

ICTR-01-75-I
18-01-2011
(2222-2215)

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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: 18 January 2011

JURISDICTIONAL SECRETARIAT
2011 JAN 18 1 P 3 05

THE PROSECUTOR

v.

JEAN-BOSCO UWINKINDI

Case No. ICTR-2001-75-I

**DECISION ON HUMAN RIGHTS WATCH REQUEST FOR LEAVE TO
APPEAR AS *AMICUS CURIAE* PURSUANT TO RULE 74 OF THE ICTR RULES
OF PROCEDURE AND EVIDENCE**

Office of the Prosecutor:

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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 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* Motion.³
4. On 3 December 2010, Human Rights Watch (HRW) filed a request for leave to appear as *amicus curiae* in this case pursuant to Rule 74 of the Rules (“the *amicus* Request”).⁴ Human Rights Watch is a non-governmental organisation headquartered in New York that is dedicated to investigating and exposing human rights violations around the world.⁵
5. On 13 December, the Prosecution filed submissions regarding the Human Rights Watch request to appear as *amicus curiae* (“Prosecution submissions”).⁶
6. On 20 December the Defence filed its own submission on the HRW request (“Defence submissions”).⁷

¹ *Prosecutor v. Jean-Bosco Uwinkindi*, Case No. ICTR-2001-75-I, T. 1 December 2010 p.1. 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 Notice of Designation - *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-I, 26 November 2010.

⁴ *Prosecutor v. Jean-Bosco Uwinkindi*, Case No. ICTR-2001-75-I, Human Rights Watch, Request for leave to appear as *amicus curiae* pursuant to rule 74 of the ICTR Rules of Procedure and Evidence, 3 December 2010.

⁵ *Amicus* Request p. 1.

⁶ *Prosecutor v. Jean-Bosco Uwinkindi*, Case No. ICTR-2001-75-I, Prosecutor’s response to the request of Human Rights Watch to appear as *Amicus Curiae*, 13 December 2010.

⁷ *Prosecutor v. Jean-Bosco Uwinkindi*, Case No. ICTR-2001-75-I, Defence submissions relating to the request by Human Rights Watch for leave to appear as *Amicus Curiae*, 20 December 2010.

SUBMISSIONS OF THE PARTIES

7. HRW believes that it has valuable information on the current status of the Rwandan judicial system that will assist the Chamber in making a proper determination with respect to the Prosecution's request for transfer of the Uwinkindi case to Rwanda. HWR affirms that it is not affiliated with any party to the case, and notes that it has previously provided the Tribunal with information on Rwanda's justice systems in four separate cases where the Prosecutor sought the transfer of the cases to Rwanda.⁸

8. HRW undertakes to set forth its research findings with emphasis on developments since its last intervention at the Tribunal in 2008 if the *amicus* request is granted. HRW notes that several legislative amendments have occurred since 2008 and that increased resources and capacity has been added to the Victims and Witness Support unit as well as capacity building activities implemented by the ICTR to strengthen the Rwandan judiciary.⁹

9. HRW contends that despite the continuous improvement in the Rwandan judicial system, there remain serious obstacles to fair and credible prosecutions, especially for persons accused of genocide and other crimes relating to the events of 1994. It submits the *amicus* request on the grounds that a decision by the Trial Chamber allowing the transfer of cases from the ICTR to the Rwandan courts will seriously jeopardise the right of the accused to a fair and credible trial as required by international law.¹⁰

10. In its response, the Prosecution states that the interest of justice favours a full and open discussion on the issue, and thus does not oppose the HRW request to appear as *amicus curiae*. It disagrees, however, with HRW's assertion that the transfer of the case to Rwanda may not satisfy Rule 11*bis* (C) of the Rules.¹¹

11. The Prosecutor submits that HRW fails to take into account the prior Trial Chamber and Appeal Chamber decisions addressing a number of fair trial concerns. Thus, the Prosecution submits that given prior Rule 11*bis* decisions, HRW should be asked only to address issues of availability and protection of witnesses with regards to both

⁸ *Amicus* Request p.1

⁹ *Amicus* Request p.2

¹⁰ *Amicus* Request p.2

¹¹ Prosecution submissions, para. 2

witnesses within and outside Rwanda; as well as working conditions of the Defence, especially in obtaining documents and visiting detainees.¹² Further, all the facts contained in the HRW brief should be supported by appropriate references, records, affidavits and other admissible evidence, in compliance with Article 27 (2) (iii) of the Directive for the Registry of the International Criminal Tribunal for Rwanda.¹³ The Prosecution requests that it be given 30 days to respond to the HRW brief if granted.¹⁴

12. The Defence in its reply argues that taking judicial notice of the element of fair trial rights does not mean that the accused will be afforded the right to a fair trial in a certain jurisdiction in a given political context. Fair trial rights are not only subject to legislative measures but must be assessed in light of the implementation of such measures and the political circumstances of the relevant country.¹⁵ Thus any decision on the Rule 11bis request should be decided on its own merits and on a case-by-case basis. It also submits that the decision must take into account political and legislative developments on that have taken place in Rwanda since the Tribunal's last ruling on the issue.¹⁶

13. The Defence disagrees with the Prosecution's assertion that the Chamber should dictate the manner in which HRW presents its report and submits that HRW be granted the right to make submissions without any restrictions as to the content of its brief.¹⁷

Deliberations

Applicable Law

14. Rule 11bis (A) 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; or...having jurisdiction and being willing and adequately prepared to accept such a case", Rule 11bis (C) emphasizes on the need of the Trial Chamber to be satisfied that the accused will received a fair trial in the courts of the stated concerned and that the death penalty will not be imposed or carried out.

¹²Prosecution submissions, paras. 4 -6

¹³Prosecution submissions, para. 7

¹⁴Prosecution submissions, para. 8

¹⁵Defence submissions, paras. 4-5

¹⁶Defence submissions, paras. 4,6

¹⁷Defence submissions, paras. 4,6

15. The Chamber notes that in determining whether the accused will have a fair trial, the Chamber must ensure that the rights of the accused provided in Article 20 of the Statute of the Tribunal are respected.¹⁸ In arriving at a decision the Chamber will analyse the judicial mechanisms, their effective implementation, and the political situation of Rwanda. Unbiased information regarding both the judicial and political atmosphere of the country is essential in determining whether the country is adequately prepared to provide the accused with a fair trial.

16. The Chamber is mindful of prior Trial and Appeals Chamber decisions on Rule 11bis motions. However, available information regarding fair trial issues in Rwanda is not static, and circumstances may change. Therefore, the Trial Chamber does not support the Prosecution contention that certain issues relating to the review of fair trial rights in Rwanda are now settled.

17. The Chamber observes that the Prosecution does not contest that Human Rights Watch is impartial. It further notes that HRW has significant relevant expertise, has

¹⁸ Article 20 of the Statute of the International Criminal Tribunal for Rwanda

Article 20: Rights of the Accused

1. All persons shall be equal before the International Tribunal for Rwanda.
2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute.
3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
 - (b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
 - (f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;
 - (g) Not to be compelled to testify against himself or herself or to confess guilt.

observed the Rwandan judicial system, and is therefore in a position to provide information that may assist in determining the issues raised in the 11 *bis* request.

18. Finally, the Chamber is of the view that it is not appropriate to dictate the manner in which Human Rights Watch chooses to submit its report, and that Article 27 (2) (iii) of the Directive for the Registry of the International Criminal Tribunal for Rwanda is not relevant to the HRW request to appear as *Amicus Curiae* in the instant case.¹⁹

FOR THESE REASONS, THE REFERRAL BENCH

- I. GRANTS leave to HRW to appear as *amicus curiae* in the present case;
- II. REQUESTS HRW to address the following points in its report:
 - (i) Whether the Rwandan legal system is able in practice to provide the Accused with assistance in:
 - a) Securing adequate legal representation;
 - b) Providing appropriate financial support to an indigent accused;
 - c) Facilitating travel and investigations for Defence teams;
 - d) Ensuring security for Defence teams.
 - (ii) Are there any impediments that the Defence may face in the discharge of its function?

¹⁹Directive for the Registry of the International Criminal Tribunal for Rwanda

Article 27 (2) (iii): Receiving Documents

2. Format of Motions and other processes. The Court Management Section shall ensure that Motions and other processes which are filed are in proper form. In particular, when counsel files a Motion before a Judge or Chamber, Counsel must in all cases provide the court with the following documents:

- (iii) A supporting affidavit or Declaration. Note that a party who wishes the Chamber to make any determination on a question of fact in dispute should not make unsworn assertions of fact orally before the Chamber, but should, in his or her Motion, state contentious facts under oath, in an affidavit, affirmation or other solemn declaration;

- (iii) What facilities and procedures exist for ensuring that witnesses and victims can be securely and safely accommodated and transported to the place of trial?
- (iv) Is Rwanda's witness protection programme functional in practice?
- (v) Are there any threats Prosecution witnesses and/or Defence witnesses may face before, during and after giving testimony in Rwanda?
- (vi) What procedures exist for the procurement and the facilitation of safe and secure travel for witnesses, particularly for Rwandan witnesses who reside abroad? Will such witnesses be able to benefit from a safe passage to and from Rwanda?
- (vii) Whether Rwanda regulations governing the arrest and detention of an accused will afford to the Accused Jean-Bosco Uwinkindi the same protection as the protection applied by the Tribunal?
- (viii) Whether the detention facilities for accused persons in Rwanda comply with internationally recognized standards.
- (ix) Any other issues relevant to the implementation of Article 20 of the Statute.

- III. **DIRECTS** that Human Rights Watch file its *amicus* brief with the Registry of the Tribunal within 21 days of the date of the present Decision;
- IV. **REQUESTS** the Registrar of the ICTR to provide HRW with all the documents related to the present case for a proper discharge of its *amicus* mandate;
- V. **REQUESTS** the Registrar to notify, without delay, the present Decision to HRW.

VI. **ORDERS** the parties to file any submissions regarding the report of *Amicus Curiae* within 14 days of the date on which the report is filed.

Arusha, 18 January 2011, done in English.



Florence Rita Arrey

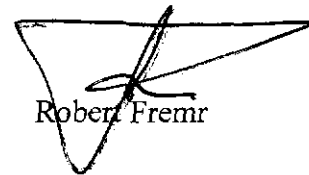
Presiding Judge



[Seal of the Tribunal]

Emile Francis Short

ES



Robert Fremr

Judge