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**Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda**

**ICTR-95-1B-A
11 January 2007
(713/H - 709/H)**

P.T.

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Decision of: 11 January 2007

Mikaeli MUHIMANA
(Appellant)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-95-1B-A

ICTR Appeals Chamber

Date: 11 January 2007
Action: P.T.

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DECISION ON THE ADMISSIBILITY OF THE APPELLANT'S BRIEF IN REPLY

Counsel for the Prosecution

Mr. James Stewart
Ms. Linda Bianchi
Mr. Abdoulaye Seye
Mr. François-Xavier Nsanzuwera

Counsel for the Appellant

Professor Nyabirungu mwene Songa
Mr. Kazadi Kabimba
Mr. Mathias Sahinkuye

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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NAME / NOM: Patrie Tchindimbo
SIGNATURE: [Signature] DATE: 11/01/07

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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 and 31 December 1994 ("Tribunal") is seized of:

- (i) the "Prosecutor's Motion to Expunge from the Record the Late and Over-Sized Reply Brief Filed by the Appellant on 14 November 2006" filed on 16 November 2006 ("Prosecution Motion");
- (ii) the "*Requête de l'Appelant aux fins de la recevabilité de la Réplique au Mémoire de l'Intimé*" filed on 17 November 2006 ("Defence Motion") by the Defence for Mikaeli Muhimana ("Defence" and "Appellant" respectively);¹

2. The parties filed their respective responses and the Prosecution thereafter filed a reply;²

I. BACKGROUND

3. On 21 June 2006, the Pre-Appeal Judge dismissed a request from the Defence for extension of time to file a Brief in Reply ("Reply") and reminded it that its Reply should be filed within fifteen days from the date of service of the French translation of the Respondent's Brief.³ In his decision of 11 September 2006, the Pre-Appeal Judge directed the Registry to inform the Appeals Chamber when the French translation of the Respondent's Brief has been served on the Defence.⁴ On 18 October 2006, the Registry advised the Appeals Chamber that this document was served on the Defence on 16 October 2006,⁵ and consequently, in its Scheduling Order of 14 November 2006 in this case ("Scheduling Order"), the Appeals Chamber noted that the Defence had not filed its Reply and that the time for filing a Reply had lapsed. Also on this day, the Defence filed the Reply.

¹ See also the English translation of the Defence Motion "Appellant's Motion for Admissibility of the Brief in Reply to the Respondent's Brief", filed on 28 November 2006.

² "Prosecutor's Response to '*Requête de l'Appelant aux fins de la recevabilité de la Réplique au Mémoire de l'Intimé*'" filed on 21 November 2006 ("Prosecution Response"). "Appellant's Reply to the Prosecutor's Motion to Expunge from the Record the Late and Over-Sized Reply Brief Filed by the Appellant on 14 November 2006", filed on 11 December 2006; "Prosecutor's Reply to '*Réplique de l'Appelant à la Requête du Procureur aux fins de retirer du dossier le Mémoire en réplique excessivement long et déposé hors délai le 14 novembre 2006 par l'Appelant*'", filed on 14 December 2006.

³ Decision on Appellant's Motion for Extension of Time to File a Brief in Reply and Postponement of a Status Conference, 21 June 2006 ("Decision of 21 June 2006"), p. 4.

⁴ Decision on Appellant's Motion to Note the Failure to File the Respondent's Brief within the Prescribed Time Limit, 11 September 2006 ("Decision of 11 September 2006"), p. 3.

⁵ See "Registrar's Submission under Rule 33(B) of the Rules on Decision on the Appellant's Motion to Note the Failure to File the Respondent's Brief within the Prescribed Time Limit of 11 September 2006", 18 October 2006, para. 2.

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4. The Prosecution requests that the Reply be expunged from the record due to its late filing and also because it exceeds the limitation on length set out in the Practice Direction on the Length of Briefs and Motions on Appeal.⁶ The Defence requests that the Reply be admitted in the interests of justice.⁷

II. DISCUSSION

5. The Defence moves for reconsideration of the Scheduling Order⁸ insofar as it noted that the Appellant had not filed a Reply and that the time for filing his Reply had lapsed.⁹ The Prosecution argues that the Defence has failed to demonstrate either a clear error of reasoning or that reconsideration is necessary to prevent an injustice.¹⁰ The Appeals Chamber observes that the Scheduling Order merely took note of the fact that a Brief in Reply had not been filed and that the time for filing this brief had lapsed. The Defence fails to show how the Appeals Chamber, in taking note of this fact, committed a clear error of reasoning or how a reconsideration of what the Appeals Chamber had merely noted is necessary to prevent an injustice.

6. The Defence refers to Rules 73(A), 107 and 116(A) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), as well as the Appeals Chamber's Decisions of 21 June 2006 and 11 September 2006, respectively, as the legal basis for the Defence Motion.¹¹ Pursuant to Rule 116(A) of the Rules, time limits for filings may be extended where good cause is shown. The Appeals Chamber will therefore consider whether the Defence has demonstrated good cause to justify the late filing of the Reply within the meaning of this rule.

7. The Defence acknowledges that the Registry transmitted the Respondent's Brief by e-mail on 16 October 2006,¹² but avers that the Lead Counsel only became aware of this transmission on 30 October 2006.¹³ It submits that the delay in receiving the Respondent's Brief resulted from exceptional circumstances, which are "common knowledge" and "comparable to unforeseen circumstances".¹⁴ These exceptional circumstances arose as a result of Lead Counsel's participation in the general election in the Democratic Republic of Congo, which resulted in him being elected as

⁶ Prosecution Motion, para. 1.

⁷ Defence Motion, para. 20.

⁸ Defence Motion, para. 3.

⁹ Defence Motion, para. 1.

¹⁰ Prosecution Response, para. 2.

¹¹ Defence Motion, paras. 15-19.

¹² Defence Motion, para. 3.

¹³ Defence Motion, para. 5.

¹⁴ Defence Motion, para. 6.

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a member of parliament and assigned to the presidential campaign.¹⁵ He was thus away from his chambers for the second half of October 2006, and unable to access his e-mail.¹⁶

8. It is recalled that when accepting an assignment as counsel in a case before the Tribunal, the assigned counsel is under an obligation to give priority to the case and to observe the time limits as prescribed in the Rules.¹⁷ Where counsel is unavailable due to other commitments, this cannot constitute good cause as envisaged in Rule 116(A) of the Rules.¹⁸ In the present case, the Lead Counsel's participation in an election does not excuse him from not respecting the prescribed time limits.

9. Furthermore, the Decision of 11 September 2006 took note of the information from the Registry that the French translation of the Respondent's Brief would be served on the Defence on 15 October 2006.¹⁹ Lead Counsel was therefore aware on 11 September 2006 of the date on which the French translation of the Respondent's Brief was expected to be served on the Defence and he, at that stage, ought to have known when the prescribed time limit for the filing of the Reply would start to run. He should therefore have made the necessary arrangements with the Registry and his Co-Counsel to accept service of the Respondent's Brief and to file the Reply within the prescribed time limit, if he was going to be "away from his chambers in the second half of October".²⁰

10. The Defence takes issue with the manner in which the Respondent's Brief had been served and argues that important documents are normally served on Lead Counsel when he is in Arusha, and when he is not in Arusha, they are sent to him by courier.²¹ Since the Respondent's Brief was served on him on 30 October 2006 when he arrived in Arusha, the Defence was within the time limit when it filed the Reply.²² The Defence admission that the Respondent's Brief was transmitted by e-mail on 16 October 2006 and the fact that he ought to have been aware of the time when the Respondent's Brief was expected to have been served vitiates this argument.

11. The Defence argues that Co-Counsel had not been served with the Respondent's Brief and had he been served with this document he would have filed the Reply in compliance with the time

¹⁵ Defence Motion, para. 6.

¹⁶ Defence Motion, para. 6.

¹⁷ Decision of 21 June 2006, p. 3, referring to *Emmanuel Ndingabizi v. The Prosecutor*, ICTR-01-71-A, Decision on "Requête urgente aux fins de prorogation de délai pour le dépôt du Mémoire en appel", 5 April 2005, p. 3; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Clarification of Time Limits and on Appellant Barayagwiza's Extremely Urgent Motion for Extension of Time to File his Notice of Appeal and his Appellant's Brief, 6 September 2005 ("Barayagwiza Decision"), p. 5.

¹⁸ Decision of 21 June 2006, referring to *Barayagwiza Decision*, p. 5.

¹⁹ Decision of 11 September 2006, p. 3.

²⁰ Defence Motion, para. 6.

²¹ Defence Motion, para. 11.

²² Defence Motion, paras. 7, 8.

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limit.²³ The Defence has not shown that it is normal Registry practice to serve documents on Co-Counsel and that the Registry had neglected to do so, nor has it shown that Lead Counsel had specifically requested the Registry to serve the Respondent's Brief on Co-Counsel, and that had the Registry complied with this request, the Reply would have been filed on time.

III. CONCLUSION

12. For the aforementioned reasons, the Appeals Chamber finds that the Defence has failed to show good cause within the ambit of Rule 116(A) of the Rules that would warrant an extension of time for the filing of the Reply or justify the late filing of the Reply. Consequently, the Appeals Chamber will not consider the Reply. This holding renders moot the Prosecution's objection to the length of the Reply.

FOR THE AFOREMENTIONED REASONS, the Appeals Chamber

GRANTS the Prosecution Motion;

DISMISSES the Defence Motion in its entirety.

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

Dated this 11th day of January 2007,
at The Hague, The Netherlands.



[Seal of the Tribunal]

A handwritten signature in black ink, appearing to read "Fausto Pocar", is written over a horizontal line.

Judge Fausto Pocar
Presiding

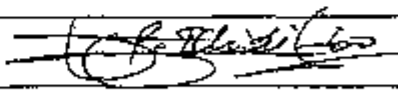
²³ Defence Motion, para. 13.



**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

REGISTRY AT THE HAGUE
Churchillplein 1, 2517 JW The Hague, The Netherlands
Tel: + 31 (0) 70 512-8225 / 8237 Fax: + 31 (0) 70 512-8932

**APPEALS CHAMBER – PROOF OF SERVICE
CHAMBRE D'APPEL - PREUVE DE NOTIFICATION**

January 11, 2007	Case Name / Affaire: Mikaeli MUHIMANA Case No / No. de l'affaire: ICTR-95-1B-A	THE PROSECUTOR v. Mikaeli MUHIMANA
To: A:	JUDICIAL ARCHIVES - ARUSHA * Fax Number: 1795251 APPEALS UNIT * Ms Félicité Talon, APPEALS CHAMBER * Judge / Juge Fausto Pocar, Presiding * Judge / Juge Mohamed Shahabuddeen * Judge / Juge Mehmet Güney * Judge / Juge Liu Daqun * Judge / Juge Wolfgang Schomburg * Ms Catherine Marchi-Ubel * Mr Roman Boed * Concerned Associate Legal Officers * Ms Fatou Fall DEFENSE * Accused / accusé : Mr. Mikaeli MUHIMANA (complete CMS Form) * Lead Counsel / Conseil Principal: Prof. Nyabirungu Mwene Songa (name / nom) * In Arusha (complete CMS 2) <input type="checkbox"/> Fax Number: * E-mail: nyabirungu@yahoo.fr * Co-Counsel / Conseil Adjoint: Me. Kazadi Kabimba (name / nom) * In Arusha (complete CMS 2) <input type="checkbox"/> Fax Number: * E-mail:	
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