond in its Trial Brief.

(1) Prosecution failed to plead or prove facts by which the Accused knew, or should have known, that crimes were about to be committed, or had been committed, by his subordinates

35. The Appeals Chamber in the *Muvunyi Decision* does not agree with the Prosecution contention that quoting the legal elements of superior responsibility put the accused on notice about the pleading of his knowledge of the crimes and his failure to prevent them or to punish his subordinates[13]. The quotation in question is the following:

> [.. .] [F]or all of the acts described at paragraphs[sic] 3.27 of the indictment the Prosecutor alleges that the accused knew, or had reason to know, that his subordinates were preparing to commit or had committed one or more of the acts referred to in Article 2(3)(a) and (e) of the Statute of the Tribunal and failed to take the necessary and reasonable measures to prevent the said acts from being committed or to punish those who were responsible pursuant to Article 6(3) of the Statute.

36. The Appeals Chamber held then that "*The Indictment is therefore defective in this respect. For these elements, proper notice requires the Prosecution to plead: the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates and the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.*"[14] [footnotes omitted]

37. The Appeals Chamber added that "*In the Ntagerura et al. case the Appeals Chamber rejected a nearly identical formulation as satisfying the pleading requirements for these elements of superior responsibility and overturned a conviction for genocide, in part, on that basis.*" [15]

38. Accordingly, since the Prosecutor failed systematically to plead, in the Ntabakuze/Kabiligi Indictment, the material facts related to Ntabukuze's

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[13] *Muvunyi Appeal Judgment*, para 43 and 44.

[14] *Muvunyi Appeal Judgment*, para 44

[15] *Muvunyi Appeal Judgment*, para 45

knowledge of the crimes; his failure to prevent crimes; or, to punish the perpetrators, no legitimate conviction can result from command responsibility against him.

(2) The failure to adduce proof for the existence of a necessary element of "command responsibility".

39. The Appeals Chamber granted the *Muvunyi* Ground of Appeal 4, concerning an "attack at the *Groupe Scolaire*"[16] and held that:

> The Appeals Chamber has explained that an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime. *The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.*[17] [footnotes omitted]

The Appeals Chamber added:

> An accused may be convicted of aiding and abetting *when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime*. In cases where tacit approval or encouragement has been found to be the basis for criminal responsibility, *it has been the authority of the accused combined with his presence at or very near the crime scene, especially if considered together with his prior conduct which allows the conclusion that the accused's conduct amounted to official sanction of the crime* and thus substantially contributed to it. The question of whether a given act constitutes substantial assistance to a crime requires a fact-based inquiry.[18] [footnotes omitted]

The Appeals Chamber concluded that there was no *direct* evidence that Muvunyi *knew* that armed soldiers left the camp to take part in the *Groupe Scolaire* attack,[19] which is precisely the evidentiary posture of the Prosecution's case at bar.

40. This *Muvunyi* Appeals Chamber jurisprudence supports and completes the Ntabakuze Defense arguments developed in its Final Trial Brief on the allegations against Ntabakuze relating to: (6.) Training of militia, (10.) Akajagali incidents (with the exception of DBQ testimony, which lacks credibility for other reasons fully delineated in the Brief, (11.) Kimihurura incidents, (12.) Killing at Centre Christus,

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[16] *Muvunyi Appeal Judgment*, para 73 to 88.

[17] *Muvunyi Appeal Judgment*, para 79.

[18] *Muvunyi Appeal Judgment*, para 80.

[19] *Muvunyi Appeal Judgment*, para 82.

(16.) Incidents in Remera and environs, (18.) Kabeza incident (witness BL), (19.) Incidents in Kabeza I, (23.) Killings in Kicukiro and Sahara, (25.) IAMSEA incidents, (27.) Killing at Masaka, and (32.) Rape.

(C) UNCORROBORATED HEARSAY

41. The Appeals Chamber granted the *Muvunyi* Ground 3 related to Attack at the University of Butare. It held that:

> It is well established that, as a matter of law, it is permissible to base a conviction on circumstantial or hearsay evidence. *However, caution is warranted in such circumstances.* In this respect, the Trial Chamber explained in the Trial Judgment that "there may be good reason for the Trial Chamber to consider whether hearsay evidence is supported by other credible and reliable evidence adduced by the Prosecution in order to support a finding of fact beyond reasonable doubt." *Here, there was good reason to consider whether the hearsay evidence was otherwise supported, as neither witness provided any detail on the abductions and killings themselves.* Consequently the Appeals Chamber is not persuaded that the Trial Chamber acted reasonably and with the requisite degree of caution in relying on the evidence of Witnesses NN and KAL about these events. *No reasonable trier of fact could have concluded that ESO camp soldiers "systematically sought and killed Tutsi lecturers and students" in circumstances where it heard no evidence about even a single incident.*[20] [footnote omitted, emphasis added]

42. This jurisprudence supports and completes the Ntabakuze Defense arguments developed in its Final Trial Brief on the allegations against Ntabakuze relating to: (6.) Training of militia, (12.) Killing at Centre Christus, (13.) Bagosora ordering "Muhere aruhande", (16.) Incidents in Remera and environs, (17.) Distribution of weapons with regard to DP testimony[21], (23.) Killing in Kicukiro and Sahara, (27.) Killings at Masaka, (28.) Kabgayi Hospital incidents with respect to XXY allegations, (31.) Rwampara incident, (33.) Reinforcing Interahamwe in Gitarama, Kibuye and Ngororero and (34.) Planning guerilla warfare.

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[20] *Muvunyi Appeal Judgment*, par 70

[21] See Trial Chamber I Decision of 18/11/2003, para 8 and Ntabakuze Defense Final Brief, para 1529. The Chamber is invited to note that in paragraph 649 of the *Nahimana Appeal Judgment* and para. 438 of the *Karera Trial Chamber Judgment* (ICTR-01-74-T, Dec. 7, 2007) emphasized that the distribution of weapons to kill civilians was the basis of the crime, not distribution of weapons for defense or other proper purpose. In this case *only* Prosecution witness DCH alleged distribution for an improper purpose and *the DCH allegation is completely uncorroborated.*

WHEREFORE,

Counsel for Major Ntabakuze prays this Honorable Court to apply the binding jurisprudence announced by the Appeals Chamber in: the *September 18, 2006 Ntabakuze Interlocutory Appeal Decision*; the *Nahimana Judgment*; the *Oric Judgment*; and, most recently, the *Muvunyi Judgment*, and DISMISS the foregoing factual allegations outside the Indictment as delineated above, and in previous Motions, or, in the alternative: (a) to set a hearing for oral argument as to whether the aforementioned jurisprudence is properly applicable to this case; and (b) upon resolution of either alternative above, to enter an ORDER: (1) dismissing all counts improperly plead by the Prosecution and not supported by sufficient evidence to carry the Prosecution's burden to proffer at least *some* credible evidence on each element of each offense; or, (2) to enter a finding of NOT GUILTY on all counts pending before the Chamber, forthwith; or such other relief as to the Chambers appears just and proper.

Respectfully submitted: date: 9/11/08

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CENTRAL REGISTRY
12 SEP 2008
ACTION:
COPY 1: TC1/CMS

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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)

To:	☒ Trial Chamber I N. M. Diallo	☐ Trial Chamber II R. N. Kouambo	☐ Trial Chamber III C. K. Hometowu	☐ Appeals Chamber / Arusha F. A. Talon
	☐ Chief, CMS J.-P. Fomété	☐ Deputy Chief, CMS M. Diop	☐ Chief, JPU, CMS M. Diop	☐ Appeals Chamber / The Hague R. Muzigo-Morrison K. K. A. Afande
From:	☐ Chamber (names)	☒ Defence ERLINDER (names)	☐ Prosecutor's Office (names)	☐ Other: (names)
Case Name:	The Prosecutor vs. NTABAKUZE		**Case Number:** ICTR-98-41.T	
Dates:	Transmitted: 9/11/08		Document's date: 9/11/08	
No. of Pages:	16	**Original Language:** ☒ English	☐ French	☐ Kinyarwanda
Title of Document:	MOTION FOR APPLICATION OF MUVUNYI JURISPRUDENCE AND DISMISSAL			

Classification Level:	**TRIM Document Type:**			
☐ Ex-Parte	☐ Indictment	☐ Warrant	☐ Correspondence	☐ Submission from non-parties
☐ Strictly Confidential / Under Seal	☐ Decision	☐ Affidavit	☐ Notice of Appeal	☒ Submission from parties
☐ Confidential	☐ Disclosure	☐ Order	☐ Appeal Book	☐ Accused particulars
☒ Public	☐ Judgement	☐ Motion	☐ Book of Authorities	

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.

Target Language(s):
☐ English ☐ French ☐ Kinyarwanda

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JUDICIAL RECORDS RECEIVED

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	☐ English	☐ French	☐ Kinyarwanda
Translation	in	☐ English	☐ French	☐ 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

☐ **The OTP** is overseeing translation.
The document is submitted for translation to:
☐ The Language Services Section of the ICTR / Arusha.
☐ The Language Services Section of the ICTR / The Hague.
☐ An accredited service for translation; see details below:
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☐ **DEFENCE** is overseeing translation.
The document is submitted to an accredited service for translation (fees will be submitted to DCDMS):
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III - TRANSLATION PRIORITISATION (For Official use ONLY)

☐ Top priority	COMMENTS	☐ Required date:
☐ Urgent		☐ Hearing date:
☐ Normal		☐ Other deadlines: