



UNITED NATIONS
NATIONS UNIES

ICTR-97-36A-I
9-11-2007
(S85 - 576)

S85
Muf

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Inés M. Weinberg de Roca, Presiding
Lee Gacuga Muthoga
Robert Fremr

Registrar: Adama Dieng

Date: 9 November 2007

JUDICIAL ARCHIVES
RECEIVED
2007 NOV 9 P 11:10

THE PROSECUTOR

v.

Yussuf MUNYAKAZI

Case No. ICTR-97-36A-I

**ORDER FOR SUBMISSIONS OF THE REPUBLIC OF RWANDA AS THE STATE
CONCERNED BY THE PROSECUTOR'S REQUEST FOR REFERRAL OF THE
INDICTMENT AGAINST YUSSUF MUNYAKAZI TO RWANDA**

Rule 11 bis of the Rules of Procedure and Evidence

Office of the Prosecutor:

Hassan Bubacar Jallow
Bongani Majola
Silvana Arbia
Alex Obote-Odora
Richard Karegyesa
George Mugwanya
Ineke Onsea
François Nsanzuwera
Florida Kabasinga

Defence Counsel:

Iwani Timothy Mwaikusa
Eliane Nyampinga

INTRODUCTION

1. On 9 October 1997, the Prosecutor of the International Criminal Tribunal for Rwanda ("the Tribunal") filed an indictment ("the Indictment") against Yussuf Munyakazi ("the Accused").¹ The Indictment was confirmed on 10 October 1997 by Judge Lennart Aspegren.² On 29 November 2002, the Prosecutor filed an amended Indictment ("the Indictment") against the Accused.³ According to the Indictment, as amended, the Accused is charged with genocide, complicity in genocide, conspiracy to commit genocide, crimes against humanity and serious violations of article 3 common to the Geneva Conventions and to Additional Protocol II. The Accused made his initial appearance on 12 May 2004 before Judge S.A. Egorov and pleaded not guilty to all counts.⁴

2. On 7 September 2007, the Prosecutor filed a request for the referral of the Indictment against the Accused to the authorities of Rwanda ("The Referral Request").⁵ On 2 October 2007 and pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence ("the Rules"), the President designated the present Chamber to decide the matter.⁶ On 2 October 2007, the Defence for the Accused filed a Response ("the Defence Response") requesting the Chamber to dismiss the Referral Request and to invite the Prosecutor to take the necessary measures to commence without delay the trial against the Accused.⁷ On 22 October 2007, the Prosecutor filed a reply to the Defence Response ("the Prosecutor's Reply"), requesting the Chamber to dismiss the Defence Response and to grant the Referral Request.⁸

¹ Indictment of 9 October 1997, Case No. ICTR-97-36-I.

² Decision to Confirm the Indictment, 10 October 1997.

³ Amended Indictment of 29 November 2002, Case No. ICTR-97-36A.

⁴ Initial Appearance, Transcripts of 12 May 2004, p. 9.

⁵ Prosecutor's Request for the Referral of the case of Yussuf Munyakazi to Rwanda pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 7 September 2007.

⁶ Designation of a Trial Chamber for the Referral of the case of Yussuf Munyakazi to Rwanda, 2 October 2007.

⁷ Defence Response to the Prosecutor's Request for the Referral of the Case of Yussuf Munyakazi to Rwanda pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 2 October 2007.

⁸ Prosecutor's Reply to "the Defence Response to the Prosecutor's Request for the Referral of the Case of Yussuf Munyakazi to Rwanda pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence", 22 October 2007.

SUBMISSIONS OF THE PARTIES

3. In his Referral Request, the Prosecutor submits that the judiciary of the Republic of Rwanda is adequately prepared to handle the case, if referred to Rwandan courts. In this regard, the Prosecutor argues that Rwanda possesses a legal framework that criminalizes all the alleged conduct of the Accused. In support of this contention, the Prosecutor explains that, in addition to ratifying the 1948 Genocide Convention and the four Geneva Conventions of 1949 and the Protocols of 1977, Rwanda has further adopted domestic legislation such as the Organic Law on Transfer of Cases and the Organic Law of 30 August 1996 on the organization of the prosecution of offences constituting the crime of genocide or crimes against humanity committed as of 1 October 1990. Both laws provide for the punishment of genocide and other violations of international humanitarian law, crimes for which the Accused has been indicted by the Tribunal.⁹ As proof of the readiness of Rwandan courts to try the present case, the Prosecutor also refers to the fact that Rwanda has enacted two organic laws, one in relation to the transfer of cases to Rwandan courts and another which abolishes the death penalty in Rwanda.¹⁰ The Prosecutor further contends that the Accused will receive a fair trial by a competent, independent and impartial court in Rwanda.¹¹ Among other rights, the Prosecutor alludes to the right for adequate time and facilities for the accused to prepare his or her defence, the right to counsel of one's choice and, if indigent, to legal representation, as well as the right of the accused to examine his or her witnesses or to cross-examine the Prosecutor's witnesses.¹²

4. In its Response, the Defence submits that, except for the law on the transfer of cases and the law on the abolition of the death penalty, there are still many provisions regarding capital sentencing in Rwandan law.¹³ The Defence points to the "unacceptable" fact that any case referred to Rwanda may be adjudicated at the first instance by a single judge of the High Court. The Defence argues that this is a derogation of the rights affordable under the ICTR Statute, as well as the internationally recognized standards of fair trial which require that persons accused of serious crimes such as genocide, crimes against humanity and war crimes be tried before a panel of three judges in the first instance, with a right of appeal to a panel of

⁹ Referral Request, paras. 19 - 22.

¹⁰ Referral Request, paras. 12, 27.

¹¹ Referral Request, paras. 36 - 38.

¹² Referral Request, paras. 59 - 69.

¹³ Defence Response, para. 4.1..

five judges at the appellate level. This is, in the view of the Defence, the practice in the *ad hoc* Tribunals, the Special Court for Sierra Leone, the International Criminal Court and even the specialized courts as referred to in Article 21 of the Rwandan Law on genocide and crimes against humanity.¹⁴

5. The Defence further contends that the Accused, if transferred to Rwanda, could potentially face additional charges beyond the Tribunal's temporal jurisdiction, considering that Article 4 of the Organic Law on the Transfer of Cases gives to the Prosecutor General of the Republic of Rwanda the power to make the referred Indictment compliant with the provisions of the Rwandan Code of Criminal Procedure.¹⁵ The Defence also argues that, notwithstanding the right to counsel provided in Rwandan law, "the poor are tried without the assistance from a lawyer".¹⁶ The Defence also submits that the overwhelming majority of the members of the Kigali bar are young and inexperienced and that it is unlikely that a lawyer in Rwanda will have access to the facilities needed to prepare a good defence for his client.¹⁷ Thus, according to the Defence, the Accused will be denied the right of intense cross-examination of prosecution witnesses and the security of defence witnesses will not be guaranteed.¹⁸ The Defence further submits that Rwanda is unable to provide the minimum detention conditions foreseen by the United Nations General Assembly (UNGA) Resolution 43/173 of 9 December 1998.¹⁹

6. In his Reply, the Prosecutor submits that the organic law relating to the abolition of the death penalty supersedes any other provisions in Rwandan law.²⁰ The Prosecutor argues that there is no basis for challenging the fairness of a single judge ruling and contends that Rule 11 *bis* does not contemplate the transfer or imposition of the judicial structures of the Tribunal onto the referral state. Rather the rule provides that a transferred case is be prosecuted within the judicial system of the referral state.²¹ The Prosecutor also argues that Article 4 of the Organic Law on the Transfer of Cases precludes the possibility that the Accused will face additional charges as a consequence of harmonizing the Indictment to the Rwandan Code of Criminal Procedure.²² The Prosecutor explains that the term "adaptation"

¹⁴ Defence Response, para. 7.5.

¹⁵ Defence Response, pp 7 and 8.

¹⁶ Defence Response, p. 21.

¹⁷ Defence Response, p. 22.

¹⁸ Defence Response, paras.8.5 – 8.13

¹⁹ Defence Response, para. 15.1.

²⁰ Prosecutor's Reply, para. 24.

²¹ Prosecutor's Reply, para. 37.

²² Prosecutor's Reply, paras. 33-35.

as referred to in Article 4 of the Organic Law on Transfer of Cases is not equivalent to "amendment" and that the expected harmonization of the ICTR Indictment to the Rwandan Code of Criminal Procedure will not result in any substantive changes in the charges against the Accused.²³

7. The Prosecutor further asserts that the Rwandan legal framework applicable to referral cases provides sufficient guarantees for adequate time and facilities for the preparation of the Accused's defence and for the protection and assistance to witnesses.²⁴ As to the conditions of detention and security of the Accused in Rwanda, the Prosecutor asserts that Article 23 of the Rwandan Organic Law on the Transfer of Cases provides special monitoring and inspection mechanisms of detention conditions and specific investigation and notification procedures in case of alleged threats upon the safety and security of prisoners.²⁵

DISCUSSION

8. The Chamber notes that the Parties' submissions seriously differ on the vital issue in respect of whether the Accused will receive a fair trial if the present case is referred to Rwanda. The Prosecutor is convinced that the Republic of Rwanda is adequately prepared and able to execute a referral and that a fair trial with guarantees comparable to those provided for accused persons under the Statute of the Tribunal is possible. However, the Defence submissions cast doubts on the capacity and competence of Rwanda to fully and effectively execute the referral as envisaged.

9. Pursuant to Rule 11 (C) of the Rules, the Chamber, in determining whether to refer a case, shall satisfy itself that the Accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.

10. The guarantee of a fair trial, enshrined in Rule 11 (C) to guarantee a fair trial to the Accused implies an obligation for Rwanda to provide an adequate legal and institutional framework which affords the Accused the right to a fair defence against the charges him.

11. Therefore the Chamber considers that it is appropriate, in the interests of justice and for a proper determination of the present case, to request the Rwandan authorities to make submissions on different issues as specified hereunder.

²³ Prosecutor's Reply, para. 51.

²⁴ Prosecutor's Reply, para. 58.

²⁵ Prosecutor's Reply, para. 87.

FOR THE FOREGOING REASONS, THE CHAMBER:

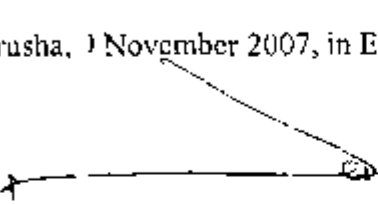
REQUESTS the Republic of Rwanda, within 45 days from the date of the present Order, to make further submissions on the following issues:

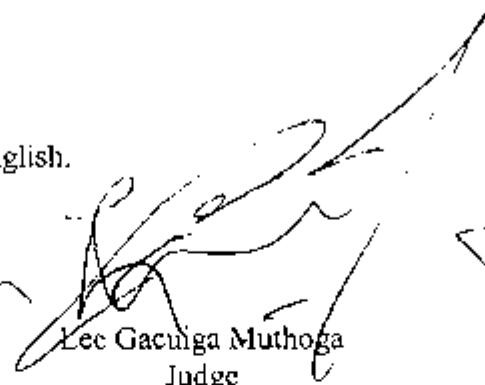
- (i) Whether the Accused Yussuf Munyakazi is presently indicted in Rwanda on any criminal charges.
- (ii) How a referred ICTR Indictment will be adapted to harmonize with the provisions of the Code of Criminal Procedure of Rwanda, pursuant to Article 4 of the *Organic Law No.11/2007 of the 16/03/2007 concerning Transfer of Cases to the Republic of Rwanda from the ICTR and from other States*.
- (iii) If the Referral is granted, what will be the composition of the Court trying the Accused:
 - a) at the First Instance;
 - b) at the Appellate level?
- (iv) Whether the same fair trial standards applied at the ICTR will be guaranteed for an ICTR accused referred to Rwanda in all instances.
- (v) What will be the composition of the panel for the specialized courts, referred to in Article 21 of the Rwandan Law on Genocide and Crime against Humanity (Annex C to the Defence Response)?
- (vi) What judicial review and/ or remedies are guaranteed to an Accused, on conviction or acquittal (nature of remedy, grounds for appeal, composition of the panel for appellate proceedings)?


- (vii) What assistance will the State of Rwanda provide the Accused in:
 - a) securing adequate legal representation in Rwanda;
 - b) financing the costs of the Defence;
 - c) facilitating travel and investigations of the Defence;
 - d) ensuring security for the Defence team?
- (viii) What provisions exist for ensuring that the Accused may be visited by relatives and members of the Defence teams?
- (ix) What facilities exist for ensuring that witnesses and victims can be securely and safely accommodated and transported to the place of trial?
- (x) What procedures exist for ensuring protection of witnesses before, during and after testifying in Court; specifically, does Rwanda operate a Witness Protection Programme? If so, what are the main features of the programme?
- (xi) What procedures exist for the procurement and the facilitation of safe and secure travel for witnesses, particularly Rwandan Witnesses who reside abroad?
- (xii) How will the travel expenses of witnesses living abroad be secured?
- (xiii) Does the Rwandan law permit the receiving of testimony through Video-Link? If so, what facilities presently exist?
- (xiv) Will the proceedings be recorded? Will the proceedings be public and accessible on the Internet?
- (xv) Whether the regulations of the arrest and detentions of an accused, according to the Code of Criminal Procedure of Rwanda, as required by Article 5 of the *Organic Law*, will afford the Accused the same protection and treatment as afforded by the Tribunal.
- (xvi) What are the facilities of detention for Accused persons, and do their compliance with internationally recognized standards?
- (xvii) Any other relevant issues.

- II. **REQUESTS** the Registrar to notify Republic of Rwanda without delay of the present Order.
- III. **REQUESTS** the Registrar to provide the Republic of Rwanda with all materials filed by the Parties, namely the Referral Request, the Defence's Response and the Prosecutor's Reply.

Arusha, 9 November 2007, in English.


 Inés I. Weinberg de Rocca
 Presiding Judge


 Lec Gacanga Muthoga
 Judge


 Robert Fremr
 Judge

