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ICTR-98-44AR73(C)
01 December 2006
(1605/H – 1596/H)

UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

P.T.

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Adama Dieng**

ICTR Appeals Chamber
Date: 01 December 2006
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Date : 1 December 2006

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THE PROSECUTOR

v.

ÉDOUARD KAREMERA
MATHIEU NGIRUMPATSE
JOSEPH NZIRORERA

Case No. ICTR-98-44-AR73(c)

DECISION ON MOTIONS FOR RECONSIDERATION

Counsel for the Accused:

Ms. Dior Diange and Mr. Moussa Félix Sow for Édouard Karemera
Ms. Chantal Hounkpatin and Mr. Frédéric Weyl for Mathieu Ngirumpatse
Mr. Peter Robinson and Mr. Patrick N. M. Ngimbi for Joseph Nzirorera

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James Stewart
Mr. Don Webster

International Criminal Tribunal for Rwanda
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NAME / NOM: T. Chidimbo, Patrice
SIGNATURE: DATE: 01/12/06

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 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of

(i) "Motion for Review of the Appeals Chamber Decision of 16 June 2006 on the Prosecutor's Interlocutory Appeal of Decision on Judicial Notice" filed by Édouard Karemera on 7 August 2006 ("Karemera Motion");[1]

(ii) "Joseph Nzirorera's Motion for Reconsideration and Modification of Judicial Notice Decision" filed on 17 August 2006 ("Nzirorera Motion"); and

(iii) "Mathieu Ngirumpatse's Motion for Reconsideration of the Appeal Chamber 16 June 2006 Decision Following the Prosecutor's Interlocutory Appeal of Decision on Judicial Notice" filed on 29 August 2006 ("Ngirumpatse Motion") ("Motions" and "Applicants", collectively).

2. The Prosecution responded to each of the Motions,[2] and the Applicants replied.[3]

I. BACKGROUND

3. On 16 June 2006, the Appeals Chamber issued the "Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice" ("Decision on Judicial Notice"),[4] in which it ordered Trial Chamber III to take judicial notice of the following three facts:[5]

> (i) The following state of affairs existed in Rwanda between 6 April 1994 to 17 July 1994: There were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed or caused

[1] Although the English translation of the motion is designated a motion for "review", Mr. Karemera in fact seeks reconsideration of the Appeals Chamber's decision, as is clear from the original motion, which was entitled "*Demande en reconsidération de la décision de la Chambre d'Appel en date du 16 juin 2006 suite á l' appel interlocutoire du Procureur de la décision relative au constat judiciaire*" 3 August 2006.

[2] "Prosecutor's Response to the '*Demande, Formulée par Edouard Karemera, en Reconsideration de la Décision de la Chambre d'Appel en date du 16 juin 2006, suite á l' Appel Interlocutoire du Procureur de la Décision Relative au Constat Judiciaire*'" 15 August 2006 ("Karemera Response"); "Prosecutor's Response to 'Joseph Nzirorera's Motion for Reconsideration and Modification of Judicial Notice Decision'", 28 August 2006 ("Nzirorera Response"); "Prosecutor's Response to 'Mathieu Ngirumpatse's Motion for Reconsideration of the 16 June 2006 Decision of the Prosecutor's Interlocutory Appeal on Judicial Notice'", 4 September 2006 ("Ngirumpatse Response").

[3] "Édouard Karemera's Reply to the '*Response du Procureur A La Demande, Formulée par Edouard Karemera, en Reconsideration de la Décision de la Chambre d'Appel en date du 16 juin 2006, suite á l' Appel Interlocutoire du Procureur de la Décision Relative au Constat Judiciaire*'", 31 August 2006 ("Karemera Reply"); "Reply Brief: Joseph Nzirorera's Motion for Reconsideration and Modification of Judicial Notice Decision", 31 August 2006 ("Nzirorera Reply"); "Ngirumpatse's Reply in Respect of the Motion for Reconsideration of the 16 June 2006 Appeals Chamber Decision on the Procesecutor's Interlocutory Appeal of Judicial Notice", 1 September 2006 ("Ngirumpatse Reply").

[4] *The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006.

[5] Decision on Judicial Notice, para. 57.

serious bodily or mental harm to person[s] perceived to be Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity;

(ii) Between 1 January 1994 and 17 July 1994 in Rwanda there was an armed conflict not of an international character;

(iii) Between 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group.[6]

The Appeals Chamber also remanded the matter to the Trial Chamber for consideration of certain facts, in a manner consistent with the Decision on Judicial Notice.[7]

4. The Applicants now move the Appeals Chamber to reconsider the Decision on Judicial Notice. Mr. Karemera submits that reconsideration of the Decision on Judicial Notice is required in the interests of justice and to ensure full respect for the rights of the Defence, in keeping with the exigencies of international justice.[8] He requests that the Appeals Chamber rule *de novo* on the Prosecutor's Interlocutory Appeal and uphold the Trial Chamber's Decision of 9 November 2005.[9]

5. Mr. Nzirorera contends that taking judicial notice of controversial matters such as the occurrence of genocide, the existence of a widespread or systematic attack, and the nature of the armed conflict is the product of a clear error in reasoning, and accordingly requests the Appeals Chamber to determine that such matters are inappropriate for judicial notice.[10] Should the Appeals Chamber decline to make such a determination, Mr. Nzirorera requests a modification of the Decision on Judicial Notice to clarify that judicial notice of genocide does not include the existence of a plan or campaign of genocide, and to provide a margin of discretion to the Trial Chamber to determine whether the facts of common knowledge should be admitted at this stage of his trial.[11] Mr. Ngirumpatse endorses the submissions of the other Applicants.[12]

II. DISCUSSION

6. The Appeals Chamber may reconsider a previous interlocutory decision under its inherent discretionary power if a clear error of reasoning has been demonstrated or if it is necessary to

[6] *The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-AR73(C), The Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (Rule 73 (c)), 9 December 2005, Annex A.
[7] Decision on Judicial Notice, para. 57.
[8] Karemera Motion, p. 11.
[9] Karemera Motion, p. 11.
[10] Nzirorera Motion, para. 24. Mr. Nzirorera endorsed the submissions of Mr. Karemera and requested that they also be considered as part of his appeal.
[11] Nzirorera Motion, para. 25.
[12] Ngirumpatse Motion, para. 3.

prevent an injustice.[13] Bearing this standard of review in mind, the Appeals Chamber will consider the alleged errors of law and miscarriages of justice advanced by the Applicants.

A. Alleged Errors of Reasoning

1. Facts of Common Knowledge

7. Mr. Karemera submits that the facts which the Appeals Chamber characterised as facts of common knowledge in the Decision on Judicial Notice are not irrefutable.[14] He argues that, in principle, judicial notice concerns only manifestly indisputable facts.[15] He states that in his trial, the testimonies of seven Prosecution witnesses do not support the Prosecution's theories on which the Appeals Chamber relied in the Decision on Judicial Notice.[16] He also argues that these facts are the subject of debate and disagreement among reasonable people, including highly renowned experts, some of whom have already testified before the Tribunal, such as Father De Souter, Professor Strizek, Professor Reyntjens, and Bernard Lugan,[17] and therefore judicial notice should not have been taken of them.[18] The Prosecution responds that these facts are a matter of common knowledge, reasonably irrefutable and not controversial.[19]

8. The Appeals Chamber recalls that whether a fact qualifies as "a fact of common knowledge" under Rule 94(A) is a legal question.[20] This determination does not turn on evidence introduced in a particular case.[21] Mr. Karemera's reference to witness testimonies and opinions of persons who, according to him, are renowned experts demonstrates no error of reasoning in the Decision on Judicial Notice.

2. The Nature of the Conflict

9. Mr. Karemera contends that the non-international character of the conflict is disputed in his case and therefore cannot be a fact of common knowledge.[22] In support of this contention, he notes that in other cases before the Tribunal there is evidence of an international conflict involving

[13] *See*, e.g., *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 203 ("*Kajelijeli* Appeal Judgement").
[14] Karemera Motion, p. 4.
[15] Karemera Motion, p. 4.
[16] Karemera Motion, p. 3.
[17] Karemera Motion, p. 5.
[18] Karemera Motion, p. 5.
[19] Karemera Response, para. 11.
[20] Decision on Judicial Notice, para. 23.
[21] Decision on Judicial Notice, para. 23.
[22] Karemera Motion, p. 4.

several countries.[23] He also refers to expert reports and publications which, in his view, establish the international character of the Rwandan conflict.[24]

10. The Prosecution responds that the publications cited by Mr. Karemera simply reiterate the relationship between the various countries and Rwanda before, during, and after the genocide[25] and that they do not qualify this conflict as international.[26]

11. The Appeals Chamber recalls that in the Decision on Judicial Notice, it relied on its findings in the *Semanza* Appeal Judgment where it held that the existence of a non-international armed conflict is a notorious fact not subject to a reasonable dispute.[27] The fact that there may have been evidence in other cases before the Tribunal which alluded to the conflict being of an international character and that some reports and publications may express a similar view does not demonstrate a clear error in holding that it is a fact of common knowledge that the conflict in Rwanda was of a non-international character. Furthermore, the Appeals Chamber has already indicated above that whether a fact is one of common knowledge is a legal question, the answer to which does not turn on the evidence introduced in a particular case. The Appeals Chamber finds that Mr. Karemera has failed to show any error of reasoning on this point that would warrant reconsideration of the Decision on Judicial Notice.

3. Genocide

12. Mr. Karemera contends that the Appeals Chamber incorrectly interpreted Resolution 955[28] in relation to the taking of judicial notice of genocide in Rwanda.[29] He argues that while Resolution 955 may refer to genocide in Rwanda, it makes no reference to genocide against the Tutsi ethnic group, contrary to the Appeals Chamber's assertion.[30] Mr. Ngirumpatse argues that even if Resolution 955 states that there was genocide in Rwanda, this cannot render moot any debate before the Tribunal, as it would deprive the Tribunal of its jurisdiction to hear and decide cases, and force it to endorse decisions that are essentially political.[31] The Prosecution responds that in referring to Resolution 955, the Appeals Chamber was making reference to basic facts that were widely known

[23] Karemera Motion, p. 4
[24] Karemera Motion, p. 5.
[25] Karemera Response, para. 16.
[26] Karemera Response, para. 16.
[27] Decision on Judicial Notice, para. 29, referring to *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, para. 192 (footnotes omitted) ("*Semanza* Appeal Judgment").
[28] S/RES/955 (1994), 8 November 1994 ("Resolution 955").
[29] Karemera Motion, p. 7.
[30] Karemera Motion, p. 6.
[31] Ngirumpatse Reply, para. 3.

and irrefutable, such as the vast campaign of killing intended to destroy in whole or in part Rwanda's Tutsi population.[32]

13. The Appeals Chamber recalls that in the Decision on Judicial Notice it reasoned as follows:

> The Appeals Chamber agrees with the Prosecution: the fact that genocide occurred in Rwanda in 1994 should have been recognized by the Trial Chamber as a fact of common knowledge. Genocide consists of certain acts, including killing, undertaken with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. There is no reasonable basis for anyone to dispute that, during 1994, there was a campaign of mass killing intended to destroy, in whole or at least in very large part, Rwanda's Tutsi population, which (as judicially noticed by the Trial Chamber) was a protected group. That campaign was, to a terrible degree, successful; although exact numbers may never be known, the great majority of Tutsis were murdered, and many others were raped or otherwise harmed. These basic facts were broadly known even at the time of the Tribunal's establishment; indeed, reports indicating that genocide occurred in Rwanda were a key impetus for its establishment, as reflected in the Security Council resolution establishing it and even the name of the Tribunal. During its early history, it was valuable for the purpose of the historical record for Trial Chambers to gather evidence documenting the overall course of the genocide and to enter findings of fact on the basis of that evidence. Trial and Appeal Judgements thereby produced (while varying as to the responsibility of particular accused) have unanimously and decisively confirmed the occurrence of genocide in Rwanda, which has also been documented by countless books, scholarly articles, media reports, U.N. reports and resolutions, national court decisions, and government and NGO reports. At this stage, the Tribunal need not demand further documentation. The fact of the Rwandan genocide is a part of world history, a fact as certain as any other, a classic instance of a "fact of common knowledge".[33]

14. Mr. Karemera's contention that the Appeals Chamber misinterpreted Resolution 955 is baseless. In the Decision on Judicial Notice, the Appeals Chamber referred to Resolution 955 in finding that "reports indicating that genocide occurred in Rwanda were a key impetus for its establishment" and that therefore the basic facts of the genocide "were broadly known even at the time of the Tribunal's establishment".[34] This resolution was one of the many authorities, which included trial and appeal judgments, that the Appeals Chamber relied upon in determining that the Trial Chamber erred in refusing to take judicial notice of the fact of the Rwandan genocide.

15. Mr. Karemera contends that the Appeals Chamber erred in law when it relied on Article 2 of the Tribunal's Statute to take judicial notice of the crime of genocide.[35] He questions, in light of this contention, whether it is possible to take judicial notice of a crime which requires a determination of the elements of *actus reus* and *mens rea* or whether these elements should be adduced from irrefutable evidence.[36] The Prosecution responds that Article 2 of the Statute was not used in support of the Decision on Judicial Notice but rather to define genocide and to determine its elements.[37]

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[32] Karemera Response, para. 21.
[33] Decision on Judicial Notice, para. 35 (internal citations omitted).
[34] Decision on Judicial Notice, para. 35.
[35] Karemera Motion, p. 7.
[36] Karemera Motion, p. 7.
[37] Karemera Response, para. 20.

16. The Appeals Chamber finds no merit in Mr. Karemera's contention on this point. There is a significant difference between the taking of judicial notice of the fact of genocide and the determination that an accused is individually criminally responsible for the crime of genocide. The former gives a factual context to the allegations of the crime of genocide. The latter requires a finding of whether the elements of the crime of genocide, such as *actus reus* and *mens rea*, exist in order to ascertain whether an accused is responsible for the crime. Consequently, the taking of judicial notice of genocide does not, in itself, go to the alleged conduct or acts of the Applicants as charged in the indictment.[38]

17. Mr. Nzirorera submits that the Appeals Chamber expanded the Prosecution's request from one of judicial notice that genocide occurred in Rwanda to judicial notice of a nationwide campaign of genocide.[39] He argues that it is one thing to believe that some people killed in Rwanda with the subjective intention of ridding the country of Tutsis, which would be sufficient for genocide. However, in his view, it is completely another matter, particularly in the trial of the country's leaders, to take judicial notice of a nationwide campaign of genocide.[40]

18. Mr. Nzirorera states that the theory of a nationwide campaign of genocide is being debated in cases before the Tribunal, and that in his case it has been disputed by Prosecution witnesses.[41] According to Mr. Nzirorera, it is incongruous to suggest that a plan or campaign of genocide is a fact of common knowledge when it was unknown to the Prosecution's own highly placed witnesses.[42]

19. The Prosecution responds that its request for judicial notice was clearly confined to the taking of judicial notice of the occurrence of genocide[43] and that the Appeals Chamber directed the Trial Chamber to take judicial notice of the occurrence of genocide in Rwanda in 1994.[44]

20. Mr. Nzirorera submits in reply that by taking judicial notice of genocide, the Trial Chamber may infer the existence of a plan and this inference will be aided by the language of the Decision on Judicial Notice which repeatedly refers to a nationwide campaign of genocide. He also argues that the Prosecution will now be in a position to assert that the taking of judicial notice of genocide

[38] Semanza Appeal Judgment, para. 192.
[39] Nzirorera Motion, para. 8.
[40] Nzirorera Motion, para. 9.
[41] Nzirorera Motion, para. 10, referring to the testimonies of Prosecution Witnesses G and T.
[42] Nzirorera Motion, para. 12.
[43] Nzirorera Response, para. 10.
[44] Nzirorera Response, para. 14.

infers the existence of a plan[45] and avers that this will lead to injustice, as the existence of a plan of genocide is not a matter of common knowledge.[46]

21. The Appeals Chamber recalls that in the Decision on Judicial Notice it directed the Trial Chamber to take judicial notice of the fact that between 6 April 1994 and 17 July 1994, there was genocide in Rwanda against the Tutsi ethnic group.[47] The taking of judicial notice of this fact does not imply the existence of a plan to commit genocide. The Appeals Chamber recalls that:

> [T]he existence of a plan or policy is not a legal ingredient of the crime of genocide. While the existence of such a plan may help to establish that the accused possessed the requisite genocidal intent, it remains only evidence supporting the inference of intent, and does not become the legal ingredient of the offence.[48]

It therefore follows that if the existence of a plan to commit genocide is vital to the Prosecution's case, this must be proved by evidence. The Appeals Chamber finds no merit in Mr. Nzirorera's submission that it expanded the Prosecution's request for judicial notice to include the existence of a plan to commit genocide.

4. Alleged Removal of the Trial Chamber's Discretion

22. Mr. Nzirorera submits that the Appeals Chamber erred in the Decision on Judicial Notice when it held that judicial notice under Rule 94(A) of the Rules of Procedure and Evidence ("Rules") is not discretionary.[49] He further contends that the Appeals Chamber erred in failing to allow the Trial Chamber the discretion not to take judicial notice of a fact of common knowledge given the late stage of the trial proceedings, which would be unfair to him and the other Applicants.[50] In support of these contentions, Mr. Nzirorera argues that even if the Appeals Chamber found a certain fact to be a fact of common knowledge, it does not necessarily follow that judicial notice of that fact must be taken in a particular case.[51] Should the Appeals Chamber maintain the Decision on Judicial Notice on its merits, Mr. Nzirorera requests modification of this Decision so as to leave discretion to the Trial Chamber to decline to take judicial notice of facts of common knowledge, if, considering the stage of the proceedings or other facts, it believes that it is unfair to do so.[52]

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[45] Nzirorera Reply, para. 3.
[46] Nzirorera Reply, para. 5.
[47] Decision on Judicial Notice, paras 33 and 57.
[48] *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgment, 19 April 2004, para. 225 which refers to *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgment, 5 July 2001, para. 48, which referred to *Obed Ruzindana and Clément Kayishema v. The Prosecutor*, Case No. ICTR-95-1-A, Oral Decision by the Appeals Chamber, 1 June 2001.
[49] Nzirorera Motion, para. 17.
[50] Nzirorera Motion, para. 18.
[51] Nzirorera Motion, para. 20.
[52] Nzirorera Motion, para. 23.

23. The Prosecution responds that the taking of judicial notice of facts of common knowledge is not discretionary.[53] It argues that it is incumbent on the Trial Chamber, under Rule 94(A) of the Rules, to take judicial notice of the occurrence of genocide in Rwanda in 1994, as a fact of common knowledge.[54] It also argues that Mr. Nzirorera has not demonstrated that the Appeals Chamber erred in directing the Trial Chamber to take judicial notice of genocide as a fact of common knowledge.[55]

24. The Appeals Chamber recalls that in the Decision on Judicial Notice it determined that the Trial Chamber has no discretion to rule that a fact of common knowledge must be proved through evidence at trial.[56] This determination was based on an interpretation of Rule 94(A) of the Rules. The express language of this rule does not allow the Trial Chamber the discretion to require proof of facts of common knowledge. Such discretion only exists for matters of judicial notice which fall within the ambit of Rule 94(B) of the Rules, that is, adjudicated facts or documentary evidence from other proceedings of the Tribunal. Consequently, the Appeals Chamber finds that Mr. Nzirorera has failed to demonstrate an error in its interpretation of Rule 94(A) of the Rules. The Appeals Chamber also finds no merit in his request for modification of the Decision on Judicial Notice.

B. The Alleged Necessity to Prevent an Injustice

25. Mr. Karemera submits that the taking of judicial notice affects the presumption of innocence, as it assumes that in the case of genocide the crime has already been proven before the outcome of the trial[57] and thus constitutes an "admission of guilt",[58] jeopardises his right to a fair hearing in accordance with Article 20 of the Statute of the Tribunal,[59] and significantly lessens the Prosecution's burden of proof.[60]

26. The Appeals Chamber recalls and emphasizes its statement in the Decision on Judicial Notice that

> the practice of judicial notice must not be allowed to circumvent the presumption of innocence and the defendant's right to a fair trial, including his right to confront his accusers. Thus, it would plainly be improper for facts judicially noticed to be the "basis for proving the Appellant's criminal responsibility" (in the sense of being *sufficient* to establish that responsibility), and it is

[53] Nzirorera Response, para. 22.
[54] Nzirorera Response, para. 27.
[55] Nzirorera Response, para. 27.
[56] Decision on Judicial Notice, para. 23.
[57] Karemera Motion, p. 7.
[58] Karemera Motion, p. 9.
[59] Karemera Motion, p. 9.
[60] Karemera Motion, p. 8.

> always necessary for Trial Chambers to take careful consideration of the presumption of innocence and the procedural rights of the accused.[61]

The Appeals Chamber also reiterates that judicially noticed facts do not relieve the Prosecution of its burden of proof.[62] The Appeals Chamber consequently finds no merit in the submission advanced by Mr. Karemera.

27. Mr. Karemera further submits that the Decision on Judicial Notice breaches the principle of *inter partes* proceedings and is inconsistent with the *audi alteram partem* doctrine.[63] He argues that the Decision on Judicial Notice affects all cases before the Tribunal without affording the parties in those cases the opportunity to present their submissions on these matters.[64] The Appeals Chamber finds no merit in this submission. Parties in other cases are not prevented from challenging the implication of the Decision on Judicial Notice in their respective cases in proceedings before their respective Trial Chambers.[65]

C. Conclusion

28. For the aforementioned reasons, the Appeals Chamber finds that the Applicants have failed to demonstrate a clear error of reasoning in the Decision on Judicial Notice or that reconsideration of this Decision is necessary to prevent an injustice. Moreover, there is no error that would warrant granting Mr. Nzirorera's request for modification of the Decision on Judicial Notice.

III. DISPOSITION

The Appeals Chamber **DISMISSES** the Applicants' motions in their entirety.

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

Mohamed Shahabuddeen
Presiding Judge

1 December 2006,
The Hague,
The Netherlands.

[Seal of the Tribunal]

[61] Decision on Judicial Notice, para. 47.
[62] Decision on Judicial Notice, para. 37.
[63] Karemera Motion, p. 7.
[64] Karemera Motion, p. 7.
[65] *Aloys Ntabakuze v. The Prosecutor*, Case No. ICTR-98-41-AR73, "Decision on Motion for Reconsideration", 4 October 2006, para. 15.

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✖ Ms Catherine Marchi-Uhel
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✖ Ms. Fatou Fall

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✖ Lead Counsels / *Conseil Principal*: Ms. Dior Diagne, Ms. Chantal Hounkpatin, Mr. Peter Robinson (name / nom)
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