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Mechanism for International Criminal Tribunals

MICT-12-25-R14.1

28 September 2015

Original: FRENCH

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**THE TRIAL CHAMBER**

**Before:** Judge Vagn Joensen, Presiding  
Judge William Hussein Sekule  
Judge Florence Rita Arrey

**Registrar:** Mr John Hocking

**PROSECUTOR**

- v. -

**JEAN UWINKINDI**

***PUBLIC***

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**DISCLOSURE OF ADDITIONAL EVIDENCE AND MATERIAL TO  
THE TRIAL CHAMBER, PURSUANT TO RULE 72(D) OF THE RULES  
OF PROCEDURE AND EVIDENCE**

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## I. INTRODUCTION

1. On 4 August 2015, the Defence submitted briefs to the Trial Chamber in support of its request for revocation of the referral order to the Republic of Rwanda.<sup>1</sup>
2. It also requested a stay of proceedings before the High Court.<sup>2</sup>
3. In its response, dated 4 September 2015, which the Defence received on 8 September 2015, the Prosecutor applied for the dismissal of this request.<sup>3</sup>
4. On 18 September 2015, the Defence filed its replies to the Prosecutor's submission.
5. At the public hearing of 23 September 2015 before the High Court, the Accused discovered additional evidence and material that may shed further light for the Chamber on the controversy surrounding the assignments of Attorneys Isaachar Hishamunda and Joseph Ngabonziza as Counsel.<sup>4</sup>
6. On 27 May 2015, both Counsel explicitly admitted to not being able to take on the assignment entrusted to them by the President of the Bar Association, in accordance with the decision of the Ministry of Justice, confirmed by the Appeal Judgments handed down by the Supreme Court and the High Court on 6 February, 24 April and 9 June 2015.<sup>5</sup>
7. Likewise, the argument in favour of the right of the Accused to counsel of his choosing, supported up until now, was challenged before the High Court, thus marking a change in the jurisprudence so highly praised by the Prosecutor in his response.<sup>6</sup>

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<sup>1</sup> Brief in support of Jean UNWINKINDI's Request for Revocation of the Referral Order.

<sup>2</sup> Brief *op.cit.* pp. 26 and 27.

<sup>3</sup> Prosecution Brief Responding to Uwinkindi's Revocation Request.

<sup>4</sup> REPUBURIKA Y'U Rwanda, URUKIKO RUKURU, URUGEREKO RWIHARIYE RUSHINZWE KUBURANISHA IBYAHA MPUZAMAHANGA N'IBYABUNKA IMBIBI, TRANSCRIPT OF HEARING OF 23 SEPTEMBER 2015 at 9hr03 A.M., RP 0002/HCCI: MP v. JEAN UWINKINDI,

<sup>5</sup> Statement made at the hearing by Counsel Isaachar Hishamunda and Joseph Ngabonziza at p. 2 of the aforementioned transcript.

<sup>6</sup> Decision handed down by the Supreme Court at the hearing of 24 April 2015, and thereafter confirmed by the High Court's Specialized Chamber responsible for international and cross-border crimes, on the assignment of Attorneys Issachar Hishamunda and Joseph Ngabonziza as counsel for Jean Unkinwindi.

8. Even the National Public Prosecution Authority, a staunch supporter of Counsel Hishamunda and Ngabonziza, eventually supported the argument in favour of the accused having a counsel of his own choosing.
9. It did, however, try to restrict this right to a roster of sixty-eight lawyers, recruited under clearly illegal conditions by the Ministry of Justice.<sup>7</sup>
10. These new facts discard offhand the Prosecutor's argument in his submission of 4 September 2015 on the freedom to choose counsel and the competence of Counsel Hishamunda and Ngabonziza.
11. In accordance with Rule 72 (D) of the Rules of Procedure and Evidence, the additional evidence and material may be disclosed to the Trial Chamber and to the OTP pursuant to the Rule.
12. Accordingly, the Defence has good reasons for presenting the following legal argument:

## II. LEGAL DISCUSSION

13. Rule 72 (D) of the Rules of Procedure and Evidence provides:

"If either Party discovers additional evidence or material which should have been disclosed earlier pursuant to the Rules, that Party shall immediately disclose that evidence or material to the other Party and the Trial Chamber."

14. In the present case, it is beyond any doubt that new evidence and additional material were discovered at the public hearing of 23 September 2015, following the disclosure of our replies.
15. In accordance with Rule 23 (B) of the Rules of Procedure and Evidence and with Practice Direction MICT/11 on Lengths of Briefs and Motions, the Defence must disclose this material to the Parties and to the Trial Chamber in a document that shall not exceed 3,000 words.<sup>8</sup>

**II.1. Counsel Isaacar Hishamunda and Joseph Ngabonziza expressly acknowledged that they were totally unable to take on the task of defending**

<sup>7</sup> Monitoring report (July 2015), case MICT-12-20, Bernard Munyagashari, p.11, para.50.

<sup>8</sup> Rules of Procedure and Evidence, Practice Direction on Lengths of Briefs and Motions, item (F), 6 August 2013.

**Jean UWINKINDI that the President of the Bar Association had entrusted them with...**

16. On 23 September 2015, Counsel stated the following before the High Court:<sup>9</sup>

**Mr Joseph Ngabonziza:**

**... We were unable to speak with our client. Under these conditions we could not prepare any submissions.**

**Mr Isaachar Hishamunda:**

**A lawyer advises his client on matters of law, but the defendant provides the facts. The lack of communication with our client is a real problem. We cannot get apprised of the facts.**

17. Further, Counsel Isaacar added: If we cannot work with our client we cannot usefully assist him and contribute to the proper administration of justice.

18. For his part, Counsel Joseph stated: So long as we cannot talk to our client, so long as we are unable to contact Defence witnesses we will not be able to assist the Court.<sup>10</sup>

19. Thus, Counsel eventually came to terms with the fact that they cannot represent an accused against his will.

20. Thus, the argument of the Prosecutor is now countered by those whose virtues and competences he so highly praised in his responses by citing ample jurisprudence.<sup>11</sup>

21. Accordingly, an indigent Accused's right to counsel of his own choosing and his/her ability to accept or refuse counsel in accordance with Articles 38 and 39 of the Code of Criminal Procedure is once again confirmed by Counsel, who thereby counter the Prosecutor's arguments.

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<sup>9</sup> Statements made by Counsel at the public hearing of 23 September 2015, see transcript op.cit., p.2, paras 5 and 6.

<sup>10</sup> Statements made by Counsel op.cit., pp. 5 and 6.

<sup>11</sup> See Prosecution Brief Responding to Unwinkindi's Revocation Request.

22. The Trial Chamber will take note of this change and rightly say that the right of the Accused to a fair trial is not guaranteed.

## **II.2. The right to choose counsel is even recognised by the National Public Prosecution Authority**

23. At the public hearing of 23 September 2015, the Prosecution Authority declared the following:<sup>12</sup>

We know that significant legal decisions have been taken in the interest of justice. We believe that the Uwinkindi case should be carefully examined, anything that will allow for a fair trial is welcome. (*Tuziko hari ibyemezo byafashwe kandi munyungu z'ubutabera. Dutekereze ko muri uru rubanza rwa Uwinkindi hajemo ikibazo. Ko ikintu cyose cyatuma habaho urubanza rwa Fair cyakorwa kugirango ikibazo gicyemucye*)

We accept that Counsel (i.e. Hishamunda and Ngabonziza) will not be able to cross-examine the witnesses for they have no knowledge of the facts (...*Dusanga abavoka batazashobora gukora cross examination ku batangabuhamya batazi les faits...*).

24. The Prosecution Authority realises that there is a need to guarantee a fair trial for the Accused and that assigned Counsel cannot cross-examine the witnesses.

25. It eventually joined in with our arguments, as expressed in the Monitoring report of March 2015 and in the Witteveen report presented in our previous written submission.<sup>13</sup>

26. Lastly, it recognises that an accused may choose a counsel even though he has been assigned one.

27. Strangely enough, the latest developments show that it restricted this principle to a roster of 68 lawyers recruited illegally by the Ministry of Justice before asking the High Court to take note of it.

## **II.3. In the matter of the sensitive question of the roster of 68 lawyers**

<sup>12</sup> Statement by the National Public Prosecution Authority at the public hearing of 23 September 2015, transcript p. 4, paras 2 and 3

<sup>13</sup> See our latest submission citing points 21 and 24 of a document entitled Additional Expert Report, Martin Witteveen re Rwanda v. Bajinya *et al.*, p. 7 points 21 and 24, June 2015.

28. At the public hearing of 23 September 2015, the Prosecution stated as follows:<sup>14</sup>

We request the High Court to consider a list of names of 68 lawyers, dated 14 September 2015, who have agreed to assist persons transferred to Rwanda by the ICTR ... Uwinkindi may chose from this list (*Turasaba Urukiko ko hejuru y'ibyemezo byinshi byagiye bifatwa, biturutse kuri iyi developpement y'urutonde rwa bavoka bemeye kw'unganira abatishoboye boherejwe na TPIR cyangwa n'ibindi bihugu, Uwinkindi yahitamo abo bagirana cooperation bakamwunganira kugirango urubanza rukomeze...*).

29. When invited to make a submission, the Accused suggested being provided with a roster of experienced and competent lawyers selected by the ICTR at the time of the request for transfer and not a roster provided by the the Ministry of Justice. He reserved his position, stating that he needed time to consult the roll of the Bar Association.<sup>15</sup>

31. The Presiding Judge of the High Court left him no other alternative, thereby demonstrating that she had already taken position in favour of the Prosecution.

#### **II.4. In the matter of the partiality of the Presiding Judge of the High Court**

32. Before she even looked at the correspondence from the Accused on the plea of *lis alibi pendens*, the President immediately wished to hear the witnesses.

33. Yet she knew that the Accused could not cross-examine them<sup>16</sup>.

34. The preliminary matters raised by the Accused met with fierce opposition from the Chamber, expressed in terms of 'you have no right to give us instructions on

<sup>14</sup> REPUBURIKA Y'U RWANDA, URUKIKO RUKURU, URUGEREKO RWIHARIYE RUSHINZWE KUBURANISHA IBYAHA MPUZAMAHANGA N'IMBYABUKA IMBIBI, TRANSCRIPT OF HEARING OF 23 SEPTEMBER 2015 AT 09hr03 A.M., RP 0002/HCCI: MP v. Jean UWINKINDI op cit p. 4

<sup>15</sup> TRANSCRIPT OF HEARING OF 23 SEPTEMBER 2015 p. 8

<sup>16</sup> SEE TRANSCRIPT pp. 1 and 2, The Chamber ignores the Accused's submission when using terms such as, *ntabwo mwadutegeka ibyo dukora muri dossier* (you have no right to give us instructions on how to conduct the proceedings)

how to conduct the proceedings' (*...Ntabwo mwadutegeka ibyo dukora muri dossier...*)<sup>17</sup>

35. The Presiding Judge of the High Court had already decided to hear the witnesses without even considering the grievances of the Accused.
36. Yet the Chamber accorded a great deal of attention to the Request filed by the Prosecution Authority.
37. The reservations made by the Accused regarding this roster never drew the attention of the Chamber.
38. Indeed, the High Court wasted no time in adopting the Prosecution's position.
39. It even went so far as to grant 30 minutes to the Accused to state his position, failing which the Prosecution's Request will be confirmed.
40. All the Accused's Requests met with fierce opposition from the Chamber.<sup>18</sup>
41. These were always met with invectives and interruptions on the part of the Chamber, thus affecting the serenity of the proceedings...<sup>19</sup>
42. The Chamber never inquired after the roll of the Bar Association in its 2015-updated version, in violation of its own jurisprudence,<sup>20</sup> thereby prejudging on the merits.<sup>21</sup>
43. The Accused has no reason to hope for a fair trial from such a Court so obvious is the dislike of the Chamber for the Accused.<sup>22</sup>

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<sup>17</sup> Transcript of hearing of 23 September 2015, p. 2

<sup>18</sup> Transcript of hearing of 23 September 2015 at 09h03 A.M. op. cit. p. 8.

<sup>19</sup> Transcript of hearing of 23 September 2015 at 09h03 A.M. op. cit. p. 8.

<sup>20</sup> Case RP001/15/HCCI ONPJ v. Emmanuel Mbarushimana, Interlocutory appeal of 25 March 2015.

<sup>21</sup> See letter of 25 March 2015 from the President of the Special Chamber of the High Court to Emmanuel Mbarushimana with the names of lawyers on the roll of the Bar Association to allow him to exercise his right to choose his counsel.

<sup>22</sup> Transcript of hearing of 23 September 2015 at 09h03 A.M., RP 0002/HCCI: MP v JEAN UNWINKINDI, p.9.

<sup>23</sup> Transcript of hearing of 23 September 2015, bottom of p. 9.

<sup>22</sup> Position of the Accused Jean UWINKINDI on the roster of sixty-eight lawyers imposed on him, see document in annex.

44. Accordingly, the Accused rightly refused to sign the court record to express his disapproval about the conduct of the proceedings regarding the roster of the sixty-eight lawyers.<sup>23</sup>

**II.5. In the matter of the invalid communiqué issued by President of the Bar Association on 22 July 2015.**

45. In reply to injunctions from the Chamber, the Accused forwarded the correspondence in which he reported irregularities in the assignment of the sixty-eight lawyers.<sup>24</sup>

46. As regards the communiqué of 22 July 2015, at its hearing of 6 August 2015, the High Court handed down a final Judgment invalidating the elections of the President of the Bar Association held on 12 June 2015 by the Kigali Bar Association.<sup>25</sup>

47. Following this court decision, any act done by the elected President of the Bar Association, including his involvement in establishing the roster of the sixty-eight lawyers to be assigned in transfer cases, is rendered void as of right.

48. Accordingly, the decision handed down by the High Court in its public hearing of 23 September 2015, in which it asked the Accused to state his position regarding a voidable roster of lawyers, should suffer the same fate.

49. Therefore, the hiring process of these lawyers, which the Ministry of Justice takes great pride in, in violation of the principle of separation of powers, is void.

**II.6. In the matter of the illegal hiring of sixty-eight lawyers by the Ministry of Justice**

50. On 16 July 2015, the Permanent Secretary of the Ministry of Justice declared that she had implemented a practice allowing for Defence Counsel to be recruited directly.<sup>26</sup>

51. Thus, the Bar Association no longer assigns Counsel for indigent Accused.

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<sup>25</sup> Decision handed down by the High Court at its public hearing of 6 August 2015 in case no RDA 007/HC/Kig,

<sup>26</sup> Monitoring report (July 2015) the case of THE PROSECUTOR V. BERNARD MUNYAGISHARI, p. 11, no. 12/515 *bis* para. 50



52. These prerogatives now belong to the Executive Branch that sends out a call for tenders to the President of the Bar Association, whose role is limited to executing the tender, in violation of the rules that govern the Profession of Lawyer.
53. Accordingly, all concerns aired by the Defence regarding the seizure by the Executive Branch of counsel representation traditionally devolved to the Bar Association come out into the open.
54. The clearly illegal process of establishing the roster of the sixty-eight lawyers is no longer in doubt.
55. Contrary to the commitments it made before the ICTR, the Bar Association has ceased to be the main administrator of legal aid, now in the hands of the Ministry of Justice, which seriously impacts the assignment of counsel in the transfer cases.
56. In light of the above:
- The irregularities that impacted the appointment of Counsel Isaachar Hishamunda and Joseph Ngabonziza as Counsel in charge of representing Jean Uwinkindi are confirmed.
  - The quashing of the Decisions handed down by the High Court and the Supreme Court respectively on 6 February, 6 April and 9 June 2015 is at last recognised by both Counsel, the Prosecution Authority and even the Chamber...
  - The right of indigent Accused to counsel of their own choosing and their ability to refuse counsel assigned unbeknownst to them is no longer challenged.
  - The Presiding Judge continues to express her dislike for the Accused.<sup>27</sup>
  - The violation by the Executive Branch of the principle of the separation of powers only further obstructs the Accused's rights to a fair trial. Currently,

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<sup>27</sup> REPUBURIKA Y'U RWANDA, URUKIKO RUKURU, URUGEREKO RWIHARIYE RUSHINZWE KUBURANISHA IBYAHA MPUZAMAHANGA N'IMBYABUKA IMBIBI, TRANSCRIPT OF HEARING OF 23 SEPTEMBER 2015 AT 09hr03 A.M., RP 0002/HCCI: MP c. JEAN UWINKINDI p. 8 to 9. THE PRESIDING JUDGE PREJUDGES THE OUTCOME OF THE UPCOMING DECISION IN DISREGARD OF THE RIGHT OF THE ACCUSED TO A FAIR TRIAL.

such obstruction has reached an ultimate stage (*last resort*), there is no turning back. No act can provide any remedy so manifest is the bad faith of the judicial institutions involved in this process.

57. The Trial Chamber shall take note of the aforementioned additional evidence and material contained in the transcript of 23 September 2015 concerning the recognition of the accused's right to counsel of his choosing.
58. It will thereby confirm that the Accused will be deprived of a fair trial before the High Court.

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**Mr Gatera Gashabana**

**Lead Counsel**

**/signed and stamped/**

**ANNEX I:**

**TRANSCRIPT OF HEARING ON 23 SEPTEMBER 2015 AT 09HR03,  
RP 0002/HCCI: MP V. JEAN UWINKINDI, REPUBURIKA Y'U  
Rwanda, URUKIKO RUKURU, URUGEREKO RWIHARIYE RUSHINZWE  
KUBURANISHA IBYAHA MPUZAMAHANGA N'IMBYABUKA IMBIBI**