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Tribunal Pénal International pour le Rwanda**

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Before: Judge Vagn Joensen, *President*

Registrar: Adama Dieng

Date Filed: 12 June 2012

PROSECUTOR v. KAYISHEMA et al

Case No. ICTR-95-1

PROSECUTOR v. BAGILISHEMA

Case No. ICTR-95-1A

PROSECUTOR v. MUHIMANA

Case No. ICTR-95-1B

PROSECUTOR v. NDIMBATI ✓

Case No. ICTR-95-1

PROSECUTOR v. SIKUBWABO

Case No. ICTR-95-1D

PROSECUTOR v. NIYITEGEKA

Case No. ICTR-96-14

PROSECUTOR v. MUSEMA

Case No. ICTR-96-13

PROSECUTOR v. MUNYAKAZI

Case No. ICTR-97-36A

PROSECUTOR v. KAREMERA et al

Case No. ICTR-98-44

PROSECUTOR v. NCHAMIHIGO

Case No. ICTR-01-63

PROSECUTOR v. NDINDABAHIZI

Case No. ICTR-01-71

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Prosecutor's Response to Motion for Reconsideration of the 28 May Decision in Relation to Jacques Mungwarere's Motion for Access to Materials and Notice Under Rule 67(D)

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A. Overview

1. On 7 June 2012, the Defence for Jacques Mungwarere ("Applicant"), currently facing prosecution in Canada for genocide and other serious crimes committed in Rwanda in 1994, filed a Motion seeking reconsideration of a Decision rendered by President Vagn Joensen on 28 May 2012.¹

2. The Prosecutor hereby opposes the Motion. The Applicant fails to meet the standard for reconsideration as established by this Tribunal, namely that a Chamber or the President "may reconsider a previous decision pursuant to its inherent discretionary power if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice."²

B. Submissions

3. Reconsideration is an exceptional remedy.³ The Applicant has not demonstrated that this is an exceptional case meriting discretionary reconsideration: he has not demonstrated a clear error in the President's reasoning, nor the necessity of reconsideration to prevent an injustice.

(i) First Ground

4. In his First Ground, the Applicant, in essence, seeks reconsideration based on an alleged lack of reasoned opinion.⁴ He argues that the Decision should be reconsidered, because it does not take into account the Applicant's Reply of 20 March 2012.⁵

¹ *The Prosecutor v. Kayishema et al*, Case No. ICTR-95-I, Motion for Reconsideration of the 28 May Decision in Relation to Jacques Mungwarere's Motion for Access to Materials and Notice Under Rule 67(D), 7 June 2012 ("Motion"). See also *The Prosecutor v. Kayishema et al*, Case No. ICTR-95-I, Decision in Relation to Jacques Mungwarere's Motion for Access to Materials and Notice under Rule 67(D), 28 May 2012 ("Decision").

² *Kajelijeli v. the Prosecutor*, Case No. ICTR-98-44A-A, Appeal Judgement, 23 May 2005 ("Kajelijeli Appeal Judgement"), paras. 203-204; *The Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-A, Decision on Idelphonse Hategekimana's Second Motion for an Extension of Time to File his Appellant's Brief, 20 May 2011, para. 6; *The Prosecutor v. Karemera et al*, ICTR-98-44-AR73.18, Decision on Request for Reconsideration, 8 March 2012, para. 7. As the Applicant rightly points out, the President has the same inherent power to reconsider his own decisions. See Motion, para. 14, with reference to *The Prosecutor v. Rutaganira*, Case No. ICTR-1995-1C-R73, Decision on the Motion for Reconsideration of the Denial of Early Release, 13 February 2008, para. 4.

³ *Kajelijeli Appeal Judgement*, para. 204,

⁴ Motion, paras. 15, 16-19.

⁵ *The Prosecutor v. Kayishema et al*, Case No. ICTR-95-I, Reply to the Prosecutor's Responses to Jacques Mungwarere's First and Second Urgent Motion for Access to Material and Notice under Rule 67(D), 20 March 2012 ("Reply"), attached as Annex A to the Motion.

5. The mere fact that the President did not reference the Applicant's Reply does not render his Decision erroneous. It is well-established jurisprudence that a Chamber (or the President) does not have to explain its decision in every detail.⁶ Moreover, the Applicant fails to show that he suffered prejudice in the current circumstance. He blatantly alleges that the President only considered the information provided in his Initial Motion to conclude that the material sought was not sufficiently identified,⁷ without even attempting to demonstrate how the information provided in the Reply would have satisfied the specificity requirement.⁸

6. Indeed, a further review of the Reply shows that the information provided is still not specific enough to identify the material sought. The Applicant does not include sufficient reference, for example, to the particular date of the witnesses' testimony, the pseudonyms used to identify the witnesses or the exhibit numbers.⁹

7. Overall, the Applicant does not make any submissions in his Reply that would have altered the President's Decision. He fails to show that he suffered prejudice by the Decision not explicitly referring to his Reply.¹⁰

(ii) Second Ground

8. The Applicant also seeks reconsideration, arguing that the impugned Decision fails to specifically address the material sought in relation to the *Munyakazi* case.¹¹ However, the Decision does address the material sought in *Munyakazi*.¹²

⁶ See, e.g., *Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Judgement, 2 February 2009 ("*Karera* Appeal Judgement"), para. 20.

⁷ *The Prosecutor v. Kayishema et al.*, Case No. ICTR-95-I, Jacques Mungwarere's Urgent Motion for Access to Material, dated 29 February 2012 and filed on 1 March 2012 ("*Initial Motion*").

⁸ Motion, paras. 17-19; Decision, paras. 15, 26.

⁹ See Decision, para. 15, with reference in footnote 13 to *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 17 May 2012, para. 17 and footnote 37.

¹⁰ See *Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-R, Decision on Rutaganda's Appeal concerning Access to Confidential Materials in the *Karemura et al.* Case, 10 July 2009, para. 18. Here, the Appeals Chamber held that a party denied the opportunity to file a reply, can show prejudice on appeal by demonstrating that it could have raised arguments in its reply to address those submissions contained in an opposing party's response.

¹¹ Motion, paras. 15, 20-21.

¹² Decision, p. 10.

9. In his Initial Motion, the Applicant submitted that no evidence was presented at the *Munyakazi* trial regarding the attacks in Bisesero, although Munyakazi was charged with several counts relating to these events.¹³ In Annex 1 to his Reply, the Applicant requests the supporting material for these charges.¹⁴

10. In the impugned Decision, the President expressly denied the Applicant's request relating to the Munyakazi and Nchamihigo cases.¹⁵ The Decision specifically explains that there is not a factual nexus in relation to the *Nchamihigo* case "which relates only broadly to events in the Bisesero area and does not refer specifically to the allegations against Mungwarere".¹⁶ Similarly, given that no evidence was led at the *Munyakazi* trial, as the Applicant concedes, no factual nexus exists between the Applicant's case and the Munyakazi case. Once again, a Chamber (or the President) does not have to explain its decision in every detail.¹⁷ It is clear from the impugned Decision that the Applicant's request with respect to the *Munyakazi* case has been addressed and denied.

(iii) Third Ground

11. In his Third Ground, the Applicant makes the unsubstantiated assertion that his submissions regarding Rule 67 (D) of the Rules of Procedure and Evidence have been "misinterpreted, ignored or misunderstood."¹⁸

12. However, the President was correct in concluding that that Rule 67 (D) should not apply *mutatis mutandis* to parties outside the Tribunal¹⁹. The Applicant merely repeats arguments raised before, and suggests another reading of the Rule, without demonstrating a clear error of reasoning or that reconsideration is necessary to prevent an injustice.

¹³ Initial Motion, para. 37, with reference in footnote 49 to the *Munyakazi* trial judgement.

¹⁴ Reply, Annex 1, para. 47.

¹⁵ Decision, Disposition, I (p. 10).

¹⁶ Decision, para. 23, with reference in footnote 31 to the *Nchamihigo* trial judgement.

¹⁷ *Karera* Appeal Judgement, para. 20.

¹⁸ Motion, paras. 15, 22-25, esp. para. 23.

¹⁹ Decision, para. 36.

C. - RELIEF SOUGHT

13. For all these reasons, the Prosecutor respectfully requests the President to dismiss the Motion in its entirety.

Dated at Arusha 12 June 2012



Richard Karegyesa

Chief of Prosecutions



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