

ICTR-01-75-I
08-12-10
(1633-1624)

1633
PM



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED
NATIONS
NATIONS
UNIES

OR: ENG

TRIAL CHAMBER II

Before Judges: Florence Rita Arrey, Presiding
Emile Francis Short
Robert Fremr

Registrar: Adama Dieng

Date: 08 December 2010

2010 DEC 8 11:10
ORIGINAL
RECORDS ARCHIVE
JUDICIAL RECEIVED

THE PROSECUTOR

v.

JEAN-BOSCO UWINKINDI

Case No. ICTR-2001-75-I

**DECISION ON DEFENCE MOTION FOR SETTING A DATE FOR THE FILING
A RESPONSE TO THE PROSECUTION'S (Rule 11 *bis*) REQUEST FOR THE
REFERRAL OF THE CASE OF JEAN UWINKINDI TO RWANDA, AND
REQUEST FOR TRANSLATION**

Office of the Prosecutor:

Hassan Bubacar Jallow
Bongani Majola
Richard Karegyesa
Deborah Wilkinson
George Mugwanya
Inneke Onsea

Counsel for the Defence

Claver Sindayigaya
Iain Edwards
Bettina Spilker

24

INTRODUCTION

1. On 30 June 2010, the Accused Jean-Bosco Uwinkindi was arrested in Uganda. He was transferred to the United Nations Detention Facility ("UNDF") in Arusha, Tanzania on 2 July 2010.¹
2. On 04 November 2010, the Prosecution, pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence ("Rules"), filed a Motion requesting that the case of the *Prosecutor v. Jean Uwinkindi* be referred to the authorities of the Republic of Rwanda for trial in the High Court of Rwanda ("11 *bis* Motion").²
3. On 10 November 2010, the Defence filed a motion asking for a translation of the 11 *bis* Motion, and requesting that the Chamber set a date for the defence to file its response to the 11 *bis* Motion ("Motion").³
4. On 15 November 2010, the Prosecutor filed a response to the Defence Motion ("Response").⁴
5. On 22 November 2010, the Defence filed a reply to the Prosecutor's Response ("Reply").⁵
6. On 26 November 2010, the President designated Trial Chamber II, as composed of Judge Florence Rita Arrey (presiding), Judge Emile Francis Short and Judge Robert Fremr, to decide the Prosecution's 11 *bis* Motion⁶

SUBMISSIONS OF THE PARTIES

7. The Prosecution submits in its 11 *bis* Motion that the Government of Rwanda has expressed its willingness to accept and prosecute the accused for the crimes with

¹Transcript of 01 December 2010 p. 1., Mr. Jean Uwinkindi made a further appearance following the filing of an Amended Indictment on 23 November 2010.

²*Prosecutor v. Jean-Bosco Uwinkindi*, Case No. ICTR-2001-75-I, Prosecutor's request for the referral of the case of Jean-Bosco Uwinkindi to Rwanda pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 4 November 2010.

³*Prosecutor v. Jean-Bosco Uwinkindi*, Case No. ICTR-2001-75-I, Defence motion for the setting of a date for the filing of a response to the prosecutor's request for the referral of the case of Jean Uwinkindi to Rwanda and request for translation, 10 November 2010.

⁴*Prosecutor v. Jean-Bosco Uwinkindi*, Case No. ICTR-2001-75-I, Prosecutor's response to Defence motion to set a date for filing of response and translation, 15 November 2010.

⁵*Prosecutor v. Jean-Bosco Uwinkindi*, Case No. ICTR-2001-75-I, Defence reply to the Prosecutor's response to the Defence motion to set a date for filing of response and translation,, 22 November 2010.

⁶ Notice of Designation - *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-I, 26 November 2010.

which he is charged in the Indictment, and that it has provided assurances that the Accused will be prosecuted in accordance with established international standards meeting all the requirements set out in Rule 11 *bis*.⁷

- 8. The Defence asserts that it intends to dispute the majority of the Prosecution’s submissions forming the basis of its request to refer the case to Rwanda.⁸ The Defence in its Motion submits that an appropriate time frame within which the Accused should be required to file a response to the 11 *bis* Motion should be 5 months, arguing that the average period of time accorded to Defence teams to respond to such motions has been four and a half months.⁹

- 9. The Defence argues that the Prosecution was not subject to any time limit in which to file its 11 *bis* Motion.¹⁰ Moreover, it had a large team to work on the Motion compared to the Defence team which “is composed of the Lead Counsel and two Legal assistants, one of whom is limited by her contract with the Registry (DCDMS) to 40 hours of work per month.”¹¹ The Defence points out that the Prosecution announced its intention to file an 11 *bis* Motion in the instant case on 18 June 2010, but did not file its motion until November 2010, and concludes that the Prosecution took nearly five months to file its Motion.¹² It is the view of the Defence that “were the Chamber to order the Defence to file its response by any time less than the period the Prosecutor had to prepare his Request, this would amount to unreasonable disparity of treatment between the parties and consequently a violation of the principle of equality of arms.”¹³

⁷ *Prosecutor v. Jean-Bosco Uwinkindi., Case No. ICTR-2001-75-I*, Prosecutor’s request for the referral of the case of Jean-Bosco Uwinkindi to Rwanda pursuant to Rule 11 *bis* of the Tribunal’s Rules of Procedure and Evidence, 4 November 2010.

⁸ Defence Motion, para. 7.

⁹ Defence Motion, para. 11.

¹⁰ Defence Motion, para. 9.

¹¹ Defence Motion, para. 10.

¹² Defence Motion para. 9.

¹³ Defence Motion, paras. 9-12.

10. The Defence notes that the Prosecution Motion, together with its annexes, is voluminous, and submits that “the preparation of a comprehensive and meaningful Response to such a substantial and undeniably important Motion will entail a significant amount of work on the part of the Defence.”¹⁴
11. The Defence notes that the Accused only speaks and understands Kinyarwanda. It argues that it is the practice of Chambers to ensure that an accused is provided with translations of those documents involving fair trial rights. It argues that 11*bis* motions fall in this category and asks that the Chamber order that a Kinyarwanda translation of the 11*bis* Motion be provided to the accused.¹⁵
12. In its response, the Prosecution objects that the request for a 5 months period to respond to its 11*bis* Motion is excessive. It points to prior 11*bis* applications and concludes that the practice is to accord the Defence an average period of one month to file its response. It considers this period is reasonable in the absence of exceptional circumstances.¹⁶ The Prosecution sets out the exceptional circumstances resulting in long delays in the Kayishema case. Notably, that the Accused is a fugitive and that the Defence Counsel was not appointed until approximately a year after the Prosecution filed its 11 *bis* Motion in that case.¹⁷
13. The Prosecution further submits that the Defence wrongly construes the principle of equality of arms, arguing that the Appeals Chamber has held that the principle does not apply to material equality between the parties but rather that it obliges “a judicial body to ensure that neither party is put at a disadvantage when presenting its case.”¹⁸

¹⁴ Defence Motion, para. 8.

¹⁵ Defence Motion, para. 15.

¹⁶ Response, para. 7.

¹⁷ Response paras. 6-7.

¹⁸ Response, para. 5: citing *Ferdinand Nahimana et al v. The Prosecutor* Case No. ICTR-99-52-A. Judgement, 28 November 2007, para 220. See also *Prosecutor v. Clement Kayishema and Obed Ruzindana* Case No ICTR- 95-1-A Judgement 1 June 2001, para 69; *Prosecutor v. Dario Cordic and Mario Cerkez* Case No. IT-95-14/2-A, Judgement, 17 December 2004, paras. 175-176.

14. The Prosecution also objects to a mandatory translation into Kinyarwanda of its 11 *bis* Motion, arguing that such a translation is not necessary for the accused to understand the case against him or to defend himself by putting forward his own version of the events.¹⁹
15. With respect to the Prosecution's argument concerning the principle of equality of arms, the Defence in its Reply argues that it was not seeking material equality but rather that it is asking the Trial Chamber to ensure that neither party is put at a disadvantage when presenting its case. Specifically, it asks the Chamber to consider 1) whether the Defence was put at a disadvantage *vis-a-vis* the Prosecution, "taking into account 'the basic principle of proportionality'"; and 2) whether the accused is permitted a fair opportunity to present his case. The Defence notes that the Prosecution does not deny that it had close to five months to work on its 11 *bis* Motion.²⁰
16. The Defence further submits that the Prosecution suggestion that the Defence response to its 11 *bis* Motion be filed within a month "seems to apply in a broad and unreflecting way that which has gone before" rather than taking into account the particular circumstances of the instant case.²¹ In particular, the Defence argues that a significant number of decisions have been rendered by national courts in cases regarding extradition requests by the Republic of Rwanda since the Tribunal's last Rule 11 *bis* decision and that it must digest these decisions.²² The Defence also hopes to address the question of the independence of the Rwandan judiciary, and notes that while the Appeals Chamber in *Munyakazi* examined the issue, it decided against the Defence in that case for lack of sufficient evidence. The Defence does not wish to repeat that failure in this case.²³

¹⁹ Response paras. 3, 8.

²⁰ Reply paras. 4-7.

²¹ Reply, para. 10, 13.

²² Reply, para. 14-15.

²³ Reply, para. 16.

MA

Decision on Defence motion for the setting of a date for the filing of a response to the prosecutor's motion pursuant to Rule 11 *bis* and request for translation

Prosecutor v. *Uwinkindi*

17. While the Defence acknowledges that the Trial Chamber in *Kanyarukiga* “considered a time period of one month to be reasonable,” it notes that the Defence in that case had only asked for an extension of one month following receipt of translation. Similarly, the Defence in *Hategekimana* had only sought a delay of 45 days following receipt of translated material.²⁴

18. Finally, with regard to its request for the translation of the 11 *bis* Motion, the Defence is of the view that the Prosecution has failed to demonstrate that the Rule 11 *bis* Motion is not a document which the Accused must understand in order to have the benefit of a fair trial.²⁵

Deliberations

Applicable Law

19. Rule 11 *bis* (A) and (B) of the Rules provide that a Trial Chamber may order the referral of a case to the authorities of a State on “..whose territory the crime was committed...”, *proprio motu*, or at the request of the Prosecutor, after having given the Prosecutor and, where the accused is in the custody of the Tribunal, the accused, the opportunity to be heard. Since the Rules do not stipulate the time within which a Reply should be filed to a Request for referral to Rwanda, the Trial Chamber held in *Kayishema* and *Hategekimana* that a Chamber may exercise its discretionary power to manage proceedings to set a time frame for the submission of the Defence's response to the referral Request.²⁶

Translation

20. Article 20 (4) (A) of the Statute states that the accused shall be entitled “to be informed promptly of the nature and cause of the charge against him or her.” While the Referral Bench does not consider that a Rule 11 *bis* Motion falls strictly within

²⁴ Reply, para. 17.

²⁵ Reply, para. 22.

²⁶ *Prosecutor v. Kayishema* Case No. ICTR-01-67-1 Decision on Defence's Request for Extension of Time to File a Comprehensive Response to Prosecutor's Motion for Referral etc 1 July 2008, para. 5 See also *Prosecutor v. Ildephonse Hategekimana* Case No. ICTR-00-55B-I Scheduling Order for filing of Submissions by the Parties, 4 December 2007, para 4.

this article, it considers the decision on venue for the trial to be one of sufficient consequence to the accused to warrant translation.

Time-frame for Defence Response

21. The Referral Bench has reviewed the debate between the parties regarding the amount of time allocated to Defence teams to respond to prior 11 *bis* Motions, and considers it to be instructive but not persuasive as the prior cases are distinguishable. Notably, the Defence teams in *Kanyurukiga* and *Hategekimana* asked for shorter periods to respond than did the Defence team in *Uwinkindi*. The *Munyakazi* Defence team was accorded 25 days in which to respond to the Prosecution's motion, but the Appeals Chamber in that case held no reasonable Trial Chamber could have found that Rwanda's judiciary was not independent on the basis of the information available to the Trial Chamber.²⁷ The Defence argues that it intends to adduce more information on this issue provided it has sufficient time to respond.²⁸ Fulgence Kayishema is a fugitive and his Defence team was not appointed until approximately one year after the Prosecution filed its 11*bis* motion. Thus, the Defence reference to time-frames in that case is inapposite.

22. With respect to the principle of the equality of arms, the Appeals Chamber has held that it "does not amount to material equality between the parties in terms of financial and/or human resources."²⁹ However, the Accused "must be afforded a reasonable opportunity to present his case...under conditions that do not place him at a substantial disadvantage vis-a-vis his opponent."³⁰

²⁷ *Prosecutor v. Munyakazi*, ICTR-97-36-RI1*bis*, Decision on the Prosecution's Appeal against Decision on Referral Under 11*bis*, 8 October 2008, paras. 27-29.

²⁸ Reply, para. 16.

²⁹ *Prosecutor v. Ndahimana*, ICTR-99-52-A, Judgement, 28 November 2007, para. 220, citing *K ordić and Čerkez* Appeal Judgement, para. 176; *Kayishema and Ruzindana* Appeal Judgement, para. 69. See also *Prosecutor v. Tihomir Blaskić*, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in *Prosecutor v. Blaškić*, 16 May 2002, paras. 19-20.

³⁰ *Prosecutor v. Dusko Tadić*, IT-94-1-A, Judgement, 15 July 1999, para. 48.

23. While the Rules do not set out a time frame for Rule 11 *bis* Motions, the Referral Bench notes that the Prosecution announced its intention to file a Rule 11 *bis* Motion in the instant case on 18 June 2010,³¹ and that the Accused was arrested less than two weeks later on 30 June 2010. Notwithstanding the latter development, the Prosecution did not file its Motion until 4 November 2010. The Referral Bench observes that the substance of the Prosecution's Rule 11 *bis* Motion in the instant case is remarkably similar to its prior Rule 11 *bis* submissions.

24. The Defence has proffered the following reasons for requesting a delay beyond one month: 1) that the Prosecution had a large team and five months to prepare its Rule 11*bis* Motion; 2) that the resulting Motion, including its annexes, is voluminous; 2) that the Defence currently has a small team of legal expertise; 3) that the Defence wishes, in its response, to provide a significant amount of information with respect to the issue of the independence of the judiciary; 4) that the Defence wishes to digest recent decisions made in domestic jurisdictions regarding requests for extradition to Rwanda.

25. The Referral Bench first notes that is not in a position to make any findings with respect to the size and composition of either the Prosecution or Defence teams working on the instant 11 *bis* Motion.

26. In addressing the other submissions, the Referral Bench is mindful that a Rule 11 *bis* decision may be of particular consequence to an accused. The mere fact that a special bench is appointed to decide on the Motion distinguishes an 11 *bis* decision from other more routine decisions. In the instant circumstances, the Referral Bench believes that to accord only one month to the Defence to respond to the 11 *bis* Motion would be to place the Accused "at a substantial disadvantage *vis-a-vis* his opponent." More practically, it is of the view that submissions of the parties with respect to the independence of the Rwandan judiciary could be of particular assistance to the Bench

³¹ Statement by Justice Hassan B. Jallow, Prosecutor of the ICTR, to the United Nations Security Council, 18 June 2010.

in its determination on the merits of the 11 *bis* Motion, and that time should be allowed for complete submissions on this issue. The Chamber notes the Defence has not cited any recent decisions in national jurisdictions regarding extradition requests to Rwanda, nevertheless such decisions, should they exist, could also assist the Referral Bench.

27. The Referral Bench is of the view that the Defence has shown good cause for requesting a period of more than one month to respond to the 11 *bis* Motion. In determining an appropriate period of time, however, the Bench recalls that "parity" is not a synonym for "the equality of arms," and believes that the five months requested by the Defence is excessive. Rather it considers a delay of three months from the date of translation appropriate in these circumstances.

FOR THESE REASONS, THE REFERRAL BENCH

GRANTS the Defence request for translation of the 11 *bis* Motion into Kinyarwandan, excluding all documents originally drafted in Kinyarwandan that are annexed to the 11 *bis* Motion;

ORDERS the Prosecution to transmit to the Defence all documents annexed to the 11 *bis* Motion originally drafted in Kinyarwandan by 17 December 2010;

GRANTS in part, the Defence request for extension of time within which to file its response to the 11 *bis* Motion; and **ORDERS** the Defence to file any response to the Prosecution's 11 *bis* Motion no later than 90 days from the date of receiving the translation of the 11 *bis* Motion;

Decision on Defence motion for the setting of a date for the filing of a response to the prosecutor's motion pursuant to Rule 11 *bis* and request for translation

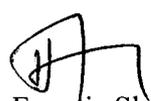
Prosecutor v. *Uwinkindi*

DIRECTS the Registry to notify both the Prosecution and the Referral Bench of the date on which it submits the translation of the 11 *bis* Motion to the Defence.

Arusha, 08 December 2010, done in English.


Florence Rita Arrey

Presiding Judge


PP Emile Francis Short

Judge


PP Robert Fremr

Judge

[Seal of the Tribunal

