

1072-01-75-I
17-06-2011
(4649-4645)

4649
Mwamba



**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: 17 June 2011

THE PROSECUTOR

v.

JEAN-BOSCO UWINKINDI

Case No. ICTR-2001-75-R11bis

2011 JUN 17 P 12: 03
DIRECTOR
JUDICIAL RECORDS/ARCHIVES
RECEIVED

**DECISION ON PROSECUTION MOTION TO ORDER THE DISCLOSURE OF
UNREDACTED AFFIDAVITS TO THE PROSECUTION**

Office of the Prosecutor:

Hassan Bubacar Jallow
Bongani Majola
Richard Karegyesa
James Arguin
George Mugwanya
Inneke Onsea

Counsel for the Defence:

Claver Sindayigaya
Iain Edwards
Bettina Spilker

MA

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 (“Response”).² In Annex 8 of the Response, the Defence submitted signed affidavits of 49 potential Defence witnesses describing their subjective fears of testifying before a Rwandan court. The Prosecution received redacted versions which concealed the identities of the prospective witnesses.
4. On 2 June 2011, the Prosecution filed a Motion to order the rescission of the Defence’s *ex parte* filings and the disclosure of the unredacted affidavits to the Prosecutor (“Motion”).

Submissions of the parties

5. The Prosecution argues that the redaction of the affiants’ identities go against the interests of justice and fairness of the proceedings; more specifically, it asserts that the fact that submissions were filed *ex parte* defies the principles of adversarial trial and the equality of arms.³
6. The Prosecution claims that it is placed at an unequal footing because it was prevented from investigating the circumstances under which the statements were obtained. Without the complete information, the Prosecution claims that it is unable to verify the veracity and reliability of the affiants’ allegations, such as

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-Bosco 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 Motion, para. 3.

- investigating ulterior motivations for the affiants' refusal to appear before a Rwandan court.⁴
7. Finally, the Prosecution claims that there is no compelling justification for the Defence's unilateral action. It asserts that the Defence made no attempt to secure protective measures for the witnesses, and has not made a strong showing that the disclosure of the identities would unduly prejudice the Defendant and defence witnesses.⁵
8. The Defence opposes the Prosecution's Motion on various grounds. As a preliminary matter, the Motion is unsupported by the Rules of Procedure and Evidence and is fundamentally misconstrued, as the parties are under no obligation to disclose the identity of witnesses during Rule 11 *bis* proceedings.
9. The Defence further asserts that the relief sought by the Prosecution is unnecessary, because the subjective fears of the affiants is sufficient to demonstrate that they would be unwilling to testify before a Rwandan court.⁶ Anonymity of the sources has not hampered the Prosecution in any material way because the substance of the affidavits has been disclosed. Conversely, the disclosure of identifying information to the Prosecution might violate the right of the Accused to a fair trial.⁷
10. The Defence concludes by stressing that granting the Motion would inevitably result in further extensive litigation with respect to the Prosecution's Motion to transfer the instant case to Rwanda for trial.⁸
11. The Prosecution did not file a Reply.

Discussion

12. At the outset, the Referral Chamber notes that the Prosecution filed the present Motion on 2 June 2011, six weeks after it first stated its intention to do so,⁹ and

⁴ Motion, para. 5..

⁵ Motion, paras. 3-7.

⁶ Response, para. 8, relying on the Appeals Chamber's decision in *The Prosecutor v. Kanyarukiga*, Case No, ICTR-2002-78-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, 30 October 2008, para. 26.

⁷ Response, para. 4.

⁸ Response, paras. 16-17.

approximately two and a half months after the Defence filed its response to the 11 bis Motion in which it included the impugned affidavits. The Chamber recalls that the Accused has been in pre-trial detention for close to one year and notes that the Prosecution has provided no justification for the late filing of this Motion. Thus, the Referral Chamber could deny the Motion on this basis alone.

13. However, the Chamber wishes to add that the Prosecution has adduced no Rules in support of its contention that the Defence is obligated to disclose the names of potential witnesses under a Rule 11bis proceeding. More importantly, the Defence has satisfied the Chamber that disclosing the identities of the potential witnesses at this time could prejudice its case. At the same time the Chamber is satisfied that the Prosecution is in a position to address the substance of the affidavits. Indeed, it is of the view that the Prosecution's contention that the statements were filed *ex parte* is misleading.¹⁰

14. The Referral Chamber recalls that it is not a Trial Chamber. This Chamber assumes that the affidavits were provided to provide insight into the subjective fears of potential defence witnesses in this case as a group. It is not its role to make findings on the veracity and reliability of the allegations made by individual affiants. Whether the individual fears are reasonable or well-founded is an issue for the Trial Judge or Chamber.

15. Finally, the Chamber observes that it has received the full, unredacted statements of the 49 potential witnesses, and it therefore has no reason to doubt that the affiants exist.

FOR THESE REASONS, THE REFERRAL BENCH DENIES the Prosecution Motion in its entirety.

⁹ 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, para. 66, footnote 129 (Prosecutor's Consolidated Response).
¹⁰ See Prosecutor's Consolidated Response, paras. 66, 85.

Decision on Prosecution Motion to order the disclosure of the unredacted affidavits to the Prosecution

Prosecutor v. Uwinkindi

Arusha, 17 June 2011, done in English.

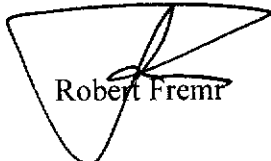

Florence Rita Arrey

Presiding Judge

PP


Emile Francis Short

[Seal of the Tribunal]



Robert Fremr

Judge