

MICT-12-25-R14.1  
30-10-2015  
(11 - 1/1943bis)

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UNITED  
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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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REPLY TO THE PROSECUTOR'S MOTION  
TO REJECT THE DEFENCE'S LATEST REPLY  
BRIEFS

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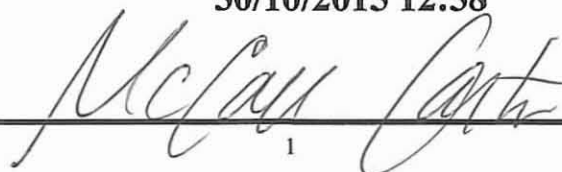
Office of the Prosecutor:

Counsel for Jean Uwinkindi:

Hassan Bubacar Jallow

Gatera Gashabana

**Received by the Registry**  
**Mechanism for International Criminal Tribunals**  
**30/10/2015 12:38**



## I. INTRODUCTION

1. On 4 September 2015, the Prosecution wrote a response to the Brief which the Defence of Jean UWINKINDI sent to it on 4 August 2015.<sup>1</sup> The Prosecution submitted this document to the Registry on 4 September 2015, which then forwarded it to the Defence at 1125 hours on 8 September 2015.<sup>2</sup>
2. In accordance with Rule 152 of the Rules of Procedure and Evidence, the Defence sent its reply within nine days from the date on which it received the Prosecution's response, as the *dies a quo* is not included in the calculation of the time limit.<sup>3</sup>
3. On 25 September 2015, the Prosecution submitted to the Chamber a motion to strike the Brief sent by the Defence, alleging that it failed to comply with the time limit, exceeded the word limit set in the Practice Direction on Lengths of Briefs and Motions and violated Rule 116 of the Rules of Procedure and Evidence.<sup>4</sup> The Defence received this motion on 29 September 2015.

## II. LEGAL DISCUSSION

### II.1. On the Prosecution's allegation of failure to comply with time limit

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<sup>1</sup> "Prosecution Brief Responding to Uwinkindi's Revocation Request".

<sup>2</sup> Jean Uwinkindi's acknowledgement of receipt of the Prosecutor's Reply at 1125 hours.

<sup>3</sup> Rule 152 of the Mechanism's Rules of Procedure and Evidence provides the following: "The time limits prescribed herein shall run from, but shall not include, the day upon which the relevant document is filed."

<sup>4</sup> "Prosecutor's Motion to Strike UWINKINDI's Reply". See also Rule 116 of the Rules of Procedure and Evidence.

4. The Prosecution claims that the Defence should have complied with the time limit of ten days set by the Scheduling Order of 22 May 2015, issued by the Presiding Judge.<sup>5</sup>
5. However, the Prosecution does not demonstrate that the Defence acknowledged receipt of its response on 4 September 2015. This date only concerns the submission of the Prosecutor's response to the Registrar.
6. Indeed, the Defence received the Prosecutor's response at 1125 hours on 18 September 2015.<sup>6</sup>
7. In accordance with Rule 152 of the Rules of Procedure and Evidence, which provides that the time limits shall not include the day upon which the relevant document is filed, the Defence sent its response within nine days from the day on which it received the reply, i.e. 18 September 2015.<sup>7</sup>
8. And even if we were to accept the Prosecution's argument that Counsel for the Accused received the Prosecution's response on 7 September 2015, the time limit of ten days prescribed in the Scheduling Order would still not have been exceeded, as, according to the above cited regulatory provision, the day of 7 September 2015 is not included. Moreover, everything Defence Counsel does is in full agreement and close cooperation with its client. In this case, Counsel had to get in touch with the client in order to work out a strategy that would be pursued when drafting a reply. This was not possible before 8 September, the day on which the client also received the document.

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<sup>5</sup> Scheduling Order, "Decision on Jean Uwinkindi's Request for Extension of Time and for Extension of the Word Limit".

<sup>6</sup> See the Defence's response to the Prosecutor's Reply.

<sup>7</sup> Reply of Jean Uwinkindi's Defence to the Prosecution's Response to the Request for Revocation of the Referral Order.

9. Furthermore, the Defence could not ask for an extension of the time limit due to the delay in the filing of the Prosecution's response, which the Registry neglected to transmit to the Defence on 4 September 2015.
10. Indeed, Rule 154 of the Rules of Procedure and Evidence allows the parties the opportunity to file a motion presenting good cause to enlarge or reduce any time prescribed. This provision does not pertain to delay for which neither party is responsible. It does not cover any negligence for which the Registry may be held accountable.
11. Therefore, there are no grounds for the Prosecution to blame the Defence for any such failure in the forwarding of its response.
12. The decisions of 22 May and 22 July 2015 were rendered in accordance with Rules 152 and 154 of the Rules of Procedure and Evidence of the Mechanism.<sup>8</sup>
13. Therefore, there are no grounds for the Prosecution to rely on the formulations "plain language of the Scheduling Order" while ignoring that it must comply with the basic documents of the Mechanism which provide that the *dies a quo* is not included in the calculation of the time limit.
14. The Chamber will note that the Defence has scrupulously observed the time limits prescribed in the Scheduling Order. It will reject the Prosecution's arguments concerning this

## II.2. On exceeding the word limit

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<sup>8</sup> Decision on Jean UWINKINDI's Request for Extension of Time, page 2, filing number 973, paragraph 5.

15. In its motion, the Prosecution claims that the Defence reported a word count of 2,986.
16. The Prosecution has increased the word count, claiming that it performed a manual count that amounted to approximately 5,130 words.
17. However, in a footnote the Prosecution acknowledges that it could not access the MS Word version of the document, making it difficult to perform a precise word count.<sup>9</sup>
18. Therefore, the word count performed by the Prosecution is not exact.
19. In view of these circumstances, is it justified to claim that UWINKINDI dramatically exceeded the permissible word limit, and to put forward the application of Article 23 (B) of the Code of Professional Conduct for Defence Counsel Appearing before the Mechanism?
20. In other words, has the Prosecution determined the precise extent to which the word count was allegedly exceeded, which could justifiably prompt him to request the application of the above rule?
21. The word count was performed by distinguishing between the text of the motion and the footnotes, which were not counted in accordance with paragraph 16 of the Practice Direction on Lengths of Briefs and Motions, concerning references cited by the party.<sup>10</sup>
22. The Prosecution should have acquainted itself with the contents of this Practice Direction before resorting to an approximate word count.

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<sup>9</sup> Footnote 17 of the Prosecutor's Motion, where he acknowledges that he could not access the MS Word version of the document.

<sup>10</sup> Practice Direction on Lengths of Briefs and Motions.

23. As for the sanction, neither the Rules of Procedure and Evidence nor the Practice Direction invoke the term "striking" on which the Prosecutor insists.
24. Even the Prosecution envisages the possibility of a review (*if the Trial Chamber allows the reply to stand or should it allow to re-file the reply by revisiting it*)<sup>11</sup> should the Chamber accept its argument.
25. Other similar arguments comply with the provisions of Articles 92 and 93 of Law no. 21/2012 of 14 June 2012 on the Code of Civil Procedure, which provide that no procedural act shall be considered void because of an irregularity in the form except in the following circumstances:<sup>12</sup>
- If undoubtedly the voidance is provided for by law
  - If there is any serious formality or of public order that is not respected
  - If the party requesting of it indicates the loss s/he may incur.
26. For its part, Article 93 of the same Law expands on this:<sup>13</sup>
27. In its response, the Prosecution does not rule out the possibility of the Chamber ordering the text to be revised in compliance with conditions to be prescribed.
28. The Prosecution thereby acknowledges the absence of prejudice which a possible exceeding of the word limit may have caused it.
29. The Chamber's decisions should be based on the spirit and the letter of the above-cited legal provisions.

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<sup>11</sup> See Prosecutor's Motion to Strike Uwinkindi's Reply, page 6, paragraph 16, filing number 1850.

<sup>12</sup> Law no. 21/2012 of 14 June 2012 entitled Code of Civil, Commercial, Social and Administrative Procedure, *Official Gazette* no. 29 of 16 July 2012.

<sup>13</sup> Procedural acts nullified due to irregularity in form shall regain validity upon corrections as long as corrections do not have any impact on the subject matter.

30. Nevertheless, the Defence wishes to recall that the text itself has 2,860 words, without the footnotes.

31. Therefore, there is no basis for the Prosecution to insist on a word count that it had not definitively established.

### **II.3. On the exhibit concerning the expert witness report**

32. Here the Prosecutor resorts to Rule 116 of the Rules of Procedure and Evidence, which provides:

(A) The full statement and/or report of any expert witness to be called by a Party shall be disclosed within the time limit prescribed by the Trial Chamber or the Pre-Trial Judge.

(B) Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or Pre-Trial Judge, the opposing Party shall file a notice indicating whether:

- (i) it accepts or does not accept the witness's qualification as an expert;
- (ii) it accepts the expert witness statement and/or report; or
- (iii) it wishes to cross-examine the expert witness.

33. In the present case, the submitted Exhibit 18 is an Expert Report concerning the extradition procedure to Rwanda of one Vincent Bajinya et al., pending before an English court.<sup>14</sup>

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<sup>14</sup> ADDITIONAL EXPERT REPORT BY MARTIN WITTEVEEN, ADVISOR INTERNATIONAL CRIMES TO THE NATIONAL PUBLIC PROSECUTION AUTHORITY NPPA IN RWANDA PREPARED FOR EXTRADITION PROCEEDINGS RE: *GOVERNMENT OF RWANDA V. DR VINCENT BAJINYA AND OTHERS*.

34. The formal and substantive requirements concerning the submission of this document were already met before the said Court. Is it necessary to subject it to the same procedure before this Chamber?
35. The report in question was drafted by an international advisor for international crimes. When he produced this report, he was assigned to The National Public Prosecution Authority, the NPPA, in Rwanda.
36. The collaborative relationship between this institution and the Office of the Prosecutor is very well known. The document is no longer secret as it was distributed at the hearing. In view of this, does it need to be subjected to a procedure such as the one prescribed by Rule 116, which is only prescribed as part of preparatory investigations? Moreover, as this argumentation originates from a close ally of the Office of the Prosecutor, is it really necessary to subject it to the conditions of acceptance prescribed under paragraph (B)?
37. By producing this exhibit, the Defence only wanted to inform the Chamber of the fact that even certain instances of the Public Prosecutor's Office recognised that Jean UWINKINDI was a victim of numerous violations of a fair trial before the High Court. We have therefore rightly recalled some of the key points of the report.
38. In fact, the points raised by the expert had been included in another document, i.e. the Monitoring Report for the month of March 2015, paragraphs 4, 17, 21, 22, 48, 49, etc.
39. Finally, even the National Public Prosecution Authority acknowledged at a public hearing of 23 September 2015 that UWINKINDI should have a free choice of Counsel in order to be able to cross-examine the witnesses.



40. If even Jean UWINKINDI's strongest opponents acknowledge that his right to a fair trial has been violated, the Chamber need only take note of this and draw the appropriate legal conclusions by revoking the referral order.

### III. CONCLUSION

41. The Defence sent its reply within the time limit prescribed in the Scheduling Order issued by the Presiding Judge. In fact, having examined the Prosecution's response, the Defence made sure it sent its reply within ten days of receipt.

42. As for the word limit, the Prosecution has not established precisely that it has been exceeded. It even envisaged in its conclusion the possibility of the Defence revising the text it had produced. This means that the Prosecution suffered no prejudice from the supposed exceeding of the word limit.

43. Finally, as for Annex 18, the Prosecution has not established why it had to be submitted in accordance with Rule 116, as this document was produced at a public hearing conducted before an English court. Besides, it is supported by various other Mechanism reports which show that UWINKINDI is not receiving a fair trial in Rwanda.

44. The Prosecutor's Motion is therefore unfounded.

Word count /in original/: 2,173

**Attorney Gatera Gashabana**

**Lead Counsel**

/signed/

/stamp:

**RWANDAN BAR ASSOCIATION**

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**ANNEX**

**ARTICLES 92 AND 93 OF LAW NO. 21/2012 OF 14 JUNE 2012 ON THE  
CODE OF CIVIL, COMMERCIAL, SOCIAL AND ADMINISTRATIVE  
PROCEDURE, *OFFICIAL GAZETTE* NO. 29 OF 16 JULY 2012**