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**INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA
IN THE APPEALS CHAMBER**

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

ICTR-00-55A-A
28-05-2008
(1245/A-1239/A)

Registrar: Adama Dieng

Date filed: 27 May 2008

THE PROSECUTOR

v.

Tharcisse MUVUNYI

CASE No. ICTR-2000-55A-A

2008 MAY 28 1 P 4: 39
JUDICIAL RECORDS ARCHIVES
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**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**

Office of the Prosecutor:

Mr. Hassan Bubicar Jallow
Mr. Neville Weston
Ms. Renifa Madenga
Mr. Francois Nsanzuwera
Ms. Evelyn Kamau

Counsel for the Appellant:

Mr. William E. Taylor III
Ms. Abbe Jolles

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1. On May 14, 2008 The Prosecutor filed a Response to our Motion to this Chamber to consider your decision in the case of *Prosecutor v. Hadzihasanovic and Kubura*, IT-01-47-A (hereinafter referred to as *Recent Decision*) as it relates to Tharcisse Muvunyi (hereinafter referred to as *Response*.)
2. We hereby respectfully request permission to late file this important Reply to that *Response*. Below signed was out of the county when the *Response* was filed and was unable to timely make this very important submission.
3. In their *Response* the Prosecutor contends, inter alia, that the *underlying premise* of our request to have this Chamber apply the holding and analysis in the *Recent Decision* is *entirely misconceived*¹.
4. What the *Response* fails to take into account is that while the *Recent Decision* may be consistent with *pre existing jurisprudence*², the *Recent Decision* makes it clear, that in order to prove effective control and or punishment or failure to punish, the identity of the bad actors, to whom the commanding officer has a duty to punish, must be known. In our case in any event we have always maintained that the evidence does not support a conclusion that Muvunyi was commander.
5. Thus in a civilized legal system applying civilized standards, as in effect at the ICTR, the *Recent Decision* is relevant and must be considered when deciding the case of Tharcisse Muvunyi. Our position, as set out in our Motion is not only not *misconceived* but it is rationally based and legally correct.
6. The analysis contained in paragraph 5 of the *Response* is somewhat empty. The Prosecutor fails to recognize the significance of the *Recent Decision*. The *Recent Decision* makes clear that in order to determine whether a particular commander punished subordinates for a bad acts, both the bad acts, and the identity of the subordinates, must be known. These facts cannot be presumed. Thus, as the *Response* points out in paragraph 5, the assessment of whether a superior fulfilled his duty must be made on a case by case basis. So while not conceding that Muvunyi was a commander based on the great weight of the evidence, even if he was he could not be held responsible for bad acts of subordinates

¹ Response, para. 3.

² Response, para. 4.

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without knowing which bad acts (time date and place) and which subordinates.

7. In each case there must be evidence of exact bad acts perpetrated and the exact perpetrators and whether these identified perpetrators were punished. That is what is meant by the requirement that each case must be analyzed on its own facts or as the Prosecutor points out, *each determination is case-specific*.³ All cases are fact specific. The facts of each case are always somewhat unique but principles must be followed and applied even handedly to all cases regardless of the individual facts. Thus if the *Recent Decision* requires the identity of perpetrators and bad acts they committed to determine if they were punished *adequately*⁴ or if at all, then such evidence must also be required in the case of Tharcisse Muvunyi.
8. That Muvunyi did not claim at trial or on appeal that he took certain measures or not, must not be considered herein as Muvunyi does not have the burden of proof. The Prosecution should know at this late date that they have the burden of proof. It is not up to Muvunyi to prove elements of the charges as the *Response* indicates.⁵ This is a feeble attempt to shift the burden of proof and must therefore be soundly rejected. We have always maintained that Muvunyi was never the commander in any case.
9. It should also be noted that despite the *Response's* confusion respecting the relevance of the *Recent Decision*, our filing has nothing to do with adequacy of measures to prevent or punish. What we are talking about is that an unidentified perpetrator cannot be punished for an unidentified act. Commander liability-Superior Responsibility cannot be presumed.
10. This is certainly not the first time we have raised this point as the *Response* contends.⁶ We have raised this a number of times. Most recently it came up in the Oral Argument. The Prosecutor had ample opportunity to object or even take note of it at that time and did not. They were absolutely silent after on this point after below signed made her presentation. On behalf of Tharcisse Muvunyi it was pointed out several times that Tharcisse Muvunyi

³ Response, para. 7.

⁴ The issue of the adequacy of measures taken by a superior to prevent or punish not being present in the Muvunyi case does not make the *Recent Decision* inapplicable to Muvunyi. The discussion of the adequacy of the measures taken by the superior in the *Recent Decision* makes it clear that the Muvunyi case is indistinguishable from the *Recent Decision*. Since the perpetrators were known in the *Recent Decision* the Superior could take measures to punish them. *Response* para. 9.

⁵ Response, para. 10.

⁶ Response, para. 11.

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could not be held responsible for failure to punish without identifying the perpetrators and the bad acts they committed.

11. In paragraph 12 the *Response* indicates that we did not understand certain comments in the Trial Chamber Judgment. This is preposterous. We rest on our quotes and understanding of the Judgment. We accurately quoted the Judgment. Although the *Response* contends we do not understand the Judgment they offer no basis for this position. The plain meaning of the language in the Judgment should control. Simply allowing the Prosecution to decide a meaning other than the plain meaning is not in the interests of justice. We respectfully request that this Chamber not blindly accept that we have *misread* the Judgment when in fact the Prosecution has *misread* it.
12. The *Response* indicates that since these remarks are made in the context of sentencing they are not relevant to the Trial Chamber's findings.⁷ They go on to conclude that the Chamber did not mean what they said and that all they meant was that Muvunyi should have done something in the worst case. This is further support for our position that Muvunyi could not have done anything without the identity of the perpetrators as well as each bad act.
13. In paragraph 17 the *Response* accuses the defense of being *confused* respecting the requirement that the commander must know about the identity of the perpetrators and what bad acts they committed in order to have a duty to punish them. The Prosecution is confused here. Simply a general allegation that crimes were committed by unknown subordinates without more is absolutely insufficient. There is no evidence, as was present in the *Recent Decision* permitting an assessment of Hadzihasanovic's responsibility, of any orders or other acts by Muvunyi, indicating that Muvunyi was aware that soldiers under his so called command were committing crimes. This has been pointed out over and over again and the Prosecution remains *confused* on this point. Again there was insufficient evidence to show Muvunyi was even a commander but even if he were there must be evidence of who did what in order for a duty to punish to arise.
14. In paragraph 20 of the *Response* the Prosecutor indicates that we simply re argued a point already raised and affirmed by the *Recent Decision*. The point they claim we re argued is that the Prosecution must prove beyond a reasonable doubt that the commander had the material ability to prevent or punish. They are quite correct that this is not *new law* but it is a recent

⁷ Response, para. 13.

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application of *old law* to the facts of the *Recent Decision* as it should be applied in the case of Tharcisse Muvunyi. The Trial Chamber failed to apply this *old law*. That is precisely the basis of our filing. The *Recent Decision* applies the *old law* to yet another set of facts and it should be applied in our case too.

15. In paragraph 21 of the *Response* our argument is deemed impermissible because we use a new set of words (*process of elimination*) to reach the same conclusion that we have reached from the beginning. That the Trial Chamber concluded that Muvunyi had effective control from the evidence presented is impermissible because such a conclusion is not supported by the evidence. Whether the Trial Chamber reached their conclusion by *process of elimination* or some other way the conclusion is not supported by the evidence.
16. It is clear in paragraph 217 of the *Recent Decision* that other authority over misbehaving subordinates is an appropriate indicia of effective control.⁸ This is dictated by common sense as well as the *Recent Decision*.
17. The Prosecution contends that the Trial Chamber had *specific positive evidence*⁹ supporting the conclusion that Muvunyi had effective control over ESO soldiers. This is simply false. First our position has always been that Muvunyi was never the Commander. That the Trial Chamber *studied* the order of command finding by this *study* that Muvunyi was the second in command during some period of time and that he may have become the commander after his superior left does not support the conclusion that he had *effective control* over ESO soldiers or even that he was the actual commander.
18. Nor does the evidence of Witnesses KAL, YAA and NN support this conclusion as the Prosecution contends. While these witnesses may have been soldiers at various times at ESO they did not offer any evidence that Muvunyi did or did not do anything indicating any control. There was no evidence that Muvunyi was informed that these witnesses committed crimes that Muvunyi knew about. It is precisely because the Trial Chamber found Muvunyi had effective control from the above referenced evidence that this finding cannot stand. This is simply insufficient evidence from which the Trial Chamber could find Muvunyi had effective control.

⁸ Response, para. 22.

⁹ Response, para. 24

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19. This may show that the Trial Chamber used *process of elimination*¹⁰ to determine who controlled these unidentified subordinates. In any event it absolutely shows there was no evidence from which a reasonable fact finder could conclude Muvunyi had effective control let alone that he was even the Commander.
20. In sum we respectfully submit that the Trial Chamber Judgment did not take account of the proper law in the context of the facts and legal issues before it as the Prosecution contends¹¹. The *Recent Decision* makes that clear when it applies it's facts to the law and reiterates the standard for superior subordinate responsibility. It offers new authority, in the sense that it applies old concepts and principles to another set of facts which cannot be significantly distinguished from the case of Tharcisse Muvunyi. In this way, contrary what the Prosecution says, it does in fact put the *Trial Chamber's finding at risk*.¹²

¹⁰ Response para. 25.

¹¹ Response, para. 26.

¹² Response, para. 26.

RELIEF SOUGHT

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21. We respectfully request that the convictions under Counts I and V be *quashed*¹³ and Mr. Muvunyi be re sentenced accordingly.
22. Based on the circumstances of this case, including the seriousness of the crime of which Muvunyi remains convicted after quashing convictions under Counts I and V and considering the tenor and source of the testimony and the lack of precision and pleading relating to Count III Muvunyi should be acquitted or in the alternative his sentence should be reduced to a term of imprisonment of five years and his immediate release effected.

Dated at Washington, DC, United States of America this 27th day of May, 2008,

Respectfully submitted,



Abbe Jolles
Co-counsel for the Accused

William F. Taylor, III
Lead counsel for the Accused

¹³ *Recent Decision*, para. 357

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28 MAY 2008
ACTION: APPEALS
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