ICTR-02-79-R11bis
28-6-2012
(527 - 520)

527

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

TRIAL CHAMBER DESIGNATED UNDER RULE 11 *bis*

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

Registrar: Adama Dieng

Date of filing: 28 June 2012

UNICTR
JUDICIAL RECORDS/ARCHIVES
RECEIVED
2012 JUN 28 A 11: 20

THE PROSECUTOR

v.

PHÉNÉAS MUNYARUGARAMA

Case No. ICTR-2002-79-R11bis

PROSECUTOR'S REPLY TO: "DUTY COUNSEL'S SUBMISSIONS IN RESPONSE TO THE PROSECUTOR'S REQUEST FOR REFERRAL OF THE CASE OF PHÉNÉAS MUNYARUGARAMA TO RWANDA PURSUANT TO RULE 11 BIS OF THE TRIBUNAL'S RULES OF PROCEDURE AND EVIDENCE"

Office of the Prosecutor

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

Duty Counsel for Phénéas Munyarugarama

Francis K. Stolla

1. In response to the Prosecutor's request for the referral of this case to Rwanda for trial, the Defence concedes that the following aspects of Rwanda's legal structure can be "presumed to have fulfilled the test of rule 11 *bis* of the Rules of Procedure and Evidence": (a) penalty structure, (b) conditions of detention, (c) presumption of innocence, and (d) right to an effective defence.[1] The Defence nevertheless submits that the Prosecutor's request should be denied for two reasons. First, the "practical reality" is that prosecution witnesses may be in a better position than defence witnesses when it comes to availability and protection.[2] Second, Rwandan judges cannot be impartial because they all witnessed or were affected by the genocide.[3] Each objection is addressed in turn.

A. Rwanda's existing legal framework for the availability and protection of witnesses is adequate in practice.

2. The Defence contends that "Prosecution witnesses may be in a better position than the Defence witnesses" in terms of availability and protection.[4] The Defence does not elaborate on this bald statement. It suggests, however, that, although the legal framework for witness availability and protection may be in place (as the Prosecutor established in paragraphs 44-70 of his Request),[5] the "practical reality on the ground" may be different.[6] The *Ntaganzwa* Referral Chamber recently dismissed identical submissions because the Defence had "offered no legal support for this contention."[7] The Defence's contention here is likewise unfounded both in law and fact.

---

[1] *The Prosecutor v. Phénéas Munyarugarama*, Case No. ICTR-2002-79-R11*bis*, Duty Counsel Submissions in Response to the Prosecutors [*sic*] Request for Referral of the Case of Pheneas Munyarugarama to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Evidence and Procedure, 27 June 2012, para. 8. ("Defence Response"). The Prosecutor notes that the Defence filed its response confidentially, but there appears to be no justification for this designation. Therefore, the Prosecutor submits this reply as a public filing.

[2] *Id.* at para. 9.

[3] *Id.* at para. 12. *See also id.*, paras. 3, 4.

[4] *Id.* at para. 9.

[5] *The Prosecutor v. Phénéas Munyarugarama*, Case No. ICTR-2002-79-I, Prosecutor's Request for the Referral of the Case of Phénéas Munyarugarama to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 13 June 2012 ("Prosecutor's Request").

[6] Defence Response, para. 9.

[7] *The Prosecutor v. Ladislas Ntaganzwa*, Case No. ICTR-96-9-R11*bis*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 8 May 2012 ("*Ntaganzwa* (TC)"), para. 37. The Referral Chamber ultimately found that Rwanda would be able to provide for the

3. The Appeals Chamber has emphasized that, for purposes of referral, a Chamber need only satisfy itself that the legal framework applicable to proceedings against the accused in courts of the state concerned provide adequate protections to ensure a fair trial.[8] If an adequate legal framework is in place, as a matter of law the Chamber need not inquire further.[9]

4. Furthermore, even if the Chamber looked beyond Rwanda's existing legal framework (which it need not), the reality on the ground refutes the Defence's unsubstantiated suggestion that the legal framework is not adequate in practice. As noted in the Prosecutor's Request, Rwanda has established a new Witness Protection Unit ("WPU") within the judiciary to address past concerns about the unit housed in the Prosecutor General's office.[10] In the wake of the Tribunal's referral of Jean Uwinkindi's case to Rwanda for trial, the Chief Justice of Rwanda's Supreme Court directed the immediate activation of the unit.[11] Fifteen registrars, acting under the direction of the Chief Registrar of the Supreme Court, have been charged with supporting WPU in meeting victim/witness needs in referred cases.[12] To assist the registrars in discharging these duties, the Supreme Court also has recruited at least one highly-experienced professional in victim/witness services to advise and consult WPU.[13]

---

availability and protection of witnesses, including Defence witnesses. *See Ntaganzwa* (TC), paras. 40-44. The Referral Chambers in two other decisions issued since the Prosecutor's Request was filed in this case have reached the same conclusion *See The Prosecutor v. Ryandikayo*, Case No. ICTR-95-1E-R11*bis*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 20 June 2012 ("*Ryandikayo* (TC)"), paras. 43-50; *The Prosecutor v. Aloys Ndimbati*, Case No. ICTR-95-1F-R11*bis*, 25 June 2012 ("Ndimbati (TC)"), paras. 40-42.

[8] *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR11*bis*, Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions, 16 December 2011, paras. 37, 64 ("*Uwinkindi* (AC)"); *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-AR11*bis*.1, Decision on Joint Defence Appeal against Decision on Referral under Rule 11*bis*, 7 April 2006, paras. 69, 81 ("*Mejakić* (AC)"); *The Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11*bis*.1, Decision on Rule 11*bis* Referral, 1 September 2005, paras. 26, 52.

[9] *Uwinkindi* (AC), para. 64; *Mejakić* (AC), para. 69.

[10] Prosecutor's Request, paras. 52-53.

[11] *Id.*, Annex I (Rwanda *Amicus Curiae* Brief – *Munyagishari*), Exhibit D (Affidavit of Anne Gahongayire, Secretary General of Rwanda's Supreme Court), paras. 2-4 (Registry Page "RP" 696).

[12] *Id.*

[13] *Id.*

5. In addition, during the past year alone, the Witness and Victim Support Unit ("WVSU") housed in the Prosecutor General's office responded to 73 separate incidents relating to witness security.[14] It also assisted the International Criminal Court and domestic courts in The Netherlands, Norway, France, Germany, Canada, Sweden, and Demark in facilitating the testimony of 192 witnesses within Rwanda.[15] In providing these services, the WVSU made no distinction between defence or prosecution witnesses.[16]

6. With regard to witness availability, the "practical reality on the ground" similarly refutes the Defence's contention. Rwanda's submissions on the 36 genocide cases over which the High Court presided from 2006 to 2010 establish that the defence had no "particular difficulty" securing the attendance of witnesses.[17] This was true, even without the "safeguards available to cases transferred from the Tribunal."[18] Thus, as the *Uwinkindi* Referral Chamber noted, "[i]t is logical to assume that with the amendments made to the laws regarding witness immunity, the creation of a new witness protection programme, and the safeguards imposed by the Chamber on Rwanda," the allegation that "witnesses may be unwilling to testify is no longer a compelling reason for denying referral."[19]

7. This reality is confirmed by the Kigali Bar Association ("KBA"), whose lawyers have encountered no serious difficulties in obtaining witness testimony.[20] In the KBA's years of experience in trying criminal cases, victims and witnesses

---

[14] *Id.*, Annex I (Rwanda *Amicus Curiae* Brief – *Munyagishari*), Exhibit F (Affidavit of Theoneste Karenzi, Coordinator of the Witness and Victim Support Unit), para. 3 (RP 690).
[15] *Id.*, Annex I, Exhibit F, para. 7 (RP 690).
[16] *Id.*, Annex I, Exhibit F, para. 7 (RP 690).
[17] *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011, para. 100 ("*Uwinkindi* (TC)"); Prosecutor's Request, Annex V (Rwanda's Report on 36 Genocide Cases) (RP 497-482).
[18] *Uwinkindi* (TC), para. 100; *see also Ntaganzwa* (TC), para. 39 (same).
[19] *Id.*
[20] Prosecutor's Request, Annex T (Kigali Bar Association *Amicus Curiae* Brief - *Munyagishari*), para. 44 (RP 533).

have "willingly testified in favor of the defence in numerous cases, including genocide cases or high profile cases."[21]

8. The KBA's practical experience is echoed by submissions from the Dutch Government and the Norwegian police, who have conducted numerous investigations in Rwanda. In connection with the *Bandora* case, a Police Superintendent with Norway's National Criminal Investigation service made a total of 10 trips to Rwanda and interviewed 149 witnesses.[22] The Norwegian court credited the Superintendent's testimony that "[n]o witness has ever expressed any fear of the authorities in connection with the interview."[23] With regard to defence witnesses in particular, "not one of the witnesses ha[s] been reluctant to testify to the Norwegian police[;] . . . "[n]or do we have the impression that they are afraid to testify for any reason, and we have never heard of any threats, reprisals, etc., that has influenced the testimony in any direction."[24]

9. The Dutch government likewise confirmed that it experienced no difficulty in investigating genocide cases (both á charge as well as à décharge) in Rwanda.[25] It regarded Rwanda's cooperation in facilitating witness interviews and assisting with witness protection issues as "exemplary," regardless of whether the witness was providing evidence for the prosecution or defence.[26]

10. The Defence thus fails to substantiate that, if referral is allowed, defence witnesses allegedly would not be in the same position as prosecution witnesses in terms of availability and protection. Thus, as in *Ntaganzwa*, the Defence's unsubstantiated assertions about witness availability are not a bar to referral.[27]

---

[21] *Id.*, para. 51 (RP 531).
[22] *Id.*, Annex B (Oslo District Court decision), p. 11 (RP 808).
[23] *Id.*
[24] *Id.*
[25] *Id.*, Annex O (Observations in Intervention of the Government of the Netherlands), para. 7 (RP 634).
[26] *Id.*
[27] *Ntaganzwa* (TC), para. 37. The Referral Chamber ultimately found that Rwanda would be able to provide for the availability and protection of witnesses, including Defence witnesses. *See*

B. Rwandan judges benefit from the same presumption of impartiality as Tribunal judges, and the Defence fails to rebut that presumption.

11. The Defence's next objection fares no better. Although the Defence concedes that the Rwandan "judiciary may be independent of the Government (The Executive) and the Judges may be very competent," it suggests that Rwanda's judges are not and could not be impartial because, as Rwandan citizens, they "must have either witnessed or experienced or felt" the crimes committed during the genocide.[28]

12. This sweeping statement is not supported by a single reference and, as such, is insufficient to rebut the presumption of impartiality that the Tribunal extends to Rwanda's judiciary.[29] Indeed, the Referral Chamber in *Ntaganzwa* recently dismissed an identical argument because "Duty Counsel [in that case] ha[d] not provided any specific instances or examples of the bias he attributes to the Rwandan judiciary and therefore ha[d] not rebutted this presumption."[30] The same reasoning applies with equal force here.

13. The only new twist offered by the Defence here is its frontal assault on the validity of the presumption of judicial independence and impartiality. The Defence broadly contends that "it is risky and improper in criminal law to rely on this presumption," which, it notes, is "not easily rebutted."[31] The Defence, however, provides no reasoned analysis to support its conclusion that the presumption is "risky or improper.". Certainly, it would be improper to presume an accused's guilt, but that is not what this presumption does. Instead, it merely

---

Ntaganzwa (TC), paras. 40-44. The Referral Chambers in two other decisions issued since the Prosecutor's Request was filed in this case have reached the same conclusion *See The Prosecutor v. Ryandikayo*, Case No. ICTR-95-1E-R11*bis*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 20 June 2012 ("*Ryandikayo* (TC)"), paras. 43-50; *The Prosecutor v. Aloys Ndimbati*, Case No. ICTR-95-1F-R11*bis*, 25 June 2012 ("Ndimbati (TC)"), paras. 40-42.

[28] Defence Response, para. 12.

[29] *Uwinkindi* (TC), para. 26.

[30] *Ntaganzwa* (TC), para. 74. The Referral Chamber concluded that "the judges of Rwanda are capable, experienced and impartial" (*id.*). The Referral Chambers in two other decisions issued since the Prosecutor's Request in this case was filed have also held that the Rwandan judiciary is impartial and independent. *See Ryandikayo* (TC), paras. 60-65; *Ndimbati* (TC), paras. 55-57.

[31] Defence Response, para. 10.

presumes, in the absence of contrary evidence, that judges will discharge their duties impartially and independently. This presumption of judicial independence and impartiality, in fact, is well established in the Tribunal's jurisprudence.[32]

14. Moreover, every Referral Chamber to address the issue has extended the same presumption of independence and impartiality applicable to the Tribunal's judges to Rwanda's judges.[33] As trained and experienced professionals, Rwanda's judges, like the Tribunal's judges, are fully capable of separating events that occurred outside the courtroom from the evidence presented inside the courtroom.[34] Thus, absent reliable or sufficient evidence to show otherwise,[35] Rwanda's judges, like the Tribunal's judges, should be presumed able to "disabuse their minds of any irrelevant personal beliefs or predispositions" that they may have relating to the crimes committed during the genocide.[36]

15. The record, in fact, shows that Rwanda's judges have presided over many criminal cases, including genocide cases, and a significant percentage (approximately 30%) of those cases resulted in acquittals at trial or on appeal.[37] This high rate of acquittals hardly comports with the Defence's bald assertion that all Rwandan judges are biased because they "must have" witnessed or been affected by the 1994 genocide.

---

[32] *See, e.g., Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. the Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana* (AC)"), para. 48; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Appeal Judgement, 1 June 2001, para. 91.

[33] *See Uwinkindi* (TC), para. 166; *Ntaganzwa* (TC), para. 73; *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-R11*bis*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 6 June 2012, para. 185; *Ryandikayo* (TC), para. 64; *Ndimbati* (TC), para. 57.

[34] *Nahimana* (AC), paras. 78, 84; *Georges Anderson Nderubumwe Rutaganda v. the Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003, paras. 42-43.

[35] There is no suggestion that any of the High Court or Supreme Court judges who might sit on the panel of this case, if it is referred, have any personal connection to Munyarugarama's alleged crimes. Even if such a connection were shown (which it has not been), there is no reason that this individual judge could not be recused from the panel. *See* Prosecutor's Request, Annex Q (Rwanda *Amicus Curiae* Brief –*Uwinkindi*), para. 121 (RP 569) (citing Article 171 of Organic Law No. 51/2008 of 9 September 2008),

[36] *Nahimana* (AC), para. 78.

[37] Prosecutor's Request, Annex Q (Rwanda *Amicus Curiae* Brief –*Uwinkindi*), paras. 118-19 (RP 570-569) and Annex V (Rwanda's Report on 36 Genocide Cases) (RP 497-482).

C. Conclusion.

16. With the exception of the two discrete points addressed above, 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 limited objections raised by the Defence are not obstacles to referral, the Chamber should allow the Prosecutor's request for referral of this case to Rwanda for trial.

Respectfully submitted,

James J. Arguin
Chief, Appeals and Legal Advisory Division

Dated this 28th day of June 2012 at Arusha, Tanzania.

United Nations
Nations Unies

TRANSMISSION SHEET

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	☐ Team I N. M. Diallo	☒ Team II C. K. Hometowu N. M. Diallo	☐ Team III C. K. Hometowu
	☐ OIC, JLSD P. Besnier	☐ OIC, JPU C. K. Hometowu	☐ Appeals Chamber / The Hague R. Muzigo-Morrison

From:	☐ Chamber (names)	☐ Defence (names)	☒ Prosecutor's Office James Arguin (names)	☐ Other: (names)

Case Name:	The Prosecutor vs. **Pheneas Munyarugarama**	**Case Number:**	ICTR-2002-79-I
Dates:	Transmitted: **28 June 2012**	Document's date: **28 June 2012**	
No. of Pages:	**8**	**Original Language:** ☒ English ☐ French ☐ Kinyarwanda	
Title of Document:	**PROSECUTOR'S REPLY TO: "DUTY COUNSEL'S SUBMISSIONS IN RESPONSE TO THE PROSECUTOR'S REQUEST FOR THE REFERRAL OF THE CASE OF PHÉNÉAS MUNYARUGARAMA TO RWANDA PURSUANT TO RULE 11 BIS OF THE TRIBUNAL'S RULES OF PROCEDURE AND EVIDENCE"**		

Classification Level:	**TRIM Document Type:**			
☐ Ex Parte	☐ Indictment	☐ Warrant	☐ Correspondence	☐ Submission from non-parties
☐ Strictly Confidential / Under Seal	☐ Decision	☐ Affidavit	☐ Notice of Appeal	☒ Submission from parties
☐ Confidential	☐ Disclosure	☐ Order	☐ Appeal Book	☐ Accused particulars
☒ Public	☐ Judgement	☐ Motion	☐ Book of Authorities	

UNICTR RECORDS/ARCHIVES RECEIVED 2012 JUN 28 A 11: 20

II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

CMS SHALL take necessary action regarding translation.

☒ Filing Party hereby submits only the original, and **will not submit** any translated version.

☐ Reference material is provided in annex to facilitate translation.

Target Language(s):

☐ English ☐ French ☐ Kinyarwanda

CMS SHALL NOT take any action regarding translation.

☐ Filing Party hereby submits **BOTH the original and the translated version** for filing, as follows:

Original	in	☐ English	☐ French	☐ Kinyarwanda
Translation	in	☐ English	☐ French	☐ Kinyarwanda

CMS SHALL NOT take any action regarding translation.

☐ Filing Party **will be submitting the translated version(s)** in due course in the following language(s):

☐ English ☐ French ☐ Kinyarwanda

KINDLY FILL IN THE BOXES BELOW

☐ **The OTP** is overseeing translation. The document is submitted for translation to: ☐ The Language Services Section of the ICTR / Arusha. ☐ The Language Services Section of the ICTR / The Hague. ☐ An accredited service for translation; see details below: Name of contact person: Name of service: Address: E-mail / Tel. / Fax:	☐ **DEFENCE** is overseeing translation. The document is submitted to an accredited service for translation (fees will be submitted to DCDMS): Name of contact person: Name of service: Address: E-mail / Tel. / Fax:

III - TRANSLATION PRIORITISATION (For Official use ONLY)

☐ Top priority	**COMMENTS**	☐ Required date:
☐ Urgent		☐ Hearing date: