



ICTR-95-IF-R11bis
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**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

TRIAL CHAMBER III

Before: Judge Vagn Joensen, Presiding
Judge Florence Rita Arrey
Judge Gberdao Gustave Kam

Registrar: Adama Dieng

Date of filing: 21 June 2012

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THE PROSECUTOR

v.

ALOYS NDIMBATI

Case No. ICTR-95-IF-R11bis

**PROSECUTOR'S REPLY TO:
"DEFENCE RESPONSE TO PROSECUTOR'S REQUEST FOR
DESIGNATION OF A TRIAL CHAMBER AND REQUEST FOR
THE REFERRAL OF THE CASE OF ALOYS NDIMBATI TO
RWANDA PURSUANT TO RULE 11 BIS OF THE TRIBUNAL'S
RULES OF PROCEDURE AND EVIDENCE"**

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I. Introduction

1. The Defence accedes to the Prosecutor's request for the referral of this case to Rwanda for trial.¹ The Defence, however, proposes that referral be subject to the following three conditions:

- a. Upon arrest, Ndimbati be surrendered to the jurisdiction of the Tribunal and then relocated to Rwanda.²
- b. Ndimbati be provided with free legal representation from both national counsel and international counsel;³ and
- c. If conditions of detention in Rwanda are subsequently found to fall short of international standards, Ndimbati "shall have an automatic right to apply to serve his sentence outside the Republic of Rwanda."⁴

Two of these conditions (a and c) misconstrue the referral process; the third condition (b) is contrary to law. And, none is necessary to ensure that the trial in this case, if it is referred, will be fair. Accordingly, for the reasons detailed below, the Prosecutor's unopposed request for referral should be allowed, without subjecting referral to any of the conditions proposed by the Defence.

II. Submissions

A. **The Referral Chamber's authority to impose conditions on referral is not unlimited.**

2. Before addressing each condition, the Prosecutor acknowledges that Rule 11 *bis* grants a Referral Chamber broad discretion to decide whether to refer cases to a national jurisdiction.⁵ In exercising this discretion, a Referral Chamber is free to consider whatever information it reasonably deems necessary

¹ *The Prosecutor v. Aloys Ndimbati*, Case No. ICTR-95-1F-R11*bis*, Defence Response to Prosecutor's Request for Designation of a Trial Chamber and Request for the Referral of the Case of Aloys Ndimbati to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 19 June 2012 ("Defence Response"), paras. 4-5. 19.

² *Id.*, para. 19 (i).

³ *Id.*, para. 19 (ii) and para. 15.

⁴ *Id.*, para. 19 (iii).

⁵ *Uwinkindi (AC)*, para. 23.

to satisfy itself that the trial in any referred case will be fair.⁶ It also may impose conditions on the referral of a case that are necessary, in its view, to ensuring that the trial in the national jurisdiction will be fair.⁷

3. But, a Referral Chamber's discretion to impose conditions on referral is not unlimited. The conditions must, at a minimum, be relevant or reasonably related to the fundamental objective of ensuring that, if referral is allowed, the trial in the national jurisdiction will be fair.⁸ It follows that, if the conditions proposed by the Defence are irrelevant or unrelated to this objective, then the Chamber should not impose them.

4. When the conditions proposed by the Defence are measured against this standard, each falls short for the reasons discussed below.

B. If referral is allowed, Ndimbati will be surrendered to Rwanda, not the Tribunal, when he is finally apprehended.

5. Rule 11 *bis* (E) anticipates that, if referral is allowed, the Chamber "may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred for trial." The Prosecutor requested just such an order in his Request.⁹ More particularly, the Prosecutor asked that, if referral is allowed, the Chamber issue a "new Warrant of Arrest requiring states to cooperate in arresting the Accused and transferring him to the authorities of Rwanda pursuant to Rule 11 *bis* (E)."¹⁰ The same procedure has been followed in other cases where, as here, the accused remains a fugitive when the referral order is entered.¹¹

⁶ *Stanković* (AC), para. 50; *Uwinkindi* (AC), para. 28.

⁷ *Stanković* (AC), paras. 50.

⁸ *Stanković* (AC), para. 51 ("under Rule 11 *bis* of the Rules, the judges have inherent authority to issue orders which are reasonably related to the task before them, *i.e.*, satisfy themselves that the accused will receive a fair trial of his case is referred"); *Mejakić* (AC), para. 93 (same); *Prosecutor v. Savo Todović*, Case No. IT-99-25/1-AR11bis.1-2, 4 September 2006, para. 105 (same).

⁹ Prosecutor's Request, para. 116.

¹⁰ *Id.*

¹¹ *The Prosecutor v. Ryandikayo*, Case No. ICTR-95-1E-R11bis, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 20 June 2012 ("*Ryandikayo* (TC)"), p. 20; *Ntaganzwa* (TC), p. 25.

6. Accordingly, there is no need for the Chamber to condition its referral order on Ndimbati being first surrendered to the Tribunal and then transferred to Rwanda. If referral is allowed, a new warrant should issue requiring Member States to extend Rwanda their fullest cooperation in apprehending Ndimbati and, upon apprehension, to surrender him directly to Rwanda. Imposition of the condition requested by the Defence, therefore, misconstrues the referral process and is unrelated to protecting any fair trial rights.

C. There is no right under international law for an indigent accused to be appointed both international counsel and national counsel, nor is such a condition warranted under the circumstances presented.

7. The Defence next proposes that referral be conditioned on the appointment of both an international lawyer and a Rwandan lawyer.¹² Assuming Ndimbati is indigent, he will be entitled to appointed counsel but not necessarily counsel of his choice.¹³ “The right to choose counsel applies only to those accused who can financially bear the costs of counsel.”¹⁴

8. As noted in the Prosecutor’s Request, Rwandan law recognizes the right to appointed counsel for those unable to afford their own counsel, and Rwanda has set aside sufficient funds to support its legal aid program.¹⁵ Moreover, the Kigali Bar Association, which administers the legal aid program, has a sufficient number of competent lawyers available to represent Ndimbati, including several lawyers who have been admitted to practice before this Tribunal and many more lawyers with over seven years of relevant experience.¹⁶ Given these submissions, it is unclear why referral should be conditioned on the appointment of an international counsel in addition to Rwandan counsel. The Defence, for its part,

¹² Defence Response, paras. 15 and 19(ii).

¹³ *Akayesu* (AC), para. 61.

¹⁴ *Id.*

¹⁵ Prosecutor’s Request, paras. 81-85.

¹⁶ *Id.*, para. 75.

offers no reasoned explanation as to why this condition is necessary to ensure Ndimbati's fair trial rights.¹⁷

9. Certainly, it is possible for appointed counsel to be an international or foreign attorney. As noted in the Prosecutor's Request, international or foreign lawyers may be admitted or accredited before Rwandan courts and, thus, appointed to represent Ndimbati, if he is indigent.¹⁸

10. Merely that is possible for Rwanda (or, more particularly, the Kigali Bar Association) to comply with this proposed condition, however, does not mean that the Chamber should impose it as a condition for referral. No international legal instrument or human rights conventions, including those included in the appendix to the Defence Response, suggests that the right to appointed counsel extends so far as to require that an international or foreign lawyer or a lawyer with international experience be appointed to a defence team.¹⁹

11. Nor has any international tribunal or court, including this Tribunal, imposed any similar requirement for appointment as defence counsel. ICTR Rule 44 requires only that "a counsel shall be considered qualified to represent a suspect or accused, provided he is admitted to the practice of law in a State, or is a University professor of law." Article 13 of the ICTR Directive on the Assignment of Defence Counsel adds that counsel should have at least seven years' relevant experience. Article 14 of the ICTY Directive on Assignment of Defence Counsel provides essentially for the same, but further specifies that the seven years' relevant experience should be as "a judge, prosecutor, attorney or in some other capacity, in criminal proceedings. . . ." The provisions governing

¹⁷ See Defence Response, para. 15.

¹⁸ Prosecution Request, para. 76.

¹⁹ See, e.g., European Convention on Human Rights, Article 6 (setting out fair trial guarantees); Rule 36 of the Rules of the European Court of Human Rights (counsel need only be "authorized to practice in any of the Contracting Parties and resident in the territory of one of them, or any other person approved by the President of the Chamber"); International Covenant on Civil and Political Rights, Article 14, section (d) (setting out the right to counsel); African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section G (counsel must be "qualified to represent and defend the accused" and possess the "necessary training and experience corresponding to the nature and seriousness of the matter").

appointment of defence counsel at the International Criminal Court (ICC), Special Court for Sierra Leone (SCSL), Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Tribunal for Lebanon (STL) are substantively the same and likewise make clear that the key requirement is that appointed counsel have relevant experience at either the international or national level.²⁰

12. These international legal instruments and rules reflect the prevailing international standard²¹ and establish that there is no right under international law for an indigent accused to be appointed an international lawyer in addition to a national lawyer. It suffices that appointed counsel have substantial relevant experience at either the national or international level, which many members of the Rwandan bar unquestionably possess.²² Requiring, as the Defence proposes, that any defence team appointed to represent Ndimbati include both national counsel and international or foreign counsel therefore goes far beyond the established international standard for appointed counsel.

13. The Appeals Chamber addressed a similar situation in *Munyakazi* where the Referral Chamber denied the Prosecutor's application for referral because, in part, there would only be a single judge at trial. This requirement, the Appeals Chamber held, was not a recognized right under international law and, therefore, could not be relied upon to deny the Prosecutor's referral application.²³

14. So too here. The Defence's suggestion that the Chamber should condition referral on the requirement that international counsel be appointed, along with national counsel, to represent Ndimbati is not a right recognized under

²⁰ ICC Rule 22 ("established competence in international or criminal law and procedure[,] . . . whether as a judge, prosecutor, advocate or in another similar capacity"); SCSL Directive on the Assignment of Counsel, Article 13 (seven years' experience "in criminal law, international law, international humanitarian law or international human rights law"); ECCC Rule 11(4)(c) ("established competence in criminal law and procedure at the international or national level"); STL Rule 57(A) ("The Head of Defence Office . . . shall be, or have been, admitted to the practice of law in a recognized jurisdiction and shall have practiced criminal law before a national or international criminal court for a minimum of fifteen years.").

²¹ See *Munyakazi* (AC), para. 26 (looking to international legal instruments, including human rights conventions, to determine the parameters of fair trial rights).

²² See Prosecutor's Request, paras. 75-76.

²³ *Munyakazi* (AC), para. 26.

international law and, therefore, should not be imposed as a condition on referral. Indeed, it would be an abuse of discretion for the Chamber to impose on Rwanda a requirement for appointed counsel that neither the Tribunal nor any other international court or tribunal require for their own appointed counsel.²⁴ This conclusion is particularly true here, given that a sufficient number of national counsel with relevant experience are ready and willing to provide legal representation to the accused.²⁵ Thus, imposition of the proposed condition is not necessary to ensure that the trial in this case, if it is referred, will be fair.

D. The monitoring and revocation procedures provide an adequate remedy should conditions of detention in Rwanda not continue to comply with international standards.

15. The Defence's proposed third condition relating to conditions of detention is similarly misguided. Every Referral Chamber to address the issue has found that Rwanda's conditions of detention for prisoners in transferred cases meet international standards.²⁶ Nevertheless, the Defence requests that, if referral is allowed, Ndimbati be granted an "automatic right to apply to serve his sentence outside" Rwanda in the event his conditions of detention deteriorate at some later time.²⁷

16. Neither this Chamber nor Rwanda can force another country to accept custody of a prisoner, particularly one who may be convicted under the domestic laws of another state.²⁸ Nor, in all events, is such an unorthodox order necessary

²⁴ The *Munyagishari* Referral Chamber imposed a condition for appointed counsel to have previous experience in eliciting testimony from international witnesses and familiarity with video-link technology. *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-R11bis, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 6 June 2012, paras. 148, 220, and pp. 54-55, para. 1. The Prosecutor has appealed the imposition of this condition, and that appeal remains pending at this time. *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-R11bis, Prosecutor's Notice of Appeal Pursuant to Rule 11 bis (H), 20 June 2012.

²⁵ Prosecution Request, paras. 75-76 and cited Annexes.

²⁶ Prosecutor's Request, paras. 37-40; *see also* Ryandikayo (TC), paras. 35- 38.

²⁷ Defence Response, paras. 8, 19 (iii).

²⁸ *See In re Andre Ntagerura*, Case No. ICTR-99-46-A28, Decision on Motion to Appeal the President's Decision of 31 March 2008 and the Decision of Trial Chamber II of 15 May 2008, 18 November 2008, para. 15 (observing that obligations under Article 28 "pertain solely to the 'investigation and prosecution of persons accused of committing serious violations of international humanitarian law', and hence does not extend to the relocation of acquitted persons"); *Protias*

in this or any other referred case. This is because Rule 11 *bis*'s monitoring and revocation provisions are adequate safeguards to ensure that there will be no substantial deterioration in the conditions of detention for prisoners in transferred cases.²⁹ This assurance is reinforced by Rwanda's Transfer Law, which provides that the International Red Cross or an "observer appointed by the president of the ICTR shall have the right to inspect the conditions of detention of persons transferred to Rwanda by the ICTR."³⁰ Under these circumstances, the Defence's third proposed condition is contrary to settled law and not necessary to ensuring that Ndimbati's conditions of detention, should he be convicted, continue to comply with international standards.

III. Conclusion

17. Apart from the three proposed conditions that either misconstrue the referral process or are not supported by law, the Defence concedes that all of the other indicators of a fair trial are satisfied by the Prosecutor's request for referral. Having now shown that the conditions the Defence proposes are neither necessary nor appropriate, the Chamber should allow the Prosecutor's request for referral of this case to Rwanda for trial, without subjecting its order to any of the conditions the Defence has proposed.

Respectfully submitted,



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Chief, Appeals and Legal Advisory Division

Dated this 21st day of June 2012 at Arusha, Tanzania.

Zigiranyirazo v. The Prosecutor, Case No. ICTR-2001-01-073, Decision on Protias Zigiranyirazo's Motion for Damages, 18 June 2012, para. 55.

²⁹ Prosecutor's Request, para. 40.

³⁰ *Id.*, para. 39; see also *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75R11*bis*, Decision on the Monitoring Arrangements for the Trial of Jean Uwinkindi in the Republic of Rwanda, 5 April 2012, para. 26 (observing that "the International Committee of the Red Cross or such other person or body at the Tribunal may designate shall be requested . . . to conduct inspections and submit reports to the President on the enforcement of sentences, in any, imposed by Rwandan Courts in cases referred from the ICTR").

