



Mechanism for International
Criminal Tribunals

Case No: MICT-12-25-R14.1

Date: 25 September 2015

Original: English

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

**PROSECUTOR'S MOTION TO STRIKE
UWINKINDI'S REPLY**

Office of the Prosecutor:
Hassan Bubacar Jallow
James J. Arguin
François Nsanzuwera

Counsel for Jean Uwinkindi:
Gashabana Gatera

**Received by the Registry
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1. Uwinkindi, in filing his Reply,¹ ignored the required deadline, exceeded the maximum word limit, and misreported the word count. He neither requested authorization in advance for filing his Reply out-of-time, nor for submitting an oversized filing. Finally, he attempted to circumvent the rules governing admission of expert witness testimony by including, as Annex 18 of the Reply, an expert report prepared for a party to contested proceedings in another jurisdiction.

2. In light of Uwinkindi's failure to show good cause for the belated and oversized filing, the Trial Chamber should strike the Reply. Should the Trial Chamber allow the Reply to stand, it should either strike Annex 18 or, in the alternative, remedy the prejudice arising from Uwinkindi's reliance on that annex by allowing the prosecution to respond to the new evidence that expert report constitutes.

I. ISSUES AND ARGUMENTS

A. Failure to comply with time-limit

3. Uwinkindi's Reply is undeniably out-of-time. According to the Trial Chamber's Scheduling Order, the time-limit for Uwinkindi's Reply was ten days from the filing of the prosecution Response Brief.² That Response Brief was filed on 4 September 2015;³ therefore, the deadline for Uwinkindi's Reply was 14 September 2015. Instead, he filed his Reply four days later, on 18 September 2015.

4. Uwinkindi has not attempted to show good cause for his late filing. Instead, disregarding the plain language of the Scheduling Order, he presumptuously asserts that the deadline for his Reply was ten days from service of the Response Brief on Uwinkindi himself.⁴ But the deadline he fashions is premised on two errors.

¹ Réplique de la défense à la réponse du procureur, 18 September 2015 (Reply).

² Scheduling Order, 22 May 2015, p. 2 (Scheduling Order).

³ Prosecution Brief Responding to Uwinkindi's Revocation Request, 4 September 2015 (Response Brief).

⁴ Reply, paras. 3–4.

5. First, according to the language of the Scheduling Order and consistent Appeals Chamber jurisprudence, deadlines run from the date of filing, not the date of service.⁵ Parties who believe that a delay in service constitutes good cause for extension of a time-limit should make a request for extension on that basis.⁶ Uwinkindi never requested extension of the time-limit for reply based on any delay in service. His 13 September 2015 Request for Extension, which was denied by the Trial Chamber,⁷ was not founded on any delay in service, but on his desire to have a Kinyarwanda translation of the Response Brief.⁸

6. Second, even if Uwinkindi had requested an extension based on a delay in service, the relevant delay in service would be calculated not from when the accused himself received the Response Brief, but from when Uwinkindi's counsel received it. Uwinkindi's counsel is his legal representative and the individual responsible for all aspects of his client's case before the Mechanism.⁹ Indictments and judgements are required under the Rules to be served on an accused;¹⁰ other filings are served on the accused personally only as a courtesy. While, as the Reply's Annex 1 indicates,

⁵ Scheduling Order, p. 2; *In the Case against Florence Hartmann*, case no. IT-02-54-R77.5-A, Decision on Motion Regarding Belated Filing of Respondent's Brief, 17 November 2009, fn. 27; *Prosecutor v. Ante Gotovina, Ivan Čermak, and Mladen Markač*, case no. IT-06-90-AR65.1, Decision on Ante Gotovina's Appeal against Denial of Provisional Release, 17 January 2008, para. 22; *Ljube Boškoski and Johan Tarčulovski*, case no. IT-04-82-AR65.3, Decision on Ljube Boškoski's Interlocutory Appeal on Second Motion for Provisional Release, 28 August 2006, para. 8 (*Boškoski and Tarčulovski Decision*).

⁶ *Boškoski and Tarčulovski Decision*, para. 8; Practice Direction on Filings Made Before the Mechanism for International Criminal Tribunals, MICT/7/Rev. 1, 16 February 2015, Article 11(3) (Practice Direction, MICT/7/Rev. 1).

⁷ Decision on Jean Uwinkindi's Motion for Translation of the Prosecution's Response, 16 September 2015, pp. 2–3.

⁸ Requête tendant à obtenir une traduction Kinyarwanda des conclusions transmises à Jean Uwinkindi par l'Office du Procureur le 08 Septembre 2015, 13 September 2015, para. 12 (Request for Extension).

⁹ Directive on the Assignment of Defence Counsel, MICT/5, 14 November 2012, Article 16(B).

¹⁰ Rules of Procedure and Evidence, MICT/1, 8 June 2012, Rules 54(A), 122(D) (Rules).

Uwinkindi himself first received the Response Brief on 8 September 2015,¹¹ his counsel was notified of the filing the day before, on 7 September 2015, when the Registry distributed it to the parties by email.¹² Thus, even if the ten-day limit ran from the date of service on counsel, Uwinkindi's Reply was still untimely.

7. Under these circumstances, striking Uwinkindi's Reply Brief is an appropriate measure, one that is necessary to maintain respect for the Mechanism's procedural time-limits and proper functioning.¹³ Reply briefs such as Uwinkindi's are optional filings, and therefore striking them when they are, without justification, belatedly filed does not run counter to the interests of justice.¹⁴ In *Munyarugarama* and *Gotovina*, the Appeals Chamber upheld striking reply briefs that were filed out-of-time.¹⁵

8. Indeed, the Appeals Chamber has held that procedural time-limits are to be respected, as they are indispensable to the proper functioning of the Mechanism. Violations of time-limits, unaccompanied by any showing of good cause, should not be tolerated.¹⁶

¹¹ Reply, Annex 1. Uwinkindi has, in his Request for Extension, taken inconsistent positions on when he received the Response Brief. Request for Extension, paras. 1 and 9.

¹² Practice Direction, MICT/7/Rev. 1, Article 11(3).

¹³ *Phénéas Munyarugarama v. the Prosecutor*, case no. MICT-12-09-AR14, Decision on Appeal of the Referral of Phénéas Munyarugarama's Case to Rwanda and Prosecution Motion to Strike, 5 October 2012, para. 16 (*Munyarugarama* Decision).

¹⁴ *Munyarugarama* Decision, para. 15.

¹⁵ *Munyarugarama* Decision, para. 15; *Gotovina* Decision, para. 22.

¹⁶ *Munyarugarama* Decision, para. 16.

B. Failure to comply with word-limit and incorrect reporting of word count

9. The word count that Uwinkindi reports in his Reply does not match the number of words in the document. While he reports a word count of 2986, the actual figure, as determined by a manual count, is approximately 5130.¹⁷

10. The applicable word-limit for the Reply is 3000 words.¹⁸ Uwinkindi's Reply is over that limit by more than 2000 words. The difference between the actual and the reported word count is so wide as to render the excuse of mere inadvertent error improbable. Thus Uwinkindi has not only dramatically exceeded the permissible word limit, he appears to have attempted to circumvent the word limit by misreporting the word count. This misreporting runs afoul of Uwinkindi's counsel's duty of candour towards the Mechanism.¹⁹

11. Even if the Trial Chamber were to excuse Uwinkindi's belated filing, it should nonetheless strike the Reply for the reason that it exceeds the permissible word-count and order Uwinkindi to file a revised Reply not exceeding 3000 words within a specified period of time. Furthermore, the Trial Chamber should note Uwinkindi's counsel's misreporting of the word-count, and take such action as it deems appropriate to deter similar behaviour in the future.²⁰

¹⁷ The prosecution, not having access to the MS Word version of the Reply, could not perform a word count by using the electronic "Word Count" feature of that software; it therefore performed a manual word count.

¹⁸ Practice Direction on Lengths of Briefs and Motions, MICT/11, 6 August 2013, para. 15 (Practice Direction, MICT/11).

¹⁹ Code of Professional Conduct for Defence Counsel Appearing Before the Mechanism, MICT/6, 14 November 2012, Article 23(B)(i).

²⁰ *Callixte Nzabonimana v. the Prosecutor*, case no. ICTR-98-44D-A, Decision on Callixte Nzabonimana's Motion to Amend his Notice of Appeal and the Prosecution's Motion to Strike Nzabonimana's Appeal Brief, 30 August 2013, paras. 29–32; *Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, and Élie Ndayambaje*, case no. ICTR-98-42-A, Order Issuing a Formal Warning to Counsel for Ntahobali, Kanyabashi, and Ndayambaje, 15 April 2013, p. 2.

C. Impermissibly annexed expert witness report

12. Expert witness reports are governed by Rule 116,²¹ and the admissibility and evaluation of expert witness evidence are subject to principles set out in a consistent line of jurisprudence.²² Unless expert evidence is already part of the case record, it cannot be included in an annex, since annexes are limited to “references, source materials, items from the record, exhibits, and other relevant, non-argumentative material.”²³

13. The Reply’s Annex 18 (Expert Report) does not qualify as an annex under the Practice Direction. It is not part of the record of Uwinkindi’s proceedings either before the ICTR, the MICT, or the Rwandan courts (indeed, it is part of the record in a separate case in another jurisdiction entirely). Nor is it primary source material in support of arguments. It is, rather, a purported evaluation of the functioning of Rwanda’s judicial system and its capacity to ensure fair trial rights for accused, prepared for a party in contested litigation, submitted by Uwinkindi without any indication as to whether it was ever credited by the court to which it was presented.²⁴ As such, it is new evidence, the reliability and objectivity of which is untested in Uwinkindi’s case. Therefore the prosecution would be prejudiced by its introduction at this late stage of the revocation proceedings.

14. The Expert Report, which is dated 3 June 2015, was available to Uwinkindi well before the 5 August 2015 deadline for filing his Brief.²⁵ Had he submitted it as

²¹ Rule 116.

²² See, e.g., *Tharcisse Renzaho v. the Prosecutor*, case no. ICTR-97-31-A, Judgement, 1 April 2011, paras. 288–289; *Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze v. the Prosecutor*, case no. ICTR-99-52-A, Judgement, paras. 198–199; *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, and Vinko Pandurević*, case no. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, paras. 21–23.

²³ Practice Direction, MICT/11, para. 16.

²⁴ Reply, Annex 18, Registry pagination 1640.

²⁵ Mémoire à l’appui de la requête d’Uwinkindi Jean en annulation de l’ordonnance de renvoi, 5 August 2015 (Brief).

part of his Brief, the prosecution would have been able to address those aspects of the Expert Report on which Uwinkindi relies. Instead, by including it in his Reply, he has deprived the prosecution of a critical opportunity to respond.

15. Thus, if the Trial Chamber allows the Reply to stand, it should nevertheless strike the Expert Report, and the paragraphs of the Reply quoting and citing it, for the reason that it is new evidence outside the record of the Uwinkindi proceedings, and thus not permissible as an annex. Should the Trial Chamber allow the Reply and all its annexes to stand, it should remedy the prejudice caused by Uwinkindi's 11th hour inclusion of the Expert Report by allowing the prosecution to submit a response limited to addressing issues raised in that new evidence.

II. CONCLUSION

16. The Trial Chamber should strike Uwinkindi's Reply because (1) it was filed outside the prescribed time-limit with no good cause being shown for the belated filing; and (2) it exceeds the prescribed word limit without showing good cause, and Uwinkindi's counsel has falsely reported the Reply's word count in an attempt to circumvent the word limit. Furthermore, if the Trial Chamber allows the Reply to stand, or should it allow Uwinkindi to re-file the Reply by revising it to bring it within the applicable word limit, it should strike the Expert Report contained in Annex 18, or, in the alternative, allow the prosecution to file a response limited to the issues raised in the Expert Report.

Word Count: 1877

Dated and signed this 25th day of September 2015 at Arusha, Tanzania.



James J. Arguin
Chief, Appeals and Legal Advisory Division
(Pursuant to the MICT Prosecutor's 26 July
2012 Interim Designation)