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Amended

International Criminal Tribunal for Rwanda
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Judge Fausto Pocar
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Judge Andrésia Vaz
Judge Carmel Agius

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Filed on: 23 January 2012

JUVÉNAL KAJELIJELI

v.

THE PROSECUTOR

Case No. ICTR-98-44A-R

PROSECUTOR'S RESPONSE TO JUVÉNAL KAJELIJELI'S MOTION FOR LEAVE TO AMEND HIS REPLY BRIEF

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654/A

A. OVERVIEW

(i) Summary of Prosecutor's Position

1. On 11 January 2012, the Applicant, Juvénal Kajelijeli, filed the *Applicant's Motion For Leave To Amend His Reply Brief* ("The Motion").[1] He proposes to make four sets of amendments relating to his submissions in the *Applicant's Reply to the Prosecutor's Response Brief* ("Reply") on Witnesses GAP, GAO, GDQ and GBV respectively.[2]

2. The Applicant contends that good cause exists justifying the amendments on the following grounds:

a) the proposed amendments are his last opportunity to present his Reply;[3]
b) the proposed amendments were not included or fully articulated in the Reply due to his inability to understand English, the language used in the Response;[4] and
c) the proposed amendments could be of substantial importance to the success of the Review.[5]

3. The Prosecutor opposes the Applicant's Motion in its entirety for the following reasons:

a) The Applicant does not demonstrate any good cause for his proposed amendments nor justify his failure to include them in the initial Reply;
b) Accepting the proposed amendments would impermissibly exceed the word limit; and
c) The motion is untimely and granting it now would unduly delay the expeditious and efficient administration of justice.

(ii) Relevant Procedural Background

4. On 15 June 2011, the Applicant filed his *Strictly Confidential Juvénal Kajelijeli's Application for Review* ("Review"). On 25 July 2011, the Prosecutor filed his Response.

5. On 28 July 2011 the Applicant filed a request for an extension of time within which to file his Reply until 15 days from the date of the French translation of the Prosecutor's Response ("Extension Request").[6] The Appeals Chamber denied this request and noted that the Applicant would have the opportunity to review the French translation of the Response,

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[1] Dated 9 January 2012 but received by CMS on 11 January 2012.
[2] Motion, paras. 12-16.
[3] Motion, para. 8.
[4] Motion, para. 9.
[5] Motion, para. 11.
[6] Applicant's Urgent Motion For An Extension of Time to File a Brief In Reply, 28 July 2011, paras. 2, 12.

and if good cause was shown, he could seek leave to amend his Reply.[7] The Applicant filed his 30-page Reply on 9 August 2011.

6. The Applicant received the French translation of the Response on 25 October 2011. 83 days later, on 11 January 2012, the Applicant filed the Reply.

(iii) Applicable Law

7. Although ICTR jurisprudence has not strictly speaking elaborated what constitutes good cause to justify amending reply briefs, existing jurisprudence on amending other filings is instructive. For instance, the concept of "good cause" encompasses both good reason for including the new or amended grounds of appeal sought and good reason why those grounds were not included (or were not correctly articulated) in the original notice of appeal.[8] The Appellant has the burden to demonstrate that each proposed amendment meets the requirement of Rule 108.[9]

8. The jurisprudence of the Tribunal also establishes that the criteria for variation of grounds of appeal should be interpreted restrictively at the stages in the appeal proceedings when amendments would necessitate a substantial slowdown in the progress of the appeal.[10] To hold otherwise would leave appellants free to change their appeal strategy and essentially restart the appeal process at will, interfering with the expeditious administration of justice and prejudicing the other parties to the proceedings.[11]

9. For the reasons that follow, the Applicant has failed to demonstrate that the proposed amendments satisfy the requirement of Rule 108. Not only has he failed to establish that good cause exists, he has also not sought the amendments in a timely manner and granting his Motion at this stage of the Review would unduly delay the proceedings.

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[7] Decision on Request for Extension of Time ("Extension Decision"), 4 August 2011, p 2.
[8] *Prosecutor v. Nikola Sainović et al,* Case No. IT-05-87-A, Decision on Dragoljub Ojdanić's Second Motion to Amend his Notice of Appeal, 4 December 2009 ("*Sainović* Decision"), para. 6; *Dominique Ntawukulilyayo v. The Prosecutor*, Case No. ICTR-05-82-A, Decision on Dominique Ntawukulilyayo's Motion for Leave to Amend his Notice of Appeal, 14 January 2011 ("*Ntawukulilyayo* Decision"), para. 10.
[9] *Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, Decision on Renzaho's Motion to Amend Notice of Appeal, 18 May 2010 ("*Renzaho* Decision"), para. 9.
[10] *Sainović* Decision, para. 8.
[11] *Ibid.*

B. SUBMISSIONS

(i) Good Cause Not established

a) <u>Alleged Lack of Oral Hearing does not Amount to Good Cause</u>

10. The fact that there is no oral hearing at the first stage of preliminary examination in review proceedings, in which to supplement or augment a reply brief, is not 'good cause' within the requirement of Rule 108.

11. The Applicant relies on the *Ruzindana* decision to show that unlike in that case where amendments were denied because the Applicant would have had an opportunity to address them during oral arguments on appeal, he would not have the same recourse in the Review proceedings.[12] The *Ruzindana* decision is inapplicable to his case. Review proceedings are considered to be an exceptional remedy and as such it would be inappropriate to compare the two procedures.[13]

12. Additionally, Rule 121 is clear that the first stage of preliminary examination is conducted by the Review Chamber on the basis of the written submissions of the parties, and that an oral hearing would be held if the Chamber decides to review the judgement based on the new facts. As argued further below, the amendments he seeks relate to further evidence of the alleged new facts that were already raised and supported in the Reply, and he now seeks to bolster his case by providing further references from other cases. It is therefore disingenuous for the Applicant to compare the two proceedings and state that he will not have an opportunity to be heard on the proposed amendments yet similar issues are already included in the Reply.

b) <u>Drafting of a Reply Brief is the Primary Duty of Counsel</u>

13. The Applicant's inability to read the Response until receipt of its French translation[14] does not also constitute 'good cause' for purposes of amending the Reply.

14. The Appeals Chamber has held that the determination of issues raised in the Response and any replies thereto fall primarily within the purview of the Defence Counsel.[15] Significantly, *in casu*, the Applicant's request for an extension of time to file his Reply, on

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[12] Motion, paras 7-8.
[13] See for example, *Rutaganda v. The Prosecutor*, ICTR-96-03-R, "Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification", 8 December 2006, para. 8 ("*Rutaganda* Decision").
[14] Motion, para. 9.
[15] Extension Decision, p.2; *Prosecutor v. Nikola Sainović et al,* Case No. IT-05-87-A, Decision on *Nebojsa Pavković*'s Second Motion to Amend his Notice of Appeal, 22 September 2009 ("*Pavković*'s Decision"), para. 15.

the same grounds that he did not understand English and required the French translation of the Response in order to instruct his counsel, was denied.[16] The same reasoning should apply in denying the proposed amendments since Counsel understood English and drafted a substantive 30-page Reply.

15. It is noted that only the Applicant and not his Counsel (who is fluent in English), could not read, understand or analyse the English version of the Response. As such, his Counsel would have been able to read the Response, analyse and discuss the issues raised therein with him. Indeed, it is noted that all the pleadings and responses from Defence Counsel in this case, have been in English meaning Counsel has been able to effectively communicate and discuss issues in various filings with the Applicant. The Reply is no different.

16. The Applicant does not demonstrate why or how his alleged failure to understand the Response affected the contents of his Reply. He has not provided any plausible explanations as to why he failed to use or make reference to the testimonies of GAP, GAO, GDQ, and GBV (that were available at the time of the Reply), which he now seeks to introduce through amendments.

17. Moreover, he fails to demonstrate how his personal reading of the French translation of the Response revealed the additional information that his Counsel allegedly could not have identified. In fact, since the Applicant selectively chose to rely on some references in the Reply and now seeks to introduce additional references to support the same issues in the Reply, it would appear that he is simply trying to bolster his arguments through the amendments after having had additional time to re-read the Reply.

18. In certain exceptional cases, notably where the failure to include the new or amended grounds of appeal resulted from counsel's negligence or inadvertence, the Appeals Chamber has allowed variations even though "good cause" was not shown by the appellant.[17] This is not the case here. There is no evidence or claim of incompetence or inadvertence of the Counsel. A comprehensive review of the Reply shows that the Counsel replied to each of the issues raised in the Response and supported them with materials from other cases, and the proposed amendments seek to introduce additional materials in support of the issues already addressed by Counsel in the Reply.

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[16] Extension Decision, p.2.
[17] *Sainović* Decision, para. 7.

c) Proposed Amendments are not of Substantial Importance to the Success of the Review Proceedings

19. Whilst the proposed amendments are not minor variations that provide clarification, the Applicant has not shown how these amendments are of substantial importance to the success of his Review. When the amendments are analysed in light of his Reply, they are merely repetitious and are relied upon to make further contentions about the credibility of witnesses GAP, GAO, GDQ and GBV.

First Proposed Amendment

20. The first amendment would insert ten paragraphs to the Applicant's Reply.[18] These paragraphs relate to the allegation in the Review that there is new information which establishes that GAP provided false testimony against the Applicant during his trial.[19]

21. In his Reply the Applicant refuted the Prosecutor's submissions that GAP's testimony could not have been a decisive factor in the Appeal Chamber's affirmation of his sentence. The Applicant argued that since GAP asserted that he was more truthful in Gacaca proceedings than before the ICTR, it was reasonable to conclude that his September 2006 recantation was likewise more credible than information he provided to an *amicus curiae* in *Bizimungu et al.*[20] The Applicant also refuted the Prosecutor's argument, that GAP's alleged September 2006 recantation could not have been a decisive factor since the Trial Chamber in *Ndindiliyimana et al.* stated that it would accord more weight to GAP's in court sworn testimony than out of court statements,[21] by arguing that the judgement was currently on appeal and maintaining that GAP's credibility had been severely undermined by the new facts of contradictory testimonies.[22]

22. In the amendments, the Applicant focuses on the issues in his Reply and makes references to alleged inconsistent testimonies and admissions in *Ndindiliyimana et al.*, *Bizimungu et al.* and *Setako* which he argues taint the credibility of GAP.[23] He therefore only seeks to add information which is cumulative in nature.

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[18] Motion, paras. 12 (a) – (j).
[19] See Review, paras. 49-51.
[20] Reply, para. 61.
[21] Reply, para. 62.
[22] *Ibid.*
[23] Motion, para. 12 (b).

Second Proposed Amendment

23. This amendment would add four paragraphs to his Reply.[24] The paragraphs relate to his allegation in the Review that GAO recanted his entire testimony against the Applicant in a letter to the Gacaca President, and that this recantation established the new fact that GAO lied about the Applicant.[25]

24. In his Reply he refuted the Prosecutor's assertions that Witness' BTH and 2's testimonies, which claimed GAO lied, were available during the Applicant's proceedings and were already considered by the Trial and Appeals Chambers.[26]

25. Through this amendment he seeks to augment his Reply by highlighting an alleged inconsistent testimony of GAO in *Ndindiliyimana et al.,* which the Applicant claims further taints the credibility of GAO.[27] Here again the Applicant is seeking to add information that is cumulative in nature.

Third Proposed Amendment

26. This amendment would add five paragraphs to his Reply.[28] The paragraphs relate to his allegation that GDQ's testimony before the Busogo Gacaca court allegedly contradicted findings made by the Trial and Appeal Chambers concerning the Applicant's role in events in Mukingo and Nkuli communes in 1994.[29]

27. In his Reply, the Applicant contended that the Prosecutor failed to explain how it was plausible that GDQ would not have implicated him in GDQ's crimes given the widespread criminal activity GDQ attributed to him on 7 April 1994 during his trial.[30]

28. Similarly in this Motion, he adds to his Reply by mentioning alleged inconsistent testimonies by GDQ in *Setako*, which he claims further taints his credibility.[31] This is cumulative information and adds nothing new to the initial arguments in the Reply.

Fourth Proposed Amendment

29. This amendment would introduce two paragraphs to his Reply.[32] The paragraphs relate to his allegation that BTH's and 2's testimonies in *Karemera et al.* contained

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[24] Motion, paras. 13 (a) – (d).
[25] Review, paras. 53-54.
[26] Reply, para. 66, which refers to para. 55.
[27] Motion, paras. 13 (b).
[28] Motion, paras. 14 (a) – (e).
[29] Review, paras. 6.
[30] Reply, para. 78.
[31] Motion, paras. 14 (a) – (e).

information that GBV was allegedly asked to fabricate evidence by Ruhengeri prison officials and agents of the Ruhengeri Prosecutor's Office.[33]

30. The Prosecutor had mentioned in the Response that the Applicant had not pointed to any specific evidence establishing that GBV among others allegedly fabricated evidence but instead made a blanket assertion.[34]

31. In his Reply the Applicant did not provide specific evidence but instead argued that throughout his proceedings and in the Review, he challenged the evidence that these witnesses gave against him.[35]

32. In this Motion, he attempts to supplement his Reply Brief by pointing out alleged inconsistent testimonies by GBV in *Setako*, which he claims further taint GBV's credibility.[36]

33. As shown above, all four proposed amendments therefore seek to introduce additional material to support issues that were already addressed and supported in the Reply. Since the issue of credibility of GAP, GAO, GDQ, and GBV, which the amendments essentially relate to, was comprehensively raised in the Review[37] and Reply[38], the amendments would only be cumulative and not different from what is already there. Moreover, the amendments sought do not correct any failure. [39] The proposed amendments would therefore at best be, *de minimis* to the success of his application for review.

(ii) Proposed Amendments Amount to an Impermissive Extension of the Word Limit

34. Additionally, though the Reply does not contain a word count in contravention of the relevant Practice Direction which states that the reply brief should not exceed 9,000 words[40] and must include a word count before the signature line,[41] it can be assumed and by

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[32] Motion, paras. 15 (a) – (b).
[33] Review, para. 81.
[34] Response, para. 61 (see also Review, para. 89).
[35] Reply, para. 52.
[36] Motion, paras. 15 (a) – (b).
[37] See Review generally but particularly paras. 2-7, 49-51, 53-54, 81.
[38] See Reply generally but particularly paras. 50-66, 78.
[39] *Ibid.*
[40] The Rules of Procedure and Evidence and the Practice Directions are silent with respect to the word limits for requests for review, responses and replies thereto. In absence of guidance of the Rules, the Appeals Chamber has reasoned that the word limit for requests for review and responses should not be greater than the longest brief permitted under the Practice Direction for an appeal from judgement. In other words, briefs and responses may not exceed 30.000 words, and replies may not exceed 9,000 words. Practice Direction on the Length of Briefs and Motions on Appeal, 8 December 2006, para. (C)(1)(c). See also, e.g., *Prosecutor v. Blaskic*, IT-95-14-R, "Decision on Word Limits in Review Proceedings", 1 February 2006.
[41] *Ibid*, para. (C)(7).

approximate estimation that the 30-page Reply falls within the 9,000 word limit.[42] Adding another five pages to his Reply (which is what the proposed amendments would do if permitted), would impermissively exceed the word limits.

35. It is recalled that a party wishing to exceed the word limit must seek authorisation in advance from the Appeals Chamber and must provide an explanation of the exceptional circumstances that necessitate the oversized filing.[43] The Applicant has not sought any such leave from the Appeals Chamber. The Applicant is therefore, through his Motion, effectively extending the word limit without first seeking permission from the Appeals Chamber and in violation of the relevant Practice Direction. The proposed amendments should not be accepted for this reason as well.

(iii) Motion is Untimely and Would Unduly Delay the Review Proceedings

36. Finally, it is noted that the Motion is untimely being filed more than 83 days after the Applicant received the French translation of the Response. Motions that seek amendments should be submitted as soon as possible after identifying the newly alleged error or after discovering any other basis for seeking a variation of the notice of appeal.[44]

37. In the Applicant's case, the Rules direct that a reply is filed within 15 days of receipt of the response. A reasonable period within which to bring this Motion would therefore have been within 15 days of receipt of the French version of the Response. This was not the case. The unreasonable delay is exacerbated by the fact that the Reply had already been filed meaning the Applicant and his Counsel were already aware of the issues in both the Response and the Reply. No explanation has been provided for the unreasonable delay in filing the Motion. This is an abuse of process. Allowing the requested amendments at this stage would also unnecessarily impact the expeditiousness of the review proceedings by delaying them further, a concern which was already noted by the Appeals Chamber when it denied the Applicant's earlier request for extension of time based on the same reasons.[45]

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[42] Approximating 300 words per page.
[43] Practice Direction on the Length of Briefs and Motions on Appeal, 8 December 2006, para. (C)(5).
[44] *Sainović* Decision, para. 5 and references cited therein.
[45] Extension Decision, p.2.

C. RELIEF SOUGHT

38. For all the above reason the Prosecutor therefore respectfully requests the Appeals Chamber to dismiss the Motion in its entirety.

Word Count: 2,998

Dated and signed this 23 day of January 2012, Arusha Tanzania

Evelyn Kamau

Appeals Counsel

Leo C. Nwoye

Assistant Appeals Counsel

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

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Case Name:	The Prosecutor vs. **JUVÉNAL KAJELIJELI**		**Case Number:** ICTR-98-44A	
Dates:	Transmitted: **23 January 2012**		Document's date: **23 JANUARY 2012**	
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