



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

11875/H

*[Handwritten mark]*

ICTR-98-42-A

IN THE APPEALS CHAMBER

6<sup>th</sup> September 2013

Before:

Judge Fausto Pocar, Pre-Appeal Judge {11875/H – 11871/H}

Registrar:

Mr. Bongani Majola

Decision of:

6 September 2013

ICTR Appeals Chamber  
06 SEP 2013  
Date: *June 6*  
Action: *Chambers. Defence*  
Copied To: *OTR-ALAD & JPU*

**THE PROSECUTOR**

v.

**Pauline NYIRAMASUHUKO  
Arsène Shalom NTAHOBALI  
Sylvain NSABIMANA  
Alphonse NTEZIRYAYO  
Joseph KANYABASHI  
Élie NDAYAMBAJE**

*Case No. ICTR-98-42-A*

**DECISION ON NDAYAMBAJE'S REQUEST TO RECONSIDER THE  
ORDER OF 22 AUGUST 2013 CONCERNING HIS THIRD RULES 68 AND  
115 REPLY AND SANCTIONING HIS COUNSEL**

**Counsel for Pauline Nyiramasuhuko**

Nicole Bergevin and Guy Poupart

**Counsel for Arsène Shalom Ntahobali**

Normand Marquis and Mylène Dimitri

**Counsel for Sylvain Nsabimana**

Josette Kadji and Pierre Tientcheu Weledji

**Counsel for Alphonse Nteziryayo**

Frédéric Titinga Pacéré and  
Gershom Otachi Bw'Omanwa

**Counsel for Joseph Kanyabashi**

Michel Marchand and Alexandra Marcil

**Counsel for Élie Ndayambaje**

Pierre Boulé and Claver Sindayigaya

**Office of the Prosecutor**

Hassan Bubacar Jallow

James Arguin

Deborah Wilkinson

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME  
COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS  
NAME / NOM: *ROSETTE MUZIGO-MORRISON*  
SIGNATURE: *[Signature]* DATE: **06 SEP 2013**

I, **Fausto POCAR**, Judge of 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) and Pre-Appeal Judge in this case;<sup>1</sup>

**NOTING** the “*Troisième requête d’Élie Ndayambaje en violation de l’obligation de communication de l’Accusation et pour l’admission de moyens de preuve supplémentaires*” filed confidentially by Élie Ndayambaje (“Ndayambaje”) on 4 June 2013;

**NOTING** the “Prosecution Response to Ndayambaje Rule [*sic*] 68 and 115 Motion” filed by the Prosecution on 1 August 2013 (“Response to Ndayambaje Third Rules 68 and 115 Motion”);

**NOTING** the decision issued on 9 August 2013, in which I authorised Ndayambaje to file a reply to the Response to Ndayambaje Third Rules 68 and 115 Motion not exceeding 4,500 words;<sup>2</sup>

**NOTING** the “*Réplique d’Élie Ndayambaje à la ‘Prosecution Response to Ndayambaje Rule 68 and 115 Motion’*” filed by Ndayambaje on 15 August 2013 (“Filed Ndayambaje Third Rules 68 and 115 Reply”);

**NOTING** the order issued on 22 August 2013, in which I, *inter alia*: (i) found that Ndayambaje’s Counsel attempted to circumvent the word limit imposed by the Appeals Chamber by omitting spaces between words as well as between words and punctuation marks in nearly all the paragraphs of the Filed Ndayambaje Third Rules 68 and 115 Reply; (ii) found that the Filed Ndayambaje Third Rules 68 and 115 Reply did not comply with the Decision of 9 August 2013 and the Practice Direction on the Length of Briefs and Motions on Appeal of 8 December 2006, was not validly filed, and would therefore be disregarded; and (iii) imposed a sanction against Ndayambaje’s Counsel, pursuant to Rule 46(A) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), in the form of non-payment of fees associated with the Filed Ndayambaje Third Rules 68 and 115 Reply;<sup>3</sup>

**BEING SEISED OF** the “*Requête en extrême urgence d’Élie Ndayambaje en reconsidération de l’Order Concerning Ndayambaje’s Third Rules 68 and 115 Reply and Sanctioning Ndayambaje’s*

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<sup>1</sup> Order Assigning a Pre-Appeal Judge, 21 July 2011.

<sup>2</sup> Decision on Ndayambaje’s Motion for Extension of the Word Limit for his Reply Relating to his Third Rules 68 and 115 Motion, 9 August 2013 (“Decision of 9 August 2013”), p. 3.

<sup>3</sup> Order Concerning Ndayambaje’s Third Rules 68 and 115 Reply and Sanctioning Ndayambaje’s Counsel, 22 August 2013 (“Order of 22 August 2013”), pp. 2, 3.

Counsel” filed by Ndayambaje on 23 August 2013 with two annexes (“Motion for Reconsideration”),<sup>4</sup> requesting that the Order of 22 August 2013 be reconsidered on the grounds that it is erroneous in fact and creates an injustice, that the PDF Version of the Reply be considered as validly filed, and that the sanction imposed against his Counsel be rescinded;<sup>5</sup>

**NOTING** that, in support of his Motion for Reconsideration, Ndayambaje submits that, as recognised by the Registry in an exchange of e-mails with his Defence team, neither the PDF Version of the Reply nor the Word version sent for translation purposes contains an omission of spaces and that the omission in the Filed Ndayambaje Third Rules 68 and 115 Reply is due to the fact that the Registry did not file the PDF Version of the Reply it received from Ndayambaje’s Defence team on 15 August 2013, but the Word version, whose format was distorted after being opened with an incompatible software program;<sup>6</sup>

**NOTING** the “Prosecution Response to Ndayambaje Motion for Reconsideration” filed by the Prosecution on 23 August 2013 (“Prosecution Response”), in which the Prosecution takes position neither on the merits of nor on the relief requested in the Motion for Reconsideration, but submits that, in ruling on the Motion for Reconsideration, the Appeals Chamber should consider that the PDF Version of the Reply also exceeds the word limit authorised by the Decision of 9 August 2013 as “necessary spaces are systematically omitted in the document’s footnotes between the words ‘paras.’, ‘para.’, ‘p.’ and ‘No.’ and the numerals that follow, as well as between the words ‘CRA’ and ‘T.’ and the date that follows, such that words are incorrectly joined with numerals and dates”;<sup>7</sup>

**NOTING** the “*Réplique à la* ‘Prosecution Response to Ndayambaje Motion for Reconsideration’” filed by Ndayambaje on 26 August 2013 with an annex (“Ndayambaje Reply”), in which Ndayambaje replies, *inter alia*, that: (i) there is no rule preventing him from using the citation method he has been consistently using in the footnotes of his filings, including in the PDF Version of the Reply; (ii) it is only an editorial preference and not an attempt to circumvent the word limit imposed by the Appeals Chamber; (iii) the Prosecution has also been using this citation method in some of the footnotes of its response brief; and (iv) the PDF Version of the Reply complies with the imposed word limit;<sup>8</sup>

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<sup>4</sup> Annex A contains an e-mail correspondence between Ndayambaje’s Defence team and the Office of the Registry of the Tribunal (“Registry”); Annex B contains the pdf version of the reply sent for filing by Ndayambaje to the Registry on 15 August 2013 (“PDF Version of the Reply”).

<sup>5</sup> Motion for Reconsideration, paras. 5, 14, 16, p. 4.

<sup>6</sup> Motion for Reconsideration, paras. 7-12, *referring to* Motion for Reconsideration, Annex A.

<sup>7</sup> Prosecution Response, paras. 1-3.

<sup>8</sup> Ndayambaje Reply, paras. 3-10, *referring to* Prosecution Consolidated Respondent’s Brief, 21 August 2013.

**NOTING FURTHER** “The Registrar’s Submission to the Appeals Chamber Pursuant to Rule 33(B) Clarifying the Receiving and Filing of Elie Ndayambaje’s Reply With Respect to His Rule[s] 68 and 115 Motion[] Filed on 15 August 2013” filed by the Registrar of the Tribunal on 26 August 2013 (“Registrar Submission”), in which the Registrar, *inter alia*: (i) confirms that, on 15 August 2013, Ndayambaje sent the PDF Version of the Reply for filing and a Word version “for use by the Languages Services Section for translation in accordance with the practice that has developed”; (ii) confirms that both the PDF Version of the Reply sent for filing and the Word version did not contain formatting irregularities; (iii) clarifies that, after the Registry staff was unable to open the PDF Version of the Reply, the Registry filed the Word version, which was signed; (iv) clarifies that the Word version was filed after having been opened with an earlier version of Microsoft Word than the one used by the Defence, which resulted in the corrupted format; and (v) “regrets the irregularities” and has “instituted corrective measures to ensure that Registry [s]taff responsible for the receiving and filing of documents are provided with the appropriate software to enable them [to] perform their duties efficiently”;<sup>9</sup>

**RECALLING** that the Appeals Chamber may reconsider a previous non-final decision pursuant to its inherent discretionary power if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice;<sup>10</sup>

**CONSIDERING** that the Registrar has confirmed that, contrary to the Filed Ndayambaje Third Rules 68 and 115 Reply, the PDF Version of the Reply originally sent for filing did not contain an omission of necessary spaces between words as well as between words and punctuation marks, such that words were incorrectly joined;

**CONSIDERING** that the Order of 22 August 2013 is the result of an unfortunate negligence from the Registry;

**CONSIDERING FURTHER** that the Prosecution has not demonstrated that: (i) the citation method used by Ndayambaje in the footnotes of the PDF Version of the Reply was an attempt to circumvent the word limit imposed by the Decision of 9 August 2013; and (ii) the omission of spaces in the footnotes of the PDF Version of the Reply should be taken into consideration in ruling on the Motion for Reconsideration;

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<sup>9</sup> Registrar Submission, paras. 1-12.

<sup>10</sup> See, e.g., Decision on Nteziyayo’s Motion for Reconsideration and on Prosecution’s Motion for Clarification of the 8 May 2013 Decision, 12 July 2013, para. 12; *Ferdinand Nahimana v. The Prosecutor*, Case No. ICTR-99-52B-R, Decision on Ferdinand Nahimana’s Motion for Reconsideration of the Decision of 27 September 2011 and of his Sentence, 29 June 2012, p. 3; *Prosecutor v. Zoran Žigić*, Case No. IT-98-30/1-A, Decision on Zoran Žigić’s “Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005”, 26 June 2006, para. 9

**FINDING** therefore that Ndayambaje has demonstrated that reconsideration of the Order of 22 August 2013 is warranted in order to prevent an injustice;

**HEREBY GRANT** the Motion for Reconsideration;

**SET ASIDE** the sanction in the form of non-payment of fees associated with the Filed Ndayambaje Third Rules 68 and 115 Reply imposed against Ndayambaje's Counsel pursuant to Rule 46(A) of the Rules;

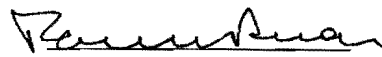
**INSTRUCT** the Registry to proceed with the filing of the PDF Version of the Reply as a separate filing, which the Appeals Chamber will consider as validly filed; and

**URGE** the Registry to exercise the utmost care in the filing of judicial documents.

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

Done this sixth day of September 2013,  
at The Hague,  
The Netherlands.



  
Judge Fausto Pocar  
Pre-Appeal Judge

[Seal of the Tribunal]