



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

1453/H

*dy*

ICTR-02-78-A

26<sup>th</sup> May 2011

{1453/H – 1450/H}

**IN THE APPEALS CHAMBER**

**Before:** Judge Patrick Robinson, Presiding  
Judge Mehmet Güney  
Judge Fausto Pocar  
Judge Andrésia Vaz  
Judge Theodor Meron

**Registrar:** Mr. Adama Dieng

**Decision of:** 26 May 2011

**Gaspard KANYARUKIGA**

**v.**

**THE PROSECUTOR**

*Case No. ICTR-02-78-A*

RECEIVED  
26 MAY 2011  
*dy*

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**DECISION ON MOTION TO STRIKE PASSAGES FROM THE  
PROSECUTOR'S REPLY BRIEF**

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Ms. Lydia Mugambe  
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**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

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**NAME / NOM:** *CONSTANT HOMETOWU*  
**SIGNATURE:** *[Signature]* **DATE:** *26-05-2011*

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seised of a "Motion to Strike Misleading Passages from the Prosecutor's Reply Brief" filed by Gaspard Kanyarukiga ("Kanyarukiga") on 30 April 2011 ("Motion"). The Prosecution responded on 4 May 2011,<sup>1</sup> and Kanyarukiga replied on the same date.<sup>2</sup>

#### **A. Background**

2. Trial Chamber II of the Tribunal ("Trial Chamber") pronounced its judgement in this case on 1 November 2010 and filed the written version on 9 November 2010.<sup>3</sup> The Prosecution filed its notice of appeal on 10 December 2010<sup>4</sup> and its appeal brief on 23 February 2011.<sup>5</sup> Kanyarukiga filed his response brief on 4 April 2011,<sup>6</sup> and the Prosecution filed its brief in reply on 19 April 2011.<sup>7</sup>

3. In the Motion, Kanyarukiga requests the Appeals Chamber to strike paragraphs 8 to 13 of the Prosecution Reply Brief or, in the alternative, to accept the Motion as a "[r]ejoinder" to the Prosecution Reply Brief.<sup>8</sup> Kanyarukiga submits that, in the Prosecution Appeal and Reply Briefs, the Prosecution "unfairly mischaracterized the facts as found by the Trial Chamber to the great prejudice of Mr. Kanyarukiga"<sup>9</sup> and that, in doing so, it has not exercised "the highest standards of integrity and care" which are incumbent upon it as an organ of the Tribunal.<sup>10</sup> In particular, Kanyarukiga asserts that, in the Prosecution Appeal Brief, the Prosecution presented Kanyarukiga as linked to the failed attempt to burn the Nyange church despite the Trial Chamber's finding to the contrary.<sup>11</sup> Kanyarukiga asserts that the Prosecution persisted in this claim in its Reply Brief despite the fact that he pointed out this mischaracterisation in his Response Brief.<sup>12</sup> Kanyarukiga further argues that the Prosecution Reply Brief unfairly suggested that bulldozers which were used in the

<sup>1</sup> Prosecution's Response to Kanyarukiga's Filing on Prosecution Reply, 4 May 2011 ("Response").

<sup>2</sup> Defence Reply to Prosecution Response to Defence Motion to Strike Misleading Passages from the Prosecutor's Reply Brief, 4 May 2011 ("Reply").

<sup>3</sup> *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-T, Judgement and Sentence, dated 1 November 2010, filed on 9 November 2010.

<sup>4</sup> Prosecutor's Notice of Appeal, 10 December 2010.

<sup>5</sup> Prosecutor's Appellant's Brief, 23 February 2011 ("Prosecution Appeal Brief").

<sup>6</sup> Defence Respondent's Brief, 4 April 2011 ("Kanyarukiga Response Brief").

<sup>7</sup> Prosecution's Reply Brief, 19 April 2011 ("Prosecution Reply Brief").

<sup>8</sup> Motion, paras. 9, 10.

<sup>9</sup> Motion, para. 1.

<sup>10</sup> *Ibid.*

<sup>11</sup> Motion, para. 2.

<sup>12</sup> Motion, paras. 2-4.

destruction of Nyange church were secured and brought to the parish as a direct result of his urging which, he asserts, is contrary to the Trial Chamber's finding.<sup>13</sup> Finally, Kanyarukiga contends that the Prosecution attempted to portray him as "the owner of the common plan" whereas the Trial Chamber made no such finding.<sup>14</sup>

4. The Prosecution responds that the Motion should be dismissed as unwarranted and amounting to a sur-reply, which is not provided for in the Rules of Procedure and Evidence of the Tribunal ("Rules").<sup>15</sup> It asserts that both parties may expand on their positions during the appeal hearing and that the Appeals Chamber will, in any event, decide for itself whether the Prosecution's submissions are supported by the trial record.<sup>16</sup>

5. Kanyarukiga replies that the Motion is neither a sur-reply nor superfluous but rather an attempt to enforce the proper role of the Prosecution to "do justice".<sup>17</sup>

### **B. Discussion**

6. The Appeals Chamber considers that the Motion amounts to a sur-reply to the Prosecution Reply Brief. In this regard, the Appeals Chamber notes that Kanyarukiga himself requests as alternative relief that the Motion be accepted as a sur-reply.<sup>18</sup> It recalls that full answers to issues raised in submissions should be provided at the response stage and that no provision of the Rules or the Practice Direction on Formal Requirements for Appeals from Judgement authorises a party to file a sur-reply.<sup>19</sup> Leave to file a sur-reply may be granted "where the reply raises a new issue to which the respondent has not already had the opportunity to respond".<sup>20</sup> However, the Appeals Chamber does not consider that this is the situation in the present case. Kanyarukiga has already challenged the Prosecution's characterisation of the Trial Chamber's findings on whether he played

<sup>13</sup> Motion, para. 5.

<sup>14</sup> Motion, para. 6.

<sup>15</sup> Response, paras. 1-4, 6.

<sup>16</sup> Response, paras. 3, 5.

<sup>17</sup> Reply, paras. 1-4.

<sup>18</sup> See Motion, para. 10. The Appeals Chamber notes that Kanyarukiga uses the term "rejoinder" in relation to the alternative relief requested whereas the Prosecution uses the term "sur-reply" but considers that, in the context of this Motion, both refer to a brief answering the Prosecution Reply Brief.

<sup>19</sup> Cf. *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-A, Decision on Johan Tarčulovski's Motion for Leave to Present Appellate Arguments in Order Different from that Presented in Notice of Appeal, to Amend the Notice of Appeal, and to File Sur-Reply, and on Prosecution Motion to Strike, 26 March 2009 ("*Bošković and Tarčulovski* Decision of 26 March 2009"), para. 15, referring to *Prosecutor v. Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, para. 5. See also *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Formal Requirements Applicable to the Parties' Filings Related to the Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence, 23 January 2006, p. 5.

<sup>20</sup> *Bošković and Tarčulovski* Decision of 26 March 2009, para. 15, citing *Prosecutor v. Mlado Radić*, Case No. IT-98-30/1-R.1, Decision on Prosecution Motion for Leave to File Sur-Reply to Defence Reply in Request for Review by Mlado Radić, 9 May 2006, p. 3. See also Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 8 December 2006, para. 19.

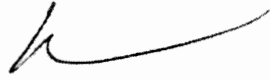
a role in the attempted burning of the church and his role in the joint criminal enterprise in his Response Brief.<sup>21</sup> Accordingly, his present submissions in this respect are repetitive. With respect to the Prosecution's characterisation of Kanyarukiga's role in securing the bulldozers, the Prosecution described the Trial Chamber's findings the same way in its Appeal Brief as in its Reply Brief.<sup>22</sup> Accordingly, Kanyarukiga had the opportunity to challenge the Prosecution's characterisation in his Response Brief. In any event, Kanyarukiga will have the opportunity to address these issues further in his oral arguments at the appeal hearing. For the foregoing reasons, the Appeals Chamber finds that the relief requested in the Motion is not warranted.

**C. Disposition**

7. For the foregoing reasons, the Appeals Chamber **DENIES** the Motion.

Done in English and French, the English version being authoritative.

Done this 26th day of May 2011,  
At The Hague,  
The Netherlands.

  
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Judge Patrick Robinson  
Presiding



<sup>21</sup> Kanyarukiga Response Brief, paras. 4-10.

<sup>22</sup> See Prosecution Appeal Brief, para. 5; Prosecution Reply Brief, para. 8.