



International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

380/A
K. M. M.

IN THE APPEALS CHAMBER

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

ICTR-01-75-AR11bis
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THE PROSECUTOR
v.
JEAN UWINKINDI

Case No. ICTR-2001-75-AR11bis

PROSECUTOR'S RESPONSE TO UWINKINDI'S MOTION FOR
STAY OF UWINKINDI'S TRANSFER AND REQUEST FOR
TIME TO FILE MOTION FOR RECONSIDERATION

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I. OVERVIEW

1. The Defence Motion of 17 April 2012 requests a 7 day time limit to file a second motion for reconsideration of the Appeals Chamber's Decision of 16 December 2011, and an injunction to prevent the transfer of Jean Uwinkindi ("the Accused") pending a decision on the Motion and a subsequent more detailed motion for reconsideration.¹ The only basis offered for these extraordinary measures are alleged recent developments in the unrelated case of Victoire Ingabire before the High Court in Rwanda, which purportedly amount to "new and compelling evidence that provides strong grounds to believe that the Accused will be deprived of a fair trial in Rwanda."²

2. The Defence's eleventh-hour request to stay the transfer of this case to Rwanda for trial should be denied. It is grounded on a faulty foundation, namely that there allegedly are "clear parallels" between Uwinkindi's referred case and Victoire Ingabire's ongoing domestic prosecution.³ Both the Appeals Chamber and Referral Chamber already rejected this same comparison.⁴

3. Nothing that Uwinkindi says in support of his latest motion for reconsideration changes this. Uwinkindi presents only second-hand, hearsay notes prepared by counsel Iain Edwards, who was counsel for Uwinkindi during the referral proceedings and is also counsel for Ingabire, relating to events that started over a week ago when he was not even present in the courtroom. The notes are replete with unsubstantiated accusations of misconduct and alleged witness intimidation, all arising under a very unique set of circumstances that are not likely to be repeated.

¹ *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-2001-75-AR11bis, Defence Extremely Urgent Motion for Stay of Uwinkindi's Transfer to Rwanda, and Request for Time to File Second Motion for Reconsideration of the Decision of 16 December 2011 on Appeal against the Referral of his case to Rwanda, 17 April 2012 ("Motion").

² Motion, para. 3.

³ Motion, para. 14 (vi).

⁴ *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, para. 196 ("*Uwinkindi* (TC)"); *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. 75 ("*Uwinkindi* (AC)").

4. Furthermore, stripped of their hyperbole, Uwinkindi's counsel's notes reveal only three rather ordinary events:

- a) Prison officials, at the request of Rwandan prosecutors, searched the cell of a prisoner who testified for the defence.
- b) Prison officials interviewed the prisoner about the materials seized from his cell.
- c) The High Court, in the exercise of its discretion, limited the scope of the Defence's re-examination of the prisoner.⁵

5. The Prosecution has not had time to fully investigate these matters, but, on their face, none of these incidents alone or in combination demonstrates the sort of grave injustice that the Defence suggests would invariably result were the referral order carried out as the President has directed. Prison cells are subject to search. Prisoners also have no right to counsel, unless they are being charged with a crime. And, trial judges have broad discretion over the conduct of trial, including the scope of any re-examination of a party's witness.

6. The absence of any tangible threat of injustice to Uwinkindi is further demonstrated by the fact that Ingabire (or, for that matter, any other defendant on trial in Rwanda) may contest the High Court's decisions by seeking reconsideration should new information be adduced or by petitioning the Supreme Court of Rwanda, which has general power to review decisions of the High Court.⁶ Ingabire, however, has apparently elected to boycott her trial. That choice is hers, but it has no bearing at all on how Uwinkindi's trial will be conducted when his case is referred to Rwanda as this Chamber, the Referral Chamber, and the President have all directed.

7. In addition, were the Defence's present Motion to be allowed, Uwinkindi would have repeated opportunities to appeal to this Chamber for extraordinary review of any alleged "new and recent development" that may emerge in

⁵ Motion, p. 6.

⁶ Article 145 of the Constitution of the Republic of Rwanda of 4 June 2003 (as amended in 2003, 2005, 2008 and 2010) ("Constitution"). For English, French and Kinyarwanda versions of the Constitution, see <http://www.amategeko.net/> (last visited 18 April 2012).

unrelated and dissimilar cases in Rwanda which do not necessarily reflect the conditions of trial or the charges Uwinkindi is faced with.

8. Accordingly, Uwinkindi's latest effort to stay his physical transfer to Rwanda should be denied.

II. SUBMISSIONS

A. Another stay of Uwinkindi's transfer is not warranted.

9. It is not appropriate to again stay the Accused's transfer pending full resolution of this Motion and any subsequent motion by the Appeals Chamber. As the Defence points out, the President has ordered the transfer of Uwinkindi to Rwanda by 19 April 2012 in light of his right to a trial without undue delay, on the basis that a proper monitoring mechanism would be in place by that time.⁷ There is no reason to further delay the transfer and trial of Uwinkindi, based, as shown below, on unsubstantiated and overblown allegations of fair trial violations in Rwanda in a case which is not indicative of how the trial in Uwinindi's case would proceed. The filing of the Defence Motion at the eve of Uwinkindi's transfer on the basis of "new and recent developments" allegedly occurring last week is another indication that this is a last attempt to delay or obstruct his transfer to Rwanda. This needlessly interference with the efficient and effective implementation of the referral order affirmed by this Chamber is unacceptable.

B. The Chamber already found that Ingabire's and other so-called political cases were not indicative of how the trial in Uwinkindi's case would proceed.

10. As the Referral Chambers already found in this case, cases such as the Ingabire one are of a political nature and do not have a bearing on cases of transferred accused, including the one of Uwinkindi.⁸ These cases, unlike the

⁷ *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75R11bis, Decision on Monitoring Arrangements for the Trial of Jean Uwinkindi in the Republic of Rwanda, 5 April 2012, para. 8; p. 12-13 ("President's Decision").

⁸ *Uwinkindi* (TC), para. 196. See also *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-01-67-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 22 February

Ingabire case, will be tried under the protections and immunities of the Transfer Law, and will be closely monitored.⁹

11. The Transfer Law, as amended, provides increased immunity and protection for witnesses.¹⁰ Article 13 states that “[w]ithout prejudice to the relevant laws of contempt of court and perjury, no person shall be criminally liable for anything said or done in the course of a trial.”¹¹ Article 14 provides an additional guarantee of immunity for witnesses who travel from abroad. It states that “[a]ll witnesses who travel from abroad to testify in the trial of cases transferred from the ICTR shall have immunity from search, seizure, arrest or detention during their testimony and during their travel to and from the trials.”¹²

12. Moreover, the transferred cases will be closely monitored to ensure that these protections are applied in practice.¹³ Any issue that may arise can and will be addressed by means of the safeguards offered by the monitoring and revocation mechanisms. In the most recent President’s decision on the monitoring mechanism in this case, the President directed the Registrar to resume negotiations with the African Commission on Human and Peoples Rights (“ACHPR”) aimed at expeditiously concluding an agreement for monitoring.¹⁴ To avoid further delay while those negotiations are ongoing, the president appointed two ICTR legal staff to serve as “interim monitors” and lend assistance once the

2012, para. 142 (“*Kayishema* (TC)”); *The Prosecutor v. Charles Sikubwabo*, Case No. ICTR-95-1D-R11bis, Decision on the Prosecutor’s Request for Referral of the Case to the Republic of Rwanda, 26 March 2012, para. 140 (“*Sikubwabo* (TC)”).

⁹ *Ibid.*

¹⁰ See Organic Law No. 11/2007 of 16 March 2007 concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and From Other States, Official Gazette of the Republic of Rwanda, 19 March 2007, as modified by Organic Law No. 03/2009/OL of 26 May 2009 modifying and complementing the Organic Law No. 11/2007 of 16/03/2007 concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States, Official Gazette of the Republic of Rwanda, 26 May 2009 (“Transfer Law”). For English, French and Kinyarwanda versions of the Transfer Law, see <http://www.amategeko.net/> (last visited 18 April 2012).

¹¹ Transfer Law, Article 13 (as amended).

¹² Transfer Law, Article 14.

¹³ *Uwinkindi* (TC), para. 196; *Kayishema* (TC), para. 142; *Sikubwabo* (TC), para. 140.

¹⁴ President’s Decision, p. 12.

full-time monitor is appointed.¹⁵ The President also clarified the modalities for monitoring, identified the terms of reference and detailed what should be included in their reports.¹⁶ The President's decision, therefore, shows that a comprehensive and robust monitoring system will be in place to provide additional safeguards for Uwinkindi's fair trial rights upon his transfer to Rwanda.

C. No clear parallels exist between the events that took place over the last week in Ingabire's case and Uwinkindi's anticipated trial.

13. The Defence submissions are unsubstantiated. The Defence submissions are based on hearsay notes of the proceedings taken by Defence counsel for Ingabire who was not even present at trial. These notes are also one-sided and only reflect the characterization of defence counsel of what transpired at trial.

14. The Prosecutor's preliminary investigation into Uwinkindi's allegations reveals that, following the witness's direct testimony at trial, the Rwandan Prosecutors suspected that the witness had been coached because his testimony closely aligned with earlier representations made by defence counsel, even though the prisoner and defence counsel denied ever having met previously (although they were free to do so). Rwandan prosecutors asked prison officials to search the prisoner's cell.¹⁷ That search revealed, among other things, a written list of questions with complete answers and "stage directions," indicating what points should be emphasized during testimony. The questions were written in the same order that defence counsel posed them at trial. Prison officials asked the prisoner if these notes were his. The prisoner acknowledged that they were his notes but stated that he no longer needed them because he had memorized their content. The interview was intended to gather substantive information regarding his testimony, but it was only to create an inventory of what was seized for chain of custody purposes.

¹⁵ *Ibid.*, p. 12. See also *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-2001-75-AR11bis, Confidential Order by Registrar Appointing Monitors to the Referred case of Jean Bosco Uwinkindi to Rwanda, 10 April 2012.

¹⁶ President's Decision, paras. 24-25.

¹⁷ See also Motion, p. 6 (*Note of Evidence – Thurs. 12 April 2012*).

15. After the Rwandan prosecutors completed their cross-examination of the prisoner, the defence sought to conduct a re-examination.¹⁸ They proposed a series of questions that they wanted to ask the prisoner. The High Court declined to ask the questions because some of them had already been asked and others, particularly those relating to the search and interview, were not relevant.¹⁹ In the High Court's view, whether prison officials properly searched the prisoner's cell or interviewed him following the search was not material or probative evidence bearing on any issue in Ingabire's trial. Accordingly, the High Court exercised its discretion to not permit re-examination along the lines proposed by the Defence.

16. As this brief summary indicates, the situation that arose over week ago in Ingabire's trial is unique to that particular case. It involves a set of facts and circumstances that are not likely to be repeated in this or any other case. In any case, it cannot in any way affect the finding that conditions are met for Mr. Uwinkindi to receive a fair trial in Rwanda and that his trial will be closely monitored and could be otherwise revoked.

D. Reconsideration is not necessary to prevent any injustice resulting from Rwandan prison officials searching and interviewing a prisoner, or the High Court's evidentiary ruling.

17. Furthermore, even if parallels could be drawn between the two cases, reconsideration is unwarranted to prevent any injustice.²⁰ Apart from conclusory assertions by counsel who was not even present about alleged witness intimidation and harassment, the record reveals only three rather routine matters. Indeed, taken at face value, counsel's notes do not suggest anything irregular or abusive.

¹⁸ See also Motion, p. 6 (*Note of Evidence – Mon. 13 April 2012*).

¹⁹ *Ibid.*

²⁰ *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 203, confirming that the Appeals Chamber has the inherent discretionary power to reconsider a previous decision if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice. The Defence argues that a reconsideration of the 16 December 2011 Decision (*Uwinkindi* (AC)) is warranted to prevent an injustice. See Motion, para. 3.

18. Prisoners have no expectation of privacy in their cells. Thus, prison officials may search a prisoner's cell without any prior judicial order. Here, the search was conducted at the request of Rwandan Prosecutors to assist them in trial preparation. This was entirely lawful under Rwandan law.²¹

19. There also is no prohibition on prison officials interviewing a prisoner. Prisoners are entitled to have counsel present only if they are suspected or charged with a crime.²² No criminal charges have been or are anticipated against the prisoner here. Instead, the interview was conducted primarily to identify the materials recovered from the search.

20. Lastly, contrary to the Defence's unsubstantiated suggestion that the High Court ignored these matters, the High Court expressly considered them but found that they did not warrant further examination. This evidentiary ruling, relating to the conduct of trial and scope of examination, is within the High Court's broad discretion and evinces no manifest injustice.

E. Adequate remedies exist under Rwandan law to address any alleged deviation from Rwandan law or practice; resort to this Chamber is entirely unwarranted.

21. Furthermore, even if the Defence were correct that the search and interview of the prisoner, and the High Court's evidentiary ruling were unlawful, full and adequate remedies are available under Rwandan law to Ingabire and any other defendant.

22. The Defence, for example, could move for reconsideration of the High Court's decision, but choose not to do so. In addition, Article 145 of the Rwandan Constitution provides a procedure for interlocutory appeals from decisions of the High Court (para. 1), review of any petitions challenging the constitutionality of

²¹ See, e.g., Article 24 of the Law No. 34/2010 of 12 November 2010 on the Establishment, Functioning and Organisation of Rwanda Correctional Service (RCS), Official Gazette nr. 4 of 24 January 2011. For English, French and Kinyarwanda versions of the Transfer Law, see <http://www.amategeko.net/> (last visited 18 April 2012).

²² See, e.g., Article 64 of the Law No. 13/2004 of 17 May 2004 relating to the Code of Criminal Procedure, Official Gazette special of 27 May 2006. For English, French and Kinyarwanda versions of the Transfer Law, see <http://www.amategeko.net/> (last visited 18 April 2012).

any laws or decrees (para. 2), and general supervisory power to the Supreme Court to ensure that lower courts act in accordance with the law (para. 2). Once again, the Defence did not avail itself of these adequate remedies, but opted to boycott the Ingabire proceedings.²³ This reaction appears on its face out of proportion and premature, especially in light of the other remedies available.

23. Before this Court or any other chamber of the Tribunal considers granting relief in this or any other referred case, it should first ensure that all available remedies in Rwanda have been exhausted. If this is not done, this Tribunal risks establishing itself as a super-Supreme Court on Rwandan criminal cases. That result would be contrary to the fundamental purpose of Rule 11 *bis*, which is to permit cases to be tried in the referral State in accordance with the referral State's laws and procedures.

24. Where all available avenues for redress have been exhausted, resort may be had to this Tribunal for any "collateral" matters to the President and for any unremedied substantive violations of fair trial rights through the revocation process.²⁴ But, as the Chamber already has noted, resort to revocation is intended to be a last resort.²⁵ The robust monitoring mechanism that the Tribunal fashioned for this and other referred cases is designed to ensure that any such violations are remedied long before revocation becomes necessary.

25. Were the Defence's present Motion to be allowed, Uwinkindi would have repeated opportunities to appeal to this Chamber for extraordinary review of any alleged "new and recent development" that may emerge in unrelated and dissimilar cases in Rwanda which do not necessarily reflect the conditions of trial

²³ Motion, p. 6 (*Note of Evidence – Mon. 16 April 2012*) and Annex. Also before this Tribunal, accused such as Jean-Bosco Barayagwiza have boycotted proceedings in the past (*see, e.g., The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, 2 November 2000). Rule 82 *bis* of the Rules of Procedure and Evidence allows the Trial Chamber to proceed in such circumstances in the absence of the accused.

²⁴ *Uwinkindi* (TC), p. 59: "declares that it would be open to the Accused to draw the attention of the President of any perceived violation of the conditions of referral by the Republic of Rwanda and to seek consequential orders including revocation of referral".

²⁵ *Uwinkindi* (TC), para. 217; *Uwinkindi* (AC), para. 85.

or the charges Uwinkindi is faced with.²⁶ The Chamber should not permit this approach by the Defence because, as this Motion demonstrates, it would needlessly interfere with the efficient and effective implementation of the referral order affirmed by this Chamber.

III. CONCLUSION

26. Staying the transfer of Uwinkindi and allowing the Defence additional time to seek reconsideration of the Decision of 16 December 2011 is not warranted at this time to prevent an injustice. The Defence has not shown that Uwinkindi is faced with an imminent violation of his fair trial rights. The alleged concerns raised by the Ingabire case are unsubstantiated and overstated. Even if such issues would arise, they can be adequately addressed in Uwinkindi's case by the Transfer law, the monitoring mechanism, the remedies available under Rwandan law and the clear procedure before the President of this Tribunal as envisaged by the Chamber's referral decision.

27. In sum, the Appeals Chamber should summarily dismiss the Defence Motion for additional time to seek reconsideration of the 16 December 2011 Decision. However, should the Defence be granted additional time to seek reconsideration, the Prosecution should also be allowed additional time to respond to the Defence submissions. In any event, the transfer of the Accused to Rwanda should not be stayed, as this would run counter to the interests of expediency and his right to a trial without undue delay pursuant to Article 20 of the Statute of this Tribunal.

Dated and signed this 18th day of April 2012, Arusha, Tanzania.

A. JEYE 
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²⁶ *Uwinkindi* (TC), para. 196.

