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Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

361/H
S-A
ICTR-01-75-AR11bis
23rd February 2012
{361/H - 354/H}

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Patrick Robinson
Judge Mehmet Güney
Judge Andréia Vaz
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Decision of: 23 February 2012

ICTR Appeals Chamber
Date: 23rd February 2012
Action: SHARIFAH ADONG
Copied To: Concerned Judges,
S.A.C., I.C.C., A.T.C., parties,
C.M.S., T.L.S.S. Sharifah

JEAN UWINKINDI

v.

THE PROSECUTOR

Case No. ICTR-01-75-AR11bis

**DECISION ON UWINKINDI'S MOTION FOR REVIEW OR
RECONSIDERATION OF THE DECISION ON REFERRAL TO RWANDA AND
THE RELATED PROSECUTION MOTION**

Counsel for Jean Uwinkindi:

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Mr. James J. Arguin
Mr. George Mugwanya
Ms. Inneke Onsea
Mr. Abdoulaye Seye
Mr. François Nsanzuwera
Ms. Erica Bussey

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: SHARIFAH ADONG
SIGNATURE: Sharifah DATE: 23/02/2012

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 (“Appeals Chamber” and “Tribunal”, respectively), is seised of a motion filed by Mr. Jean Uwinkindi on 25 January 2012¹ for review or reconsideration of a decision of 16 December 2011 by the Appeals Chamber affirming the referral of his case to Rwanda.² The Appeals Chamber is also seised of a related motion filed by the Prosecution on 30 January 2012.³

I. BACKGROUND

2. On 28 June 2011, a chamber of the Tribunal designated under Rule 11*bis* of the Rules of Procedure and Evidence of the Tribunal (“Referral Chamber” and “Rules”, respectively) ordered that Mr. Uwinkindi’s case be referred to the authorities of the Republic of Rwanda for trial before the High Court of Rwanda.⁴ The Referral Chamber also, *inter alia*, requested the Registrar to: (i) appoint the African Commission on Human and Peoples’ Rights (“ACHPR”) as monitor for Mr. Uwinkindi’s trial in Rwanda pursuant to Rule 11*bis* of the Rules within 30 days of the Decision of 28 June 2011 becoming final; and (ii) inform the President of the Tribunal of “any hurdles in the implementation and operation of the monitoring mechanism for any consequential orders”.⁵

3. On 13 July 2011, Mr. Uwinkindi appealed the Decision of 28 June 2011.⁶ On 16 December 2011, the Appeals Chamber dismissed Mr. Uwinkindi’s appeal but stayed his transfer to Rwanda pending the acceptance of a corrected indictment.⁷

4. On 16 January 2012, the Registrar filed submissions before the President of the Tribunal pursuant to Rule 33(B) of the Rules stating that the ACHPR had been appointed as the monitor in a decision dated 11 January 2012 and seeking guidance on whether Mr. Uwinkindi’s transfer to

¹ Defence Extremely Urgent Motion for Review or Reconsideration of the Decision of 16 December 2011 on Uwinkindi’s Appeal Against the Referral of his Case to Rwanda, 25 January 2012 (“Uwinkindi Motion”).

² Decision on Uwinkindi’s Appeal Against the Referral of his Case to Rwanda and Related Motions, 16 December 2011 (“Decision of 16 December 2011”).

³ Prosecutor’s Opposition to Defence Extremely Urgent Motion for Review or Reconsideration of the Decision of 16 December 2011 on Uwinkindi’s Appeal Against the Referral of his Case to Rwanda and Motion to Vacate the Appeals Chamber’s 26 January 2012 Interim Order, 30 January 2012 (“Response and Prosecution Motion”).

⁴ *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-R11*bis*, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, 28 June 2011 (“Decision of 28 June 2011”), p. 57 (disposition).

⁵ Decision of 28 June 2011, pp. 57, 59 (disposition).

⁶ Defence Notice of Appeal Against the Decision on the Prosecutor’s Request for Referral to the Republic of Rwanda, 13 July 2011.

⁷ Decision of 16 December 2011, para. 89.

Rwanda should be stayed until the practical arrangements for monitoring, including a technical agreement and funding, were fully in place.⁸

5. In a decision issued on 20 January 2012, Judge Vagn Joensen, the Acting President of the Tribunal, observed that discussions with the ACHPR regarding the modalities of the monitoring and securing the necessary funding “should have been ongoing” since 28 June 2011, when the referral was initially ordered, and indicated that “a further stay in the transfer for such purposes is not warranted at this time”.⁹ Acting President Joensen further observed that the Decision of 28 June 2011 “will not become final until such time as the corrected indictment has been accepted” and ordered that Mr. Uwinkindi be transferred to Rwanda within 30 days of acceptance of the corrected indictment.¹⁰

6. Trial Chamber III of the Tribunal confirmed an amended indictment against Mr. Uwinkindi on 23 January 2012,¹¹ thus commencing the 30-day period for his transfer.¹² On 25 January 2012, Mr. Uwinkindi filed the Uwinkindi Motion, seeking in part an interim injunction to prevent his imminent transfer to Rwanda.¹³ On 26 January 2012, the Appeals Chamber issued an interim order granting the Uwinkindi Motion in part and staying the transfer of Mr. Uwinkindi pending full resolution of the Uwinkindi Motion by the Appeals Chamber.¹⁴

7. On 30 January 2012, the Prosecution responded to the Uwinkindi Motion and moved to vacate the Interim Order.¹⁵ The Prosecution also requested the Appeals Chamber to order the Registrar to file a detailed report concerning the steps taken to put in place the monitoring mechanism and any obstacles preventing its implementation, and to give 7 days’ advance notice prior to Mr. Uwinkindi’s physical transfer.¹⁶ Mr. Uwinkindi filed his reply on 7 February 2012.¹⁷

⁸ *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-AR11bis, Registrar’s Submissions Regarding the Transfer of the Accused to the Custody [sic] of the Republic of Rwanda, 16 January 2012 (“Registrar’s Submissions”), paras. 4, 12, 13.

⁹ *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-R11bis, Decision on the Registrar’s Request for Stay of Transfer of Jean Uwinkindi to Rwanda, 20 January 2012 (“Decision of 20 January 2012”), para. 6.

¹⁰ Decision of 20 January 2012, para. 7, p. 4 (disposition).

¹¹ *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-PT, Decision on the Confirmation of the Re-Filed Amended Indictment, 23 January 2012 (confidential).

¹² Decision of 20 January 2012, para. 7, p. 4 (disposition); Decision of 28 June 2011, p. 57 (disposition).

¹³ Uwinkindi Motion, paras. 21, 22.

¹⁴ Interim Order on Uwinkindi’s Motion for Review or Reconsideration of the Decision of 16 December 2011, 26 January 2012 (“Interim Order”).

¹⁵ Response and Prosecution Motion, paras. 22, 28.

¹⁶ Response and Prosecution Motion, para. 29.

¹⁷ Defence Reply to Opposition to Defence Extremely Urgent Motion for Review or Reconsideration of the Decision of 16 December 2011 on Uwinkindi’s Appeal Against the Referral of his Case to Rwanda and Motion to Vacate Interim Order, 7 February 2012 (“Uwinkindi Reply”).

8. On 16 February 2012, Mr. Uwinkindi filed supplementary submissions in relation to the Uwinkindi Motion.¹⁸ The Prosecution responded on 22 February 2012.¹⁹

II. UWINKINDI MOTION

A. Preliminary Matter

9. Mr. Uwinkindi seeks either review or reconsideration of the Decision of 16 December 2011, a request which he acknowledges is without precedent with regard to a decision under Rule 11*bis* of the Rules.²⁰ The Prosecution argues that Mr. Uwinkindi's reliance on review or reconsideration "is improper, as neither of those procedures applies here".²¹

10. The Appeals Chamber recalls that review proceedings are governed by Article 25 of the Statute of the Tribunal ("Statute") and by Rules 120 and 121 of the Rules.²² The Appeals Chamber considers that only a final judgement – a decision which puts an end to proceedings – can be reviewed pursuant to Article 25 of the Statute and Rule 120 of the Rules.²³ Accordingly, the Decision of 16 December 2011 is not subject to review.

11. As Mr. Uwinkindi acknowledges,²⁴ the Appeals Chamber considers that an appeal pursuant to Rule 11*bis* of the Rules is more akin to an interlocutory appeal than to an appeal from judgement.²⁵ The Appeals Chamber may reconsider a previous interlocutory decision under its

¹⁸ Supplementary [*sic*] Submissions to the Defence Extremely Urgent Motion for Review or Reconsideration of the Decision of 16 December 2011 on Uwinkindi's Appeal Against the Referral of his Case to Rwanda, 16 February 2012 (confidential) ("Uwinkindi Supplementary Submissions").

¹⁹ Prosecutor's Response to Uwinkindi's Supplementary Submissions to his Extremely Urgent Motion for Review or Reconsideration, 22 February 2012 (confidential) ("Prosecution Supplementary Response"). In view of the need to expeditiously consider the Uwinkindi Motion and the lack of prejudice to the Prosecution, the Appeals Chamber has not considered the Prosecution Supplementary Response to the Uwinkindi Supplementary Submissions, and therefore also does not need to await a reply.

²⁰ Uwinkindi Motion, paras. 1, 21, 22; Uwinkindi Reply, paras. 6, 7.

²¹ Response and Prosecution Motion, para. 4. See also Response and Prosecution Motion, paras. 11-17.

²² See *François Karera v. The Prosecutor*, Case No. ICTR-01-74-R, Decision on Requests for Review and Assignment of Counsel, 28 February 2011, para. 9 (and references therein).

²³ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, *Décision relative à la requête de l'appelant Jean-Bosco Barayagwiza demandant l'examen de la requête de la Défense datée du 28 juillet 2000 et réparation pour abus de procédure*, 23 June 2006, para. 21; *Jean Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000 (English translation of the French original filed on 7 April 2000), para. 49; Rule 120(A) of the Rules.

²⁴ See Uwinkindi Reply, para. 6 ("Rule 11*bis* proceedings are strictly speaking interlocutory in nature."). Mr. Uwinkindi contends, however, that such decisions have a "far greater element of finality" than other interlocutory proceedings, given the unlikelihood that revocation would ever be ordered. See Uwinkindi Reply, para. 6. The Appeals Chamber considers that this point of distinction is speculative and, in any event, inconsistent with the Appeals Chamber's explicit provision for the case to remain trial ready at the Tribunal in the event of any possible revocation. See Decision of 16 December 2011, para. 88. See also, e.g., *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-11*bis*, Decision on Prosecutor's Extremely Urgent Motion for Revocation of the Referral to the Kingdom of the Netherlands Pursuant to Rule 11 *Bis* (F) & (G), 17 August 2007, p. 5 (disposition) (revoking referral of a case to the Kingdom of the Netherlands).

²⁵ See *Prosecutor v. Željko Mejačić et al.*, Case No. IT-02-65-AR11*bis*.1, Decision on Joint Defense Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115, 16 November 2005, para. 6; *Prosecutor v.*

inherent discretionary power to do so “if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice”.²⁶ Accordingly, the Appeals Chamber will proceed to consider the Uwinkindi Motion as a request for reconsideration.

B. Discussion

12. Mr. Uwinkindi requests the Appeals Chamber, *inter alia*, to reconsider and reverse the Decision of 16 December 2011 because, following Acting President Joensen’s Decision of 20 January 2012, he is at risk of being transferred to the custody of the Rwandan authorities without a monitoring mechanism in place.²⁷ Mr. Uwinkindi contends that the Referral Chamber envisaged that monitoring with regard to his fair trial rights would start from the date of his transfer.²⁸ He further argues that both the Referral Chamber and the Appeals Chamber recognized the “fundamental importance” of having a monitor in place to observe and report on his case, and that the presence and active engagement of independent monitors was “a determining factor” for both Chambers in reaching their decisions.²⁹ He adds that it could not have been foreseen that on the eve of his transfer to Rwanda there would be no monitoring mechanism in place, and that the current state of affairs thus could not have been within the contemplation of either the Referral Chamber or the Appeals Chamber when they issued their respective decisions.³⁰ In his view, the Appeals Chamber’s intervention to protect his fair trial rights is therefore warranted.³¹

13. The Prosecution submits that Mr. Uwinkindi fails to address the standard for reconsideration, much less demonstrate how it could be met under the circumstances presented.³² According to the Prosecution, Mr. Uwinkindi merely points to an alleged post-appeal change of circumstances which, in any event, has already been effectively addressed by the Decision of 20 January 2012.³³ The Prosecution further argues that Mr. Uwinkindi only speculates that he will be transferred to Rwanda without a monitoring mechanism in place and that Mr. Uwinkindi’s

Radovan Stanković, Case No. IT-96-23/2-AR11bis.1, Decision on Defence Application for Extension of Time to File Notice of Appeal, 9 June 2005, paras. 14-16, cited with approval in *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-AR11bis, Decision on the Prosecution’s Request for a Scheduling Order, 8 June 2006, paras. 3, 4.

²⁶ *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 203 (internal quotation marks omitted). See also, e.g., *Aloys Ntabakuze v. The Prosecutor*, Case No. ICTR-98-41A-A, Decision on Peter Erlinder’s Motion to Reconsider Order Imposing Sanctions, 1 September 2011, p. 3 (and references therein).

²⁷ Uwinkindi Motion, paras. 5, 16, 22. See also Uwinkindi Reply, paras. 1, 3, 4, 10, 11.

²⁸ Uwinkindi Motion, paras. 8-10.

²⁹ Uwinkindi Motion, paras. 7, 11. See also Uwinkindi Motion, para. 19.

³⁰ Uwinkindi Motion, paras. 17, 18. See also Uwinkindi Reply, paras. 5, 8.

³¹ Uwinkindi Motion, para. 5. See also Uwinkindi Reply, para. 8 (observing that Mr. Uwinkindi’s transfer to Rwanda without any reporting or monitoring mechanism in place “could well result in serious injustices being caused”).

³² Response and Prosecution Motion, para. 15.

³³ Response and Prosecution Motion, para. 15. See also Response and Prosecution Motion, paras. 23, 24.

request for reconsideration is, at best, premature and, if granted, would amount to an “end-run on the President’s decisions”.³⁴

14. In the Uwinkindi Supplementary Submissions, Mr. Uwinkindi argues that recent developments have demonstrated that engaging the ACHPR to act as a monitor is no longer a workable option for the Tribunal.³⁵ He also contends that appointing any alternative monitoring body would violate the spirit and terms of the Decision of 28 June 2011 and that no discretionary power was given to the President to substitute an alternative monitor for the ACHPR.³⁶ Mr. Uwinkindi adds that his right to be tried without undue delay has already been seriously compromised, and that any further efforts by the Registrar to explore alternative monitoring mechanisms will necessarily compound the violation.³⁷

15. The Appeals Chamber finds that Mr. Uwinkindi has not demonstrated a clear error of reasoning in the Decision of 16 December 2011 warranting reconsideration. The Appeals Chamber recalls that the existence of a mechanism to monitor Mr. Uwinkindi’s case was an important consideration for the Referral Chamber and the Appeals Chamber in rendering their respective decisions on the referral of Mr. Uwinkindi’s case to Rwanda.³⁸ The Appeals Chamber also takes note of the Referral Chamber’s statement that “effective monitoring would require the monitoring to begin from the date the case is transferred to the relevant national authority”,³⁹ and shares the concerns of both Mr. Uwinkindi and the Prosecution that the monitoring mechanism contemplated by the Referral Chamber is not yet in place.⁴⁰

16. In rendering the Decision of 16 December 2011, however, the Appeals Chamber did not assume that such a mechanism was already established, nor did it assume that any final agreement with the ACHPR had been reached.⁴¹ To the contrary, the Appeals Chamber specifically noted that the Tribunal lacks the authority to compel an independent organization which is neither a party nor an organ of the Tribunal to conduct monitoring.⁴² The Appeals Chamber also explicitly observed that the Referral Chamber “requested the Registrar to enter into a suitable agreement with the ACHPR and to seek further directions from the President of the Tribunal, *should the arrangements*

³⁴ Response and Prosecution Motion, paras. 16, 20, 21. *See also* Response and Prosecution Motion, paras. 18, 19.

³⁵ Uwinkindi Supplementary Submissions, paras. 2-3, 6-12, 15.

³⁶ Uwinkindi Supplementary Submissions, para. 14.

³⁷ Uwinkindi Supplementary Submissions, paras. 17, 18.

³⁸ *See, e.g.*, Decision of 16 December 2011, paras. 52, 83-85, 87; Decision of 28 June 2011, paras. 35, 43, 60, 132, 146, 159, 169, 196, 208-216.

³⁹ Decision of 28 June 2011, para. 216.

⁴⁰ *See, e.g.*, Uwinkindi Motion, para. 17; Response and Prosecution Motion, para. 2; Uwinkindi Reply, para. 3. *See generally* Uwinkindi Supplementary Submissions.

⁴¹ *See* Decision of 16 December 2011, para. 84.

⁴² Decision of 16 December 2011, para. 84.

prove ineffective".⁴³ The Appeals Chamber thus contemplated that issues with respect to the establishment and effectiveness of the monitoring mechanism might arise, and that such issues could be resolved through the process envisaged by the Referral Chamber involving consultation with the President of the Tribunal or, if not, "[could] be brought to the attention of the Tribunal for appropriate action".⁴⁴ It follows that it is within the authority of the President of the Tribunal to direct the Registrar to seek other sources of funding to meet the ACHPR's terms or to make arrangements for an alternative monitoring mechanism, and the Appeals Chamber expects that, in light of the changed circumstances, the President will do so.⁴⁵ Based on the foregoing, the Appeals Chamber considers that even if the terms proposed by the ACHPR are currently untenable for the Tribunal and arrangements with the ACHPR may have so far proven ineffective, this does not demonstrate a clear error of reasoning in the Appeals Chamber's Decision of 16 December 2011.

17. The Appeals Chamber is also not persuaded that reconsideration of the Decision of 16 December 2011 is warranted at this time to prevent an injustice. Mr. Uwinkindi has not demonstrated that he is faced with an imminent violation of his fair trial rights.⁴⁶ Moreover, a clear procedure exists to address issues related to his transfer and the monitoring mechanism. Although Acting President Joensen previously declined to grant a stay of Mr. Uwinkindi's transfer, the Appeals Chamber notes that the transfer was not imminent at that time, and thus issuing a stay would have been premature.⁴⁷ The Appeals Chamber further notes that the Decision of 28 June 2011 is now final, and that Mr. Uwinkindi is subject to transfer. Consequently, the President of the Tribunal should now consider what further measures or rulings are appropriate in light of the circumstances that have changed since the Decision of 20 January 2012 was issued, and the clear expectations of both the Appeals Chamber and the Referral Chamber that Mr. Uwinkindi's transfer would not occur until a monitoring mechanism is in place.

III. PROSECUTION MOTION

18. The Prosecution requests the Appeals Chamber to vacate the Interim Order or, in the alternative, to decide the Uwinkindi Motion as expeditiously as possible.⁴⁸ The Appeals Chamber observes that its Interim Order stayed the transfer of Mr. Uwinkindi pending full resolution of the

⁴³ Decision of 16 December 2011, para. 84 (emphasis added).

⁴⁴ Decision of 16 December 2011, para. 84.

⁴⁵ While the Decision of 28 June 2011 specifically referred to the ACHPR as the monitor for Mr. Uwinkindi's case, for the reasons already indicated, the Appeals Chamber is not persuaded that the appointment of alternative observers to monitor the proceedings in Rwanda violates that Decision as affirmed by the Decision of 16 December 2011.

⁴⁶ The Appeals Chamber considers that Mr. Uwinkindi's claims that his right to a trial without undue delay has been compromised or will be compromised by any further delay are unsubstantiated and speculative.

⁴⁷ Decision of 20 January 2012, paras. 6, 7.

⁴⁸ Response and Prosecution Motion, paras. 22, 28.

Uwinkindi Motion.⁴⁹ In accordance with the terms of the Interim Order, the stay is therefore lifted on the issuance of this decision. Accordingly, the Prosecution's request to vacate the Interim Order is moot.

19. The Prosecution also urges the Appeals Chamber to direct the Registrar to submit a detailed report "updating the Chamber and parties on the steps that have been and will be taken to ensure that the monitoring mechanism will be implemented within the time and in the manner ordered" so as to ensure that there will be no further disruption in the referral of Mr. Uwinkindi's case, and to allow the parties reasonable time to respond to the report.⁵⁰ In light of the demonstrated competence of the President of the Tribunal to address issues related to the monitoring mechanism,⁵¹ the Appeals Chamber declines the Prosecution's invitation to request a detailed report from the Registrar concerning the status of the monitoring mechanism's implementation and further briefing from the parties. The Appeals Chamber considers, however, that the President should be fully informed by the Registrar of the status of the implementation of the monitoring mechanism prior to any decision concerning the timing of Mr. Uwinkindi's transfer, and should be satisfied that the *monitoring mechanism has been established prior to the actual transfer*.

IV. DISPOSITION


20. For the foregoing reasons, the Appeals Chamber **DISMISSES** the remainder of the Uwinkindi Motion⁵² and **DISMISSES** the Prosecution Motion.

Done in English and French, the English version being authoritative.

Done this 23rd day of February 2012.
At The Hague,
The Netherlands.



[Seal of the Tribunal]


Judge Theodor Meron
Presiding

⁴⁹ Interim Order, p. 1.

⁵⁰ Response and Prosecution Motion, paras. 25, 29, 30. *See also* Response and Prosecution Motion, para. 26.

⁵¹ *See generally* Decision of 20 January 2011.

⁵² *See* Interim Order, p. 1 (granting the Uwinkindi Motion in part).