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ICTR-01-75-AR11bis
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International Criminal Tribunal for Rwanda



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IN THE APPEALS CHAMBER

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

Registrar: Mr. Adama Dieng

Date filed: 30 January 2012

THE PROSECUTOR

v.

JEAN UWINKINDI

Case No. ICTR-2001-75-AR11bis

JUDICIAL RECORDS ARCHIVES
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**PROSECUTOR'S OPPOSITION TO 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 AND MOTION TO VACATE THE APPEALS
CHAMBER'S 26 JANUARY 2012 INTERIM ORDER**

The Prosecution

Hassan Bubacar Jallow
James J. Arguin
George Mugwanya
Inneke Onsea
Abdoulaye Seye
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The Defence

Claver Sindayigaya
Iain Edwards
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1. The Defence's motion for review and reconsideration seeks to reverse this Chamber's 16 December 2011 judgement,¹ affirming the Trial Chamber's 28 June 2011 decision allowing the Prosecutor's application for referral of this case to Rwanda for trial.² The only basis offered for this admittedly "extraordinary" remedy is the Registrar's recent submission to the President of the Tribunal, wherein the Registrar stated that funding for the monitoring mechanism was not yet in place.³

2. To be sure, the Registrar's recent submission is concerning.⁴ In the months since the Trial Chamber's decision, the Registrar apparently has not yet identified funding for the monitoring mechanism. As the Acting President noted in response to the Registrar's submission, discussions concerning the modalities of the monitoring mechanism and "securing of the necessary funding should have been ongoing" since June 2011 when the Trial Chamber issued its decision.⁵

3. Nevertheless, in the wake of the Acting President's decision, Uwinkindi's core contention that he allegedly faces imminent transfer to Rwanda without the monitoring mechanism being in place is unfounded. To demonstrate this point, the Prosecutor first untangles the procedural path that brings us to this juncture.

¹ *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR11bis, Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions, 16 December 2011, para. 89 ("*Uwinkindi (AC)*").

² *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011, p. 57 ("*Uwinkindi (TC)*").

³ *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, 25 January 2012, paras 3-4, 16 ("*Defence Motion*"); *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-AR11bis, Registrar's Submissions Regarding the Transfer of the Accused to the Custody of the Republic of Rwanda, 16 January 2012, paras. 6-7 ("*Registrar's Submissions*").

⁴ See *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-AR11bis, Prosecutor's Response to Registrar's Submissions Regarding the Transfer of the Accused to the Republic of Rwanda, 16 January 2012, para. 6.

⁵ *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-R11bis, Decision on the Registrar's Request for Stay of Transfer of Jean Uwinkindi to Rwanda, 20 January 2012, para. 6 ("*Uwinkindi (President's Decision)*").

4. He will then address the merits of Uwinkindi's flawed procedural and legal arguments. Most fundamentally, Uwinkindi's reliance on review or reconsideration as the vehicle for advancing his present motion is improper as neither of those procedures applies here.

5. Even if applicable, the Chamber should not lightly assume that the Registrar will fail to discharge his solemn obligation to take all steps necessary to implement the Trial Chamber's referral order as affirmed by this Chamber and clarified by the Acting President. Any contrary result would call into doubt the legitimacy of this Tribunal by undermining the force and effectiveness of its judicial orders.

6. In all events, the remedy that Uwinkindi proposes – reversal of the Appeals Chamber's decision and denial of the referral request – is entirely unwarranted.

Procedural Background

7. The Registrar, in his recent submission, alerted the President to the alleged lack of available funds for the monitoring mechanism because he viewed it as an obstacle to his ability to comply with the Trial Chamber's directive. The Trial Chamber had directed "the Registrar, *within 30 days of [its] Decision becoming final*, appoint the African Commission on Human and People's Rights [ACHPR] as monitor for the trial of the Accused in Rwanda . . . and to make arrangements to this effect."⁶ In the Registrar's view, the Trial Chamber's decision became final when the Appeals Chamber issued its decision on 16 December 2011.⁷ Thus, the Registrar apparently believed that all arrangements for the monitoring mechanism had to be in place by 16 January 2012, the day he made his submissions.

⁶ *Uwinkindi* (TC), p. 57 (emphasis added). More particularly, the Trial Chamber directed the Registry to secure a written agreement with the ACHPR that would "clearly stipulate the logistical, financial and other modalities by which the monitoring [would] be carried out." *Id.*, paras. 210 and 221.

⁷ Registrar's Submissions, paras. 1, 5-6.

8. The Acting President rejected the Registrar's interpretation of the Trial Chamber's order.⁸ He noted that the Appeals Chamber had stayed Uwinkindi's transfer "pending the Trial Chamber's acceptance of the corrected indictment" filed pursuant to the Appeals Chamber's order in another appeal.⁹ Therefore, the Acting President determined that the "Trial Chamber Referral Decision will not become final until such time as the corrected indictment has been accepted by the Trial Chamber."¹⁰ Pursuant to this reasoning, which Uwinkindi has not appealed nor challenged in any way, the 30-day deadline for the Registrar's implementation of the monitoring mechanism and Uwinkindi's physical transfer to Rwanda had not yet started.

9. That time limit did not start to run until 23 January 2012 when the Trial Chamber confirmed the amended indictment.¹¹ Thus, under the Acting President's reasoning, the Registrar now has until 22 February 2012 to finalize arrangements for the monitoring mechanism and effectuate Uwinkindi's physical transfer to Rwanda.¹²

10. Three days after the Acting President's clarification, Uwinkindi filed this "extremely urgent" motion, contending that his transfer to Rwanda was imminent and allegedly would take place without the monitoring mechanism being in place.¹³ This "state of affairs," Uwinkindi alleges, constitutes a "new fact" that warrants setting aside the Appeals Chamber's decision and vacating the referral order "in its entirety."¹⁴

⁸ *Uwinkindi* (President's Decision), para. 7.

⁹ *Uwinkindi* (President's Decision), para. 7; *Uwinkindi* (AC), para. 88.

¹⁰ *Uwinkindi* (President's Decision), para. 7.

¹¹ *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-PT, (Confidential) Decision on the Confirmation of the Re-Filed Amended Indictment, 23 January 2012, p. 9.

¹² *Uwinkindi* (President's Decision), para. 7 and p. 4.

¹³ Defence Motion, para. 16.

¹⁴ *Id.*, paras. 17 and 22.

Submissions

A. Uwinkindi’s motion for review and reconsideration is procedurally misdirected.

11. Uwinkindi correctly acknowledges that a motion for review or reconsideration of an Appeals Chamber decision in relation to Rule 11 *bis* proceedings is “without precedent within the jurisprudence of the Tribunal.”¹⁵ The Prosecutor agrees.

12. Article 25 of the Statute and Rules 120 and 121 of the Rules, which govern review proceedings, anticipate that review will only be granted *after* conviction or another order terminating proceedings (*e.g.*, dismissal of an indictment). Article 25 of the Statute makes this clear by referring to motions for review filed by a “convicted person.” Similarly, the reference in Rules 120 and 121 to a “final judgement” has been interpreted as applying only to a judgement that terminates the proceedings, not interlocutory orders.¹⁶

13. Uwinkindi is not a convicted person; rather, he is an accused person whose case has been referred for trial in a national court. Referral proceedings under Rule 11 *bis* are interlocutory in nature because the trial has not yet occurred and the referral is subject to revocation.¹⁷ Accordingly, review is not available here.

14. Nor is there any basis for reconsideration of the Appeals Chamber’s 16 December 2011 decision. The Appeals Chamber “may reconsider a previous decision pursuant to its inherent discretionary power if a clear error of

¹⁵ Defence Motion, para. 1.
¹⁶ *Jean Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision on Prosecutor’s Request for Review or Reconsideration, 31 March 2000, paras. 48-49.
¹⁷ *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-AR11*bis*, Decision on the Prosecution’s Request for a Scheduling Order, 8 June 2006, para. 4 & n. 7; *Prosecutor v. Željko Mejačić et al.*, Case No. IT-02-65-AR11*bis*.1, Decision on Joint Defence Motion to Admit Additional Evidence before the Appeals Chamber pursuant to Rule 115, 16 November 2005, para. 6. *See also* Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, Section III(4) and (8) (specifying that the paragraph (C)(2) of the Practice Direction on the Length of Briefs and Motions on Appeal, governing interlocutory appeals, applies to appeals from decisions under Rule 11 *bis*).

reasoning has been demonstrated or if it is necessary to prevent an injustice.”¹⁸

15. Uwinkindi does not even address this standard, let alone demonstrate how it could be met here. There is no clear error of reasoning in the Chamber’s decision. Uwinkindi points only to an alleged post-appeal change in circumstances relating to the Registrar’s delay in implementing the monitoring mechanism. Furthermore, as shown in the following sections, this alleged change in circumstances already has been effectively addressed by the Acting President’s decision and, in all events, can be remedied by relief far short of reconsideration of the Chamber’s decision. Thus, reversal of the Chamber’s final decision, affirming the Trial Chamber’s referral order, is not “necessary to prevent an injustice.”

16. This result has particular resonance here. The Trial Chamber’s order allows the Registrar to apply to the President for any collateral or “consequential” orders necessary to effectuate the referral of this case.¹⁹ It is foreseeable that the President may issue additional orders in the course of this proceeding. Were Uwinkindi’s present position to be endorsed, he would have repeated opportunity to appeal to this Chamber for extraordinary review of any allegedly new “state of affairs” that may emerge from the President’s supervision of the referral process. The Chamber should not permit this end-run on the President’s decisions because, as this motion demonstrates, it would needlessly interfere with the efficient and effective implementation of the referral order affirmed by this Chamber.

17. Accordingly, Uwinkindi’s present motion is procedurally without basis, and the Chamber should decline his invitation to be seized of a matter that is not properly before it, particularly where, as shown below, the Acting President already has effectively addressed the matter.

¹⁸ *Iddephonse Hategekimana v. The Prosecutor*, Case No. ICTR-00-55B+A, Decision on Iddephonse Hategekimana’s Second Motion for an Extension of Time to File his Appellant’s Brief, 20 May 2011, para. 6.

¹⁹ *Uwinkindi* (TC), p. 59.

B. Uwinkindi's assumption that the Registrar will fail to discharge his duty of implementing the Tribunal's judicial orders is unwarranted.

18. As a consequence of the Acting President's decision, the Registrar now has until 22 February 2012 to finalize his arrangements for the monitoring mechanism and Uwinkindi's physical transfer to Rwanda.²⁰ The Prosecutor is confident that the Registrar will meet this deadline and stands ready to provide whatever assistance the Registrar may require to fully implement the Trial Chamber's referral order as affirmed by this Chamber.

19. It should not be lightly assumed that the Registrar will fail to discharge his duties. To the contrary, it should be presumed that the Registrar will take all steps necessary to discharge his solemn responsibility under Article 16 of the Statute to administer and service the Tribunal. Inherent in this responsibility is the Registrar's obligation to see that the Tribunal's judicial orders are implemented in the manner and within the time directed by the Tribunal's judges.

20. Uwinkindi offers nothing but speculation to support his belief that he will be transferred to Rwanda without having in place the monitoring mechanism that the Trial Chamber and this Chamber imposed. If anything, the Registrar's recent submission shows that he is being proactive in anticipating potential obstacles to the implementation of the Chambers' orders. Now that the Acting President has clarified how much time remains to implement the order, the Registrar should be permitted to discharge his duties within the time remaining.

21. Because the Registrar still has several weeks to implement the referral mechanism and arrange Uwinkindi's physical transfer to Rwanda, Uwinkindi's request for review or reconsideration of the Appeals Chamber's decision is, at best, premature and should be denied.

²⁰ *Uwinkindi (President's Decision)*, para. 7 and p. 4.

22. For this same reason, the Appeals Chamber should vacate the interim stay that it issued on 26 January 2012.²¹ This interim order was premised on the false assumption that Uwinkindi's transfer to Rwanda would take place without the monitoring mechanism being in place. The Acting President's decision demonstrates that this is not the case as the Registrar still has time to make the necessary arrangements before transfer will be effectuated. Alternatively, the Chamber should decide the present motion as expeditiously as possible so that referral is not further delayed.

C. Nothing in Uwinkindi's submissions warrants vacating this Chamber's decision affirming the Trial Chamber's referral order.

23. In all events, the remedy that Uwinkindi proposes is grossly disproportionate to the potential harm that could result should the Registrar fail to implement the Tribunal's judicial orders within the time remaining. Uwinkindi proposes that the Appeals Chamber vacate its decision affirming the Trial Chamber's decision and deny the Prosecutor's application for referral in its entirety.²² There is no legal or equitable basis for relief along these lines.

24. The most that Uwinkindi could hope for is that this Chamber would stay referral until such time as the Registrar makes the necessary arrangements for the monitoring mechanism. But, as the Acting President already has determined, there is no basis for such an order at this time.²³ As noted above, it must be presumed that the Registrar will take all necessary steps to see that the Tribunal's judicial orders have practical effect. Anything less would threaten the interests of justice and the integrity of this Tribunal.

25. To ensure that there will be no further disruption in the efficient and timely referral of Uwinkindi's case to Rwanda, the Appeals Chamber should

²¹ *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR11bis, Interim Order on Uwinkindi's Motion for Review or Reconsideration of the Decision of 16 December 2011, 26 January 2012 ("Interim Order").

²² Defence Motion, p. 6.

²³ *Uwinkindi* (President's Decision), para. 7 and p. 4.

direct the Registrar to submit a detailed report, updating the Chamber and parties on the steps that have been and will be taken to ensure that the monitoring mechanism will be implemented within the time and in the manner ordered by this Chamber and the Trial Chamber. The Registrar should be further directed to specifically advise the Chamber and parties on any obstacles, including funding, that would render it impossible for him to implement the Tribunal's judicial orders in the time remaining.

26. Additionally, to ensure that all mechanisms, including the Prosecutor's own monitor, are in place when the Registrar effectuates the transfer of Uwinkindi's physical custody to Rwanda, the Registrar should be further directed to provide the Chamber and parties with seven days advance notice of Uwinkindi's physical transfer to Rwanda.²⁴

Conclusion

27. The Appeals Chamber should deny Uwinkindi's motion for review or reconsideration of its 16 December 2011 decision because the motion is both procedurally and substantively flawed. Neither the Statute nor Rules provide for review of Rule 11 *bis* decisions post appeal. Uwinkindi fails to demonstrate any exceptional circumstances meriting reconsideration of the Chamber's decision. His professed fear of imminent transfer to Rwanda without the monitoring mechanism being in place is unfounded and, at best, premature given the time remaining for the Registrar to comply with the Trial Chamber's order.

28. For this reason as well, the Chamber should vacate its Interim Order, staying Uwinkindi's transfer pending resolution of the present motion. Alternatively, the Chamber should resolve this motion as expeditiously as possible so there is no further delay in the referral of this case to Rwanda for trial.

²⁴ This notification is consistent with Paragraph 7 of the Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment.

29. In all events, the relief Uwinkindi seeks is unwarranted. To ensure the timely and effective implementation of the Trial Chamber's and this Chamber's referral decisions, the Appeals Chamber should instead direct the Registrar to:

- a. submit a detailed report within two days of the Chamber's decision, updating the Chamber and parties on the steps that the Registrar has taken and will take to ensure that the monitoring mechanism will be implemented within the time and in the manner ordered by this Chamber and the Trial Chamber;
- b. specifically advise the Chamber and parties in the same report on any obstacles, including funding, that the Registrar believes would render it impossible to implement the Tribunal's judicial orders in the time remaining; and
- c. provide the Chamber and parties with seven days advance notice of the date scheduled for effectuating Uwinkindi's physical transfer of custody to Rwanda.

30. Lastly, the Appeals Chamber should allow the parties a reasonable opportunity to respond to the Registrar's report, and issue any and all additional orders it deems necessary to ensure that the Tribunal's judicial orders have practical force and effect.

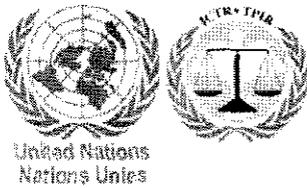
Respectfully submitted,

30 January 2012, Arusha, Tanzania



James J. Arguin

Chief, Appeals and Legal Advisory Division



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Case Name:	The Prosecutor vs. Jean Uwinkindi		Case Number: ICTR-2001-75-AR11bis
Dates:	Transmitted: 30 January 2012		Document's date: 30 January 2012
No. of Pages:	10	Original Language: <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda	
Title of Document:	PROSECUTOR'S OPPOSITION TO 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 AND MOTION TO VACATE THE APPEALS CHAMBER'S 26 JANUARY 2012 INTERIM ORDER		
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<input type="checkbox"/> Trial Attorney in charge of case:	RICHARD KAREGYESA	received by
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<input type="checkbox"/> Accused / Accusé:	JEAN UWINKINDI	complete / remplir "CMS4 FORM"
<input type="checkbox"/> Lead Counsel	CLAVER SINDAYIGAYA	
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Objet:		

PROSECUTOR'S OPPOSITION TO 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 AND MOTION TO VACATE THE APPEALS CHAMBER'S 26 JANUARY 2012 INTERIM ORDER

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