Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

728/H

ICTR-00-55C-A
22nd August 2013
{728/H - 721/H}

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Pre-Appeal Judge**

Registrar: **Mr. Bongani Majola**

Decision of: **22 August 2013**

THE PROSECUTOR

v.

ILDÉPHONSE NIZEYIMANA

Case No. ICTR-00-55C-A

DECISION ON PROSECUTION'S MOTION TO STRIKE "ILDÉPHONSE NIZEYIMANA'S *CONFIDENTIAL* BRIEF ON APPEAL" OR FOR ALTERNATIVE RELIEF

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ICTR Appeals Chamber
22 AUG 2013
Date: Juma R.
Action: Chambers, Defence
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1. **I, THEODOR MERON,** Presiding Judge of 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 ("Appeals Chamber" and "Tribunal", respectively) and Pre-Appeal Judge in this case,[1] am seised of a motion by the Prosecution to strike "Ildéphonse Nizeyimana's *Confidential* Brief on Appeal" filed on 13 August 2013 ("Motion").[2]

A. Procedural Background

2. On 19 June 2012, Trial Chamber III of the Tribunal ("Trial Chamber") convicted Mr. Nizeyimana of genocide, extermination and murder as crimes against humanity, and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[3] The written Trial Judgement was filed in English on 22 June 2012.[4] The Trial Chamber sentenced Mr. Nizeyimana to life imprisonment.[5]

3. On 29 June 2012, the Prosecution filed a notice of appeal against the Trial Judgement.[6] Mr. Nizeyimana filed his notice of appeal on 23 July 2012.[7] On 12 September 2012, the Prosecution filed its Appellant's brief.[8] On 16 April 2013, the Pre-Appeal Judge granted, in part, Mr. Nizeyimana's request for an extension of the word limit for his Appellant's brief.[9] On 5 August 2013, Mr. Nizeyimana filed his Appellant's brief.[10]

4. On 13 August 2013, the Prosecution filed the Motion requesting to strike Nizeyimana's Appeal Brief, or in the alternative seeking an extension of the word limit and deadline for the filing of its Respondent's brief.[11] Mr. Nizeyimana filed his response to the Motion on 14 August 2013.[12] The Prosecution replied on 15 August 2013.[13]

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[1] Order Assigning Pre-Appeal Judge, 26 June 2012.
[2] Prosecution's Urgent Motion to Strike "Ildéphonse Nizeyimana's *Confidential* Brief on Appeal" or for Alternative Relief, 13 August 2013.
[3] T. 19 June 2012 pp. 10, 11.
[4] *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Judgement and Sentence, pronounced on 19 June 2012, filed on 22 June 2012 ("Trial Judgement").
[5] Trial Judgement, para. 1599.
[6] Prosecutor's Notice of Appeal, 29 June 2012.
[7] Ildéphonse Nizeyimana's Notice of Appeal, 23 July 2012.
[8] Prosecutor's Appellant's Brief, 12 September 2012.
[9] Decision on Ildéphonse Nizeyimana's Motion Requesting an Extension of the Word Limit for his Brief on Appeal, 16 April 2013 ("Appeal Decision of 16 April 2013"), para. 9.
[10] Ildéphonse Nizeyimana's *Confidential* Brief on Appeal, 5 August 2013 ("Appeal Brief").
[11] *See* Motion, paras. 3, 17.

B. Applicable Law

5. Paragraph C(7) of the Practice Direction on the Length of Briefs and Motions on Appeal provides:

> Parties shall conduct a word count of any document they file which is subject to the length limitations set forth in the Practice Direction and shall include this information in the form "Word Count: ___" at the end of the document, before the signature line.[14]

6. Paragraph C(4) of the Practice Direction on Length of Briefs provides:

> Headings, footnotes and quotations count towards the above word limitations. Any addendum containing verbatim quotations of the Tribunal's Statute or Rules does not count towards the word limit. Any appendix does not count towards the word limit. An appendix will not contain legal or factual arguments, but rather references, source materials, items from the record, exhibits, and other relevant, non-argumentative material. An appendix will be of reasonable length, which is normally three times the word limit for that class of motion or brief (e.g., for a brief that is limited to 30,000 words by the above Practice Direction, the appendix should be limited to 90,000 words), although it is understood that the length of appendices will naturally vary more than the length of briefs.[15]

7. The Practice Direction on Formal Requirements for Appeals from Judgement provides in relevant part:

> 4. [...] the Appellant shall file, [...] an Appellant's Brief containing, [...]:
>
> (b) the arguments in support of each ground of appeal, including, but not limited to:
>
> (i) legal arguments, giving clear and precise references to the Judgement, relevant provisions of the Statute, the Rules, the jurisprudence of the Tribunal or other legal authorities relied upon;
>
> (ii) factual arguments and, if applicable, arguments in support of any objections as to whether a fact has been sufficiently proven or not, with precise reference to any relevant exhibit, transcript page, decision or paragraph number in the judgement;
>
> (iii) arguments demonstrating why any alleged error on a question of law invalidates the decision and/or any alleged error of fact has occasioned a miscarriage of justice;
>
> (iv) the precise relief sought;
>
> (c) the arguments in support of any overall relief sought.
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> [...]

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[12] Ildéphonse Nizeyimana's Response to the Prosecution's Urgent Motion to Strike "Ildéphonse Nizeyimana's *Confidential* Brief on Appeal" or for Alternative Relief, 14 August 2013 ("Response").
[13] Prosecution's Reply to "Ildéphonse Nizeyimana's Response to the Prosecution's Urgent Motion to Strike 'Ildéphonse Nizeyimana's *Confidential* brief on Appeal' or for Alternative Relief", 15 August 2013 ("Reply").
[14] Practice Direction on the Length of Briefs and Motions on Appeal, 8 December 2006 ("Practice Direction on Length of Briefs"), para. C(7).
[15] Practice Direction on Length of Briefs, para. C(4).

> 13. Where a party fails to comply with the requirements laid down in this Practice Direction, or where the wording of a filing is unclear or ambiguous, a Pre-Appeal Judge or the Appeals Chamber may, within its discretion, decide upon an appropriate sanction, which can include an order for clarification or re-filing. The Appeals Chamber may also reject a filing or dismiss submissions therein. [16]

C. Discussion

8. The Prosecution requests the Appeals Chamber to strike Mr. Nizeyimana's Appeal Brief and to order Mr. Nizeyimana to re-file the document in compliance with the relevant practice directions, the Appeal Decision of 16 April 2013, and relevant jurisprudence.[17] Specifically, it submits that the Appeal Brief (i) "significantly" exceeds the permitted word limit by removing necessary spaces in the footnotes between words and punctuation;[18] (ii) violates paragraph C(4) of the Practice Direction on Length of Briefs as Mr. Nizeyimana annexes legal or factual arguments to his Appeal Brief and references previous filings in the footnotes;[19] and (iii) violates paragraph 4(b)(i)-(iii) and 4(c) of the Practice Direction on Formal Requirements for Appeals from Judgement and relevant Appeals Chamber jurisprudence by failing to adequately develop legal and factual arguments in support of Mr. Nizeyimana's submissions.[20]

9. The Prosecution asserts that this makes it difficult to fully and effectively address the issues in its Respondent's brief within the allocated time limit.[21] As relief, the Prosecution requests the Appeals Chamber to order Mr. Nizeyimana to file a revised Appellant's brief and to set the time limit for the filing of its Respondent's brief to run from the date the revised Appellant's brief is filed.[22] Alternatively, the Prosecution requests an extension of the word limit by 5,000 words and additional time to file its Respondent's brief.[23]

10. Mr. Nizeyimana responds that the Motion is "frivolous" and that these concerns would be better raised in the Prosecution's Respondent's brief.[24] He asserts that the Prosecution merely attempts to circumvent the procedural requirements pursuant to the Appeal Decision of 16 April

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[16] Practice Direction on Formal Requirements for Appeals from Judgement, 15 June 2007 ("Practice Direction on Formal Requirements for Appeals from Judgement"), paras. 4, 13.
[17] Motion, paras. 3, 17.
[18] Motion, paras. 1, 5-8. *See also* Reply, para. 3.
[19] Motion, paras. 1, 9. Particularly, the Prosecution refers to paragraph 372 of the Appeal Brief, which explicitly "adopts" submissions made in Mr. Nizeyimana's motion to recall Witnesses BXF, BZC, and ZBJ, attached as Annex F to his Appeal Brief. The Prosecution also refers to Mr. Nizeyimana's reference to submissions made in his closing brief. *See* Motion, para. 9. *See also* Reply, para. 6.
[20] Motion, paras. 2, 13-16. The Prosecution specifically refers to Mr. Nizeyimana's submissions in relation to his liability under joint criminal enterprise contained in grounds 39 and 40 of his Appeal Brief. *See* Motion, paras. 14, 15. *See also* Reply, paras. 11-13.
[21] Motion, paras. 2, 3, 13, 16.
[22] Motion, paras. 3, 17.
[23] Motion, paras. 3, 17, fn. 19. The Prosecution further requests that the Appeals Chamber dispose of the Motion on an expedited schedule. *See* Motion, paras. 4, 18. Given that the briefing of the Motion is already complete, this request is moot.
[24] Response, paras. 3, 19.

2013 and Rules 112 and 116 of the Rules of Procedure and Evidence ("Rules").[25] Mr. Nizeyimana further submits that the Motion should be summarily dismissed and the Prosecution warned pursuant to Rule 46(A) of the Rules.[26]

11. Mr. Nizeyimana argues, however, that should the Motion be considered, it should be denied in its entirety.[27] Mr. Nizeyimana responds specifically that: (i) his Appeal Brief is not comparable to other cases where spaces have been omitted from footnotes;[28] (ii) the footnotes in his Appeal Brief "mirror" the style and format of his closing brief and are similar to those in the Prosecution closing brief at trial;[29] (iii) Annex F to his Appeal Brief was attached purely for reference purposes and not for the submissions contained therein[30] and that the references to his Closing Brief were to highlight that the Trial Chamber had a duty to consider the evidence as a whole and to respond to those submissions;[31] and (iv) the paragraphs referred to in the Motion concerning his joint criminal enterprise submissions were merely introductory paragraphs, and are further and fully developed in paragraphs 514 through 529 of his Appeal Brief.[32]

12. The Prosecution replies that the Practice Direction on Length of Briefs applies to filings made on appeal and therefore the formatting used in submissions made during trial is irrelevant, and emphasizes that any variation of the word limit must be based on exceptional circumstances and be requested in advance.[33] The Prosecution submits that if Mr. Nizeyimana's claim that he does not seek to incorporate the arguments contained in the previous filings into his Appeal Brief is true, it was unnecessary to include them in his addendum as the documents already formed part of the record on appeal.[34] The Prosecution adds that the Appeals Chamber should dismiss Mr. Nizeyimana's request to warn it and instead issue a warning against Mr. Nizeyimana, given that he

[25] Response, paras. 1, 3, 19.
[26] Response, paras. 4, 21, 23.
[27] Response, paras. 5, 22, 23.
[28] Response, paras. 6-8.
[29] Response, para. 9, *referring to The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Prosecutor's Closing Brief, 8 November 2011, fns. 2-4, 6-10, 12-55 *and The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Nizeyimana Defence Closing Brief, 8 November 2011 ("Closing Brief"). Mr. Nizeyimana argues specifically that in its closing brief, the Prosecution inserted hyphens instead of spaces when referring to transcripts and "repeatedly" omitted spaces between words and underscores that no objection was raised thereto by either party.
[30] Response, paras. 11, 12. Mr. Nizeyimana concedes that he used the word "adopts" in paragraph 372 of his Appeal Brief, but submits that he did not rely on or incorporate said submissions. Rather, he asserts that he explained in detail how the Trial Chamber erred in its decision on the recall of those witnesses in paragraphs 365-368 and 373-382 of his Appeal Brief. *See* Response, paras. 11, 13.
[31] Response, para. 14. Mr. Nizeyimana further asserts that all the filings referred to by the Prosecution form part of the record on appeal, in compliance with Rule 109 of the Rules. *See* Response, para. 15.
[32] Response, paras. 16-18.
[33] Reply, para. 4.
[34] Reply, para. 9.

acknowledges that he has "flouted" the procedural precepts in place and provides no justification for doing so.[35]

13. Footnotes, of course, count toward the overall word limit, pursuant to paragraph C(4) of the Practice Direction on Length of Briefs.[36] I note that many spaces between numbers and punctuation marks were omitted from the footnotes of the Appeal Brief. The Appeal Brief indicates a word count of 39,866 words, such that if all the necessary spaces were included, the Appeal Brief would exceed the word limit set out in the Appeal Decision of 16 April 2013. The Appeals Chamber has previously held that such conduct is contrary to both the spirit and letter of the relevant Practice Directions.[37]

14. Nevertheless, after careful review of the footnotes in the Appeal Brief, I do not consider that this undermines the clarity of the Appeal Brief, or the footnote referencing, which in particular does not string words together. Furthermore, Mr. Nizeyimana clearly defines the abbreviations where necessary, further adding to the clarity of the references.[38] Accordingly, and in light of the need to facilitate expeditious appellate proceedings and in order not to prejudice Mr. Nizeyimana for the actions of his Counsel, I do not find this conduct to be so egregious as to warrant the filing of a revised Appellant's brief.

15. Turning to the Prosecution's assertion that Mr. Nizeyimana improperly included argumentation in the Annexes, the Appeals Chamber has previously held that the proper place for arguments in support of a particular ground of appeal, as well as any supporting authority, is the appeal brief.[39] An appellant therefore cannot simply refer in his appeal brief to other documents and expect those grounds of appeal to be preserved.[40]

16. Pursuant to paragraph C(4) of the Practice Direction on Formal Requirements for Appeals from Judgement, appendices do not count towards the word limit provided they do not contain legal or factual arguments, but only non-argumentative material.[41] Furthermore, an annex that provides

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[35] Reply, para. 15.
[36] *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Decision on Further Motions to Strike, 17 December 2009 ("*Hartmann* Appeal Decision of 17 December 2009"), para. 11.
[37] *Hartmann* Appeal Decision of 17 December 2009, para. 11. *See also The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Order Issuing a Formal Warning to Counsel for Ntahobali, Kanyabashi, and Ndayambaje, 15 April 2013, pp. 1, 2.
[38] *See, e.g.*, Appeal Brief, fns. 2, 29, 197.
[39] *Hartmann* Appeal Decision of 17 December 2009, para. 12, *referring to Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Decision on the Motion to Strike Defence Reply Brief and Annexes A–D, 7 June 2007, paras. 8-12.
[40] *See Hartmann* Appeal Decision of 17 December 2009, para. 12.
[41] *See, e.g.*, *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-A, Decision on Prosecution's Motions to Strike and for Extension of Time, and on Nzabonimana's Motions for Extension of Words and for Remedies, 17 June 2013, pp. 2, 3; *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, Decision on Ante Gotovina's Motion to Strike the Prosecution's Response to Gotovina's Second Rule 115 Motion, 9 May 2012 ("*Gotovina* Appeal Decision of 9 May 2012"), p. 2; *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, Decision on

description for some references cited does not necessarily lead to the conclusion that the annex has argumentative content.[42] The interests of justice may even allow for a very limited amount of argumentative material in an annex, for which the parties have some discretion, as long as it is not abused and which will be determined on a case-by-case basis.[43] In this regard, even if an annex provides a clear overview of a party's positions, this does not necessarily prove that the annex is argumentative.[44]

17. In this regard, I observe that on a plain reading of the Appeal Brief, Mr. Nizeyimana "adopts" paragraphs 32 through 59 of Annex F, which contain submissions relating to the recall of the relevant witnesses and arguments concerning Prosecution disclosure violations.[45] Nonetheless, I note Mr. Nizeyimana's clarification that Annex F was attached to his Appeal Brief for reference purposes only and not for the submissions contained therein.[46] Furthermore, Mr. Nizeyimana does not rely solely on these submissions in support of his arguments on this point but rather develops his arguments in detail in his Appeal Brief, indicating why he believes that the Trial Chamber erred.[47] In these circumstances, I do not consider that Mr. Nizeyimana abused his use of the Annex.

18. Similarly, I find no error concerning Mr. Nizeyimana's references to his Closing Brief. I am not convinced that by referring to his Closing Brief, Mr. Nizeyimana incorporated arguments made at trial into his appeal. In this respect, the Appeals Chamber has recalled that nothing prevents an appellant from referring to the trial record in making its submissions and, indeed, an appellant is expected to provide precise references in support of his arguments.[48]

19. I am likewise not convinced that Mr. Nizeyimana fails to adequately develop legal and factual arguments in support of his submissions such as to warrant the filing of a revised Appellant's brief at this stage of the proceedings.[49] Furthermore, an appellant has discretion as to how to develop arguments and how to allot the allowed space between arguments.

20. Given the foregoing, I do not consider that the Prosecution's arguments demonstrate that striking the Appeal Brief or ordering the filing of an amended Appellant's brief is appropriate in this case. Furthermore, recalling that I have previously granted the Prosecution 10,000 words above

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Prosecution's Motion to Strike Ante Gotovina's Reply Brief, 18 October 2011 ("*Gotovina* Appeal Decision of 18 October 2011"), p. 1.

[42] *Gotovina* Appeal Decision of 18 October 2011, p. 2.

[43] *Gotovina* Appeal Decision of 9 May 2012, p. 2; *Gotovina* Appeal Decision of 18 October 2011, p. 2.

[44] *See Gotovina* Appeal Decision of 18 October 2011, p. 2, *referring to Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Decision on the Motion to Strike Annexes A, C, D and E of the Prosecution's Appeal Brief, 18 May 2007, para. 7.

[45] *See* Appeal Brief, para. 372, Annex F, paras. 32-59.

[46] Response, paras. 11, 12.

[47] *See* Appeal Brief, paras. 373-382.

[48] Practice Direction on Formal Requirements for Appeals from Judgement, para. 4(b).

[49] *See* Appeal Brief, paras. 489-530.

the specified word limit, I order the Prosecution to file its Respondent's brief in accordance with the prior decision and within the prescribed time limit.[50] Finally, I do not consider that the conduct of either party warrants a warning pursuant to Rule 46(A) of the Rules at this time.

D. Disposition

21. For the foregoing reasons, the Motion is **DISMISSED** and the Prosecution is **INSTRUCTED** to file its Respondent's brief, if any, in compliance with the Appeal Decision of 16 April 2013 and Rule 112 of the Rules, no later than 14 September 2013. The Parties' requests pursuant to Rule 46(A) of the Rules are **DISMISSED**.

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

Done this twenty-second day of August 2013,
At The Hague,
The Netherlands.

Judge Theodor Meron
Pre-Appeal Judge

[Seal of the Tribunal]

[50] *See* Appeal Decision of 16 April 2013; Rule 112 of the Rules.

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