



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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msh

OR: ENG

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Patrick Robinson
Judge Mehmet Güney
Judge Andréia Vaz
Judge Carmel Agius

ICTR-2011-75-AR11bis
25-01-2012
(306/A-300/A)

Registrar: Adama Dieng

Date: 25 January 2012

JUDICIAL RECORDS/ARCHIVES
UNICTR
2012 JAN 25 A-9-12

JEAN UWINKINDI

v.

THE PROSECUTOR

Case No. ICTR-2001-75-AR11bis

**DEFENCE EXTREMELY URGENT MOTION FOR REVIEW OR
RECONSIDERATION OF THE DECISION OF 16 DECEMBER 2011 ON
UWINKINDI'S APPEAL AGAINST THE REFERRAL OF HIS CASE TO RWANDA**

Office of the Prosecutor

Hassan Bubacar Jallow
James J. Arguin
George Mugwanya
Inneke Onsea
Abdoulaye Seye
François Nsanzuwera

For the Defence

Claver Sindayigaya
Iain Edwards
Bettina Spilker

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I. Preliminary matter

1. The Defence acknowledges that a motion for review or reconsideration of an Appeals Chamber's decision in relation to proceedings under Rule 11*bis* of the Rules of Procedure and Evidence, and consequently any decision thereon, is without precedent within the jurisprudence of the Tribunal.

2. Article 25 of the Statute and Rules 120 and 121 of the Rules govern the review process of a final judgement of a case after trial. There is no express provision for review or reconsideration by the Appeals Chamber in the context of Rule 11*bis* proceedings. However, it is submitted that in the particular circumstances of the present case the Appeals Chamber should not prevent itself from being seized of the current motion.

3. The Defence recalls established Tribunal's jurisprudence that in order for a review to be granted, "the moving party must show that: (1) there is a new fact; (2) the new fact was not known to the moving party at the time of original proceedings; (3) the lack of discovery of that new fact was not the result of a lack of due diligence by the moving party; and (4) the new fact could have been a decisive factor in reaching the original decision."¹

4. The Defence recognises that review is "an exceptional procedure and not an additional opportunity for a party to re-litigate arguments that failed at trial or on appeal"².

5. However, it is submitted that new and recent developments, namely the Tribunal's acting President's decision on the Registrar's submissions regarding monitoring of the Accused's case in Rwanda constitute new facts which fully warrant the intervention of the Appeals Chamber to protect the fair trial rights of the Accused.

II. Submissions

6. On 28 June 2011, the Referral Chamber ordered the referral of the Accused to the Republic of Rwanda for trial ("the Referral Decision"). On 16 December 2011 the Appeals

¹ *Jean Bosco Barayagwiza v. the Prosecutor*, ICTR 99-52-A-R, Decision on Jean-Bosco Barayagwiza's motion for review and/or reconsideration of the appeal judgement of 28 November 2007, dated 22 June 2009, para 22. See also, *Eliézer Niyitegeka v. The Prosecutor*, ICTR-96-14-R, Decision on third request for review, dated 23 January 2008, para 13

² *Jean Bosco Barayagwiza*, *ibidem*, para 22

Chamber dismissed the Accused's appeal and endorsed the Referral Decision ("the Appeal Decision").

7. In reaching their decisions, both the Referral Chamber and the Appeals Chamber recognised the fundamental importance of an objective monitor being in place to observe and report on the transferred case in Rwanda. At para. 223 of the Referral Decision, the Chamber stated that, "The Referral Chamber is persuaded to refer this case after receiving assurances that *a robust monitoring mechanism* provided by the ACHPR [African Commission on Human and Peoples' Rights] will ensure that any material violation of the fair trial rights of this Accused will be brought to the attention of the President of the Tribunal forthwith so that remedial action, including revocation, can be considered by this Tribunal, or if applicable, by the Residual Mechanism."³

8. Moreover, the Referral Chamber clearly provided that the monitoring, observation and reporting from the ACHPR is envisaged to start from the date the Accused is transferred to Rwanda and is to continue on uninterruptedly even beyond the conclusion of the trial. The monitoring is not limited only to the actual trial itself, but involves the ACHPR's active and positive involvement before the trial. In this regard, it is stated at para. 216 of the Referral Decision in unambiguous terms that "The Chamber considers that effective monitoring would require the monitoring to begin from the date the case is transferred to the relevant national authority as stipulated herein." For example, the monitor will monitor on a full-time basis the progress of the referred case in general, and on the observance of international fair trial standards with special emphasis on the availability and protection of witnesses *before*, during and after the proceedings.⁴

9. For instance, guideline (g) stipulated by the Referral Chamber relates to the ACHPR having to "indicate, in general, any violations of the fair trial rights of the Accused." Conditions of detention in Rwanda is a matter that is recognised as falling within the ambit of the fairness of the national criminal justice system. Consequently, the monitoring of the Accused's fair trial rights necessarily includes monitoring of detention conditions.⁵ The

³ Emphasis added.

⁴ Emphasis added.

⁵ See Referral Decision, para. 58, "The conditions of detention speak to the fairness of a country's criminal justice system and must accord with internationally recognised standards." See also footnote 75, "Conditions of detention in a national jurisdiction, whether pre- or post-conviction, is a matter that touches upon the fairness of that jurisdiction's criminal justice system and is an inquiry squarely within the Referral Chamber's mandate."

Accused will be held in detention from the moment of his arrival in Rwanda and so the ACHPR must be seized of this aspect of its monitoring function with respect to the Accused's rights from the date of his arrival in Rwanda at the very latest.

10. Upon his arrival in Rwanda, the Accused will have to be assigned counsel. It is foreseeable that very soon after his arrival in Rwanda he will be served with an indictment that conforms with Rwandan procedural rules, as well as supporting materials. It is equally foreseeable that very soon after his arrival he will be taken before a Judge for an initial appearance as prescribed by Rwandan law. These are crucial stages of the criminal process which should be observed and monitored. This will not be possible unless a fully functioning monitoring programme is in place.

11. It is the very fact of the anticipated presence and assurance offered by the ACHPR that weighed so heavily in favour of the granting of the Prosecutor's initial referral request and in the subsequent dismissal of the Defence appeal. Indeed, the presence and active engagement of independent monitors on a full time basis was a determining factor for the Trial and Appeals Chambers in reaching their decisions.

III. The Registrar's submissions dated 16 January 2012

12. On 16 January 2012, the Registrar made representations to the President of the Tribunal by which he sought guidance on whether the Tribunal may consider transferring the Accused to Rwanda only upon the settlement of a number of practical issues (Registrar's Submissions, paragraph 13).

13. At paragraph 6, the Registrar disclosed that he has already commenced discussions with the ACHPR to secure a written arrangement "which will clearly stipulate the logistical, financial and other modalities by which the monitoring will be carried out". He added, however, that "owing to the complex nature of these discussions (...) they are likely to take more time before a written arrangement is entered into between the Tribunal and the ACHPR".

14. Moreover, the Registrar disclosed that there were no funds available to the Tribunal for monitoring. He was only able to promise to "commence exploring the avenues of funding the monitoring", because, in his own words, "Currently there is no funding available in the Registry's budget for this activity" (paragraph 7).

15. On 19 January 2012, the Defence submitted that the Accused should not be transferred to Rwanda before an operational monitoring mechanism is in place.

16. On 20 January 2012, the Acting President of the Tribunal rendered a decision denying the Registrar's request and ordered the transfer of the Accused to Rwanda "within 30 days of acceptance of the corrected indictment". The corrected indictment was accepted on 23 January 2012. Consequently, the Accused is at risk of being removed to Rwanda at no further notice, notwithstanding the absence of any monitoring mechanism being in place.

IV. This is a new fact

17. The Defence submits that this is a state of affairs that could not have been within the contemplation of either the Referral Chamber or the Appeals Chamber at the time they rendered their respective decisions. There is no concrete arrangement in place between the Tribunal and the ACHPR and negotiations are "likely to take more time". There is no indication as to how long this process will take, or whether it will ultimately lead to an agreement at all, given the heavy burden placed by the Trial Chamber on the ACHPR's monitors who will be required to oversee the whole process on a "full time basis". No funding is in place for this programme. Again, it is not clear how long it will take for the Registrar to secure funds for the mechanism, or even if those funds will be secured at all.

18. It could not have been foreseen that on the eve of the transfer of the Accused to Rwanda, there would be no monitoring mechanism in place on account of there being no agreement with the ACHPR and no funding available.

19. The Defence respectfully submits that had this situation been known to the Appeals Chamber during its deliberations on the merits of the Accused's appeal, it is likely that such knowledge would have been an important factor taken into account when determining whether or not the appeal should be allowed. Indeed, it is submitted that it is such an important factor that it would have led to a different conclusion in the appeal.

20. This situation is extremely urgent. The Accused is likely to be transferred to Rwanda any day. The Defence submits that the Appeals Chamber should declare itself seized of this urgent motion without delay, and competent to provide a remedy.

21. In light of this unforeseen and unforeseeable situation the Defence respectfully requests the Appeal Chamber to review and reconsider its decision of 16 December 2011. The Defence

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additionally requests the Appeal Chamber to issue an interim injunction to the Registry not to transfer the Accused to Rwanda before this motion for review is determined by the Appeals Chamber.

22. For all the foregoing reasons, the Defence respectfully requests that the Appeals Chamber:

DECLARE itself competent to consider this Motion;

RECONSIDER the Appeals Decision;

ALLOW the appeal;

REVERSE the Referral Decision;

DENY the Request for Referral in its entirety;

ORDER that the Accused be tried before a Trial Chamber of the International Criminal Tribunal for Rwanda;

and in the interim

INJUNCT the Registrar from transferring the Accused to Rwanda until such time as the Appeals Chamber decides on the merit of this motion.

Respectfully submitted,

30/11/03



Claver Sindayigaya, Lead Counsel



Iain Edwards



Bettina Spilker

1,827 words

