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Mwemur



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: 6 May 2011

JUDICIAL RECORDS ARCHIVER
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THE PROSECUTOR

v.

JEAN-BOSCO UWINKINDI

Case No. ICTR-2001-75-R11bis

**DECISION ON DEFENCE MOTION FOR LEAVE AND EXTENSION OF TIME
TO FILE A CONSOLIDATED RESPONSE TO THE PROSECUTOR'S REPLY
AND TO THE AMICUS CURIAE BRIEF OF THE KIGALI BAR ASSOCIATION**

Office of the Prosecutor:

Hassan Bubacar Jallow
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Richard Karegyesa
James Arguin
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Inneke Onsea

Counsel for the Defence:

Claver Sindayigaya
Iain Edwards
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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.
2. On 04 November 2010, the Prosecution 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") pursuant to Rule 11 bis of the Rules of Procedure and Evidence ("Rules").¹
3. On 14 March 2011 the Defence filed a response to the Prosecution's 11 bis Motion ("11 bis Response").² On 20 April 2011, the Prosecution filed a Consolidated Reply to the Defence Response and the *amici curiae* briefs submitted in the case (11 bis Reply)³
4. On 27 April 2011 the Kigali Bar Association filed an *amicus curiae* brief in support of the 11 bis Motion.⁴
5. On 3 May 2011 the Defence filed a motion for leave and extension of time to respond to the Prosecution's Consolidated Reply and the Kigali Bar Association (KBA) Amicus brief ("Motion").⁵

¹*Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, Prosecutor's request for the referral of the case of Jean-Bosco Uwinkindi to Rwanda pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 4 November 2010.

²*Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, Defence response to the 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, 14 March 2011.

³ *Prosecutor v. Jean Uwinkindi*, Prosecutor's consolidated Response to : (1) Defence Response to the Prosecutor's Request for the Referral of the case of Jean Uwinkindi to Rwanda Pursuant to Rule 11 bis of the Rules of Procedure and Evidence; (2) *Amicus Curiae* Brief of Human Rights Watch in opposition to Rule 11 bis Transfer; (3) *Amicus Curiae* Brief of the International Association of Democratic Lawyers (IADL) Pursuant to Rule 74 (Rules of Procedure and Evidence); and (4) International Criminal Defence Attorneys Association (ICDAA) *Amicus Curiae* Brief, 20 April 2011.

⁴ *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, *Amicus Curiae* Brief of the Kigali Bar Association in the matter of the Prosecutor's request for the Referral of the a case of Uwinkindi Jean, 26 April 2011.

6. On 5 May 2011, the Chamber issued an expedited filing order.⁶

7. On 6 May 2011, the Prosecution filed a response ("Response").⁷

SUBMISSIONS OF THE PARTIES

Defence Motion

8. The Defence submits that 11 *bis* Reply is an extensive document, comprising 375 pages, which includes new and serious allegations. Further, it argues that the Prosecution deliberately misrepresented submissions contained in the Defence 11 *bis* Response and distorted existing and well-established facts. Thus, the Defence is of the view that it is in the interests of justice to allow the Defence to respond to the 11 *bis* Reply.⁸

9. The Defence observes that many of the documents annexed to the 11 *bis* Reply pre-date the 11 *bis* Motion, and that despite the fact that those documents are directly linked to issues raised in that Motion, the Prosecution chose to "prevent the Chamber and the Defence from accessing those documents." It also notes that *amici curiae* appointed by the court were equally unable to address these documents.⁹

10. The Defence further notes that the Prosecution annexed to the 11 *bis* Reply several documents in Kinyarwanda and some in Portuguese with no translation. Furthermore, several pages of the Gacaca material contained in *Exhibit A* are

⁵ *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11*bis*, Defence Motion for leave and extension of time to file a consolidated response to the Prosecutor's Reply and to the Amicus curiae brief of the Kigali Bar Association ("Motion"), 3 May 2011.

⁶ *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11*bis*, Order for Prosecution to File an Expedited Response to the Defence Motion for Leave and Extension of time to File a Consolidated Response to the Prosecutor's Reply and to the Amicus Curiae Brief of the Kigali Bar Association, 5 May 2011.

⁷ *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11*bis*, Prosecutor's Opposition to the Defence Request to File a Sur-reply to the Prosecutor's Response and for Extension of Time, 6 May 2011.

⁸ Motion paras 3, 9.

⁹ Motion para 4.

illegible, *Exhibit E* is missing one page and the Prosecution failed to annex to its submissions "Circular No 1285/DG/2008," a document it referred to in paragraph 11 of the 11 *bis* Reply, which is also referred to in *Exhibit A*.¹⁰

11. The defence seeks to file a consolidated response to both the 11 *bis* Reply and the Kigali Bar Association *amicus curiae* brief, and that it be allowed 30 days from date of the translation of the Kinyarwanda documents contained in the 11 *bis* Reply, to file a consolidated rejoinder.¹¹

Prosecution Reponse

12. In its Motion, the Prosecution opposes the Motion arguing that the 11 *bis* Reply included no new allegations. It further argues that the moving party is entitled to the last word, and therefore if the Chamber were to accord the Defence request, the Prosecution would then respond to that submission.¹² Finally, the Prosecution contends that in the 11 *bis* Reply it merely appended documents responding to submissions made in the Defence 11 *bis* Response.¹³

DELIBERATIONS

Right to Respond

13. In support of its position that the Defence has no right to reply to the 11 *bis* Response, the Trial Chamber cites a footnote in a decision by the Appeals Chamber in the *Butare* case. The Referral Chamber is unable to determine in which circumstances that determination was made.¹⁴ Thus the Chamber is aware of no rule or jurisprudence according or denying a right to respond to a reply in circumstances analogous to those at issue here. Therefore, the Chamber will consider whether it is in the interests of justice to grant the Defence request to respond.

¹⁰ Motion paras. 5-7.

¹¹ Motion para 13, 14.

¹² Response, paras. 2-3.

¹³ Response, paras. 4-6.

¹⁴ Reply, para. 3 footnote 3.



14. The Defence claims that the Prosecution raised new issues in the 11 *bis* Reply. The Chamber observes that the Defence identified no specific new issues, and that in its 11 *bis* Reply, the Prosecution responded not only to matters raised by the Defence in its 11 *bis* Response but to the *amicus curiae* briefs submitted by Human Rights Watch, the International Association of Democratic Lawyers (IADL) and the International Criminal Defence Attorneys Association (ICDAA) Amicus Curiae briefs.¹⁵

15. The Chamber notes that it has been unable to review the entire Prosecution submission because of issues related to translation. However, it wishes to express deep concerns with regard to those sections of the Prosecution's brief relating to the prior convictions of the Accused before Gacaca Courts in Rwanda. In Annex A of the 11 *bis* Reply, the Prosecution made available for the first time to the Referral Chamber and the Defence the following documents:

- A letter from Hassan Bubacar Jallow, the Chief Prosecutor of the ICTR, to Martin Ngoga, the Prosecutor General of Rwanda, dated 22 October 2010, in which he stated: "I understand that JEAN BOSCO UWINKINDI, an indictee of the ICTR who was recently arrested by the Tribunal prior to his arrest, tried and convicted in absentia probably before a Gacaca Court [sic]]. It is necessary for you to confirm if Mr. Uwinkindi was indeed tried in absentia in Rwanda, on what charges if so and what steps you intend to take to clear the way for his new trial in Rwanda."¹⁶
- Related correspondence from Mr. Ngogoga to Domitilla Mukantaganzwa, the Executive Secretary of the Gacaca Court, dated 28 October 2010;¹⁷

¹⁵ *Prosecutor v. Jean-Bosco Uwinkindi*, Case No. ICTR-2001-75-R11*bis*, Prosecutor's Consolidated Response To: (1) Defence Response to the Prosecutor's Request for the Referral of the case of Jean Uwnkindi to Rwanda pursuant to Rule 11 bis of the Rules of Procedure and Evidence; (2) Amicus Curiae Brief of Human Rights Watch in opposition to Rule 11 bis Transfer; (3) Amicus Curiae Brief of the International Association of Democratic Lawyers (IADL) pursuant to Rule 74 (Rules of Procedure and Evidence); and (4) International Criminal Defence Attorneys Association (ICDAA) Amicus Curiae Brief

¹⁶ 11 *bis* Reply, Exhibit A

¹⁷ *Exhibit A* of the Prosecution's Reply- Mr. Ngogoga to Domitilla Mukantaganzwa, the Executive Secretary of the Gacaca Court, 28 October 2010- The date on the letter illegible, but Mukantaganzwa's letter refers to his letter of 28 October

- A letter dated 3 November 2010 from Ms. Mukantaganzwa to the President of of Kayumba Gacaca Appeals Chamber regarding Mr. Uwinkindi's Gacaca convictions;
- Two decisions from the Kayumba and Ntarama *secteur* Gacaca Appeals Chambers, dated 4 and 5 November 2010 respectively, nullifying the convictions of the Accused; and
- A letter from Mr. Ngoga to Mr. Jallow, dated 18 November 2010, informing him that the Accused had indeed been tried and convicted by two Gacaca Courts in Rwanda but that the relevant Rwandan courts had nullified those convictions.¹⁸

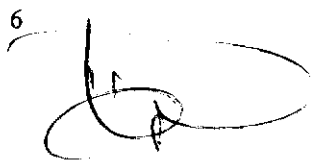
16. The Chamber notes that the Prosecution's 11 *bis* Motion includes submissions with respect to the issue of double jeopardy,¹⁹ yet nowhere does the Prosecution mention the possibility of convictions against the Accused in Rwanda for crimes related to those addressed in the ICTR Indictment. The Chamber further observes that the Government of Rwanda also failed to raise the issue of the prior convictions of the Accused in Rwanda in the *amicus curiae* brief it filed on 18 February 2011, three months after the developments in Rwanda referred to above.

17. The documents above demonstrate conclusively that the Prosecution was aware before it filed its 11 *bis* Motion that there might be a problem relevant to the rights of the accused with respect to double jeopardy. Within days of filing the Motion, it received confirmation that the Accused had been tried and convicted before two separate Gacaca courts in Rwanda. Yet it did not make this information available to the Defence or the Chamber until 20 April 2011, five months after receiving this clearly relevant information. Not only was the Defence therefore obliged to use its scarce resources to bring to this matter to attention of the Chamber without the benefit of all the available relevant information, but

¹⁸ Prosecution reply paras 6-13. *Exhibit A* of the Prosecution's Reply

¹⁹ 11 *bis* Motion, paras. 105-106.

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amici curiae appointed by the Trial Chamber to advise it were not in a position to address this material.

18. In its response to the instant Motion, the Prosecution submits that it “only dealt with matters or issues raised [in the 11 *bis* Response]. These issues or matters cannot be described as ‘new.’” On its face, the Chamber agrees that the documents were filed in response to the submissions of the Defence in its 11 *bis* Response, with respect to the Gacaca convictions of the Accused in Rwanda. However, given the critical importance of this matter, the Chamber is of the view that the Prosecution acted unfairly in failing to disclose this information earlier. The Chamber recalls that the Accused has been in detention since 30 June 2010, and considers that this Prosecution conduct has resulted in unwarranted delays in the proceedings. In these circumstances, the Chamber is left with two alternative remedies: 1) to determine that it will not take into account the submissions made by the Prosecution at the last minute, or 2) to provide the Defence with a right to respond. The Chamber concludes that among the unpalatable possibilities, the latter solution is the one most consistent with the interests of justice. As the Chamber is not in a position to determine, at this juncture, whether there are other such issues in the 11 *bis* Reply requiring a Defence response in the interests of justice, the Chamber will allow the Defence to respond more generally to the 11 *bis* Reply.

19. Further, the Chamber observes that the Prosecution has adduced no jurisprudence in support of its contention that the moving party is entitled to submit the “last word.” The Chamber recognises that this is general practice in the international tribunals with respect to the filing of motions, however it is the rights of the Accused which are at stake in 11 *bis* proceedings, and therefore the Chamber is of the view that when good cause has been demonstrated, it is not inappropriate that he should have the right to have the “last word” in these proceedings. Thus, the Chamber the Prosecution will not have a right to respond to the Defence submissions.

Translation

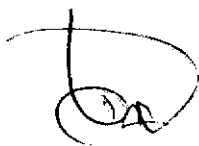
20. Article 20 (4) (A) of the Statute states that the accused shall be entitled "to be informed promptly of the nature and cause of the charge against him or her." While the Trial Chamber does not consider that a Rule 11bis Motion falls strictly within this article, it is of the view that the decision on the venue of the trial to be one of sufficient consequence to the accused to warrant translation. In addition, the Trial Chamber requires translation of the documents appended to the 11 bis Reply, some of which appear to have been in the possession of the Prosecution for a considerable amount of time. However, it does not see any documents in Portuguese as referred to by the Defence. The Trial Chamber considers that the failure of the Prosecution to ensure translation of these documents earlier will further result in an unwarranted delay in proceedings.

21. The Referral Chamber further observes that much of *Exhibit A* of the 11 bis Reply is not legible and that *Exhibit E* is missing one page. The Chamber notes that any party submitting documents to the Chambers for consideration has the burden of making sure that the documents are legible and complete. In addition, the Chamber notes that a number of documents referred to by the Prosecution in its 11 bis Reply were not appended to the Reply. As detailed below, these documents must be provided forthwith.

Period of time for Defence Reply

22. Having determined that the Defence may file a response to the Prosecution's 11 bis Reply, the Referral Chamber further accords the Defence request to file a consolidated submission. As noted above, translation of a number of documents is required, and therefore the Chamber directs the Defence to file this submission within 14 days of the receipt of the French translation of the documents at issue.

Conclusion



23. As noted above, the Trial Chamber is mindful of the need to put an end to the litigation between the parties, and complete the process of adjudication. Therefore, it reiterates its conclusion that it expects the Defence response to the 11 *bis* Reply to constitute the last word in the instant proceedings.

FOR THESE REASONS, THE REFERRAL BENCH

GRANTS the Defence Motion in part, and **DIRECTS** that it submit its response within 14 days of receipt of the translation of the relevant documents from Kinyarwanda into French;

ORDERS the Prosecution to transmit to the Defence legible copies of *Exhibit A* and a complete copy of *Exhibits E* by 20 May 2011

ORDERS the Prosecution to provide the following (in English or French) by 20 May:

- 1) Circular no. 1285/DG2008, 10 December 2008 as referred to by the Prosecution in para. 11 of the 11 *bis* Reply;
- 2) Organic Law #16/2004 of 19 June 2004 establishing the organisation, competence and function of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, as referred to by the Prosecution in footnote 3 of the 11 *bis* Reply;

- 3) Loi organique n° 11/2007 du 16 mars 2007 (or 2008) relative au renvoi d'affaires à la République du Rwanda par le Tribunal pénal international pour le Rwanda et par d'autres Etats, as cited in Annex A of the 11 bis Reply.

Arusha, 6 May 2011, done in English.

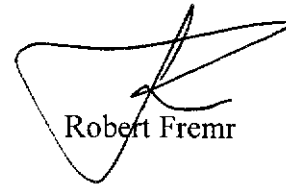


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Florence Rita Arrey

Presiding Judge



Emile Francis Short



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Judge